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7
8 BEFORE THE BOARD OF ADMINISTRATION
9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
10

11 In Re the Matter of) CALPERS CASE NO.: TBD
12) OAH CASE NO.: TBD
13 BRUCE V. MALKENHORST, SR., and)
14 CITY OF VERNON,) BRUCE V. MALKENHORST, SR.'S
15 Respondents.) APPEAL OF CALPERS' DENIAL OF
16) BENEFITS
17)
18) EXHIBITS 89 THROUGH 93

19 Bruce V. Malkenhorst, Sr. ("Malkenhorst"), timely submits this Appeal of CalPERS'
20 denial of benefits associated with his employment at the City of Vernon.

21 Malkenhorst incorporates by reference Exhibits 1 through 88 previously provided to
22 CalPERS on or about July 27, 2012, as well as the associated Cover Letter, Initial Response to
23 CalPERS Audit Request, and Declaration of Bruce V. Malkenhorst, Sr., served together with
24 Exhibits 1 through 88. Malkenhorst attaches Exhibits 89 through 93 and also reserves the right to
25 provide additional documents at a later date to support this Appeal.

26 Malkenhorst also incorporates by reference his concurrently filed Jurisdictional
27 Challenge to CalPERS' Administrative Proceedings. CalPERS has no authority outside that
28 granted to it by the Public Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et*
seq.) As a foundational matter, CalPERS has no legal right to initiate or conduct an

1 administrative process concerning the calculation of Malkenhorst's pension benefits unless and
2 until a court of law issues a final ruling on Malkenhorst's constitutional challenge to CalPERS'
3 assertion that the PERL preempts Charter Cities' constitutional autonomy to establish governance
4 structure and compensation, as was done by the City of Vernon ("City" or "Vernon"). In filing
5 this Appeal, Malkenhorst neither consents to CalPERS' administrative process nor waives his
6 challenge to CalPERS' jurisdiction.

7 Malkenhorst also incorporates by reference his December 18, 2012, letter to Scott Yates
8 and Tomi Jimenez of CalPERS challenging CalPERS' administrative proceedings on the grounds
9 that those proceedings are barred by the doctrine of collateral estoppel (issue preclusion, *res*
10 *judicata*).

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1 **CALPERS' FAILURE AND/OR REFUSAL TO PROVIDE**
2 **DOCUMENTS PURSUANT TO MALKENHORST'S PUBLIC RECORDS ACT**
3 **AND INFORMATION PRACTICES ACT REQUESTS**

4 At the outset, Malkenhorst objects to CalPERS' insistence that he immediately file his
5 Appeal of CalPERS' "final determination" while simultaneously denying him the documents and
6 information needed to fully inform his Appeal. Specifically, Malkenhorst has been attempting to
7 obtain relevant documents in the possession, custody or control of CalPERS since he first
8 propounded his Public Records Act ("PRA") and Information Practices Act ("IPA") requests at
9 the beginning of June 2012. Although CalPERS has produced approximately 140,000 pages of
10 documents, it appears the vast majority of those documents are irrelevant to the issues of this
11 Appeal and not responsive to Malkenhorst's PRA and IPA requests. Further, CalPERS has failed
12 and refused to produce documents responsive to the very specific document requests and instead
13 engaged in a "document dump" that makes it virtually impossible for Malkenhorst or his counsel
14 to know what has been provided, much less to be able to determine the relevance of such
15 documents to this Appeal.

16 Further, CalPERS has produced documents out of sequence, with numerous "gaps" in the
17 Bates numbering sequence it utilized to identify supposedly responsive documents, and has
18 failed to either produce the missing documents or provide an explanation for the "gaps".
19 CalPERS has also advised that it cannot and will not produce any documents related to CalPERS'
20 reviews or analyses of the pension benefits to which it believes Malkenhorst is entitled on the
21 ground that the request is too vague and does not reasonably describe identifiable records. Given
22 that Malkenhorst's appeal rights were triggered by CalPERS' self-admitted reviews or analyses of
23 his pension benefits, CalPERS' objections appear to aimed at preventing him from obtaining the
24 very documents CalPERS has based its "final determination" on.

25 Finally, CalPERS has failed and refused to grant Malkenhorst an extension of time to file
26 his Appeal until it has provided a good-faith response to his PRA and IPA requests.

27 Based on the foregoing, as well as the concurrently filed jurisdictional challenge,
28 Malkenhorst reserves the right to correct and augment this Appeal at any time.

1 **INTRODUCTION**

2 CalPERS is incorrectly and unjustly seeking to deny Malkenhorst the vested pension
3 benefits that accrued during his nearly three decades of employment with the City of Vernon,
4 including the last 27 of those years in the position titled "City Administrator/City Clerk".

5 Vernon contracts with CalPERS to provide retirement benefits. As an integral and
6 material part of Malkenhorst's employment, Vernon contracted with Malkenhorst to provide him
7 with pension benefits based upon his Vernon base salary and longevity pay special
8 compensation. CalPERS has paid Malkenhorst the correct pension allowance based upon his
9 base salary and longevity pay special compensation for more than seven years since his
10 retirement on June 30, 2005. Furthermore, CalPERS apparently conducted a full administrative
11 review with appeal rights of Malkenhorst's compensation and related pension calculations in or
12 about 2004 through 2006, yet concluded it should continue paying him his correct pension.

13 Now, however, CalPERS has unilaterally decided to drastically slash Malkenhorst's
14 pension benefits as a result of an *additional* administrative investigation and review, based upon
15 CalPERS' refusal to accept the base salary and longevity pay that Vernon chose to pay
16 Malkenhorst. As extensively discussed in Malkenhorst's December 18, 2012, letter to CalPERS
17 incorporated herein by reference, this additional review is barred by the doctrine of collateral
18 estoppel (issue preclusion, *res judicata*).

19 CalPERS' October 22, 2012, "final determination" letter is extremely general in nature
20 and lacks the specific allegations necessary to put Malkenhorst on notice of what CalPERS'
21 concerns and charges are. However, it appears to Malkenhorst that CalPERS is proceeding based
22 on an assumption, without legal justification or authority, that Malkenhorst held *multiple*
23 positions simultaneously at Vernon, each with its own hours of work and pay rate. Based upon
24 this foundationless *presumption*, CalPERS has chosen to ignore the compensation established by
25 Vernon, paid to Malkenhorst, and reported to and accepted by CalPERS, and to instead set its
26 *own* allegedly "appropriate" compensation to use in calculating Malkenhorst's pension.

27 Vernon is a Charter City, with all the rights inuring to Charter Cities under the California
28 Constitution. Charter Cities have broad powers under the "home rule" doctrine of the California

1 Constitution. (Cal. Const., art. XI, §§3(a), 5(a) and 5(b).) Charter Cities have exclusive
2 constitutional autonomy to establish their own governance systems and administrative structure,
3 and to pay their employees what those charter cities deem in the best interest of the city. (*State*
4 *Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547 ("City
5 of Vista".))

6 Vernon has functioned as a Charter City since 1988. It has determined its own structure.
7 Vernon's elected leaders decided to handle the administrative affairs of the city through a strong
8 City Administrator. Pursuant to the terms of the *Vernon City Charter* (Exh. 89), Malkenhorst's
9 position as City Administrator required him to perform duties and undertake responsibilities for
10 many aspects of Vernon's administrative functioning. The Charter also provides the City Council
11 with the authority to pay a single salary for this position, covering all duties and responsibilities.
12 Malkenhorst received a base salary pursuant to publicly available pay schedules for his service
13 throughout his tenure as "City Administrator/City Clerk".

14 Further, pursuant to its authority under the Charter, the Vernon City Council adopted a
15 longevity plan mandating additional pay for long-term city employees. Malkenhorst received
16 additional compensation in addition to his City Administrator base salary based on that longevity
17 plan.

18 Malkenhorst's base salary and longevity pay special compensation were regularly
19 reported to CalPERS and accepted by CalPERS throughout Malkenhorst's tenure as City
20 Administrator.

21 CalPERS has no legal or constitutional right to interfere with Vernon's right to structure
22 its municipal affairs. (*Sonoma County Organization of Public Employees v. County of Sonoma*
23 (1979) 23 Cal.3d 296.) CalPERS certainly has no authority to arbitrarily decide that Vernon must
24 split the City Administrator position into multiple jobs, each with its own pay rate and required
25 hours of work. (*Id.*)

26 Moreover, CalPERS neither has authority to override Vernon's constitutionally
27 empowered autonomy, nor statutory authority to conduct an administrative proceeding to try to
28 reduce Malkenhorst's pension allowance because of the constitutional questions involved and

1 legal prohibitions on CalPERS' determination of constitutional issues.

2 **FACTUAL BACKGROUND**

3 **I. Governmental Structure of the City of Vernon As Determined by the City Council**

4 1. The City of Vernon is governed by a five-member City Council. The City Council
5 was attentive to the structural concerns of operating the City efficiently.

6 2. Vernon is fairly unique among California cities. It has few residents, few schools,
7 and provides few social services, which are typically a large amount of the work of a city
8 council. The Vernon City Council instead focused much of its attention on matters of concern to
9 the large number of industries and businesses that were located in Vernon. The businesses in
10 Vernon wanted an efficiently run city with reduced electrical costs, lower taxes, and low
11 infrastructure costs. At the same time, the businesses in Vernon wanted superior fire protection
12 and superior business-related municipal services. The Vernon City Council in part structured its
13 municipal government and affairs in response to the concerns and needs of its business
14 components, property owners, and related constituents.

15 3. Although Vernon had employed an Administrative Officer from the mid-1950's to
16 mid-1960's, the position was left vacant and unfilled after the Administrative Officer at the time
17 passed away. The City Council did not seek candidates to fill the Administrative Officer
18 position.

19 4. Prior to the mid-1970's, the City Council structured its municipal government
20 affairs such that the department heads reported directly to the City Council. Up through the mid-
21 1970's, Vernon's governmental structure required the City Council to directly manage and
22 oversee a number of separate individuals working as department heads or otherwise undertaking
23 responsibility for some aspect of city affairs. The City Council would manage these individuals
24 and office holders in open meetings.

25 5. The City Council had a regular policy and practice of establishing a position and
26 then determining which duties and responsibilities that position would be responsible for. The
27 City Council also had a regular policy and practice of naming a single position with hyphenated
28 words or a hyphenated title. In certain cases, the City Council established a position (or the title

1 to a position) so that it was named with words that contained or described multiple duties, but the
2 position functioned and was intended to function as a single position, albeit with multiple duties
3 and responsibilities. In certain cases, the City Council required a position to act in an *ex officio*
4 manner wherein the position performed additional duties with different titles or names.

5 6. For example, in or about the fall of 1975, Vernon listed a job opening for the
6 position as "Deputy City Clerk/Deputy Director of Finance". The "Deputy City Clerk/Deputy
7 Director of Finance" was one title for one position that was responsible for various duties,
8 including overseeing accounts payable and receivables.

9 7. In the mid- to late-1970's, the Vernon City Council began to implement or to
10 change its structure, governance, and oversight of the administration of the City, as well as its
11 conception and vision of the management level governmental structure of Vernon.

12 8. At this time, the City Council was increasingly exploring ways of concentrating
13 or consolidating the duties and responsibilities for the day to day management of the City in
14 fewer hands, freeing the City Council up from having to directly manage the affairs of numerous
15 separate individuals and responsibilities.

16 9. Over time, as individuals holding various positions or responsibilities in Vernon's
17 governmental management retired from their jobs, the City Council decided to concentrate,
18 consolidate, or incorporate the job duties or responsibilities of those positions or jobs into other
19 existing city management jobs or positions. Often, the City Council mandated that no separate
20 compensation was to be paid for performing these duties or responsibilities.

21 10. In other cases, the City Council established new *ex officio* titles but assigned the
22 duties and responsibilities associated with such *ex officio* titles to existing positions. In those
23 cases, the person holding the existing position became responsible for the new duties and
24 responsibilities, but he or she performed them as part of the single position already held by the
25 individual and was compensated with a single salary for the existing position. The City Council
26 then restructured its governance and municipal affairs so as to require that an existing position or
27 job would be responsible for those job duties. Often, the City Council mandated that no separate
28 compensation was to be paid for performing these duties or responsibilities.

1 11. The City Council exercised its discretion to implement a governance structure that
2 it found best to accomplish the City Council's goals. The changes and structures that the City
3 Council made to Vernon's governance may have been unique, but it was likely in response to
4 Vernon's rather unique position.

5 12. During the same period that it was consolidating various city management
6 responsibilities and duties into existing positions, and as a component part of its
7 reconceptualization and reorganization of city management structure, the City Council began
8 developing plans to create a single position in city administration that would be responsible for
9 an increased number of duties and responsibilities. The City Council wanted to establish a
10 centralized position to handle many of the duties involved in running the city and transforming
11 Vernon into a stronger municipal entity.

12 13. These efforts reached a certain culmination point on August 1, 1978, when the
13 City Council adopted Vernon Ordinance No. 883 (Exh. 90), effective September 1, 1978, which
14 established the position of City Administrator.

15 14. Up to that point in time, Vernon's City Code established a position called
16 "Administrative Officer" as the City's administrative official. However, nobody had filled the
17 position of Administrative Officer for many years predating Malkenhorst's start at Vernon.
18 Further, as discussed above, the City Council was in the process of reconceptualizing and
19 restructuring Vernon's government management structure. Ordinance No. 883 amended Vernon's
20 City Code to remove reference to an "Administrative" position.

21 15. In adopting Ordinance No. 883, the City Council decided to change the
22 governmental structure of Vernon by employing an individual in the position of City
23 Administrator and requiring that all other city departments would report to the City
24 Administrator. As Ordinance No. 883 stated: "The City Council finds and determines that the
25 administrative affairs of the Municipal Government of the City would be handled more
26 expeditiously, efficiently, and satisfactorily through an officer, who acting on behalf of the
27 Council, would attend to such administrative affairs, to correlate and coordinate various
28 municipal activities, compile data, prepare reports relating to the affairs of City government, and

1 to generally act as the agent of the Council in the discharge of administrative duties."

2 16. Ordinance No. 883 further appointed the City Administrator to simultaneously
3 serve as the City Clerk, the Municipal Employee Relations Representative, and the Personnel
4 Director and the duties and responsibilities of City Clerk, Municipal Employee Relations
5 Representative, and Personnel Director were incorporated into the single position of City
6 Administrator. This was a continuation and formal ratification of policies begun earlier whereby
7 the duties and responsibilities of previously existing positions were incorporated into the duties
8 and responsibilities of existing city management positions. Pursuant to Ordinance No. 883, the
9 authority for this organizational structure was also incorporated in the Vernon City Code.

10 17. At many times, Vernon designated the new single position as "City
11 Administrator/City Clerk" and used that designation to refer to all duties and responsibilities
12 incorporated in the single position. On other occasions, it referred to individual duties by *ex*
13 *officio* titles such as "City Clerk" or other titles. However, even when individual duties were
14 referred to by such an *ex officio* title, those duties were simply a part of the overall duties and
15 responsibilities of the single City Administrator position and were performed as part of the
16 regular duties and responsibilities of that position.

17 18. Ordinance No. 883 also gave the City Council authority to establish the
18 compensation for the position of City Administrator, which was already defined as a single
19 position incorporating various duties and responsibilities. Pursuant to that authority, the City
20 Council set a single salary as compensation for all of the duties undertaken in that position.

21 19. From that point forward, the City Council periodically awarded merit pay and/or
22 cost of living adjustments so as to increase the base salary of the City Administrator position. All
23 of those periodic pay increases are memorialized in regular compensation resolutions formally
24 approved and adopted by the City Council.

25 20. Up until mid-1981, Vernon retained the services of an outside contractor to obtain
26 electrical power from Southern California Edison. That contractor had promised that the rate
27 charged to Vernon would be below the rate Southern California Edison charged other
28 commercial customers in the area but when he presented Vernon with a new contract, Vernon

1 was actually being charged rates *above* those charged to other commercial customers. The City
2 Council recognized that it was not in the City's interests to sign such a contract and it terminated
3 its relationship with the outside contractor. At the same time, the City Council reorganized
4 Vernon's Department of Light and Power to rectify the problems.

5 21. On or about May 5, 1981, the City Council adopted Resolution No. 4803, which
6 revised the structure of the Department of Light and Power and created several new positions
7 within the department. One of these positions was a Chief Executive Officer ("CEO") with
8 responsibility for coordinating the development of policies involving all phases of the electrical
9 department. In adopting Resolution No. 4803, the City Council continued its existing practice of
10 incorporating new duties and responsibilities into the duties and responsibilities of an existing
11 position by appointing the City Administrator to serve as the CEO of the Electrical Department.
12 Furthermore, the City Council mandated that no separate compensation be paid for performing
13 these duties or responsibilities.

14 22. On or about June 27, 1985, the City Council adopted Resolution No. 5197 which
15 appointed the City Administrator to undertake the additional duties and responsibilities of the
16 city's Purchasing Agent. Again, this represented the absorption or incorporation of new duties
17 and responsibilities into the duties and responsibilities of an existing position. The City Council
18 mandated that no separate compensation was to be paid for performing these duties or
19 responsibilities.

20 23. On April 12, 1988, the electorate of Vernon voted in its majority to establish
21 Vernon as a Charter City under the terms of the California Constitution and adopted the *Vernon*
22 *City Charter*. The *City Charter* incorporated and adopted the existing policy and practice of
23 Vernon whereby it retained the services of a City Administrator, bearing numerous duties and
24 responsibilities as outlined above, to manage the affairs of Vernon under the direction and
25 authority of the Vernon City Council.

26 24. On or about June 20, 1991, the City Council adopted Resolution No. 5946 which
27 established the City of Vernon Gas Municipal Utility Department. The City Council expanded
28 the duties of the City Administrator to include fulfilling the duties of the CEO of the new gas

1 utility. Once again, the duties and responsibilities of CEO of the Gas Municipal Utility
2 Department were incorporated into the duties and responsibilities of the existing position of City
3 Administrator responsibilities. The City Council mandated that no separate compensation was to
4 be paid for performing these duties or responsibilities.

5 25. On or about November 21, 1995, the City Council adopted Ordinance No. 1035
6 (Exh. 91), effective December 21, 1995, making certain changes in the *Vernon City Code* to
7 bring it into conformity with *Vernon City Charter*. Ordinance No. 1035 fully upheld and re-
8 endorsed the establishment of the position of City Administrator as mandated by Ordinance No.
9 883 and later incorporated into the *Vernon City Charter*.

10 26. On or about May 15, 2002, the City Council adopted Resolution No. 7967
11 declaring the City Council's intent regarding Vernon's administrative organization. Section 6
12 says, "[t]he City Council of the City of Vernon also intends that the City Administrator will
13 discharge all of the duties and obligations of a municipal corporation as provided for in its Code,
14 its Charter and the applicable statutes enacted by the Legislature of the State of California."
15 Section 8 says, "[t]he City Council of the City of Vernon hereby declares that having the City
16 Administrator responsible for the entire administration of the City avoids the conflicts and
17 organizational politics that frequently occur in political organizations when many executives
18 independently report to a City Council."

19 **II. Malkenhorst's Employment History at Vernon**

20 27. Bruce V. Malkenhorst, Sr. has superior business, organizational, and managerial
21 skills.

22 28. Malkenhorst had a career in private industry for approximately 13 years,
23 including positions as accountant for American Urethane from 1961 through 1964, office
24 manager (which included labor relations responsibilities) for Stauffer Chemical from 1964
25 through 1965, Chief Accountant for Chase Bag Company from 1965 through 1967, and
26 Controller for Ranger Die Casting from 1967 through 1973. All of these positions helped
27 Malkenhorst to develop his professional and administrative skills.

28 29. Malkenhorst sought to apply his skills and experience to efficiently carrying out

1 the business affairs of a municipality.

2 30. In or about January, 1973, Malkenhorst accepted the position of Accountant at the
3 City of Manhattan Beach ("Manhattan Beach"). He was employed in that position until mid-
4 September 1975. Duties included all financial aspects of the city, but he also handled multiple
5 additional functions in Manhattan Beach as part of that single position, including water
6 department billing; overseeing the bus system, parking enforcement, and the warehouse
7 employees; and serving as the city's representative to the citizen's budget committee.

8 31. Malkenhorst became dissatisfied with his position at Manhattan Beach and began
9 looking for other positions. He wished to remain in municipal government and had aspirations to
10 become a city manager.

11 32. In or about the fall of 1975, Malkenhorst submitted several applications for
12 positions at other cities and was invited to interview for them. One was for a position at the City
13 of Mountain View, but Malkenhorst had minimal interest in this opening because it would
14 require him to uproot his family and move to northern California. Another was for a position at
15 the City of Vista in San Diego County, but Vista was a newly incorporated city and Malkenhorst
16 was not sure he had the experience to handle the position. The third was a position at Vernon.

17 33. Vernon's open position was for "Deputy City Clerk/Deputy Director of Finance".
18 R.A. Ziemer, the then-current City Clerk/Finance Director, told Malkenhorst that he would be
19 retiring soon and that Vernon was having problems that Ziemer felt Malkenhorst could help
20 Vernon solve. Malkenhorst submitted an application to fill the open position.

21 34. Vernon already had a regular policy and practice of establishing one position that
22 was named with words that contained or described multiple duties. Malkenhorst understood that
23 the job was a single position with multiple duties and responsibilities, and that the person holding
24 the position would be compensated with a single salary. Malkenhorst understood that he was to
25 be paid one salary, and that the City Council often mandated that no separate compensation was
26 to be paid for performing multiple duties or responsibilities.

27 35. The job opening at Vernon appealed to Malkenhorst, in part because he had
28 worked as an assistant finance director at Manhattan Beach and was familiar with the duties. He

1 also thought that going to work at Vernon might increase his opportunities to become a City
2 Manager or other senior management position, either at Vernon or at some other city in
3 California. As Malkenhorst later learned, Vernon had employed someone as Administrative
4 Officer from the mid-1950's to mid-1960's, but the individual had passed away and the position
5 had been vacant for some time. (Vernon's Administrative Officer position was never filled after
6 the prior Administrative Officer passed away. The City Council of Vernon did not seek
7 candidates to fill the Administrative Officer position).

8 36. After expressing interest in the Deputy City Clerk/Deputy Director of Finance job
9 and submitting an application, Malkenhorst was offered the position at Vernon. He accepted the
10 offer and began working in the position the day after terminating his employment at Manhattan
11 Beach.

12 37. The "Deputy City Clerk/Deputy Director of Finance" was one title for one
13 position that was responsible for various duties. The duties included all aspects of City
14 accounting as well as preparation of the annual controller's report and annual city budget.

15 38. Malkenhorst quickly demonstrated his skills to the benefit of Vernon, his new
16 employer. The City Council took notice. For example, very shortly after beginning his
17 employment at Vernon, Malkenhorst learned that the policy and practice of the former Deputy
18 Finance Director had been to pay Vernon's utility bill from Southern California Edison the day
19 the bill arrived. Malkenhorst quickly changed this policy and practice, initially waiting 30 days
20 to pay the bill and later waiting 60 days to pay it. Southern California Edison filed suit over the
21 delayed payments and the Federal Energy Regulatory Commission ultimately ruled that Vernon
22 must pay its utility bills within 45 days, but Malkenhorst had achieved a result which enabled
23 Vernon to use the money for the utility bills for a month and a half before paying it, increasing
24 the city's interest, financial planning, and available cash flow.

25 39. In the summer of 1977, the then-current City Clerk/Finance Director, R.A.
26 Ziemer, retired. Although Malkenhorst had been serving as Deputy City Clerk/Deputy Finance
27 Director, he had been performing many of the duties that Mr. Ziemer was presumably
28 responsible for, such as negotiating the City's self-insurance program and negotiating over new

1 police officer and firefighter labor agreements on Vernon's behalf.

2 40. The City Council remained pleased with Malkenhorst's good results. After Ziemer
3 left, the City Council appointed Malkenhorst to the City Clerk/Finance Director position on or
4 about July 1, 1977.

5 41. Beginning in or around the mid-1970's, the Vernon City Council began to change
6 its oversight of the administration of the City, as well as its conception and vision of the
7 management level governmental structure of Vernon as outlined above. At the same time,
8 Malkenhorst began to demonstrate that his skills and knowledge could significantly benefit
9 Vernon. Therefore, as individuals holding various positions in Vernon's governmental
10 management retired from their jobs, the City Council decided to incorporate the job duties in
11 those now-vacant positions into existing city management and to have an existing position be
12 responsible for those job duties as part and parcel of the already existing duties. The City
13 Council often turned to Malkenhorst to fill such duties and responsibilities.

14 42. For example, on or about March 2, 1978, the Vernon City Council adopted
15 Resolution No. 4544. This created the position of Municipal Employee Relations Representative.
16 The City Council intended the duties to become a component part of an existing position, with
17 no separate salary for the duties associated with that *ex officio* title, and appointed Malkenhorst
18 to serve in that capacity as part of his already existing duties and responsibilities. Malkenhorst
19 held the office and was responsible for the additional duties. The City Council mandated that no
20 separate compensation was to be paid for performing these duties or responsibilities.

21 43. The City Council recognized that Malkenhorst was an able Municipal Employee
22 Relations Representative in large part because Vernon was embroiled in a bitter labor dispute
23 with the City's firefighters' union. The firefighters went on strike beginning in August 1978 and
24 Malkenhorst was able to handle the labor dispute to the City's benefit. Malkenhorst also brought
25 experience negotiating labor agreements from his private sector employment at Stauffer
26 Chemical.

27 44. On or about June 30, 1978, the then-current City Treasurer of Vernon terminated
28 his employment with the City. On or about July 16, 1978, the City Council appointed

1 Malkenhorst to undertake the duties of the City Treasurer. Again, the City Council assigned the
2 City Treasurer duties to Malkenhorst as a component part of his existing duties and
3 responsibilities. The City Council mandated that no separate compensation was to be paid for
4 performing these duties or responsibilities. The City Council's action was memorialized in the
5 City Council Minutes for the meeting on July 27, 1978.

6 45. The action by the City Council appointing Malkenhorst as City Treasurer was
7 later incorporated in Resolution No. 4810, adopted by the City Council on or about June 2, 1981.

8 46. Once again demonstrating his ability to bring his skills and knowledge to bear in
9 advancing the interests of Vernon, Malkenhorst discovered that monies that Vernon had on
10 deposit with local banking institutions were earning little or no interest on the deposited funds.
11 When Malkenhorst investigated, one of the bankers showed him a document that the bank had
12 sent to Vernon seeking advice on how Vernon wished to handle various financial matters
13 concerning their funds deposited in the bank. The former City Treasurer had written on the
14 bottom of the document, "You deal with the f***ing bank, we'll deal with the f***ing city."
15 Malkenhorst quickly changed the financial arrangements with the bank so that Vernon began
16 accruing interest on the considerable funds it had on deposit.

17 47. As described in detail above, Vernon had previously established a position called
18 "Administrative Officer" as the city's administrative official. However, nobody had filled the
19 position of Administrative Officer for many years predating Malkenhorst's start at Vernon.
20 Further, as discussed above, the City Council was in the process of reconceptualizing and
21 restructuring Vernon's government management structure.

22 48. As the City Council began formulating plans to establish a new city governance
23 structure and create a single position in city administration that would be responsible for an
24 increased number of duties and responsibilities, it also evaluated its several years of experience
25 with Malkenhorst. Based on its experience thus far with Malkenhorst's performance, skills and
26 knowledge, the City Council felt that Malkenhorst was capable of filling such a position and
27 communicated to him that the City Council wanted him to fill that single position that would be
28 responsible for many duties once it was established.

1 49. On August 1, 1978, the City Council adopted Vernon Ordinance No. 883,
2 effective September 1, 1978, which established the position of City Administrator. Malkenhorst
3 was appointed City Administrator at the same time Ordinance No. 883 was adopted. Pursuant to
4 Ordinance No. 883, Malkenhorst carried out the duties and responsibilities associated with the
5 titles of City Clerk and Municipal Employees Relations Representative (titles Malkenhorst
6 already held) as part of the single City Administrator position, and he was also given duties and
7 responsibilities associated with the *ex officio* title of Personnel Director and performed those
8 duties and responsibilities as part of the single position of City Administrator.

9 50. This was a continuation and formal ratification of policies begun earlier whereby
10 the duties and responsibilities of previously existing positions were incorporated into the duties
11 and responsibilities of existing city management positions. Pursuant to Ordinance No. 883, the
12 authority for this organizational structure was also incorporated in the *Vernon City Code*.

13 51. Ordinance No. 883 also gave the City Council authority to establish the
14 compensation for the position of City Administrator, which was already defined as a single
15 position incorporating various duties and responsibilities. Pursuant to that authority, the City
16 Council set a single salary as compensation for all of the duties undertaken in that position.
17 Malkenhorst was assigned the initial base salary of \$3,502 per month, representing Step 2 of the
18 pay schedule for "City Administrator/City Clerk". The City Council mandated that no separate
19 compensation was to be paid for performing any other duties or responsibilities.

20 52. From that point forward, the City Council regularly evaluated the performance of
21 Malkenhorst, rewarding his superior performance with periodic merit pay and cost of living
22 adjustments to his single salary. This usually occurring on or about the start of a new fiscal year
23 although occasionally at other points during the year based on exemplary performance. All of
24 those periodic pay increases are memorialized in regular compensation resolutions formally
25 approved and adopted by the City Council.

26 53. When the City Council adopted Resolution No. 4803 on or about May 5, 1981,
27 which revised the structure of the Department of Light and Power and created several new
28 positions within the department, it also established the new position of Chief Executive Officer

1 ("CEO") with responsibility for coordinating the development of policies involving all phases of
2 the electrical department. The City Council continued its existing practice of incorporating new
3 duties and responsibilities into the duties and responsibilities of an existing position by
4 appointing the City Administrator to serve as the CEO of the Electrical Department. Because
5 Malkenhorst held the position of City Administrator, he began performing the additional duties
6 and responsibilities of CEO of the Electrical Department as part of his single existing City
7 Manager position. Further, he continued receiving a single base salary as City Administrator.
8 The City Council mandated that no separate compensation was to be paid for performing these
9 duties or responsibilities. He received no additional base salary for undertaking the additional
10 duties and responsibilities as Electrical Department CEO.

11 54. On or about June 27, 1985, the City Council adopted Resolution No. 5197 which
12 appointed the City Administrator to undertake the additional duties and responsibilities of the
13 city's Purchasing Agent. Again, this represented the absorption or incorporation of new duties
14 and responsibilities into the duties and responsibilities of an existing position. Compensation
15 remained a single base salary attributable to the City Administrator position for all of the duties
16 the individual in that position performed. The City Council mandated that no separate
17 compensation was to be paid for performing these duties or responsibilities. Because
18 Malkenhorst was serving as City Administrator, the duties of Purchasing Agent were
19 incorporated into his existing duties and responsibilities as City Administrator, and he continued
20 to receive a single base salary for serving as City Administrator.

21 55. On or about June 20, 1991, the City Council adopted Resolution No. 5946 which
22 established the City of Vernon Gas Municipal Utility Department. The City Council expanded
23 the duties of the City Administrator to include fulfilling the duties of the CEO of the new gas
24 utility. Once again, because Malkenhorst was serving as City Administrator, the duties and
25 responsibilities of CEO of the Gas Municipal Utility Department were incorporated into his
26 existing City Administrator duties and responsibilities, and he continued to receive a single base
27 salary for serving as City Administrator. The City Council mandated that no separate
28 compensation was to be paid for performing these duties or responsibilities.

1 establish a governance structure whereby it employed Malkenhorst in the single position of City
2 Administrator, albeit one with numerous duties and responsibilities, and determined the base
3 salary and longevity pay earned by Malkenhorst in that single position throughout his tenure as
4 City Administrator for Vernon.

5 CalPERS, however, has unilaterally assigned itself the authority to accept or reject the
6 governance structure and job descriptions of Vernon and the base salary it paid to Malkenhorst,
7 and by implication has unilaterally assigned itself authority to accept or reject the governance
8 structure and job descriptions established by *all* Charter Cities.

9 CalPERS exceeds its authority and violates the law when it seeks to substitute its own
10 determination that Malkenhorst held numerous *separate* positions while working for Vernon,
11 each with its own *separate* salary, hours of work, and duties and responsibilities. Instead, it must
12 utilize the position and salary information provided by Vernon to calculate the pension benefit to
13 be paid to Malkenhorst.

14 **A. Charter City's Powers**

15 A city accepting the home-rule privilege, by charter provision broadly authorizing it to
16 make and enforce all ordinances and regulations in respect to municipal affairs except as
17 provided in the charter, generally has complete power over municipal affairs, otherwise lawfully
18 exercised, subject only to clear and explicit limitations and restrictions contained in the charter.
19 (*City of Glendale v. Trondsen* (1957) 48 Cal.2d 93; *Ruane v. City of San Diego* (1968) 267
20 Cal.App.2d 548; *City of Santa Monica v. Grubb* (1966) 245 Cal.App.2d 718.) Under the home-
21 rule doctrine, Charter Cities have full power to regulate municipal affairs, and ordinances
22 governing municipal affairs supersede general laws insofar as the latter conflict with the
23 ordinance, unless the state has preempted the field.

24 **B. Charter City Powers to Structure Government**

25 The broad duties of the City Administrator described in the *Vernon City Charter*
26 encompass the tasks for which Malkenhorst received compensation from Vernon for CalPERS'
27 purposes.

28 In 1978, Vernon determined that "the administrative affairs of the Municipal Government

1 of the City would be handled more expeditiously, efficiently, and satisfactorily through an office,
2 who acting on behalf of the Council, would attend to such administrative affairs, to correlate and
3 coordinate various municipal activities, compile data, prepare reports relating to the affairs of the
4 City government, and to generally act as the agent of the Council in discharge of administrative
5 duties." (Ordinance No. 883; *Vernon City Code*, Sec. 2.7).

6 Vernon's *Charter* provides broad powers to the City Administrator. Vernon's *Charter*
7 provides that "[t]he city council shall appoint, by majority vote, a city administrator who shall be
8 the chief administrative office of the City of Vernon. The city administrator shall serve at the
9 pleasure of the council except as may otherwise be provided by written contract; provided
10 however, that the city administrator shall not be removed from office except as provide by this
11 Charter." (*Vernon City Charter*, CH: 6.1, Appointment.) "Compensation for the city
12 administrator shall be set by the city council." (*Vernon City Charter*, CH: 6.3, Compensation.)
13 "The city administrator shall receive such compensation and expense allowances as the council
14 shall, from time to time, determine, and such compensation and expenses shall be a proper
15 charge against such funds of the city as the council shall designate." (*Vernon City Code*, Sec.
16 2.7.2, Compensation and Expenses; see also Ordinance No. 883, Section 4.)

17 "The city administrator shall be responsible to the city council for the proper and efficient
18 management of all the affairs of the city and those specific duties assigned to the city
19 administrator by this charter or by the city council. The specific duties of the city administrator
20 may be specified by ordinance, resolution, or order of the city council. (*Vernon City Charter*,
21 CH: 6.4, Duties.)

22 "The city administrator shall be the administrative head of the government of the city,
23 under the direction and control of the council. He shall be responsible for the efficient
24 administration of all of the affairs of the city which are under his control. In addition to his
25 general powers as administrative head, and not as a limitation thereon, he shall have the
26 following powers and duties: (a) *General supervision*. To execute on behalf of the council its
27 administrative supervision and control of such affairs of the city as may be placed in his charge,
28 or which are not otherwise provided for by the council, and to exercise control over and to

1 supervise in general all departments and division of the city government and all appointive
2 offices and employees thereof." (*Vernon City Code*, Sec 2.8, Powers and Duties.)

3 In Section 6.7 of Vernon's *City Charter*, the City Council is empowered to appoint the
4 City Administrator to any other duties. "The city council may appoint the city administrator to
5 any other office in the city and direct the city administrator to carry out the duties of that office
6 or any other position of employment with the city in addition to his or her duties as city
7 administrator." (*Vernon City Charter*, CH: 6.7, Other Positions.) "The city administrator is
8 hereby appointed to serve as the city clerk and shall have the powers and duties provided for in
9 the government code of the State of California." (*Vernon City Code*, Sec 2.7.3, City Clerk; see
10 also Ordinance No. 883, section 4, Ordinance No. 1035, Section 4.)

11 **C. Constitutional "Home Rule" Autonomy of Charter Cities to Set**
12 **Compensation of City Employees**

13 "Most prominently, [the Supreme Court has] limited or invalidated state laws that unduly
14 interfere with the prerogative of local governments to set the salaries of their own employees.
15 (See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 132 Cal.Rptr.2d 713, 66 P.3d
16 718; *San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d
17 785, 163 Cal.Rptr. 460, 608 P.2d 277; *Sonoma County Organization of Public Employees v.*
18 *County of Sonoma* (1979) 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (*County of Sonoma*.)"
19 (*City of Vista, supra*, at 25.)

20 In *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, the California
21 Supreme Court upheld the city's salary schedules. Taxpayer's allegations that the salary schedule
22 differed from one recommended by the civil services commission failed to cause the court to
23 order the civil service schedule because the taxpayer failed to meet the heavy burden of
24 persuasion required of those challenging a Charter City decision pursuant to *City and County of*
25 *S.F. v. Boyd* (1943) 22 Cal.2d 685. (*City and County of San Francisco v. Cooper, supra*, at 921.)

26 The state constitution grants Charter Cities specific authority over the "...constitution,
27 regulation and government of...subgovernment in all or part of a city..." including plenary
28 power to determine "...the manner in which, the method by which, the times at which, and the

1 terms for which the... municipal officers and employees.. shall be elected or appointed, and for
2 their removal, and...**compensation.**" (*Cal. Const.*, art. XI, § 5(a)(b), emphasis added.)¹

3 "Interference with employee salaries would thus have an enormous, ongoing impact on
4 city finances. And if the state sought to control the salaries of only some city employees, such
5 control would interfere with the city's ability to set salary schedules and pay differentials for its
6 employees, decisions which in turn affect matters of employee morale, retention, and workforce
7 cohesion that indeed go to the heart of municipal autonomy. **Interference with employee**
8 **salaries would also likely affect a municipality's long-term pension obligations.**" (*City of*
9 *Vista, supra*, at 30, emphasis added.)

10 "In light of this constitutional provision, the salary level of the mayor and city council
11 members clearly falls within a city's municipal affairs, as does the compensation level of the
12 "city police force" as well as those city employees involved in the "subgovernment in all or part
13 of a city" such as "deputies, clerks *and other employees.*" (*Cal. Const.*, art. XI, § 5, *subd. (b)*),
14 italics added; see *Bishop v. City of San Jose, supra*, 1 Cal.3d 56, 81 Cal.Rptr. 465, 460 P.2d.
15 137...." (*City of Vista, supra*, at 15.)

16 Clearly, Malkenhorst is a city employee who is necessary to maintain the
17 "subgovernment in all or part of a city" (*Cal. Const.*, art. XI, § 5, *subd. (b)*, *item (2)*), and/or
18 considered "deputies, clerks and other employees" of the city (*id.*, *item (4)*). (*City of Vista,*
19 *supra.*)

20 Malkenhorst's compensation is a municipal affair beyond CalPERS' regulation. CalPERS

21
22
23 ¹ **Cal. Const., Art. 11, §5(b)** It shall be competent in all city charters to provide, in
24 addition to those provisions allowable by this Constitution, and by the laws of the State for: (1)
25 the constitution, regulation, and government of the city police force (2) subgovernment in all or
26 part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject
27 only to the restrictions of this article, to provide therein or by amendment thereto, the manner in
28 which, the method by which, the times at which, and the terms for which the several municipal
officers and employees whose compensation is paid by the city shall be elected or appointed, and
for their removal, and for their compensation, and for the number of deputies, clerks and other
employees that each shall have. and for the compensation, method of appointment,
qualifications, tenure of office and removal of such deputies, clerks and other employees.

1 must accept the amount of the "pay rate" clearly designated in the pay schedules for the City
2 Administrator position.

3 **D. Reasonableness of Compensation**

4 Courts will not question the terms or reasonableness of compensation. California courts
5 are reluctant to intervene in issues involving compensation for municipal officers and employees.
6 (See *Merritt v. Weldon* (1908) 154 Cal. 545, et al.)

7 **E. Pensions Are a Municipal Issue**

8 Providing for pensions is also a municipal issue. A Charter City's constitutional grant of
9 autonomy reserves to the City to designate the terms of the compensation that are utilized by
10 CalPERS. (*Murphy v. City of Piedmont* (1936) 17 Cal.App.2d 436; *Richards v. Wheeler* (1935)
11 10 Cal.App.2d 108.) Questions arising in connection with retirement are also municipal issues.
12 (*Heard v. Board of Administration of All City Employees' Retirement System of City of Los*
13 *Angeles* (1940) 39 Cal.App.2d 685.) As employer, the City funds the actuarial value of the future
14 pension obligations that arise from its choice of compensation for its employees.

15 **F. Pension Obligation Superfunded; Vernon's Payment of CalPERS'**
16 **Contributions**

17 Although current total funding is not required at the time that a City contracts for or
18 offers employees future benefits, CalPERS itself indicated in its report on Vernon's actuarial
19 valuation that Vernon's miscellaneous plan (the plan to which Malkenhorst belonged and retired
20 under) was sufficiently funded or super-funded on June 30, 2006 (FY05-06), the date subsequent
21 to Malkenhorst's retirement. Moreover, CalPERS recognized that and approved Malkenhorst's
22 full pension allowance.

23 **G. Structure of Employment and Offices is Vernon's Choice**

24 Vernon could structure its city government as it pleases, pursuant to its *Charter*. Vernon
25 could structure the City Administrator's position so that the individual appointed to that position
26 performs a wide range of activities, has multiple duties and responsibilities, or has unique names
27 associated with certain duties or responsibilities. Vernon can give the City Administrator one or
28 many titles, honorary or otherwise, and as many duties and responsibilities as it desires (within

1 the charter authorization). CalPERS cannot interfere in Vernon's Charter City rights to structure
2 its offices and government as it sees fit. CalPERS cannot intrude on Vernon's Charter City rules
3 and require that it structure the office of City Administrator differently than Vernon did.

4 "Statutes that seek to micromanage municipal affairs without any clear extra municipal
5 objective have been held inapplicable to charter cities. (See, e.g., *County of Sonoma, supra*, 23
6 Cal.3d at pp. 317-318, 152 Cal.Rptr. 903, 591 P.2d 1 [finding no extramunicipal statewide
7 concern to justify a state law restricting state funds to cities that grant cost-of-living increases to
8 their employees].)" (*City of Vista, supra*, at 24.)

9 The City of Vernon paid Malkenhorst for his full-time work in his singular position of
10 City Administrator (designated "City Administrator/City Clerk" in Vernon's compensation
11 resolutions). There is no question that CalPERS' efforts to reject Malkenhorst compensation
12 because Malkenhorst as City Administrator also held "title" to several offices simultaneously
13 interferes with Vernon's protected municipal autonomy. CalPERS invades Vernon's local
14 prerogative expressly protected by constitutional text. CalPERS' use of the PERL in this case
15 excessively interferes with municipal autonomy that is expressly prevented by *City of Vista*,
16 *supra*.

17 Without legal support, CalPERS essentially argues that Vernon cannot pay Malkenhorst a
18 salary in the City Administrator position that qualifies as "pay rate" for CalPERS' final
19 compensation purposes if Vernon also assigns Malkenhorst multiple duties or responsibilities, or
20 awards him honorific titles associated with some of those duties or responsibilities.

21 **H. Vernon's Constitutional Autonomy on City Procedures and City Structure**

22 Vernon's structure of its governmental offices is solely within the Charter City's grant of
23 autonomy.

24 **Cal. Const., Art. 11, § 5(a).**

25 It shall be competent in any city charter to provide that the city governed
26 thereunder may make and enforce all ordinances and regulations in respect to
27 municipal affairs, subject only to restrictions and limitations provided in their
28 several charters and in respect to other matters they shall be subject to general
laws. City charters adopted pursuant to this Constitution shall supersede any
existing charter, and with respect to municipal affairs shall supersede all laws
inconsistent therewith.

1 Vernon has adopted procedures for enacting City business in its *Charter*. Vernon
2 followed all the required procedures in the *City Charter* when negotiating, contracting, and
3 adopting the employment resolutions, pay schedules, and other documents regarding
4 employment agreements between Malkenhorst and Vernon. The manner of enacting municipal
5 ordinances and resolutions is a municipal affair. (*People ex rel. Seal Beach Police Officers Assn.*
6 *v. City of Seal Beach* (1984) 36 Cal.3d 591; *Brougher v. Board of Public Works of City and*
7 *County of San Francisco* (1928) 205 Cal. 426.)

8 CalPERS contracted with Vernon and accepted that Vernon retained its constitutional
9 autonomy to determine compensation and the structure of its government.

10 **II. CalPERS' Ministerial Duties**

11 CalPERS' administrative jurisdiction is limited to determining any right, benefit, or
12 obligation of a person under the PERL. (*Government Code*, §20134.)

13 Pension payments are compensation, deferred as to time. (*In re Retirement Cases* (2003)
14 110 Cal.App.4th 426, 451.) It is well settled that compensation of charter cities employees is a
15 municipal affair, rather than a "statewide concern". (See *Cal. Const.*, art. XI, §§ 4, 5, 6; see, e.g.,
16 *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.)

17 Neither the Legislature nor CalPERS may invade a Charter City's autonomy and
18 determine the amount of compensation or deferred compensation (i.e. pensions) of Charter City
19 employees. CalPERS is unable to adjudicate claims regarding Vernon's constitutional autonomy
20 to compensate its employees. (*Locker v. City and County of San Francisco* (2004) 33 Cal.4th
21 1055.)

22 Once Vernon has designated the full time "base salary" compensation, CalPERS has the
23 ministerial and mandatory duty to accept the compensation and to pay a pension accordingly.
24 While CalPERS can determine and require Vernon to fund the actuarial value of Vernon's
25 associated pension liabilities as a consequence of contracting with CalPERS, CalPERS officials
26 have no discretion to hold a hearing to determine or withhold a pension or refuse to pay a
27 pension based on information received from a Charter City. (*Locker v. City and County of San*
28 *Francisco, supra*, at 1081.)

1 **III. Malkenhorst's Compensation, Job Duties and Publicly Available Pay Schedules**
2 **Meet the Requirements of the PERL**

3 Malkenhorst's compensation and job satisfy the requirements of the PERL. CalPERS
4 violates the express terms of the PERL. CalPERS attempts to disregard the regular and special
5 compensation earned by Malkenhorst as Vernon's City Administrator. Capriciously and
6 arbitrarily, CalPERS, among other things, seems to assume that Malkenhorst held multiple
7 separate positions, with separate salaries and separate required hours of work for each assumed
8 separate position. It is unable to provide either legal authority or factual support for this
9 assumption.

10 CalPERS also violates the express terms of the PERL when it decides that the salary
11 schedules governing Malkenhorst's compensation as City Administrator do not meet the
12 requirements of the PERL, including as "publicly available".

13 **A. Demand for Specific Detailed Information about CalPERS' Concerns**

14 CalPERS fails to describe its concerns with sufficient particularity to inform Malkenhorst
15 of the nature of those concerns. By its ambiguity and withholding, CalPERS denies Malkenhorst
16 the ability to provide a defense. CalPERS fails to set forth specific information or questions to
17 allow Malkenhorst to respond to CalPERS' inquiries or concerns. CalPERS has failed to provide
18 Malkenhorst with sufficient notice of what CalPERS believes was nonconforming, required
19 correction, or was deficient.

20 CalPERS is vague about which action may have violated some statutes. For example,
21 CalPERS fails to describe with sufficient particularity or specific references to the provisions of
22 the PERL any defects in (i) Malkenhorst's employment history at Vernon; (ii) the publicly
23 available pay schedules or (iii) other documents setting forth his base salary and longevity
24 special compensation at each point in his tenure. As another set of examples, CalPERS fails to
25 describe with sufficient particularity or specific references to the provisions of the PERL any
26 defects in (iv) Malkenhorst's job duties, (v) his reported pay; or (vi) other issues related to his
27 pension.

28 Overall, CalPERS fails to provide sufficient notice of CalPERS' specific problems with

1 Malkenhorst's or Vernon's actions or how CalPERS' identified concerns culminated in its present
2 position. Malkenhorst demands a more detailed explanation of CalPERS' concerns, with specific
3 references to identified provisions of the PERL and how CalPERS alleges that the PERL has
4 been violated. Malkenhorst is entitled to present a defense in an appropriate forum, after notice.
5 Up to this time, CalPERS has failed to provide Malkenhorst sufficient information to know (i)
6 CalPERS' concerns and (ii) how they apply to the particulars of Malkenhorst's situation.

7 However, with the understanding that Malkenhorst will present information in good faith
8 and, if necessary, defend himself vigorously at each step of every process in the appropriate
9 forum, it appears from CalPERS' Audit Report and its October 22, 2012, "final determination"
10 letter that CalPERS' arguments essentially revolve around several interrelated, and false,
11 assumptions and assertions:

- 12 • CalPERS falsely assumes that Malkenhorst worked in multiple positions
13 simultaneously, when the facts are clear that Malkenhorst worked full time and
14 performed all of his duties and responsibilities in the single position of City
15 Administrator position. CalPERS further assumes that Malkenhorst earned separate
16 salaries for each such position, when the facts are clear that Malkenhorst was
17 compensated for the singular position of City Administrator and received no other
18 salary connected with his multiple duties and responsibilities.
- 19 • CalPERS further falsely assumes that each purported "separate" job had its own set of
20 job duties, pay schedule, and required hours of work. The facts are clear that
21 Malkenhorst performed all of his duties and responsibilities in the single position of
22 City Administrator position and was compensated for that singular position. The City
23 Council mandated that no separate compensation was to be paid for performing these
24 duties or responsibilities.
- 25 • CalPERS further falsely assumes that therefore a portion of Malkenhorst's earnings at
26 the City of Vernon must be considered "overtime" under the PERL and non-
27 reportable to CalPERS. It does so even though Malkenhorst worked in one exempt
28 position where there was no overtime payable.

- 1 • CalPERS further falsely assumes that Malkenhorst received "exceedingly high salary
2 increases" during his tenure at the City of Vernon. In fact, Malkenhorst's salary
3 increased an average of just over 3.5% for the last ten years of his employment at
4 Vernon.
- 5 • CalPERS further falsely assumes that Malkenhorst received 3% salary increases only
6 during his final three years of employment, rather than just over that percentage
7 during his last ten years of employment. CalPERS' intent in limiting the period only
8 to the final three years of Malkenhorst's tenure at Vernon appears to aimed at falsely
9 implying that Malkenhorst and Vernon radically reduced Malkenhorst's pay raises
10 during his final three years at Vernon for purposes of avoiding "anti-spiking"
11 allegations. Further, CalPERS' construct assumes that Vernon would have offered
12 Malkenhorst higher pay increases which he declined.
- 13 • CalPERS further falsely assumes that Malkenhorst's greatest period "exceedingly
14 high salary increases" (1985 through 1992 according to CalPERS' audit) coincided
15 with, and represented additional compensation for, Malkenhorst's appointment to
16 "additional positions". In fact, Malkenhorst was assigned additional duties and
17 responsibilities throughout his nearly three decade tenure at Vernon, not just during
18 the seven year period identified by CalPERS. The City Council mandated that no
19 separate compensation was to be paid for performing these duties or responsibilities.
20 Malkenhorst's salary increases were awarded in recognition of his superior
21 performance and proficiency at carrying on the duties and responsibilities of single
22 position of City Administrator.
- 23 • CalPERS further falsely assumes that the City of Vernon over-reported the longevity
24 pay special compensation earned by Malkenhorst. CalPERS already conducted a full
25 administrative review and appeal on this issue in or about 2004 through 2006 and
26 concluded at the end of that process that Malkenhorst was entitled to a pension
27 allowance calculated in part on the longevity pay reported to CalPERS.

28

1 **B. Malkenhorst Held a Single Job at Vernon, with a Single Pay Rate**

2 CalPERS makes the unsubstantiated and incorrect assumption that Malkenhorst worked
3 in multiple positions at the same time. CalPERS assumes that each one of the multiple positions
4 had its own set of job duties, pay schedule, and required hours of work. Based on these false
5 assumptions, CalPERS then complains that neither Vernon nor Malkenhorst have provided
6 separate pay schedules, salary rates, hours of work, job descriptions and similar materials on
7 each of the allegedly "separate" positions. CalPERS ignores that the City Council mandated that
8 no separate compensation was to be paid for performing these duties or responsibilities.

9 Using circular logic and assuming the conclusion it seeks to reach, CalPERS then claims
10 that since Vernon and/or Malkenhorst have failed to provide pay schedules, job descriptions and
11 designated hours of work for imagined (but nonexistent) separate positions, CalPERS can ignore
12 the pay schedules, job description and designated hours of work of the single *existing* position,
13 City Administrator, and deny Malkenhorst the pension allowance he has rightfully earned. As a
14 subpart of this argument, CalPERS also simply assumes—without any evidence to support it—
15 that the allegedly separate "payrates and earnings [of the nonexistent separate positions] were
16 combined and reported as one item indicating one position". (See CalPERS' Audit, page 10.)

17 As discussed in detail above and demonstrated in the documents provided to CalPERS,
18 Vernon enacted a form of governance which relies on a strong City Administrator, who works
19 under the direction and control of the Vernon City Council. Malkenhorst served as City
20 Administrator (also designed at times by Vernon as "City Administrator/City Clerk") and the
21 City Administrator position had multiple responsibilities, all within the singular position of City
22 Administrator.

23 The City of Vernon also chose a form of governance whereby it paid Malkenhorst a
24 single salary for his City Administrator employment, compensating for all of his duties and
25 responsibilities with a single salary for a single position. The City Council mandated that no
26 separate compensation was to be paid for performing these other duties or responsibilities.

27 In other words, Malkenhorst did not hold several paying jobs simultaneously. For
28 CalPERS' and other purposes, Malkenhorst held one paid position as City Administrator.

1 Further, the *Vernon City Code*, Sec. 2.8, Powers and Duties of the City Administrator,
2 mandates in subsection (p), *Full-time duties*, that the City Administrator is "[t]o devote his entire
3 time to the duties and interests of the city." The City Administrator was an exempt position.
4 Thus, although a position explicitly exempt from the overtime provisions of the *Labor Code*, the
5 City Administrator position was a full-time position.

6 The Constitution and the PERL no more allow CalPERS to interfere with the power and
7 authority of Vernon (as a Charter City) to establish its governance structure, offices and
8 compensation structure than they allow CalPERS to arbitrarily split the position of any
9 management level CalPERS Member into two or more "separate" positions with "separate"
10 duties, hours of work and compensation, simply because CalPERS objects to the "high" salary
11 paid that employee for a single position.

12 **C. Malkenhorst's Base Salary is "Compensation Earnable" Under the PERL**

13 Vernon paid Malkenhorst in cash for "full-time" work in the position of City
14 Administrator performed during normal working hours for an exempt employee.

15 Vernon paid Malkenhorst on a full-time basis pursuant to a salary schedule which listed
16 the base salary of the single position of City Administrator. The base salary certainly qualifies as
17 "pay rate". Even under a narrow reading of the PERL, Malkenhorst's "pay rate" as City
18 Administrator qualifies as compensation earnable.

19 The longevity pay also qualifies as "special compensation". Vernon reported the pay rate
20 and special compensation to CalPERS and made contributions associated with the reported pay.
21 CalPERS accepted those contributions for nearly 30 years.

22 The California Supreme Court has explicitly held that "[w]ith the exception of overtime
23 pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade
24 or class, must be included in the 'compensation earnable' and 'final compensation' on which an
25 employee's pension is based." (*Ventura County Sheriffs Assoc. v. Board of Retirement* (1997) 16
26 Cal.4th 483, 488, emphasis added.)

27 *Government Code* section 20630 determines "Compensation" and reads:

28 ***Government Code* § 20630.**

1 (a) As used in this part, "compensation" means the **remuneration paid out of**
2 **funds controlled by the employer in payment for the member's services**
3 performed during normal working hours or for time during which the member is
4 excused from work because of any of the following:

5 (1) Holidays. (2) Sick leave. (3) Industrial disability leave, during which,
6 benefits are payable pursuant to Sections 4800 and 4850 of the Labor Code,
7 Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6, or section
8 44043 or 87042 of the Education Code. (4) Vacation. (5) Compensatory time off.
9 (6) Leave of absence.

10 *Government Code* section 20636 determines "compensation earnable" and reads in
11 relevant part:

12 **Section 20636. Compensation earnable; payrate; special compensation;**
13 **group or class of employment; final settlement pay**

14 (a) "Compensation earnable" by a member means the payrate and special
15 compensation of the member, as defined by subdivisions (b), (c), and (g), and as
16 limited by Section 21752.5.

17 (b)(1) "Payrate" means the normal monthly rate of pay or base pay of the
18 member paid in cash to similarly situated members of the same group or class of
19 employment for services rendered on a full-time basis during normal working
20 hours, pursuant to publicly available pay schedules. "Payrate," for a member who
21 is not in a group or class, means the monthly rate of pay or base pay of the
22 member, paid in cash and pursuant to publicly available pay schedules, for
23 services rendered on a full-time basis during normal working hours, subject to the
24 limitations of paragraph (2) of subdivision (e).

25 ...

26 (e)(2) Increases in compensation earnable granted to an employee who is not in
27 a group or class shall be limited during the final compensation period applicable
28 to the employees, as well as the two years immediately preceding the final
compensation period, to the average increase in compensation earnable during the
same period reported by the employer for all employees who are in the same
membership classification, except as may otherwise be determined pursuant to
regulations adopted by the board that establish reasonable standards for granting
exceptions.

Malkenhorst's base salary for the City Administrator position was unquestionably paid in
cash out of funds controlled by the City of Vernon. The salary was in payment for his services as
City Administrator (including all other duties and responsibilities arising from that single
position pursuant to decisions of the Vernon City Council) performed during normal working
hours and on a full-time basis.

1 **D. Malkenhorst's Longevity Pay is Special Compensation Eligible to Be**
2 **Included "Compensation Earnable" Under the PERL**

3 *Government Code* section 20636 also defines what constitutes "special compensation"
4 eligible to be included in "compensation earnable" and reads in relevant part:

5 **Section 20636. Compensation earnable; payrate; special compensation;**
6 **group or class of employment; final settlement pay**

7 (a) "Compensation earnable" by a member means the payrate and special
8 compensation of the member, as defined by subdivisions (b), (c), and (g), and as
9 limited by Section 21752.5.

10 ...
11 (c)(1) Special compensation of a member includes a payment received for
12 special skills, knowledge, abilities, work assignment, workdays or hours, or other
13 work conditions.

14 (2) Special compensation shall be limited to that which is received by a member
15 pursuant to a labor policy or agreement or as otherwise required by state or
16 federal law, to similarly situated members of a group or class of employment that
17 is in addition to payrate. If an individual is not part of a group or class, special
18 compensation shall be limited to that which the board determines is received by
19 similarly situated members in the closest related group or class that is in addition
20 to payrate, subject to the limitations of paragraph (2) of subdivision (e).

21 Malkenhorst's longevity pay explicitly qualifies as special compensation pursuant to
22 *California Code of Regulations*, section 571(a)(1), Incentive Pay, which reads in relevant part:

23 **Longevity Pay** – Additional compensation to employees who have been with an
24 employer, or in a specified job classification, for a certain minimum period of
25 time exceeding five years.

26 **E. All of Malkenhorst's Base Pay and Longevity Pay Special Compensation**
27 **Were Paid Pursuant to Publicly Available Pay Schedules in Compliance with**
28 **the PERL**

29 CalPERS makes the following statements in its October 22, 2012, "final determination"
30 letter to Malkenhorst:

31 As detailed below, not all pay schedules provided appear to have included
32 amounts solely attributable to one position. [Fn. 1 then lists positions CalPERS
33 asserts Malkenhorst served in simultaneously.] The pay schedules provided by
34 you and the City list the positions of City Administrator/City Clerk. Moreover, the

1 documentation provided confirms that Mr. Malkenhorst served in the capacity of
2 several positions simultaneously. Since more than one position has been
3 identified, each position Mr. Malkenhorst occupied must have the corresponding
4 payrate listed on all publicly available pay schedules. [Fn. 2 omitted.] CalPERS
5 has yet to receive copies of publicly available pay schedules for each of these
6 positions. Also, to discern the amount of service credit attributable to each
7 position and the payrate associated with each position, CalPERS must receive
8 information verifying the proportionate amount of service rendered in each
9 respective position.

10 ...

11 Pay related to services performed that constitute "overtime", as that term is
12 defined under the PERL, is not reportable for retirement purposes.

13 ...

14 As a result, CalPERS has preliminarily concluded that the amounts reported to
15 CalPERS by the city for your services do not appear to have been paid "pursuant
16 to publicly available pay schedules" under the meaning of that phrase in the
17 statutory and regulatory definitions for payrate.

18 (See CalPERS' October 22, 2012, "final determination" letter to Malkenhorst, p. 2
19 and 4.)

20 As indicated in the quoted language itself, CalPERS bases its conclusion that on the false
21 and unsupported *assumption* that he worked numerous "separate and distinct" positions, each
22 with their own separate pay rate. As discussed extensively above, this *assumption* is untrue.

23 The documents provided thus far prove conclusively that Vernon established the City
24 Administrator position as a single, full-time position with multiple duties and responsibilities.
25 The City Administrator received a single base salary for performing all of the duties and
26 responsibilities of the position. The additional duties and responsibilities were not separately or
27 additionally compensated. The Vernon City Council then amended the responsibilities and duties
28 of the City Administrator position over the next two-plus decades. But the changes in the
responsibilities and duties of the City Administrator position do not coincide in time or in effect
with increases in the base salary of the City Administrator position.

CalPERS further misrepresents the evidence by referring to pay schedules that "list the
positions [pluralization by CalPERS] of City Administrator/City Clerk." In fact, this was the
single position of City Administrator, which included multiple duties and responsibilities. The
nominal term that Vernon used to refer to the City Administrator position on its publicly
available pay schedules as "City Administrator/City Clerk" does not make one position into two

1 *separate* positions.

2 Once CalPERS' baseless assumption about "multiple positions" is excluded, it becomes
3 readily apparent that Malkenhorst was paid pursuant to publicly available pay schedules
4 throughout the entire time period he worked as City Administrator. The numerous Vernon
5 Resolutions and related City Council Minutes provided to CalPERS make clear that each one of
6 Malkenhorst's salary increases was documented on pay schedules attached to or referenced in the
7 applicable Resolutions. Each of those Resolutions were adopted in public meetings by the
8 Vernon City Council. The Minutes were also publicly available. The salary schedules for the
9 City Administrator position clearly meet the requirements of "publicly available pay schedules"
10 under the terms of the PERL.

11 **F. None of Malkenhorst's Compensation Constituted "Overtime" Under the**
12 **PERL**

13 Reaching to create argument on a defective premise, CalPERS makes the further
14 unsubstantiated assumption that Malkenhorst either (1) held a single full-time position along
15 with numerous separate part-time positions. or (2) that all of his positions were part-time (but
16 with the implication that the total time exceeded a single full-time position).

17 CalPERS then argues that anything in excess of full-time employment must be
18 considered "overtime" under the PERL, even though Malkenhorst was an exempt management
19 employee and the Vernon documents barred overtime for him. CalPERS argues that all
20 compensation attributable to such "additional" jobs would be non-reportable to CalPERS.

21 Finally, CalPERS complains about a failure of proof of its false assumption, and blames
22 Malkenhorst for not providing documentation to prove CalPERS' false assumption. Essentially,
23 CalPERS complains that the City of Vernon failed to provide documentation to establish the
24 hours and pay received for each of Malkenhorst's purported "separate" positions. This lack of
25 documentation about the separate position exists because CalPERS alleges that there are separate
26 positions. In other words, it is nothing but a figment of CalPERS' imagination.²

27 _____
28 ² CalPERS offers an odd trick. Allege something untrue. Require the other person to

1 CalPERS argues that Malkenhorst does not agree to provide documentation of the
2 nonexistent positions. As a result, CalPERS gives itself the authority to unilaterally limit his
3 compensation to a different *fictional office that Malkenhorst never held*. CalPERS decide that his
4 final compensation shall be limited to the compensation earned by a different individual working
5 at a different time in a different job, i.e. the person hired to work as "Acting City Clerk" after
6 Malkenhorst's retirement. To get its desired result, CalPERS retroactively applies regulations that
7 were passed years after Malkenhorst retired.

8 *Government Code* section 20635 defines what constitutes "overtime" compensation and
9 reads:

10 **Section 20635.**

11 When the compensation of a member is a factor in any computation to be made
12 under this part, there shall be excluded from those computations any
13 compensation based on overtime put in by a member whose service retirement
14 allowance is a fixed percentage of final compensation for each year of credited
15 service. For the purposes of this part, overtime is the aggregate service performed
16 by an employee as a member for all employers and in all categories of
17 employment in excess of the hours of work considered normal for employees on a
18 full-time basis, and for which monetary compensation is paid.

19 If a member concurrently renders service in two or more positions, one or more
20 of which is full time, service in the part-time position shall constitute overtime. If
21 two or more positions are permanent and full time, the position with the highest
22 payrate or base pay shall be reported to this system. This provision shall apply
23 only to service rendered on or after July 1, 1994.

24 As described above, Malkenhorst worked in a single City Administrator position. As part
25 of its *City Charter* and organizing laws, the City Council of Vernon mandated and decided that
26 the City Administrator position would include various duties and responsibilities, including
27 various other titles or honorifics, as from time to time established by the City Council. The City
28 Council had complete authority under its Charter City powers to establish the City of Vernon
governance structure and the responsibilities and duties of the City offices as it saw fit. It did so

provide documentation of the untrue thing. When the other person cannot prove the falsehood,
use that person's failure to get to the result that you want anyway. Heads I win, tails you lose. It
is not a proper legal proceeding, but it is endlessly cyclical, capricious, (and cynical) political
maneuver to the agency's benefit.

1 for the position of City Administrator, including designating that as a single job and paying a
2 single base salary for the position, regardless of any duties and responsibilities it assigned to the
3 office.

4 The City Council was free to use and include whatever duties, responsibilities, titles or
5 words that it wanted to use in structuring the position of City Administrator. The Vernon City
6 Council could call the office any name that it wanted to, including nonstandard terms or standard
7 terms in nonstandard ways, as is the autonomous power of a Charter City to do. Pursuant to its
8 charter, the Vernon City Council had complete freedom and authority to assign ex officio
9 responsibilities, consolidate responsibilities, or otherwise adjust its government, organization,
10 and management of municipal affairs.

11 Barred by Vernon's charter autonomy from interfering, CalPERS is in no position of
12 authority or power to invade Vernon's choices and require Vernon to adopt CalPERS' preferred
13 descriptions, "definitions" or terms when Vernon establishes the government structure,
14 establishes job duties or responsibilities, or compensates its employees.

15 Accordingly, all of Malkenhorst's compensation was for full-time "service" in one
16 position performed for the City of Vernon during "the hours of work considered normal for
17 employees on a full-time basis, and for which monetary compensation is paid." The hours of
18 managerial level exempt employees by definition might vary from week to week, but they are
19 "the hours of work considered normal" for such exempt employees.³

20 CalPERS' membership explicitly includes numerous managerial level employees who,
21

22 ³ Without conceding or endorsing CalPERS' "logic", for purposes of argument that even
23 if CalPERS could somehow prevail on its argument that Malkenhorst worked numerous
24 positions in excess of full-time status – a contention that Malkenhorst firmly rejects – CalPERS
25 would still be bound by the terms of *Government Code* section 20635. Section 20635 states that
26 the exclusion of overtime "shall apply only to service rendered on or after July 1, 1994."
27 Malkenhorst was making a base salary of \$23,037 per month just prior to July 1, 1994, and
28 would thus be entitled at minimum to have that salary, plus applicable cost of living increases,
and longevity pay at the time of his retirement, used to calculate his pension allowance.
However, this is explicitly not within Malkenhorst's contemplation. He is entitled to the full
benefit of his service.

1 unlike the typical civil service employees, are exempt from the overtime laws and who work
2 varying hours from time to time but get paid a regular weekly or other periodic salary based
3 upon the assumption that they are working full-time. The PERL "has been drawn on the
4 assumption that all state employees shall participate in the system, without regard to whether or
5 not they have civil service status."⁴ (*Metropolitan Water District v. Superior Court* (2004) 32
6 Cal.4th 491, 505, quoting *Com. on Pensions of State Employees, Rep. to Leg.* (Dec. 1928).)

7 **G. Malkenhorst's Salary Increases Were For His Performance in the Single**
8 **Position of City Administrator**

9 CalPERS implies that Malkenhorst's salary was increased over the years *because* he was
10 given additional duties, responsibilities, or ex officio titles, with the implication that he was not
11 receiving a single salary as City Administrator. Contrary to all evidence, CalPERS implies that
12 City paid Malkenhorst a salary that included payment for that position and for additional separate
13 and distinct positions and jobs. The implication is unsupported and untrue.

14 The salary of the City Administrator position was not increased for or as a result of
15 "assuming the additional duties and positions". Vernon required that no compensation was
16 payable for performing these duties and responsibilities, including in the form of increases in the
17 City Administrator pay.

18 The City Council clearly required the office of the City Administrator to perform all the
19 duties and responsibilities put on it. No extra, additional, or special compensation was provided
20 for performing additional duties or responsibilities. The City Council provided Malkenhorst's
21 raises or pay increases solely attributable to his City Administrator position.

22 Importantly, none of the pay raises coincided in time or consequence with Malkenhorst
23 assuming "additional positions" as CalPERS alleges. The increases or raises to the City
24 Administrator position were not linked in time to the time that the City Council increased or
25 added duties to the City Administrator position. The case law is clear that no pay is associated

26 _____
27 ⁴ Since CalPERS membership has been extended from state workers to all employees of
28 CalPERS-contracting agencies not excluded by statute or contract, this same provision would
apply to local agencies, including the City of Vernon.

1 with undertaking a duty or responsibility unless compensation is provided for prior to taking the
2 position.

3 The increases in base salary were typically associated with increases at the end of each
4 fiscal year, as is typical for annual increases unassociated with increased duties or
5 responsibilities.

6 Occasionally at other times during the year, Vernon provided the City Administrator
7 position with other merit pay increases based upon job performance and accomplishments of the
8 City Administrator position. These were not associated with performing additional duties or
9 responsibilities, neither in time nor in consequence.

10 As indicated above, the assumption that Malkenhorst held numerous "separate and
11 distinct" positions is without merit. Assuming he was paid more as a result of assuming extra
12 duties is without merit. CalPERS' assumption is based on nothing but speculation and an effort to
13 reach a desired result, i.e., to disqualify a portion of Malkenhorst's compensation from his "final
14 compensation".

15 **H. CalPERS' Prejudicial and Inaccurate Statements About Malkenhorst's**
16 **Salary Increases**

17 CalPERS also makes the following prejudicial comment in its Audit: "Following the
18 numerous years of substantial salary increases, it appeared the City limited the annual salary
19 increases during the final compensation period and the two preceding years to 3 percent. By
20 doing so, the individual [Malkenhorst] was not impacted by Government Code Section
21 20636(e)(2) which limits increases in compensation carnable for employees not in a group or
22 class during the final compensation period and the two years immediately preceding the final
23 compensation period to the average increase in compensation carnable for employees in the same
24 membership classification." (See CalPERS' Audit, page 10.)

25 The implication of CalPERS' statement is that Malkenhorst (apparently aided by the City
26 of Vernon) was focusing on and gaming CalPERS. CalPERS implies that Malkenhorst declined
27 higher pay increases (without any evidence that they were offered) in order to keep the history of
28 his salary increases to a low rate during his final three years of employment in order to avoid the

1 limitations of *Government Code* section 20636(c)(2). In fact, Malkenhorst's base salary increases
2 were between 3% and 4.5% for every single fiscal year during his final ten years of employment
3 at the City of Vernon, and his salary increased an average of just over 3.5% per year for the
4 entire period from July 1, 1995, through June 30, 2005.

5 **I. There is Nothing In the PERL Which Requires that Malkenhorst's**
6 **Reportable Compensation Match His Total Compensation**

7 Although not identifying Malkenhorst by name, CalPERS complains that City of Vernon
8 employees received "significantly higher amounts of employee compensation reported on W-2
9 forms in comparison to earnings reported to CalPERS" and that unnamed individuals "received
10 compensation through both payroll (employee compensation) and accounts payable (non-
11 employee compensation)". (See CalPERS Audit, page 6.)

12 CalPERS has provided no statutory or regulatory reference that requires that a Member's
13 reportable compensation bear some predetermined ratio to his or her total compensation. In fact,
14 the PERL explicitly assumes that many CalPERS Members will earn various forms of special
15 compensation that are non-reportable. *California Code of Regulations*, section 571, has been
16 enacted precisely to separate reportable compensation from non-reportable compensation.

17 Further, CalPERS exceeds its authority under the PERL and the Constitution when it
18 complains about allegedly "excessive" non-reportable compensation. There is nothing in the law
19 that awards CalPERS the power and authority to pass judgment on the compensation paid by a
20 CalPERS-contracting employer to any of its employees. In fact, CalPERS' statements implicitly
21 admit that any non-reportable compensation earned by Malkenhorst was not reported to
22 CalPERS, and thus that he seeks no pension benefits based on that non-reportable income.

23 The reference to "significantly higher amounts of employee compensation reported on
24 W-2 forms in comparison to earnings reported to CalPERS" appears designed to malign
25 Malkenhorst and make it appear his compensation was somehow improper. As such, the
26 reference has no place in an audit allegedly aimed at ensuring that Malkenhorst's compliance
27 with the PERL.

28

1 **J. Pension Law: CalPERS Is Required To Provide Malkenhorst Pension**
2 **Benefits Based On His Final Compensation Earned At the City of Vernon**

3 CalPERS must calculate Malkenhorst's retirement benefits based on his compensation
4 accrued while working as City Administrator at Vernon. Monies paid by the City of Vernon to
5 Malkenhorst are "compensation earnable", explicitly included in "payrate" and "special
6 compensation". (*Government Code*, §20636.)

7 As *Government Code* section 20636(b)(1) states, payrate can also be determined for a
8 member who is not in a group or class. Therefore, even if Malkenhorst does not fit within a
9 similar "group," his payrate would still be based on his base pay plus eligible special
10 compensation (longevity) pursuant to available pay schedules and the services he rendered to
11 Vernon.

12 The statutory scheme evidences an intent to include items which constitute regular,
13 periodic payments made to the employee that advantage the employee, and exclude only special
14 pay which would have the effect of "spiking" the employee's compensation during the
15 employees' final years. (See, e.g., *City of Fremont v. Board of Administration* (1989) 214
16 Cal.App.3d 1026, 1032-1034; *Hudson v. Board of Admin. of Public Employees Retirement*
17 *System* (1997) 59 Cal.App.4th 1310, 1320.) It evidences an intent to base an employee's pension
18 on his or her regular pay and not on special one-time items.

19 All of the items that are in dispute were earned by Malkenhorst as part of compensation
20 for his regular employment and were earned regularly and periodically.

21 **K. CalPERS Breached Its Contract with Vernon by Denying Malkenhorst His**
22 **Retirement Benefits As Accrued At Vernon**

23 CalPERS is required by contract to provide Vernon employees with retirement benefits
24 as (1) expressly listed in the Vernon-CalPERS contract and (2) pay schedule and resolutions that
25 make up the Malkenhorst-Vernon employment agreement. CalPERS is contractually required to
26 provide these retirement benefits to Malkenhorst.

27 After an employee has retired and all conditions precedent to the obligation of the public
28 body are fulfilled, the pension payments may not be changed to the employee's detriment.

1 (*Kavanagh v. Board of Police Pension Fund Com'rs* (1901) 134 Cal. 50.) The employee's status
2 being fixed by the happening of the contingency make the pension due and payable. A retired
3 employee is entitled to the fulfillment of the contract which he or she already has performed
4 without detrimental modification. (*Allen v. Board of Administration* (1983) 34 Cal. 3d 114.)

5 Therefore, CalPERS is liable for its breach of contract in (1) denying the Vernon-
6 Malkenhorst employment agreement and (2) denying Malkenhorst retirement benefits that
7 CalPERS is legally obligated to provide.

8 Vernon specifically contracted with CalPERS to provide CalPERS' benefits to its
9 employees, including Malkenhorst, pursuant to the PERL, the contract, and the agreements
10 existing between Malkenhorst and Vernon.

11 **IV. CalPERS Must Proceed by Accusation; CalPERS Bears the Burden of Proof**

12 Malkenhorst retired effective June 30, 2005, and has been drawing a monthly pension
13 allowance since then. This allowance is based on the full base salary reported for his position as
14 City Administrator, along with applicable special compensation longevity pay.

15 Further, CalPERS previously conducted an administrative investigation, review and
16 appeal concerning the pension calculations in 2004 through 2006. At the end of that process,
17 CalPERS concluded that Malkenhorst was entitled to the pension based on his reported City
18 Administrator base salary and his special compensation longevity pay. We have asserted and
19 continue to assert that this second administrative proceeding is barred by collateral estoppel.

20 In its October 22, 2012, "final decision" letter to Malkenhorst, CalPERS now states that it
21 intends to drastically reduce Malkenhorst's pension and to take away monies that it has been
22 paying to Malkenhorst since the time of his retirement. The monies, separately and as a result of
23 CalPERS' prior payment, constitute vested pension benefits to which Malkenhorst is entitled.

24 CalPERS conducts all of its administrative reviews and appeals pursuant to the
25 Administrative Procedures Act, *Government Code* sections 11500, *et seq.* (*Government Code*,
26 §20134.) *Government Code* section 11503 states in pertinent part, "A hearing to determine
27 whether a right, authority, license or privilege should be revoked, suspended, limited or
28 conditioned shall be initiated by filing an accusation."

1 Malkenhorst does not in any way concede or waive his rights to challenge these
2 administrative proceedings based on jurisdictional, collateral estoppel and other grounds.
3 However, if CalPERS ultimately is held to have authority to go forward with administrative
4 proceedings, to disallow portions of the monies earned by Malkenhorst and reported to
5 CalPERS, and to reduce his vested pension allowance as a result, this would constitute
6 "revo[cation], suspen[sion], limit[ation] or condition[ing]" of Malkenhorst's "right, authority,
7 license or privilege" to receive the vested pension benefits to which he is entitled and which he
8 has been correctly paid by CalPERS since his retirement. This is all the more the case given that
9 CalPERS has already conducted an administrative review and appeal process of these same
10 issues in 2004 through 2006 and awarded Malkenhorst his full pension at that time.

11 Thus, before holding a hearing on whether its actions to reduce Malkenhorst's pension are
12 justified, CalPERS must initiate the action by filing an accusation.

13 As *Government Code* section 11503 further mandates, "[t]he accusation shall be a written
14 statement of charges which shall set forth in ordinary and concise language the acts or omissions
15 with which the respondent is charged, to the end that the respondent will be able to prepare his
16 defense. It shall specify the statutes and rules which the respondent is alleged to have violated,
17 but shall not consist merely of charges phrased in the language of such statutes and rules."

18 The proceedings in any hearing on CalPERS' right to reduce Malkenhorst's monthly
19 pension allowance or to make any changes in the reporting of his compensation earnable must be
20 held pursuant to the relevant sections of the *Government Code* governing proceedings initiated
21 by an "accusation". Since it is taking away benefits already bestowed and vested, CalPERS bears
22 the burden of proof in this action.

23 **V. Additional Arguments and Affirmative Defenses**

24 **A. CalPERS' Breach of Constitutional and Fiduciary Duties**

25 CalPERS owes significant fiduciary duties to Malkenhorst, including those mandated by
26 the California *Constitution* which dictates that "[a] retirement board's duty to its participants and
27 their beneficiaries shall take precedence over any other duty." (California *Constitution*, Art. XVI,
28 Sec. 17(b).) CalPERS has a special relationship with Mr. Malkenhorst. CalPERS *now* claims that

1 the PERL allegedly requires a different result than what was earlier promised. CalPERS must be
2 equitably estopped from denying its prior representations. CalPERS' unjust denial of
3 Malkenhorst's pension accrual while Malkenhorst was a Vernon employee meets each of the
4 elements to bring a breach of fiduciary claim against CalPERS.

5 Malkenhorst continued employment at Vernon based upon Vernon's and CalPERS'
6 representations that his retirement benefits would continue to accrue and his final compensation
7 could be based upon his City Administrator compensation at Vernon.

8 **B. Vesting of Pension Benefit**

9 Public employees' retirement rights are contractual and are vested in the sense that the
10 lawmakers' power to alter them after they have been earned is quite limited. (*California Ass'n of*
11 *Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371; *In re Retirement Cases*
12 (2003) 110 Cal.App.4th 426.) By entering public service, an employee obtains a vested
13 contractual right to earn a pension on terms substantially equivalent to those then offered by the
14 employer. (*California Ass'n of Professional Scientists v. Schwarzenegger, supra.*)

15 Where an employee renders services under a pension statute, its provisions become a part
16 of the contemplated compensation and part of the contract of employment itself. *French v.*
17 *French* (1941) 17 Cal.2d 775, overruled on other grounds by *In re Marriage of Brown* (1976) 15
18 Cal.3d 838.) The retirement privileges under a pension law become part of the employee's
19 contract on the effective date of the law, though the operation of the law may be postponed to a
20 later date. (*Ross v. Board of Retirement of Alameda County Emp. Retirement Ass'n* (1949) 92
21 Cal.App.2d 188.)

22 After the contractual duty to make salary payments has arisen, the employing body may
23 not deny or impair its contingent liability to furnish a pension any more than it can refuse to
24 make the salary payments that are immediately due, since a part of the compensation the
25 employee has at that time earned consists of pension rights. (*Bellus v. City of Eureka* (1968) 69
26 Cal.2d 336 [in this respect the public agency is no different from any other employer or public
27 service institution which induces reliance on a contract that may reasonably be interpreted to
28 afford a protection already impliedly promised]; *Kern v. City of Long Beach* (1947) 29 Cal.2d

1 848.)

2 **No Modification Allowed After Retirement.** A pension right may not be destroyed,
3 once vested, without impairing a contractual obligation of the employing public entity. (*Kern v.*
4 *City of Long Beach, supra*, at 852-853; *Belts v. Board of Administration* (1978) 21 Cal.3d 859,
5 863.)

6 **Malkenhorst Vested in Law at the Time of His Retirement, Laws Were Not**
7 **Retroactive.** In several places, CalPERS seeks to apply statutes that became effective after
8 Malkenhorst retired. CalPERS cannot use laws that were passed after Malkenhorst retired in a
9 retroactive manner to divest Malkenhorst of his rights. For example, written agreement and
10 changes to special compensation rules changed in 2011. (*Cal. Code Regs.* tit. 2, § 571.)

11 Many of the laws affecting Charter Cities, procedures, and CalPERS compensation
12 changed materially after Malkenhorst's retirement. The changes cannot be applied to
13 Malkenhorst.

14 Under California law, statutes are not to be given a retrospective operation unless it is
15 clearly made to appear that such was the legislative intent. (*Gadda v. State Bar of Cal.*, 511 F.3d
16 933 (9th Cir. 2007); 58 Cal.Jur.3d, *Statutes*, §32.) CalPERS is trying to retroactively bind
17 Malkenhorst with rules and regulations that did not yet have the force and effect of law.

18 A retrospective or retroactive statute is one that operates on matters that occurred, or on
19 rights, obligations, and conditions that existed, before the time of its enactment, giving them an
20 effect different from that which they had under previously existing law (*Myers v. Philip Morris*
21 *Companies, Inc.* (2002) 28 Cal.4th 828; *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450.)
22 Every statute that takes away or impairs vested rights acquired under existing laws or creates a
23 new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or
24 considerations already past, must be deemed retrospective (*Strauss v. Horton* (2009) 46 Cal.4th
25 364, as modified, (June 17, 2009).)

26 C. **Collateral Estoppel, Res Judicata: CalPERS Consideration and Approval of**
27 **Malkenhorst's Pay Rate, Longevity, and Compensation**

28 In 1994, CalPERS started "investigating" the pay rate and schedule at Vernon. In 2004

1 through 2006, CalPERS initiated another administrative investigation and review of
2 Malkenhorst's pay rate and position at Vernon, including issuing a July 18, 2005 letter with
3 "appeal rights" addressing questions of Malkenhorst's position, pay rate and longevity pay.
4 Thereafter, CalPERS issued a determination letter accepting the approximately \$35,000 pay rate
5 and the longevity bonus for use in calculating Malkenhorst's pension allowance.

6 Since CalPERS raised the issues of Mr. Malkenhorst pay rate, longevity special
7 compensation and pension with a formal 2005 administrative action letter that provided for
8 appeal rights, and thereafter issued a determination letter granting Malkenhorst the higher
9 pension including the longevity bonus, CalPERS' further efforts against Mr. Malkenhorst are
10 barred by collateral estoppel, *res judicata*, and issue preclusion.

11 **D. Statute of Limitations Jurisdictional Bar**

12 A limitations period also promotes repose by giving security and stability to human
13 affairs. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396.) Although a statute of limitations
14 may purchase such repose at the price of procedurally barring a meritorious cause of action, the
15 public policies favoring repose and disposition on the merits are equally strong, substantial, and
16 important. It is for the Legislature to establish a period that strikes a balance between the two.
17 (*Ibid.*; see also *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 909.)

18 CalPERS was aware of these issues but did nothing. The *Code of Civil Procedure* statute
19 of limitations for errors or mistake must be borrowed in these instances.

20 **E. CalPERS Is Estopped From Its Actions**

21 The California Supreme Court has expressly recognized the "unique importance of
22 pension rights to an employee's well-being" and affirmed the application of estoppel against
23 government retirement agencies to protect those rights, particularly in cases where "employees
24 were induced to accept and maintain employment on the basis of expectations fostered by
25 widespread, long-continuing misrepresentations." (*Longshore v. County of Ventura* (1979) 25
26 Cal.3d 14, 28.)

27 **F. Laches Applies**

28 Laches bars CalPERS' reconsideration of Malkenhorst's pension. "The law helps the

1 vigilant, before those who sleep on their rights." (*Civil Code*, §3527.) Malkenhorst is substantial
2 prejudiced as a result of CalPERS unlawful actions and its unlawful delay. (*Admiral Ins. Co. v.*
3 *Debber* (E.D.Cal. 2006) 442 F.Supp.2d 958, affirmed 295 Fed.Appx. 171, 2008 WL 4429527.)
4 After eight years, it is difficult to find documents. Many have been destroyed. As is typical, the
5 City of Vernon has a document destruction policy. CalPERS should possess documents that
6 support Mr. Malkenhorst's pay schedule, but has failed and/or refused to provide them. Vernon's
7 former City Attorney Fresch is deceased. Malkenhorst had already completed his working life at
8 Vernon such that subsequent public employment at a high wage was limited.

9 Important evidence is no longer available. (*City and County of San Francisco v. Pacello*
10 (1978) 85 Cal.App.3d 637 [city and county's action seeking to abate alleged public nuisance was
11 barred by doctrine of laches where delay caused important evidence to become unavailable,
12 prejudice was manifest and, such prejudice, plus unexplained delay, constituted laches].)

13 CalPERS acquiesced to the Malkenhorst pension in 2004-2006 when it closed its
14 administrative review and permitted Malkenhorst to be paid the higher pension based on the full
15 pay rate and the longevity bonus. CalPERS had actual knowledge of Malkenhorst's situation.
16 Every person who has actual notice of circumstances sufficient to put a prudent person on
17 inquiry as to a particular fact, has constructive notice of that fact in all instances in which he or
18 she, by making an inquiry, might have learned it. (*Code of Civil Procedure*, §19.)

19 The element of prejudice may be "presumed" if there exists a statute of limitations which
20 is sufficiently analogous to the facts of the case, and the period of such statute of limitations has
21 been exceeded by the public administrative agency in making its claim. (*Fountain Valley*
22 *Regional Hospital & Medical Center v. Bonta* (1999) 75 Cal.App.4th 316; 2 Cal.Jur.3d,
23 *Administrative Law*, §440.)

24 There are several statutes of limitation in the *Code of Civil Procedure* which are clearly
25 applicable to the facts of this case. They include section 338, subdivision (a), which provides for
26 a three-year statute of limitations for "[a]n action upon a liability created by statute, other than a
27 penalty or forfeiture"; and section 338, subdivision (d), which provides for a three-year statute of
28 limitations for actions "for relief on the ground of fraud or mistake."

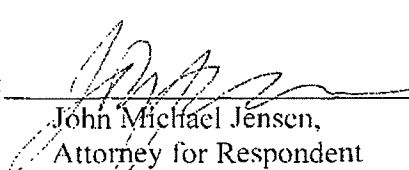
1 After eight years of inactivity where the matters seemed to have been put to rest,
2 CalPERS suddenly decides to reopen the issue unlawfully and with unreasonable delay. "When
3 one party's unjustified delay operates to the injury of another party, defense of laches may be
4 successfully invoked, even though lapse of time is less than applicable period of limitations;
5 laches exists independently of relevant statute of limitations." (*In re Marriage of Plescia* (1997)
6 59 Cal.App.4th 252.)

7 **CONCLUSION**

8 Malkenhorst is entitled to a pension calculated on the basis of his highest City
9 Administrator pay rate, and with a longevity bonus.

10
11
12 Dated: December 21, 2012

By: _____


John Michael Jensen,
Attorney for Respondent
Bruce V. Malkenhorst, Sr.



California Public Employees' Retirement System
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December 20, 2012

Ref. No. 2012-0671

John M. Jensen, Esq.
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Suite 550
Los Angeles, CA 90064

Via Fax and Overnight

Subject: Bruce V. Malkenhorst, Sr., v. Board of Administration, California Public Employees' Retirement System, et al.

Dear Mr. Jensen:

In response to your correspondence dated December 18, 2012, CalPERS does not intend to withdraw its current administrative action regarding Mr. Malkenhorst Sr.'s final compensation. Furthermore, CalPERS has already provided you with a 30-day extension to submit an appeal from November 21, 2012 to December 21, 2012. Therefore, we will not provide a second extension to submit an appeal of the determination in this matter. The appeal notice does not require that you provide every argument you intend to make at the administrative hearing. It is simply to notify CalPERS, in writing, of your intent to appeal the determination of this matter. Thus, a one sentence affirmative statement would be sufficient.

As to your most recent request for additional documents pursuant to the Public Records Act, Government Code section 6253, the office of CalPERS Stakeholder Relations will be contacting you.

Lastly, with respect to any assertion that the Board is acting in an arbitrary and capricious manner, please note Government Code section 20126, which states: "Refusal by this system to admit liability pursuant to any provision of this part shall not be considered arbitrary or capricious action or conduct within the meaning of Section 800, or any other provision of law."

Sincerely,

RENEE SALAZAR
Senior Staff Attorney

RRS:smj

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December 18, 2012

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Tomi Jimenez, Manager
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Customer Account Services Division
California Public Employees' Retirement
System
P.O. Box 942709
Sacramento, CA 94229-2709

Re: Collateral Estoppel, Petition for Writ of Mandate, Public Records Act Request for Documents re Bruce V. Malkenhorst, Sr.

Dear Mr. Yates and Ms. Jimenez:

This letter (i) asserts collateral estoppel (issue preclusion, *res judicata*) to bar CalPERS' current administrative proceeding against Mr. Malkenhorst.

Additionally, this letter (ii) demands CalPERS provide copies of relevant documents about its prior consideration of Bruce V. Malkenhorst, Sr.'s pension.

Collateral Estoppel (Res Judicata, Issue Preclusion)

I have recently learned that CalPERS conducted a full-scale review of matters related to Mr. Malkenhorst's pension in the 2004-2006 period. The review encompassed the same primary rights that CalPERS has raised now.

Although we have requested from CalPERS the documents and correspondence exchanged in 2004 to 2006 on matters relating to Mr. Malkenhorst's pension, CalPERS has not provided them to us.

Based on the few documents that are presently available, it seems that CalPERS began the administrative process by providing formal appeal rights pursuant to the APA. CalPERS initially denied Mr. Malkenhorst some of his pension benefit, including denying his longevity pay and/or pay rate. A written appeal with documentation was submitted, including in part by the law firm of Loeb and Loeb, in about 2005. CalPERS acted in a judicial capacity after the appeal rights were given. CalPERS received documentary and other evidence. CalPERS undertook a formal review. CalPERS resolved disputed issues of law and facts. At that time, CalPERS considered pay rate and other matters that are the primary rights that CalPERS is now attempting to relitigate.

CalPERS had an adequate opportunity to litigate the facts and law in an administrative hearing in 2006. (See *United States v. Utah Construction Co* (1966) 384 U.S. 394.) Although it

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is unclear if the matter went formally before an ALJ, the parties had an adequate opportunity and an absolute right to a full de novo trial-like hearing before an ALJ that would substantially comport with the *Pacific Lumber* requirements for establishing that the administrative proceeding were "undertaken in a judicial capacity". (*Pacific Lumber co. State Water Resources Control Bd.* (2006) 37 Cal.4th 921.) It is the opportunity to litigate that is important for purposes of collateral estoppel, not whether the litigant availed itself of the opportunity. (*Teitelbaum Furs Inc. v. Domination* (1962) 58 Cal.2d 601.)

After receiving facts and documents provided to CalPERS on Mr. Malkenhorst's behalf, CalPERS then determined that Mr. Malkenhorst was entitled to the higher pension amount. CalPERS closed the matter with a letter to Mr. Malkenhorst that found that he was entitled to continue to receive the higher pension. CalPERS has paid the higher pension to Mr. Malkenhorst for the past six or so years.

No formal adversarial hearing is required to establish collateral estoppel. If anything, CalPERS failed to invoke an adversarial hearing after it initiated the administrative process and thereby forfeited its rights in 2006. CalPERS' agency findings became final, nonappealable order by operation of law in 2006. (*Murray v. Alaska Airline* (2010) 50 Cal.4th 860.)

As CalPERS was a party to the prior proceeding, Mr. Malkenhorst now invokes collateral estoppel to bar CalPERS from relitigating those matters, and related matters based on common facts.

Law of Collateral Estoppel Applies

Collateral estoppel precludes CalPERS from challenging Mr. Malkenhorst's pay rate and other issues at this time. In 2004 to 2006, CalPERS undertook an administrative determination that reviewed the variables and facts regarding Mr. Malkenhorst's pension.

"In its primary aspect, res judicata operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action." (*People v. Sims* (1982) 32 Cal.3d 468, 477, fn. 6.)

Under the doctrine of *res judicata* (claim preclusion), a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action. (See *Migra v. Warren City School Dist. Board of Ed.* (1984) 465 US 75, 84-85, 104 S.Ct. 892, 897-898.) Similarly, under the doctrine of collateral estoppel (issue preclusion), a court's decision on an issue of fact or law necessary to the judgment precludes the

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parties from relitigating the same issue as part of a different cause of action. (See *Allen v. McCurry* (1980) 449 US 90, 94, 101 S.Ct. 411, 414; *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 US 322, 326, 99 S.Ct. 645, 649, fn. 5.)

The doctrine of collateral estoppel has traditionally been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding. (*People v. Sims, supra, at 477*, superseded by statute on another ground as stated in *Gikas v. Zolin* (1993) 6 Cal.4th 841, 851-852.) But the doctrine may also be applied to administrative decisions possessing a judicial character. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944; *California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1519.) Judicial decisions by "constitutional" agencies, as distinguished from statutory agencies, are *res judicata*. (*Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749.)

Under California law, a prior administrative proceeding, if upheld on review, or not reviewed at all, will be binding in later civil actions to the same extent as a state court decision if the administrative proceeding possessed the requisite judicial character; in order to possess the requisite judicial character, the administrative agency must act in a judicial capacity and resolve disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. (*White v. City of Pasadena* (2012) 671 F.3d 918; see also *People v. Sims, supra.*)

Same Primary Rights Disputed

CalPERS' 2004-2006 inquiry and determination involved the same primary rights that CalPERS is attempting to relitigate.

For purposes of identifying a cause of action under the doctrine of *res judicata*, "California has consistently applied the 'primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 543 P.2d 593.) But "the 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." (*Ibid.*)

(*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340-342, fn. omitted.)

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Office of Stakeholder Relations, External Affairs Branch
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CalPERS' actions in 2004-2006 and now are the "same cause of action":

- They both arise out of the same transactional nucleus of facts;
- Mr. Malkenhorst's pension rights or interests established in 2006 would be destroyed or impaired by CalPERS prosecution of the second action;
- The two actions involve infringement of the same right; and
- The same evidence would be presented in both actions.

(*Mpoyo v. Litton Electro-Optical Systems* (2005) 430 F.3d 985, 987.)

Collateral Estoppel Applies to CalPERS in This Matter

Sims explained that "[a]n issue is actually litigated '[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined... A determination may be based on a failure of ...proof' by the agency. (*People v. Sims, supra*, at 484.) CalPERS had notice of the process as well as the opportunity and the incentive to present its case to a hearing officer. CalPERS resolved the matter in a final determination by letter (after initiating the administrative process).

CalPERS' final determination was binding. For purposes of issue preclusion, "final judgment" includes any prior adjudication of an issue in a former action that is determined to be sufficiently "firm" to be accorded preclusive effect. (Rest.2d, *Judgments*, §13; see *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1564.)

If a subsequent criminal proceeding can be collaterally estopped in *Sims*, then certainly a subsequent administrative proceeding by the same agency on the same facts can be estopped. (See *People v. Sims, supra*.) After all, both would lead to a *Petition for Writ of Administrative Mandamus* which would be collaterally estopped by the prior administrative decision.

CalPERS' Failure to Raise Issues Previously Is a Forfeiture

Since the primary pension right remains the same, CalPERS' failure in 2004-2006 to raise issues has been held to forfeit the defense or claims "(T)he values of judicial economy, agency autonomy, accuracy and the need for a well-developed record for review, are all served by requiring objections ... to be raised in the agency proceeding." (*Ester v. Principi* (2001) 250 F.3d 1068, 1072.)

A final determination bars a later claim involving the "same transactional nucleus of fact" even when new evidence has been discovered to support the claim and new legal theories

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advanced. (*International Union of Operating Engineers-Employers Const. Industry Pension, Welfare & Training Trust Funds v. Karr* (1993) 994 F.2d 1426, 1430.)

Conclusion re Collateral Estoppel

CalPERS is barred by collateral estoppel, *res judicata*, and issue preclusion from proceeding against Bruce V. Malkenhorst, Sr.

Based on what I have learned so far about the 2004-2006 review of Mr. Malkenhorst's pension calculations, I demand that CalPERS withdraw its current action and provide Mr. Malkenhorst with the higher pension that he is currently receiving. To continue the process would be an arbitrary and capricious act by CalPERS.

Petition for Writ of Mandate re Collateral Estoppel, and PRA Requests

Mr. Malkenhorst's Appeal is due this Friday, December 21, 2012.

As the proceeding is barred by collateral estoppel, CalPERS must immediately terminate its current administrative proceedings and provide Mr. Malkenhorst the higher pension allowance.

Unless CalPERS advises me by close of business on Thursday, December 20, 2012 that it terminates the administrative process favorably to Mr. Malkenhorst, please be advised that I may proceed with a *Petition for Writ of Mandate* on these and related issues, asserting all of Mr. Malkenhorst's rights.

A *Petition for Writ of Mandate* will seek CalPERS to pay attorneys' fees incurred by Mr. Malkenhorst concerning the current administrative proceeding and related matters as an arbitrary and capricious act not supported by law or fact.

I have also included Peter Mixon, CalPERS' General Counsel, as a recipient of this letter to ensure that the CalPERS Legal Office is fully informed.

Demand for Documents About CalPERS' Prior Consideration of Malkenhorst's Pension Calculation

We have requested the documents about CalPERS 2004-2006 review of Malkenhorst's pension at least four times. Up to this point, CalPERS has not responded. We reiterate the

Scott Yates, Manager
Office of Stakeholder Relations, External Affairs Branch
Tomi Jimenez, Manager
Compensation and Employer Review, Customer Account Services Division
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requests.

My December 11, 2012, letter to both of you requested that CalPERS immediately provide me with copies of all documents referring or relating to CalPERS' 2004-2006 review of Mr. Malkenhorst's pension allowance. We requested all documents related to any appeals or determinations that grew out of that review. To assist you in that search, I provided you with a copy of a July 18, 2005, letter from Alinda Heringer, RPS II in the Compensation Review Unit, to Martha Valenzuela of the City of Vernon Personnel Department.

Most recently, CalPERS has refused to provide any documents responsive to the fourth category of my Public Records Act request for documents. We requested any and all reviews or analyses of the pension benefits to which it believes Mr. Malkenhorst is entitled. CalPERS has refused. It justified this refusal on the ground that the request is too vague and does not reasonably describe identifiable records. We have adequately identified the records, which are not privileged.

For purposes of illustration and not limitation, we identify and request documents that mention or address Bruce Malkenhorst including but not limited to documents sent from Marla Aspinwall or Carla Feldman at Loeb and Loeb (or successor law firms) to CalPERS (or Vernon), including to CalPERS representatives Alina Heringer (RPSII) during the period of 2004 to 2006.

Public Records Act (PRA) and Information Practices Act Requests for Documents

Pursuant to the *Public Record Act* and *California Information Practices Act*, please immediately provide the following documents:

Full and complete copies of all documents concerning the 2004-2006 review, appeal and determination of Mr. Malkenhorst's pension rights.

I served my original Public Records Act ("PRA") and Information Practices Act ("IPA") requests for documents upon CalPERS by letter dated June 5, 2012, addressed to the CalPERS Office of Stakeholder Relations and to Ms. Jimenez. I have been trying for more than five months to obtain production of all relevant and responsive documents without success.

Petition for Writ of Mandate, Declaratory and Injunctive Relief to Enforce PRA Requests

Government Code Sections 6258 and 6259 provide Mr. Malkenhorst the right to seek

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enforcement of his PRA requests by way of Writ of Mandate in Superior Court. The law provides for the payment of court costs and reasonable attorney fees. *Civil Code* Sections 1798.34, 1798.45 and 1798.46 similarly provide Mr. Malkenhorst the right to seek enforcement of his IPA requests by way of a civil action and provide for the payment of court costs and reasonable attorneys' fees.

Please be advised that should CalPERS continue to refuse to provide the requested records, Mr. Malkenhorst will seek court assistance in the matter. Further, he will seek court costs and reasonable attorneys' fees associated with the matter, including on the ground that CalPERS' refusal to provide the documents is arbitrary and capricious and subject to a reasonable award of costs and fees.

If CalPERS contends that the documents related to the 2004-2006 review, appeal and determination have been provided as part of the approximately 160,000 pages of documents produced by CalPERS, please provide me with the Bates numbers so that I may locate and review those documents.

Request for Extension of Time to File Appeal

As we have raised these issues, without prejudice or consent to the administrative process, we request that CalPERS continue the due date for the filing of Mr. Malkenhorst's Appeal, currently due on December 21, 2012, to a date at least 30 days after CalPERS provides the requested documents concerning the 2004-2006 review, appeal and determination. Although we assert that the Appeal is barred by collateral estoppel and other grounds, we are also not waiving any rights or privileges.

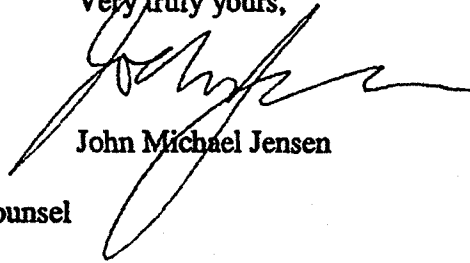
Request for Immediate Response by CalPERS

To reduce the risk of unnecessary and expensive litigation, I request that you respond to me about these matters in writing as soon as practicable. Whatever CalPERS' decision, I am requesting that one or both of you respond to this letter and to my previous letters by the close of business on Thursday, December 20, 2012.

Should you wish to discuss any aspect of this matter, please contact me immediately. However, unless we reach an agreement on concerning the issues set forth above, including a continuance of the deadline for Mr. Malkenhorst to file his Appeal, I will proceed with my *Petition for Writ of Mandate* without further notice to CalPERS.

Scott Yates, Manager
Office of Stakeholder Relations, External Affairs Branch
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Compensation and Employer Review, Customer Account Services Division
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Very truly yours,

A handwritten signature in black ink, appearing to read "John Michael Jensen", written over a horizontal line.

John Michael Jensen

JMJ:gm

cc: Peter Mixon, CalPERS General Counsel
Bruce V. Malkenhorst, Sr.



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November 13, 2012

John Jensen
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Dear Mr. Jensen:

CalPERS is in receipt of your e-mail dated November 9, 2012, requesting an extension to submit an appeal to CalPERS' final determination regarding the reduction of Bruce Malkenhorst Sr.'s retirement benefit.

Your request for an extension has been granted. Appeal rights were originally granted on October 22, 2012. Thus, in an effort to give you ample time to respond, your response date has been extended to December 21, 2012.

If you have any questions regarding this information please contact me at (916) 795-0340.

Sincerely,

A handwritten signature in cursive script that reads "Tomi Jimenez".

TOMI JIMENEZ, Manager
Compensation and Employer Review
Customer Account Services Division

cc. Karen DeFrank
Bruce Malkenhorst Sr.