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10  
11 BEFORE THE BOARD OF ADMINISTRATION  
12 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
13

14 In Re the Matter of ) CALPERS CASE NO.: 2012-0671  
15 BRUCE V. MALKENHORST, SR., and ) OAH CASE NO.: 2013080917  
16 CITY OF VERNON, )  
17 Respondents. ) BRUCE V. MALKENHORST, SR.'S  
18 ) POINTS AND AUTHORITIES ON  
19 ) LACHES, STATUTE OF LIMITATIONS,  
20 ) AFFIRMATIVE DEFENSES  
21 )  
22 )  
23 ) Hearing Dates: October 31, 2013  
24 ) Hearing Location: Los Angeles OAH

25  
26 Bruce V. Malkenhorst, Sr. hereby submits this *Memorandum of Points and Authorities on*  
27 *Laches, Statutes of Limitations, and Affirmative defenses.*

28 At the threshold to bar CalPERS claim, Malkenhorst seeks a motion hearing to provide  
evidence to establish the elements of collateral estoppel, res judicata, laches, statute of  
limitations bar, unreasonable delay and resulting prejudice. Malkenhorst requests the opportunity  
to present evidence and testimony on these matter in a prehearing trial that could be decisive.

Secondly, Malkenhorst asserts that the element of prejudice may be "presumed" because  
there exists a number of statute of limitations that is sufficiently analogous to the facts of the  
case, and the period of such statute of limitations has been exceeded by the public administrative

10/9

1 case, and the period of such statute of limitations has been exceeded by the public administrative  
2 agency in making its claim. *Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75  
3 Cal. App. 4th 316, 89 Cal. Rptr. 2d 139 (2d Dist. 1999).

4 For organizational reasons, these challenges and the supporting papers, including made  
5 pursuant to Government Code 11506, are made in separate pleadings, motions, and points and  
6 authorities that each incorporate the other, yet each is filed under protest with a reservation of  
7 rights. As such, this Points and authorities incorporates herein all of the concurrently filed points  
8 and authorities.  
9

10 Malkenhorst provides this *Memorandum* under protest and does not in any manner waive,  
11 nor intend to waive, any of his legal rights. As a foundational matter, CalPERS has no legal  
12 right to initiate or conduct an administrative process that is barred by laches, statute of  
13 limitations, collateral estoppel, res judicata, and other affirmative defense.  
14

15 Malkenhorst neither consents to CalPERS' administrative process nor waives his  
16 challenges to CalPERS' jurisdiction.  
17

18  
19 Dated October 9, 2013

  
20 John Jensen  
21 Attorney for Bruce Malkenhorst  
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1 **I. INTRODUCTION**

2 **II. FACTUAL BACKGROUND**

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

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

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

26           20. Up until mid-1981, Vernon retained the services of an outside contractor to obtain  
27 electrical power from Southern California Edison. That contractor had promised that the rate  
28 charged to Vernon would be below the rate Southern California Edison charged other



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

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

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

21 23. On or about June 26, 1986, the City Council adopted Resolution No. 5294 which,  
22 among other things, established a longevity program, effective July 1, 1986, for all City  
23 employees except certain lower level police department personnel. It provided for additional  
24 compensation for designated personnel, based on having worked for the City a total of at least  
25 five, ten, fifteen, or twenty years as of specified dates.

26 24. On April 12, 1988, the electorate of Vernon voted in its majority to establish  
27 Vernon as a charter city under the terms of the California Constitution and adopted the *Vernon*  
28 *City Charter*. The *City Charter* incorporated and adopted the existing policy and practice of

1 Vernon whereby it retained the services of a City Administrator, bearing numerous duties and  
2 responsibilities as outlined above, to manage the affairs of Vernon under the direction and  
3 authority of the Vernon City Council.

4 25. On or about June 20, 1991, the City Council adopted Resolution No. 5946 which  
5 established the City of Vernon Gas Municipal Utility Department. The City Council expanded  
6 the duties of the City Administrator to include fulfilling the duties of the CEO of the new gas  
7 utility. Once again, the duties and responsibilities of CEO of the Gas Municipal Utility  
8 Department were incorporated into the duties and responsibilities of the existing position of City  
9 Administrator responsibilities. The City Council mandated that no separate compensation was to  
10 be paid for performing these duties or responsibilities.

11 26. On or about November 21, 1995, the City Council adopted Ordinance No. 1035,  
12 effective December 21, 1995, making certain changes in the *Vernon City Code* to bring it into  
13 conformity with *Vernon City Charter*. Ordinance No. 1035 fully upheld and re-endorsed the  
14 establishment of the position of City Administrator as mandated by Ordinance No. 883 and later  
15 incorporated into the *Vernon City Charter*.

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

25 **B. Malkenhorst's Employment History at Vernon**

26 28. Bruce V. Malkenhorst, Sr. has superior business, organizational, and managerial  
27 skills.

28 29. Malkenhorst had a career in private industry for almost one and one-half decades,

1 including positions as accountant for American Urethane from 1961 through 1964, office  
2 manager (which included labor relations responsibilities) for Stauffer Chemical from 1964  
3 through 1965, Chief Accountant for Chase Bag Company from 1965 through 1967, and  
4 Controller for Ranger Die Casting from 1967 through 1973. All of these positions helped  
5 Malkenhorst to develop his professional and administrative skills.

6 30. Malkenhorst sought to apply his skills and experience to efficiently carrying out  
7 the business affairs of a municipality.

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

14 32. Malkenhorst became dissatisfied with his position at Manhattan Beach and began  
15 looking for other positions. He wished to remain in municipal government and had aspirations to  
16 become a city manager.

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

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

27 35. Vernon already had a regular policy and practice of establishing one position that  
28 was named with words that contained or described multiple duties. Malkenhorst understood that

1 the job was a single position with multiple duties and responsibilities, and that the person holding  
2 the position would be compensated with a single salary. Malkenhorst understood that he was to  
3 be paid one salary, and that the City Council often mandated that no separate compensation was  
4 to be paid for performing multiple duties or responsibilities.

5 36. The job opening at Vernon appealed to Malkenhorst, in part because he had  
6 worked as an assistant finance director at Manhattan Beach and was familiar with the duties. He  
7 also thought that going to work at Vernon might increase his opportunities to become a City  
8 Manager or other senior management position, either at Vernon or at some other city in  
9 California. As Malkenhorst later learned, Vernon had employed someone as Administrative  
10 Officer from the mid-1950's to mid-1960's, but the individual had passed away and the position  
11 had been vacant for some time. (Vernon's Administrative Officer position was never filled after  
12 the prior Administrative Officer passed away. The City Council of Vernon did not seek  
13 candidates to fill the Administrative Officer position).

14 37. After expressing interest in the Deputy City Clerk/Deputy Director of Finance job  
15 and submitting an application, Malkenhorst was offered the position at Vernon. He accepted the  
16 offer and began working in the position the day after terminating his employment at Manhattan  
17 Beach.

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

21 39. Malkenhorst quickly demonstrated his skills to the benefit of Vernon, his new  
22 employer. The City Council took notice. For example, very shortly after beginning his  
23 employment at Vernon, Malkenhorst learned that the policy and practice of the former Deputy  
24 Finance Director had been to pay Vernon's utility bill from Southern California Edison the day  
25 the bill arrived. Malkenhorst quickly changed this policy and practice, initially waiting 30 days  
26 to pay the bill and later waiting 60 days to pay it. Southern California Edison filed suit over the  
27 delayed payments and the Federal Energy Regulatory Commission ultimately ruled that Vernon  
28 must pay its utility bills within 45 days, but Malkenhorst had achieved a result which enabled

1 Vernon to use the money for the utility bills for a month and a half before paying it, increasing  
2 the city's interest, financial planning, and available cash flow.

3 40. In the summer of 1977, the then-current City Clerk/Finance Director, R.A.  
4 Ziemer, retired. Although Malkenhorst had been serving as Deputy City Clerk/Deputy Finance  
5 Director, he had been performing many of the duties that Mr. Ziemer was presumably  
6 responsible for, such as negotiating the City's self-insurance program and negotiating over new  
7 police officer and firefighter labor agreements on Vernon's behalf.

8 41. The City Council remained pleased with Malkenhorst's good results. After Ziemer  
9 left, the City Council appointed Malkenhorst to the City Clerk/Finance Director position on or  
10 about July 1, 1977.

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

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

27 44. The City Council recognized that Malkenhorst was an able Municipal Employee  
28 Relations Representative in large part because Vernon was embroiled in a bitter labor dispute

1 with the City's firefighters' union. The firefighters went on strike beginning in August 1978 and  
2 Malkenhorst was able to handle the labor dispute to the City's benefit. Malkenhorst also brought  
3 experience negotiating labor agreements from his private sector employment at Stauffer  
4 Chemical.

5 45. On or about June 30, 1978, the then-current City Treasurer of Vernon terminated  
6 his employment with the City. On or about July 16, 1978, the City Council appointed  
7 Malkenhorst to undertake the duties of the City Treasurer. Again, the City Council assigned the  
8 City Treasurer duties to Malkenhorst as a component part of his existing duties and  
9 responsibilities. The City Council mandated that no separate compensation was to be paid for  
10 performing these duties or responsibilities. The City Council's action was memorialized in the  
11 City Council Minutes for the meeting on July 27, 1978.

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

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

23 48. As described in detail above, Vernon had previously established a position called  
24 "Administrative Officer" as the city's administrative official. However, nobody had filled the  
25 position of Administrative Officer for many years predating Malkenhorst's start at Vernon.  
26 Further, as discussed above, the City Council was in the process of reconceptualizing and  
27 restructuring Vernon's government management structure.

28 49. As the City Council began formulating plans to establish a new city governance

1 structure and create a single position in city administration that would be responsible for an  
2 increased number of duties and responsibilities, it also evaluated its several years of experience  
3 with Malkenhorst. Based on its experience thus far with Malkenhorst's performance, skills and  
4 knowledge, the City Council felt that Malkenhorst was capable of filling such a position and  
5 communicated to him that the City Council wanted him to fill that single position that would be  
6 responsible for many duties once it was established.

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

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

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

26 53. From that point forward, the City Council regularly evaluated the performance of  
27 Malkenhorst, rewarding his superior performance with periodic merit pay and cost of living  
28 adjustments to his single salary. This usually occurring on or about the start of a new fiscal year

1 although occasionally at other points during the year based on exemplary performance. All of  
2 those periodic pay increases are memorialized in regular compensation resolutions formally  
3 approved and adopted by the City Council.

4 54. The City regularly reported the pay roll and compensation to CalPERS.

5 55. The City regularly made contributions to CalPERS

6 56. CalPERS regularly accepted the contributions.

7 57. CalPERS regularly audited Vernon.

8 58. CalPERS accepted the pay rate, contributions, and office structure of Vernon.

9 59. When the City Council adopted Resolution No. 4803 on or about May 5, 1981,  
10 which revised the structure of the Department of Light and Power and created several new  
11 positions within the department, it also established the new position of Chief Executive Officer  
12 ("CEO") with responsibility for coordinating the development of policies involving all phases of  
13 the electrical department. The City Council continued its existing practice of incorporating new  
14 duties and responsibilities into the duties and responsibilities of an existing position by  
15 appointing the City Administrator to serve as the CEO of the Electrical Department. Because  
16 Malкенhorst held the position of City Administrator, he began performing the additional duties  
17 and responsibilities of CEO of the Electrical Department as part of his single existing City  
18 Manager position. Further, he continued receiving a single base salary as City Administrator.  
19 The City Council mandated that no separate compensation was to be paid for performing these  
20 duties or responsibilities. He received no additional base salary for undertaking the additional  
21 duties and responsibilities as Electrical Department CEO.

22 60. On or about June 27, 1985, the City Council adopted Resolution No. 5197 which  
23 appointed the City Administrator to undertake the additional duties and responsibilities of the  
24 city's Purchasing Agent. Again, this represented the absorption or incorporation of new duties  
25 and responsibilities into the duties and responsibilities of an existing position. Compensation  
26 remained a single base salary attributable to the City Administrator position for all of the duties  
27 the individual in that position performed. The City Council mandated that no separate  
28 compensation was to be paid for performing these duties or responsibilities. Because



1 Malkenhorst was serving as City Administrator, the duties of Purchasing Agent were  
2 incorporated into his existing duties and responsibilities as City Administrator, and he continued  
3 to receive a single base salary for serving as City Administrator.

4 61. As of July 1, 1986, Malkenhorst had been serving as Vernon's City Administrator  
5 for approximately eight years. Pursuant to the terms of the new longevity program adopted by  
6 the City Council effective July 1, 1986 pursuant to Resolution No. 5294, Malkenhorst began  
7 receiving additional compensation in the form of longevity pay equal to five percent (5%) of his  
8 base salary. From that point forward until the end of his tenure as Vernon's City Administrator,  
9 Malkenhorst received additional special compensation in the form of longevity pay based on the  
10 terms of Vernon's longevity pay program, including as that program was amended over time.

11 62. On or about June 20, 1991, the City Council adopted Resolution No. 5946 which  
12 established the City of Vernon Gas Municipal Utility Department. The City Council expanded  
13 the duties of the City Administrator to include fulfilling the duties of the CEO of the new gas  
14 utility. Once again, because Malkenhorst was serving as City Administrator, the duties and  
15 responsibilities of CEO of the Gas Municipal Utility Department were incorporated into his  
16 existing City Administrator duties and responsibilities, and he continued to receive a single base  
17 salary for serving as City Administrator. The City Council mandated that no separate  
18 compensation was to be paid for performing these duties or responsibilities.

19 63. The City regularly reported Malkenhorst's pay roll and compensation to  
20 CalPERS.

21 64. The City regularly made contributions for Malkenhorst to CalPERS

22 65. CalPERS regularly accepted the contributions for Malkenhorst's pension in the  
23 higher amount.

24 66. CalPERS regularly audited Vernon.

25 67. CalPERS accepted the pay rate, contributions, and office structure of Vernon with  
26 respect to Malkenhorst's pension.

27 68. On June 30, 2005, Malkenhorst retired from his employment at Vernon after  
28 nearly 30 years of work at the City, 27 of them as City Administrator.

1           **C. Structure of Vernon's City Government After Malkenhorst's Retirement**

2           69.     When Malkenhorst retired, Vernon likely confronted a situation where nobody  
3 among its current employees had the skill, knowledge and experience to step in and take over the  
4 role Malkenhorst had played as City Administrator with its multiple and complex duties and  
5 responsibilities, nor was Vernon likely to find an eligible candidate for the position among the  
6 general public.

7           70.     Pursuant to its Charter City status and the *Vernon City Charter*, the City Council  
8 possessed the authority to establish or alter the governance structure of the City to best  
9 accomplish its goals. During the period of Malkenhorst's tenure, this often took the form of the  
10 City Council adding various duties and responsibilities to the City Administrator job  
11 requirements.

12          71.     After Malkenhorst retired, however, Vernon's City Council apparently decided to  
13 move in a different direction concerning the City's governance structure. As part of this, the City  
14 Council apparently decided to divide up many of the duties and responsibilities that had been  
15 undertaken by Malkenhorst in the single position of City Administrator, and to establish  
16 numerous separate job positions responsible for those duties and responsibilities. The City  
17 Council then hired or appointed existing employees to file these new individual positions.

18          72.     In 2005-2006, CalPERS finally determined all of the factual and legal the issues  
19 that CalPERS now attempts to raise again in a second administrative process. No new facts have  
20 arisen. No new facts could arise as Malkenhorst's employment with the City of Vernon ("City"  
21 or "Vernon") terminated in 2005. Malkenhorst was already retired in 2006.

22           73.     **Factual Background OF 2005-6 HEARING AND DECISION**

23           74.     In 2005-2006, CalPERS forced Malkenhorst to engage counsel to litigate the  
24 identical issues. Malkenhorst did everything in his power to pursue and timely secure all his  
25 legal rights under CalPERS' regulations and law.  
26

27           75.     In the 2005-2006 quasi-judicial process, Malkenhorst and the City of Vernon's  
28

1 legal counsel (Loeb & Loeb LLP) *jointly* filed at least two formal "Notice(s) of Appeal" with  
2 supporting evidence.

3 76. After establishing compulsory appeal rights and deadlines, CalPERS formally  
4 received evidence and argument from Malkenhorst's and Vernon's shared counsel. In the quasi-  
5 judicial process, CalPERS explicitly weighed evidence, and made determinations of law.  
6 Although a formal Administrative Procedures Act ("APA", *Government Code*, §§11340, *et seq.*)  
7 hearing was available to CalPERS, CalPERS chose not to make an adversarial record. Under the  
8 case law of *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464 and *res judicata*  
9 concepts, CalPERS was required to bring forward all legal causes of action that arose from the  
10 same nucleus of common facts.  
11

12  
13 77. While the 2005-2006 process was pending, CalPERS withheld or reduced  
14 Malkenhorst's pension. The participants awaited CalPERS' decision for about a year.

15 78. After CalPERS deliberated the resolution for more than a year (as it withheld part  
16 of his pension), CalPERS finally and unequivocally determined in several writings that  
17 Malkenhorst was entitled to the higher pension.  
18

19 79. On August 17, 2006, CalPERS formally "ruled" on all the presented issues and  
20 held that "*CalPERS has determined*" that Malkenhorst was entitled to the higher pension,  
21 including his 25% longevity pay. CalPERS informed Malkenhorst and Vernon that the Benefits  
22 Division will "make the adjustment to Mr. Malkenhorst's allowance."  
23

24 80. On or about November 30, 2006, CalPERS' Benefit Services Division adjusted  
25 Malkenhorst's final compensation to \$44,128 per month.<sup>1</sup>  
26

27  
28 <sup>1</sup> CalPERS informed Malkenhorst that CalPERS would use the full \$35,302 monthly base  
salary he received for his service as City Administrator during his final year at Vernon pursuant

1 81. CalPERS paid Malkenhorst a lump sum of \$176,105.79 to make up for the  
2 cumulative underpayment during the pendency of the CalPERS appeal process.

3 82. By its formal determination letters, CalPERS resolved all outstanding issues  
4 raised in the compulsory quasi-judicial process in Malkenhorst's favor. CalPERS waived or  
5 abandoned any other challenges to Malkenhorst's pension when it resumed paying him the  
6 higher pension and paid him the lump sum. The correction of the "final compensation" and  
7 payment of the lump sum confirmed the final resolution of the issues.  
8

9 83. Over eight (8) years ago, CalPERS necessarily made legal and factual findings  
10 when CalPERS determined that Malkenhorst was entitled to the higher pension and the payment  
11 of a lump sum of \$176,105.79 for the accumulated underpayments. CalPERS' decision was  
12 sufficiently judicial and final to bar re-litigation.  
13

14 84. From 2006 to the present, CalPERS has consistently paid Malkenhorst the higher  
15 pension, without reservations.

16 85. CalPERS' public relations assault began after the public fury at the City of Bell  
17 scandal. Now, under political pressure, CalPERS is discriminating against Malkenhorst and  
18 trying to re-litigate a "second process" on these same issues.  
19

### 20 **III. LAW AND ARGUMENT**

#### 21 **1. STATUTE OF LIMITATIONS APPLIES DIRECTLY AND BARS THIS** 22 **PROCEEDING:**

23 Malkenhorst raises statute of limitations and laches at the threshold to bar the  
24 proceeding. *Medical Bd. of California v. Superior Court*, 227 Cal. App. 3d 1458, 278 Cal. Rptr.  
25 247 (3d Dist. 1991), opinion modified, (Feb. 22, 1991).

26  
27  
28 \_\_\_\_\_  
to the City's pay schedules plus 25% longevity pay special compensation (\$35,302 x 1.25 =  
\$44,128) as his final compensation.

1 At the threshold to bar CalPERS claim, Malkenhorst seeks a motion hearing to provide  
2 evidence to establish the elements of unreasonable delay and resulting prejudice. Malkenhorst  
3 requests the opportunity to present evidence on unreasonable delay and resulting prejudice.

4 Secondly, Malkenhorst asserts that the element of prejudice may be "presumed" because  
5 there exists a number of statute of limitations that is sufficiently analogous to the facts of the  
6 case, and the period of such statute of limitations has been exceeded by the public administrative  
7 agency in making its claim. *Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75  
8 Cal. App. 4th 316, 89 Cal. Rptr. 2d 139 (2d Dist. 1999).

9  
10  
11  
12 **A. CalPERS Barred by Its Failure to Challenge Decision in 2005-6 By Writ**

13 CalPERS rendered a decision in this matter in 2005-6 in Malkenhorst's favor.  
14 In the absence of a statute to the contrary, an agency's jurisdiction in a particular proceeding  
15 expires when it renders its decision. *Olive Proration Program Committee for Olive Proration*  
16 *Zone No. 1 v. Agricultural Prorate Commission*, 17 Cal. 2d 204, 109 P.2d 918 (1941); *Kirk v.*  
17 *County of San Luis Obispo*, 156 Cal. App. 3d 453, 202 Cal. Rptr. 606 (2d Dist. 1984); *Chas. L.*  
18 *Harney, Inc. v. State*, 217 Cal. App. 2d 77, 31 Cal. Rptr. 524 (1st Dist. 1963).

20 CalPERS and Vernon failed to challenge it in court. As with any other cause of action, a  
21 proceeding for a writ of mandamus is barred if not commenced within the prescribed limitation  
22 period. [*Sinetos v. Department of Motor Vehicles*, 160 Cal. App. 3d 1172, 207 Cal. Rptr. 207 (3d  
23 Dist. 1984)]The time for filing a Petition for Writ of Mandamus or Wirt of Administrative  
24 mandamus expired long ago.

26 Whether directly or by analogy, CalPERS is barred by the rules of law regarding  
27 limitations of actions in mandamus proceedings. *Ginns v. Savage*, 61 Cal. 2d 520, 39 Cal. Rptr.  
28

1 377, 393 P.2d 689 (1964); *Sinetos v. Department of Motor Vehicles*, 160 Cal. App. 3d 1172, 207  
2 Cal. Rptr. 207 (3d Dist. 1984)]

3 While Mandamus proceedings are subject to the various statutes of limitation, CalPERS  
4 has violated every statute of limitations that could apply. An administrative mandamus  
5 proceeding to review the decision of an agency subject to the Administrative Procedure Act  
6 [Gov. Code, §§ 11340 et seq.] must be commenced within 30 days after the last day on which  
7 reconsideration can be ordered<sup>2</sup>.

9 The particular statute of limitation that would be applicable to an action on the underlying  
10 right or obligation applies to a mandamus proceeding to enforce that right or obligation. [*Green*  
11 *v. Obledo*, 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256 (1981)]

13 For example, Code Civ. Proc., § 338, subd. (a), which prescribes a three-year period for  
14 bringing an action based on a liability created by statute, applied to a mandamus proceeding  
15 against a city by a former police officer to enforce her right to a pension or a hearing to  
16 determine her entitlement to the pension, because her right to the pension and hearing were  
17 created by statute. [*Ragan v. City of Hawthorne*, 212 Cal. App. 3d 1361, 261 Cal. Rptr. 219 (2d  
18 Dist. 1989)]

20 If there is no statute of limitation specifically applicable to the underlying right or  
21 obligation, Code Civ. Proc., § 343, the catch-all statute of limitation which provides a limitation  
22 period of four years for actions not otherwise provided for, will apply. [*Balch Enterprises, Inc. v.*  
23 *New Haven Unified School Dist.*, 219 Cal. App. 3d 783, 268 Cal. Rptr. 543, 59 Ed. Law Rep.  
24 796 (1st Dist. 1990), opinion modified, (Apr. 18, 1990)]

27 \_\_\_\_\_  
28 <sup>2</sup> If, however, preparation of the record of the decision to be reviewed is requested within 10  
days after the last day on which reconsideration can be ordered, the time for commencing the  
proceeding is extended to until 30 days after delivery of the record. [Gov. Code, § 11523]

1  
2 **II. LACHES**

3 **B. CalPERS Prejudicial Delay of Eight Years Is Sufficient for Laches**

4 CalPERS has delayed eight years in bring this claim. Equity may bar an administrative  
5 proceeding, and the courts will apply notions of laches borrowed from the civil law; where  
6 equity "borrows" a statute of limitations, it is to avoid unfairness due to delay by the public  
7 agency against whom laches was asserted. *City of Oakland v. Public Employees' Retirement*  
8 *System*, 95 Cal. App. 4th 29, 115 Cal. Rptr. 2d 151 (3d Dist. 2002).

9  
10 Malkenhorst has established that (1) CalPERS unreasonably delayed and (2) acquiesced  
11 in the higher payment by CalPERS' payment of its for eight years, the act about which the  
12 CalPERS complains and additionally (3) Malkenhorst has suffered prejudice resulting from the  
13 delay because records have been destroyed, memories or recall lost, monies and reliance  
14 expended by Malkenhorst during the delay, and attorney fees expended, among other things..  
15 *Wells Fargo Bank v. Goldzband*, 53 Cal. App. 4th 596, 61 Cal. Rptr. 2d 826, 136 O.G.R. 468  
16 (5th Dist. 1997).

17  
18  
19 At the threshold to bar CalPERS claim, Malkenhorst seeks a motion hearing to provide  
20 evidence to establish the elements of unreasonable delay and resulting prejudice. Malkenhorst  
21 requests the opportunity to present evidence on unreasonable delay and resulting prejudice.

22 Secondly, Malkenhorst asserts that the element of prejudice may be "presumed" because  
23 there exists a number of statute of limitations that is sufficiently analogous to the facts of the  
24 case, and the period of such statute of limitations has been exceeded by the public administrative  
25 agency in making its claim. *Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75  
26 Cal. App. 4th 316, 89 Cal. Rptr. 2d 139 (2d Dist. 1999).

1 Several of the analogous statute of limitations are

- 2 (1) Code Civ. Proc., § 338, subd. (a), which prescribes a three-year period for bringing an  
3 action based on a liability created by statute. [Ragan v. City of Hawthorne, 212 Cal. App.  
4 3d 1361, 261 Cal. Rptr. 219 (2d Dist. 1989)]
- 5 (2) If there is no statute of limitation specifically applicable to the underlying right or  
6 obligation, Code Civ. Proc., § 343, the catch-all statute of limitation which provides a  
7 limitation period of four years for actions not otherwise provided for, will apply. [Balch  
8 Enterprises, Inc. v. New Haven Unified School Dist., 219 Cal. App. 3d 783, 268 Cal.  
9 Rptr. 543, 59 Ed. Law Rep. 796 (1st Dist. 1990), opinion modified, (Apr. 18, 1990)]
- 10 (3) "any contract, obligation or liability *founded upon* an instrument *in writing*" must be  
11 commenced within 4 years after accrual of the action. CCP § 337(1)

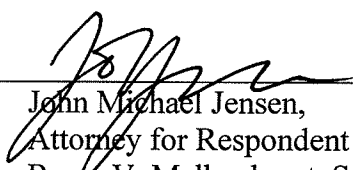
12  
13  
14 The defense of laches is not limited to an unreasonable delay prior to the filing of the  
15 proceeding. Rather, the time period to be considered as constituting possible laches includes the  
16 period of time the proceeding is pending and an unreasonable delay during litigation may  
17 constitute such laches as would bar the granting of relief. [*Vernon Fire Fighters Assn. v. City of*  
18 *Vernon*, 178 Cal. App. 3d 710, 223 Cal. Rptr. 871 (2d Dist. 1986)]

19  
20  
21 **VI. CONCLUSION**

22 CalPERS is barred by the statute of limitations and laches from initiating this hearing.

23 Dated: October 11, 2013

24 By: \_\_\_\_\_

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