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Malkenhorst's Motions
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9
10 BEFORE THE BOARD OF ADMINISTRATION
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12 In Re the Matter of) CALPERS CASE NO.: TBD
13) OAH CASE NO.: TBD
14 BRUCE V. MALKENHORST, SR., and)
15 CITY OF VERNON,)
16 Respondents.) BRUCE V. MALKENHORST, SR.'S
17) OBJECTS TO AND CHALLENGES
18) CALPERS' AND OAH'S JURISDICTION
19) OR AUTHORITY, INCLUDING UNDER
20) GOVERNMENT CODE 11506
21)
22) Hearing Dates: _____
23) Hearing Location: _____
24)
25) INCORPORATING CONCURRENTLY
26) FILED MOTIONS, MEMORANDUM OF
27) POINTS AND AUTHORITIES, AND
28) SUPPORTING PAPERS ON (1)
) COLLATERAL ESTOPPEL, RES
) JUDICATA, ISSUE PRECLUSION, CLAIM
) PRECLUSION; (2) CHARTER CITY
) AUTONOMY; (3) JUDICIAL ESTOPPEL,
) (4) PAROLE EVIDENCE RULE (4)
) JURISDICTIONAL CHALLENGE; (6)
) DEMURRER;(7) AGENCY FAILURE TO
) STATE ACTS OR OMISSION ON WHICH
) AGENCY MAY PROCEED (GOVERN-
) MENT CODE SECTION 115069(A)(2)-(3));
) (8) MOTIONS IN LIMINE TO EXCLUDE
) EVIDENCE; (9) MOTION TO STRIKE FOR
) INDEFINITENESS; (10) MOTIONS AND
) CHALLENGES REGARDING AGENCY
) JURISDICTION AND AUTHORITY; (11)
) DEMURRER; (12) REQUEST FOR
) JUDICIAL NOTICE (13) SUPPORTING

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1 Bruce V. Malckenhorst, Sr. challenges CalPERS and OAH's jurisdiction and authority to
2 hold a hearing or proceed. Without consenting to CalPERS' jurisdiction or authority,
3 Malckenhorst asserts that the pleading does not state acts or omission upon which CalPERS or the
4 OAH may proceed. Gov. Code, § 11506.

5 CalPERS is seeking to reduce Malckenhorst's existing rights to pension.

6 Malckenhorst has the right to object to CalPERS actions, jurisdiction, authority, and
7 pleading including on the grounds that it does not state acts or omissions upon which the agency
8 may proceed. Gov. Code, § 11506. Malckenhorst has an equal right to assert those grounds
9 against OAH.

10 Malckenhorst files this *Jurisdictional Challenge* and the related incorporated motions and
11 supporting papers to assert grounds on which CalPERS and the OAH do not have the right to
12 proceed.

13
14 **Motions Incorporated.** Malckenhorst files this *Jurisdictional Challenge* that also includes
15 and incorporates a concurrently filed:

- 16 (1) Demurrer;
17 (2) Motion to Strike;
18 (3) Motion In Limine;
19 (4) Request for an Evidentiary Hearing on Jurisdictional Matters;
20 (5) Supporting points and authorities, documents, Declarations; and related pleadings.

21 Malckenhorst expressly incorporates each of those documents herein in full.

22 **Grounds.** The grounds for challenging CalPERS and OAH's jurisdiction and authority
23 include that CalPERS and the OAH are:

- 24 (1) Barred by or violate collateral estoppel, *res judicata*, issue preclusion, and claim
25 preclusion. *See attached and incorporated Demurrer and Motion to Strike,*
26 *Motions in Limine, Points and Authorities on collateral estoppel and res judicata.*
27 (2) Violate the charter cities autonomy to determine compensation and office
28 structure. *See attached and incorporated Demurrer, Motion to Strike, Motions in*

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- 1 *Limine, and Points and Authorities on charter city autonomy.*
- 2 (3) Violates the appellate court exclusive jurisdiction to determine the issues that are
- 3 on appeal. *See attached and incorporated Demurrer, Motion to Strike, Motions in*
- 4 *Limine, and Points and Authorities on collateral estoppel and res judicata.*
- 5 (4) Violate judicial estoppel. *See attached and incorporated Demurrer and Motion to*
- 6 *Strike, Motions in Limine, and Points and Authorities on judicial estoppel.*
- 7 (5) Violate the parole evidence rule. *See attached and incorporated Demurrer and*
- 8 *Motion to Strike, Motions in Limine, and Points and Authorities on the parole*
- 9 *evidence rule.*
- 10 (6) Act in excess of CalPERS' limited agency jurisdiction; *See attached and*
- 11 *incorporated Demurrer, Motion to Strike, Motions in Limine, and Points and*
- 12 *Authorities on the limitations to agency jurisdiction.*
- 13 (7) Barred by laches and the statute of limitations. *See attached and incorporated*
- 14 *Demurrer, Motion to Strike, Motions in Limine, and Points and Authorities on*
- 15 *laches and the statute of limitations*

17 **Authority.** Malkenhorst makes this Jurisdictional Challenge based on the authority cited
18 herein and in the incorporated motions, points and authorities, and related documents.

19 Under *Government Code* section 11500 et seq and other authority, including Section
20 11506(a)(5), Malkenhorst submits this evidentiary and jurisdictional defense to CalPERS efforts
21 to reduce his vested pension benefit.

22 Malkenhorst involuntarily submits these documents under protest and with a full reservation
23 of all rights and without waiver of any kind, as they are submitted under CalPERS compulsion
24 and threat of an immediate reduction in his pension.

25 This jurisdictional challenge is based upon this Notice, the incorporated points and authorities
26 listed herein, the Request for Judicial Notice filed concurrently, the Memorandum of Points and
27 Authorities attached hereto, the documents concurrently file under protest in this matter which are
28 incorporated in full herein, and upon such argument and other matters (including the reply

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1 incorporated in full herein, and upon such argument and other matters (including the reply
2 memorandum) as may be filed with the Court or received by the Court at the time of hearing.

3
4 Respectfully submitted,

5
6 Dated: October 11, 2013

By: 

John Michael Jensen,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Respondent files this Jurisdictional Challenge under protest, with a reservation of rights,
3 and as a ""special appearance". Respondent incorporates in full herein all of the concurrently
4 filed Motions, memorandum of points and authorities, and supporting papers.

5 Respondent challenges jurisdiction under the California Constitution, under the
6 Administrative Procedures Act, including under *Government Code* sections 11506(a)(2)-(3) , and
7 other authority¹ for the reasons stated herein.

8 **I. The Office of Administrative Hearings Must Allow Malkenhorst to Assert Defenses**

9 Explicitly under the *Government Code*, the is empowered to allow Malkenhorst to
10 present argument and evidence that CalPERS and OAH does not (i) state a cause of action or (ii)
11 acts or omissions upon which the agency may proceed:

12 (a) Within 15 days after service of the accusation the respondent may file with the agency
13 a notice of defense in which the respondent may:

14 (2) Object to the accusation upon the ground that it does not state acts or omissions upon
15 which the agency may proceed.

16 (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain
17 that the respondent cannot identify the transaction or prepare a defense.

(*Government Code*, §11506.)

18 **II. The Statement of Issues Does Not State Acts or Omission Upon Which the Agency
May Proceed**

19 Jurisdictionally, The *Statement of Issues* does not state acts or omissions upon which the
20 agency may proceed. (*Government Code*, §11506.) The form of the accusation is so indefinite or
21 uncertain that Respondent cannot identify the transaction or prepare a defense. (*Government*
22 *Code*, §11506.)

23 Respondent challenges jurisdiction as the *Statement of Issues* does not (i) state a cause
24 of action or (ii) acts or omissions upon which the agency may proceed:

25
26 ¹ CalPERS seeks to reduce Malkenhorst's existing pension. A pension is a property right
27 and a legal privilege to which he is currently legally entitled. Procedurally, a right or privilege
28 should be revoked, suspended, limited or conditioned by filing an accusation. (*Government*
Code, §11503.) Malkenhorst is entitled to file these challenges, including those available to
accusations, because in essence CalPERS is filing an accusation.

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- 1 (1) CalPERS and OAH lack of jurisdiction including because of (1) constitutional
2 infirmity of violating the charter city autonomy, appellate court exclusive jurisdiction
3 and other infirmities (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381); and
4 (2) running of the statute of limitations (*In re Demillo* (1975) 14 Cal.3d 598;
- 5 (2) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does
6 not state facts sufficient to constitute a cause of action;
- 7 (3) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does
8 not (i) state a cause of action or (ii) acts or omissions upon which the agency may
9 proceed as the *Statement of Issues* is barred by or violates collateral estoppel, *res*
10 *judicata*, issue preclusion, and claim preclusion. *See attached and incorporated Points*
11 *and Authorities on collateral estoppel and res judicata.*
- 12 (4) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does
13 not (i) state a cause of action or (ii) acts or omissions upon which the agency may
14 proceed as the *Statement of Issues* violates the charter cities autonomy to determine
15 compensation and office structure. *See attached and incorporated Points and*
16 *Authorities on charter city autonomy.*
- 17 (5) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does
18 not (i) state a cause of action or (ii) acts or omissions upon which the agency may
19 proceed as the *Statement of Issues* violates the appellate court exclusive jurisdiction to
20 determine the issues that are on appeal. *See attached and incorporated Points and*
21 *Authorities on collateral estoppel and res judicata.*
- 22 (6) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does
23 not (i) state a cause of action or (ii) acts or omissions upon which the agency may
24 proceed as the *Statement of Issues* violates judicial estoppel. *See attached and*
25 *incorporated Points and Authorities on judicial estoppel.*
- 26 (7) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does
27 not (i) state a cause of action or (ii) acts or omissions upon which the agency may
28 proceed as the *Statement of Issues* violates the parole evidence rule. *See attached and*

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incorporated Points and Authorities on the parole evidence rule.

(8) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions upon which the agency may proceed as the *Statement of Issues* is an act in excess of CalPERS' limited agency jurisdiction; *See attached and incorporated Points and Authorities on the limitations to agency jurisdiction.*

(9) CalPERS and OAH lack of jurisdiction including because the *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions upon which the agency may proceed as the *Statement of Issues* is barred by laches and the statute of limitations. *See attached and incorporated Points and Authorities on laches and the statute of limitations*

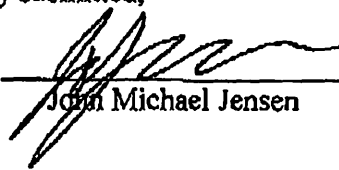
Incorporation by Reference is Acceptable.

The phrase "incorporation by reference" is almost universally understood to mean the inclusion, within a body of a document, of text that, although physically separate from the document, becomes as much a part of the document as if it had been typed in directly. The Civil Code provides that several documents relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be construed together. *Civ. Code, § 1642.* Under this rule, several documents covering the same or similar subject matter are considered together, and with the same effect as if all had been incorporated in one document.

It is appropriate for organizational reasons to separately set out the various issues, arguments, and authorities, but incorporate them in full into this Jurisdictional Challenge.

Respectfully submitted,

Dated: October 11, 2013

By: 
John Michael Jensen

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8 Attorneys for Respondent Bruce Malkenhorst

BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

9	In Re the Matter of	) CALPERS CASE NO.: 2012-0671
10		) OAH CASE NO.: 2013080917
11	BRUCE V. MALKENHORST, SR and)
12	CITY OF VERNON,	) RESPONDENT MALKENHORST'S
13		) DEMURRER, INCLUDING UNDER
14	Respondents.	) GOVERNMENT CODE SECTIONS
15		) 11506(a)(2)-(3)
16)
17		) Hearing Date: October 31, 2013, 10:00 am
18		) Hearing Location: Los Angeles OAH
19)
20		) FILED CONCURRENTLY WITH
21		) MOTIONS, MEMORANDUM OF POINTS
22		) AND AUTHORITIES, AND SUPPORTING
23		) PAPERS ON (1) COLLATERAL ESTOPPEL,
24		) RES JUDICATA, ISSUE PRECLUSION,
25		) CLAIM PRECLUSION; (2) CHARTER CITY
26		) AUTONOMY; (3) JUDICIAL ESTOPPEL,
27		) (4) PAROLE EVIDENCE RULE (4)
28		) JURISDICTIONAL CHALLENGE; (6)
		) MOTION TO STRIKE;(7) AGENCY
		) FAILURE TO STATE ACTS OR OMISSION
		) ON WHICH AGENCY MAY PROCEED
		) (GOVERNMENT CODE SECTION
		) 115069(A)(2)-(3)); (8) MOTIONS IN
		) LIMINE TO EXCLUDE EVIDENCE; (9)
		) MOTION TO STRIKE FOR
		) INDEFINITENESS; (10) MOTIONS AND
) CHALLENGES REGARDING AGENCY
) JURISDICTION AND AUTHORITY; (11)
) REQUEST FOR JUDICIAL NOTICE

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1 **TO ALL COUNSEL AND ATTORNEYS OF RECORD**

2 **PLEASE TAKE NOTICE** that on October 31, 2013 at 10:00 a.m. or as soon thereafter
3 as counsel may be heard, in Office of Administrative Hearings, located at

4 320 West Fourth Street, Suite 630
5 Los Angeles, CA 90013
6 Located in: The Serra Building
7 Main Telephone Number: 213.576.7200
8 Fax: 916.376.6324

9 Respondent Bruce Malckenhorst will and hereby does move the Presiding Judge
10 Formaker or the Office of Administrative Hearings for a *Demurrer* to the *Statement of Issues* of
11 the California Public Employees' Retirement System, and the Board thereof (collectively
12 CalPERS), filed on or about September 27, 2013.

13 Respondent Bruce Malckenhorst will and hereby does demurrer to the *Statement of Issues*
14 pursuant to law, including but not limited to *Government Code* sections 11506(a)(2)-(3) and
15 *Code of Civil Procedure* section 430.50 and their equivalents under the Administrative
16 Procedures Act:

17 *Grounds for demurrer to the Statement of Issues include:*

- 18 (1) CalPERS doe not have jurisdiction to proceed;
- 19 (2) The OAH does not have jurisdiction to proceed;
- 20 (3) The *Statement of Issues* does not state facts sufficient to constitute a cause of action;
- 21 (4) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
22 upon which the agency may proceed as the *Statement of Issues* is barred by or violates
23 collateral estoppel, *res judicata*, issue preclusion, and claim preclusion. *See attached*
24 *and incorporated Points and Authorities on collateral estoppel and res judicata.*
- 25 (5) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
26 upon which the agency may proceed as the *Statement of Issues* violates the charter
27 cities autonomy to determine compensation and office structure. *See attached and*
28 *incorporated Points and Authorities on charter city autonomy.*
- (6) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions

1 upon which the agency may proceed as the *Statement of Issues* violates the appellate
2 court exclusive jurisdiction to determine the issues that are on appeal. *See attached and*
3 *incorporated Points and Authorities on Appellate Jurisdiction.*

4 (7) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
5 upon which the agency may proceed as the *Statement of Issues* violates judicial
6 estoppel. *See attached and incorporated Points and Authorities on judicial estoppel.*

7 (8) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
8 upon which the agency may proceed as the *Statement of Issues* violates the parole
9 evidence rule. *See attached and incorporated Points and Authorities on the parole*
10 *evidence rule.*

11 (9) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
12 upon which the agency may proceed as the *Statement of Issues* is an act in excess of
13 CalPERS' limited agency jurisdiction; *See attached and incorporated Points and*
14 *Authorities on the limitations to agency jurisdiction.*

15 (10) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
16 upon which the agency may proceed as the *Statement of Issues* is barred by laches and
17 the statute of limitations. *See attached and incorporated Points and Authorities on the*
18 *statute of limitations and laches.*

19 With reference to the cause of actions implied in the *Statement of Issues*, Respondent
20 demurs that:

21 **Cause of Action related to offices held.** Malikenhorst demurs to the cause of action in
22 the *Statement of Issues* that relate to offices held. Neither CalPERS nor the OAH have
23 jurisdiction to hear any issues related to the offices held as those matters are subject to the
24 charter city's constitutional authority to determine office structure. The exclusive jurisdiction to
25 determine those issues is before the Fourth District Court of Appeal. The issue is also barred by
26 collateral estoppel, *res judicata*, claim preclusion and issue preclusion by CalPERS' prior
27 acceptance of the office structure in the 2005-2006 administrative process. The issue is also
28 barred by judicial estoppel by CalPERS' prior acceptance of those matters in the 2005-2006

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1 administrative hearing. The issue as implied in the *Statement of Issues* is also vague and
2 uncertain, subject to demurrer. Laches bars and the statute of limitations has also run on any
3 claims involving office structure as CalPERS undertook a review and acceptance of those
4 matters in 2005-2006, more than 8 years ago. The cause of action regarding office held is also
5 barred by the parol evidence rule, as it conflicts with integrated writings accepted by the parties.

6 **Cause of Action related to pay rates or compensation.** Malckenhorst demurs to the
7 cause of action in the *Statement of Issues* that relate to pay rates or compensation paid. Neither
8 CalPERS nor the OAH have jurisdiction to hear any issues related pay rates or compensation
9 paid as those matters are subject to the charter city's constitutional authority to determine pay
10 rates or compensation paid. The exclusive jurisdiction to determine those issues is before the
11 Fourth District Court of Appeal. The pay rates or compensation paid issue is also barred by
12 collateral estoppel, *res judicata*, claim preclusion and issue preclusion by CalPERS' prior
13 acceptance of the pay rates or compensation paid in the 2005-2006 administrative process. The
14 pay rates or compensation paid issue is also barred by judicial estoppel by CalPERS' prior
15 acceptance of those matters in the 2005-2006 administrative hearing. The issue as implied in the
16 *Statement of Issues* is also vague and uncertain, subject to demurrer. Laches bars and the statute
17 of limitations has also run on any claims involving pay rates or compensation paid as CalPERS
18 undertook a review and acceptance of those matters in 2005-2006, more than 8 years ago. The
19 cause of action regarding pay rates or compensation paid is also barred by the parol evidence
20 rule, as it conflicts with integrated writings accepted by the parties.

21 **General Demurrer.** Malckenhorst demurs to the *Statement of Issues*. Neither CalPERS
22 nor the OAH have jurisdiction to hear any issues that invade or contradict the charter city's
23 constitutional authority to determine municipal affairs. The exclusive jurisdiction to determine
24 those issues is before the Fourth District Court of Appeal. The *Statement of Issues* is also barred
25 by collateral estoppel, *res judicata*, claim preclusion and issue preclusion by CalPERS' prior
26 acceptance of these matters in the 2005-2006 administrative process. The *Statement of Issues* is
27 also barred by judicial estoppel by CalPERS' prior acceptance of those matters in the 2005-2006
28 administrative hearing. The *Statement of Issues* is also vague and uncertain, subject to demurrer.

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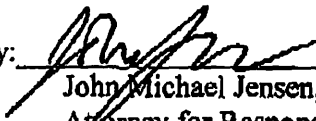
1 Laches bars and the statute of limitations has also run on any claims in the *Statement of Issues* as
2 CalPERS undertook a review and acceptance of those matters in 2005-2006, more than 8 years
3 ago. The *Statement of Issues* is also barred by the parol evidence rule, as it conflicts with
4 integrated writings accepted by the parties.

5 These demurrers are filed pursuant to *Government Code* sections 11506(a)(2)-(3) and
6 *Code of Civil Procedure* sections 430.10 (d) & (e), including on the grounds that the *Statement of*
7 *Issues* and the causes of action, inclusive, fall outside the jurisdiction of the administrative
8 venue, are barred, and fail to state facts sufficient to constitute a cause of action against
9 Malkenhorst and are otherwise uncertain.

10 This motion is based upon this Notice, the incorporated points and authorities listed
11 herein, the Request for Judicial Notice filed concurrently, the Memorandum of Points and
12 Authorities attached hereto, the documents concurrently filed under protest in this matter, and
13 upon such argument and other matters (including the reply memorandum) as may be filed with
14 the Court or received by the Court at the time of hearing.

15 Respectfully submitted,

16 Dated: October 11, 2013

17 By: 
18 John Michael Jensen,
19 Attorney for Respondent
20 Bruce V. Malkenhorst, Sr.
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MEMORANDUM OF POINTS AND AUTHORITIES

Respondent files this demurrer under protest, with a reservation of rights, and as a "special appearance". Respondent incorporates in full herein all of the concurrently filed Motions, memorandum of points and authorities, and supporting papers.

Respondent moves for a demurrer to the *Statement of Issues* under *Government Code* sections 11506(a)(2)-(3) and *Code of Civil Procedure* section 430.50 and their equivalents under the *Administrative Procedures Act*¹ for the reasons stated herein.

I. The Office of Administrative Hearings Is Authorized to Strike the Whole and Parts of Pleadings

Explicitly under the *Government Code*, the ALJ is empowered to grant a demurrer to the *Statement of Issues* as it does not (i) state a cause of action or (ii) acts or omissions upon which the agency may proceed:

- (a) Within 15 days after service of the accusation the respondent may file with the agency a notice of defense in which the respondent may:
 - (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.
 - (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense. (*Government Code*, §11506.)

II. The Statement of Issues Does Not State Acts or Omission Upon Which the Agency May Proceed

The *Statement of Issues* is not drawn in conformity with California law as there is no basis in California law for CalPERS' *Statement of Issues*. The *Statement of Issues* does not state acts or omissions upon which the agency may proceed. (*Government Code*, §11506.) The form of the accusation is so indefinite or uncertain that Respondent cannot identify the transaction or prepare a defense. (*Government Code*, §11506.) Respondent moves for a demurrer to the

¹ CalPERS seeks to reduce Malkenhorst's existing pension. A pension is a property right and a legal privileges to which he is currently legally entitled. Procedurally, a right or privilege should be revoked, suspended, limited or conditioned by filing an accusation. (*Government Code*, §11503.) Malkenhorst is entitled to file these challenges, including those available to accusations, because in essence CalPERS is filing an accusation.

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- 1 *Statement of Issues* as it does not (i) state a cause of action or (ii) acts or omissions upon which
 2 the agency may proceed. With reference to the cause of actions implied in the *Statement of*
 3 *Issues*, Respondent demurs that:
- 4 (1) CalPERS does not have jurisdiction to proceed;
 - 5 (2) The OAH does not have jurisdiction to proceed;
 - 6 (3) CalPERS and OAH lack of jurisdiction including because of (1) constitutional
 7 infirmity of violating the charter city autonomy, appellate court exclusive jurisdiction
 8 and other infirmities (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381); and
 9 (2) running of the statute of limitations (*In re Demillo* (1975) 14 Cal.3d 598;
 - 10 (4) The *Statement of Issues* does not state facts sufficient to constitute a cause of action;
 - 11 (5) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
 12 upon which the agency may proceed as the *Statement of Issues* is barred by or violates
 13 collateral estoppel, *res judicata*, issue preclusion, and claim preclusion. *See attached*
 14 *and incorporated Points and Authorities on collateral estoppel and res judicata.*
 - 15 (6) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
 16 upon which the agency may proceed as the *Statement of Issues* violates the charter
 17 cities autonomy to determine compensation and office structure. *See attached and*
 18 *incorporated Points and Authorities on charter city autonomy.*
 - 19 (7) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
 20 upon which the agency may proceed as the *Statement of Issues* violates the appellate
 21 court exclusive jurisdiction to determine the issues that are on appeal. *See attached and*
 22 *incorporated Points and Authorities on collateral estoppel and res judicata.*
 - 23 (8) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
 24 upon which the agency may proceed as the *Statement of Issues* violates judicial
 25 estoppel. *See attached and incorporated Points and Authorities on judicial estoppel.*
 - 26 (9) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
 27 upon which the agency may proceed as the *Statement of Issues* violates the parole
 28 evidence rule. *See attached and incorporated Points and Authorities on the parole*

1 *evidence rule.*

2 (10) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
3 upon which the agency may proceed as the *Statement of Issues* is an act in excess of
4 CalPERS' limited agency jurisdiction; *See attached and incorporated Points and*
5 *Authorities on the limitations to agency jurisdiction.*

6 (11) The *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions
7 upon which the agency may proceed as the *Statement of Issues* is barred by the statute
8 of limitations. *See attached and incorporated Points and Authorities on the statute of*
9 *limitations*

10 **Cause of Action related to offices held.** Malkenhorst demurs to the cause of action in
11 the *Statement of Issues* that relates to offices held. Neither CalPERS nor the OAH have
12 jurisdiction to hear any issues related to the offices held as those matters are subject to the
13 charter city's constitutional authority to determine office structure. The exclusive jurisdiction to
14 determine those issues is before the Fourth District Court of Appeal. The issue is also barred by
15 collateral estoppel, res judicata, claim preclusion and issue preclusion by CalPERS' prior
16 acceptance of the office structure in the 2005-2006 administrative process. The issue is also
17 barred by judicial estoppel by CalPERS' prior acceptance of those matters in the 2005-2006
18 administrative hearing. The issue as implied in the *Statement of Issues* is also vague and
19 uncertain, subject to demurrer. The statute of limitations has also run on any claims involving
20 office structure as CalPERS undertook a review and acceptance of those matters in 2005-2006,
21 more than 8 years ago. The cause of action regarding office held is also barred by the parol
22 evidence rule, as it conflicts with integrated writings accepted by the parties.

23 **Cause of Action related to pay rates or compensation.** Malkenhorst demurs to the
24 cause of action in the *Statement of Issues* that relates to pay rates or compensation paid. Neither
25 CalPERS nor the OAH have jurisdiction to hear any issues related pay rates or compensation
26 paid as those matters are subject to the charter city's constitutional authority to determine pay
27 rates or compensation paid. The exclusive jurisdiction to determine those issues is before the
28 Fourth District Court of Appeal. The pay rates or compensation paid issue is also barred by

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1 collateral estoppel, res judicata, claim preclusion and issue preclusion by CalPERS' prior
2 acceptance of the pay rates or compensation paid in the 2005-2006 administrative process. The
3 pay rates or compensation paid issue is also barred by judicial estoppel by CalPERS' prior
4 acceptance of those matters in the 2005-2006 administrative hearing. The issue as implied in the
5 *Statement of Issues* is also vague and uncertain, subject to demurrer. The statute of limitations
6 has also run on any claims involving pay rates or compensation paid as CalPERS undertook a
7 review and acceptance of those matters in 2005-2006, more than 8 years ago. The cause of action
8 regarding pay rates or compensation paid is also barred by the parol evidence rule, as it conflicts
9 with integrated writings accepted by the parties.

10 **General Demurrer.** Malckenhorst demurs to the *Statement of Issues*. Neither CalPERS
11 nor the OAH have jurisdiction to hear any issues that invade or contradict the charter city's
12 constitutional authority to determine municipal affairs. The exclusive jurisdiction to determine
13 those issues is before the Fourth District Court of Appeal. The *Statement of Issues* is also barred
14 by collateral estoppel, *res judicata*, claim preclusion and issue preclusion by CalPERS' prior
15 acceptance of these matters in the 2005-2006 administrative process. The *Statement of Issues* is
16 also barred by judicial estoppel by CalPERS' prior acceptance of those matters in the 2005-2006
17 administrative hearing. The *Statement of Issues* is also vague and uncertain, subject to demurrer.
18 The statute of limitations has also run on any claims in the *Statement of Issues* as CalPERS
19 undertook a review and acceptance of those matters in 2005-2006, more than 8 years ago. The
20 *Statement of Issues* is also barred by the parol evidence rule, as it conflicts with integrated
21 writings accepted by the parties.

22 **III. Demurrer, Authority Implied From Code of Civil Procedure**

23 A respondent may demur to a complaint on the ground that it does not state facts
24 sufficient to constitute a cause of action when the ground for the objection appears on the face of
25 the complaint. (*See Government Code* sections 11506(a)(2)-(3) and *Code of Civil Procedure*
26 section 430.10(e).) The function of a demurrer is to "test the sufficiency of a complaint by
27 raising questions of law" and the question to be determined upon demurrer is whether the
28 complaint can state facts sufficient to constitute a cause of action. (*Award Metals, Inc. v.*

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1 *Superior Court* (1991) 228 Cal.App.3d 1128, 1131.) For purposes of a demurrer, the "material
2 and issuable facts properly pleaded in the complaint" are admitted, but "contentions, deductions,
3 or conclusions" are not. (*Dyer v. Northbrook Property & Casualty Insurance Co.* (1989) 210
4 Cal.App.3d 1540, 1542-43; *Building Industry Ass 'n v. Marin Municipal Water Dist.* (1991) 235
5 Cal.App.3d 1641, 1645.)

6 **IV. A Complaint is Subject to a Special Demurrer if it is "Uncertain"**

7 A defendant may also specially demur to a complaint where it is "uncertain" or fails to
8 state an act or omission on which an agency may proceed. (*Government Code*, §§11506(a)(2)-
9 (3), *Code of Civil Procedure*, §430.10(f). The Code defines "uncertain" as being, *inter alia*
10 "ambiguous and unintelligible." A special demurrer for uncertainty should be sustained where a
11 class action complaint does not allege an ascertainable class. (*Alvarez v. May Dep't Store Co.*
12 (2006) 143 Cal.App.4th 1223, 1231.) A defendant must be apprised of the issues it is being asked
13 to address so that it can properly respond. (*Ankeny v. Lockheed Missiles and Space Co.* (1979) 88
14 Cal.App.3d 531, 537 [pleadings should be stated with clearness and precision so that "nothing is
15 left to surmise"].) A party may demur to the entire pleading or to any of the causes of action
16 stated in the pleading. (*Government Code*, §§11506(a)(2)-(3), *Code of Civil Procedure*,
17 §430.50(a), *California Rules of Court*, Rule 3.1320.)

18 **V. Grounds Appear on Face of Pleading and/or From Matters Which the Court is**
19 **Required To or May Take Judicial Notice (Including As Concurrently Filed)**

20 It is settled that judicial notice can be taken in aid of a demurrer challenging a complaint:
21 "In consideration of a pleading, the courts must read the same as if it contained a statement of all
22 matters of which they required to take judicial notice, even when the pleading contains an
23 express allegation to the contrary." (*Charles L. Harnev. Inc. v. State* (1963) 217 Cal.App.2d 77;
24 accord, *Alta-Dena Dairy v. County of San Diego* (1969) 271 Cal.App.2d 60 ["In testing the
25 sufficiency of the pleading on demurrer, matters judicially noticed will be considered and will
26 prevail over contrary allegations contained in the pleading"]; *Talifero v. County of Contra Costa*
27 (1960) 192 Cal.App.2d 587 ["Where an allegation is contrary to law or to a fact of which a court
28 may take judicial notice, it is to be treated as a nullity"]; *South Shore Land Co. v. Petersen*

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1 (1964) 226 Cal.App.2d 725 ["A demurrer does not... admit allegations contrary to facts of which
2 a court may take judicial knowledge"].)

3 For sake of the Court's convenience and organization, Malkenhorst has set out the
4 supporting memoranda of authorities by subject matter and specifically incorporates the
5 references and documents in full in this memorandum. The matter of which the Respondent
6 seeks Judicial Notice are set out in the incorporated papers and in the attached Request for
7 Judicial Notice as well.

8 **VI. Leave To Amend Should Be Denied**

9 Sometimes, as here, demurrers should be granted without leave to amend. (*Government*
10 *Code*, §§11506(a)(2)-(3).) An ALJ does not abuse his or her discretion by sustaining
11 a demurrer without leave to amend if it appears from the *Statement of Issues* that, under
12 applicable substantive law, there is no reasonable possibility that an amendment could cure the
13 complaint's defect. (See *Dalton v. East Bay Mun. Utility Dist* (1993) 18 Cal.App.4th 1566, 1570-
14 71.) When a defendant successfully challenges a complaint by demurrer, the plaintiff, to avoid
15 dismissal, must show how he would amend the complaint (See *Association of Community*
16 *Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal.App.4th 298,
17 302.)

18 **VII. Properly Noticed or Set for Hearing**

19 A demurrer shall specify a hearing date.

20 **VIII. Compelled; Involuntary Submission of Challenge and Appeal**

21 Respondent Bruce V. Malkenhorst, Sr. does not consent, acquiesce, or submit to
22 CalPERS' jurisdiction or authority in this matter in any way. Compelled to present information
23 pursuant to *Government Code* section 20128 to prevent an unlawful reduction of Malkenhorst's
24 pension as threatened by CalPERS, Malkenhorst presents facts, legal argument, and information
25 in this document and accompanying filings under protest and with a reservation of rights.
26 Malkenhorst incorporates in full herein the arguments and facts provided in the concurrent
27 filings, and in related documents, but they are also filed under protest, with a full reservation of
28 rights, and without acquiescence or consent to CalPERS' jurisdiction.

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1 The compulsion is that CalPERS will consider a nonresponse to be a default, with the
2 consequence that CalPERS will immediately reduce the pension amount. Without CalPERS
3 continuing to pay the pension, Malkenhorst will not be able to afford counsel to defend himself
4 in litigation to the extent necessary.

5 Counsel has endeavored to make "special appearances" before the OAH prior to the filing
6 of a *Statement of Issues* in order to contest the OAH's and CalPERS' "jurisdiction". But there is
7 no means under the Administrative Procedures Act to make a special appearance or the
8 equivalent.

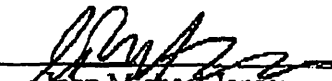
9 By these filings under compulsion, Malkenhorst does not waive any rights. The parties
10 cannot confer jurisdiction by agreement or action.

11 **IX. Conclusion**

12 Based upon the foregoing facts and authorities, Malkenhorst respectfully requests that the
13 Court grant a demurrer to the *Statement of Issues*, and each cause of action therein, including
14 under *Government Code* sections 11506(a)(2)-(3).

15 Respectfully submitted,

18 Dated: October 11, 2013

19 By: 
20 John Michael Jensen,
21 Attorney for Respondent
22 Bruce V. Malkenhorst, Sr.
23
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1 John Jensen, Esq., State Bar No. 176813
2 Law Offices of John Michael Jensen
3 11500 West Olympic Blvd Suite 550
4 Los Angeles CA 90064
5 (310) 312-1100
6 (310) 312-1109 Facsimile
7 johnjensen@johnmjensen.com
8 Attorneys for Respondent Bruce Malckenhorst

9
10
11 **BEFORE THE BOARD OF ADMINISTRATION**

12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

13 In Re the Matter of
14
15 **BRUCE V. MALKENHORST, SR and**
16 **CITY OF VERNON,**
17
18 Respondents.

- 19) CALPERS CASE NO.:
- 20) OAH CASE NO.: 2013080917
- 21)
- 22) **RESPONDENT MALKENHORST'S**
- 23) **NOTICE AND MOTION TO STRIKE**
- 24) **STATEMENT OF ISSUES;**
- 25) **MEMORANDUM OF POINTS AND**
- 26) **AUTHORITIES IN SUPPORT;**
- 27) **[PROPOSED] ORDER**
- 28)
-) Hearing Date: October 31, 2013, 10:00 am
-) Hearing Location: Los Angeles OAH
-)
-) FILED CONCURRENTLY WITH
-) MOTIONS, MEMORANDUM OF POINTS
-) AND AUTHORITIES, AND SUPPORTING
-) PAPERS ON (1) COLLATERAL ESTOPPEL,
-) RES JUDICATA, ISSUE PRECLUSION,
-) CLAIM PRECLUSION; (2) CHARTER CITY
-) AUTONOMY; (3) JUDICIAL ESTOPPEL.
-) (4) PAROLE EVIDENCE RULE (4)
-) JURISDICTIONAL CHALLENGE; (6)
-) DEMURRER;(7) AGENCY FAILURE TO
-) STATE ACTS OR OMISSION ON WHICH
-) AGENCY MAY PROCEED (GOVERN-
-) MENT CODE SECTION 115069(A)(2)-(3));
-) (8) MOTIONS IN LIMINE TO EXCLUDE
-) EVIDENCE; (9) MOTION TO STRIKE FOR
-) INDEFINITENESS; (10) MOTIONS AND
-) CHALLENGES REGARDING AGENCY
-) JURISDICTION AND AUTHORITY; (11)
-) REQUEST FOR JUDICIAL NOTICE

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that on October 31, 2013, at 10:00 am or as soon thereafter as
3 the matter may be heard, before Administrative Law Judge Formaker of the Office of
4 Administrative Hearings, Los Angeles, Respondent Bruce Malkenhorst ("Malkenhorst") shall
5 move the Court pursuant to *Code of Civil Procedure* sections 435 and 436 and *Government Code*
6 section 11504 for an Order striking the *Statement of Issues* filed by Petitioner California Public
7 Employees' Retirement System ("CalPERS").

8 The Office of Administrative Hearings is located at :

9 320 West Fourth Street, Suite 630
10 Los Angeles, CA 90013
11 Located in: The Serra Building
12 Main Telephone Number: 213.576.7200
13 Fax: 916.376.6324

14 The *Statement of Issues* exceeds CalPERS' authority pursuant to *Government Code*
15 section 11504 to decide the matters lawfully put at issue in these administrative proceedings.

16 Respondent Bruce Malkenhorst will and hereby does move the Presiding Judge
17 Formaker of the Office of Administrative Hearings for an order striking in whole the *Statement*
18 *of Issues* of the California Public Employees' Retirement System, and the Board thereof
(collectively CalPERS), filed on or about September 27, 2013.

19 Respondent Bruce Malkenhorst will and hereby does moves to strike the *Statement of*
20 *Issues* pursuant to law, including but not limited to *Government Code* sections 11506(a)(2)-(3)
21 and *Code of Civil Procedure* sections 435, 436, and 437 and their equivalents under the
22 Administrative Procedures Act:

23 *Grounds for striking the Statement of Issues include:*

- 24 (1) The *Statement of Issues* is not drawn in conformity with California law.
25 (2) The *Statement of Issues* must be struck as it is barred by or violates collateral
26 estoppel, *res judicata*, issue preclusion, and claim preclusion. *See attached and*
27 *incorporated Points and Authorities on collateral estoppel and res judicata.*
28 (3) The *Statement of Issues* must be struck as it violates the charter cities autonomy to

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determine compensation and office structure. *See attached and incorporated Points and Authorities on charter city autonomy.*

(4) The *Statement of Issues* must be struck as it violates the appellate court exclusive jurisdiction to determine the issues that are on appeal. *See attached and incorporated Points and Authorities on collateral estoppel and res judicata.*

(5) The *Statement of Issues* must be struck as it violates judicial estoppel. *See attached and incorporated Points and Authorities on judicial estoppel.*

(6) The *Statement of Issues* must be struck as it violates the parole evidence rule. *See attached and incorporated Points and Authorities on the parole evidence rule.*

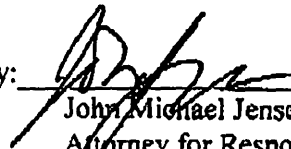
(7) The *Statement of Issues* must be struck as an act in excess of CalPERS' limited agency jurisdiction; *See attached and incorporated Points and Authorities on the limitations to agency jurisdiction.*

(8) The *Statement of Issues* must be struck as it is barred by the statute of limitations. *See attached and incorporated Points and Authorities on the statute of limitations*

This motion is based upon this Notice, the incorporated points and authorities listed herein, the Request for Judicial Notice filed concurrently, the Memorandum of Points and Authorities attached hereto, the documents concurrently file under protest in this matter, and upon such argument and other matters (including the reply memorandum) as may be filed with the Court or received by the Court at the time of hearing.

Respectfully submitted,

Dated: October 11, 2013

By: 

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

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MEMORANDUM OF POINTS AND AUTHORITIES

Respondent files this motion under protest, with a reservation of rights, and as a "special appearance". Concurrently filed motions and supporting papers are incorporated in full herein.

Respondent moves for an order striking the *Statement of Issues* under *Government Code* sections 11506(a)(2)-(3) and *Code of Civil Procedure* sections 435, 436, and 437 and their equivalents under the *Administrative Procedures Act*¹ including on the grounds that the *Statement of Issues* is not drawn in conformity with law.

I. The Office of Administrative Hearings Is Authorized to Strike the Whole and Parts of Pleadings

Explicitly under the *Government Code*, the ALJ is empowered to strike a non-conforming pleading:

- (a) Within 15 days after service of the accusation the respondent may file with the agency a notice of defense in which the respondent may:
 - (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.
 - (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense. (*Government Code*, § 11506.)

II. Authority to Bring Motion to Strike

Code of Civil Procedure section 435 grants a party the right to serve and file a notice of motion to strike a pleading in whole or any part thereof. (*Code of Civil Procedure*, section 435(b)(1).)

Although there is no explicit authority for a motion to strike or a demurrer under the APA, it appears to be implicit in the respondent's ability to object to the pleading in the notice of defense ... on grounds that the pleading does not state acts or omissions on which the agency may proceed (*Govt C* §11506(a)(2)).... In such cases, a motion to strike or a demurrer during the pretrial phase would be appropriate. Generally these issues should be dealt with as a motion before the

¹ CalPERS seeks to reduce Malkenhorst's existing pension. A pension is a property right and a legal privileges to which he is currently legally entitled. Procedurally, a right or privilege should be revoked, suspended, limited or conditioned by filing an accusation. (*Government Code*, §11503.) Malkenhorst is entitled to file these challenges, including those available to accusations, because in essence CalPERS is filing an accusation.

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1 appropriate. Generally these issues should be dealt with as a motion before the
2 hearing or at the prehearing conference.

3 (*Cal. Admin. Hearing Prac., 2nd Ed., §6.58.*)

4 **A. Malkenhorst Timely Objected to Portions of CalPERS's Statement of Issues**

5 As indicated in the attached Declaration of John Michael Jensen, counsel for Malkenhorst
6 received CalPERS' *Statement of Issues* on September 27, 2013. Counsel timely asserted his
7 objections to those issues, reserved his rights and objected to CalPERS' lack of jurisdiction to
8 consider such matters in his *Notice of Defense*. CalPERS has refused to amend or withdraw any
9 portion of its *Statement of Issues*.

10 This motion is also brought consistent with the ALJ orders in the *Notice of Prehearing*
11 *Conference* to bring motions at the prehearing conference.

12 Thus, Malkenhorst brings this Motion to Strike.

13 **B. The Statement of Issues Exceeds CalPERS' Statutory Authority**

14 The *Statement of Issues* is not drawn in conformity with California law. As there is no
15 basis in California law for CalPERS' *Statement of Issues*, it should be stricken. The *Statement of*
16 *Issues* does not state acts or omissions upon which the agency may proceed. (*Government Code,*
17 *§11506.*) The form of the accusation is so indefinite or uncertain that Respondent cannot identify
18 the transaction or prepare a defense. (*Government Code, §11506.*) Respondent moves to strike all
19 of the *Statement of Issues* for the following grounds:

- 20 1. The matter is irrelevant, false, improper, and/or not drawn in conformity with
21 laws, local rules, or order of court, and
- 22 2. The *Statement of Issues* does not state acts or omissions upon which the agency
23 may proceed (*Government Code, §11506*) in that the *Statement of Issues* is:
 - 24 a) Not drawn in conformity with California law.
 - 25 b) Barred by or violates collateral estoppel, *res judicata*, issue preclusion,
26 and claim preclusion. *See attached and incorporated Points and*
27 *Authorities on collateral estoppel and res judicata.*
 - 28 c) Violates the charter cities autonomy to determine compensation and office
structure. *See attached and incorporated Points and Authorities on charter*

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city autonomy.

- d) Violates the appellate court exclusive jurisdiction to determine the issues that are on appeal. *See attached and incorporated Points and Authorities on collateral estoppel and res judicata.*
- e) Violates judicial estoppel. *See attached and incorporated Points and Authorities on judicial estoppel.*
- f) Violates the parole evidence rule. *See attached and incorporated Points and Authorities on the parole evidence rule.*
- g) Is an act in excess of CalPERS' limited agency jurisdiction; *See attached and incorporated Points and Authorities on agency jurisdiction.*
- h) Is barred by the statute of limitations. *See attached and incorporated Points and Authorities on the statute of limitations.*

III. Motion to Strike, Authority Implied From Code of Civil Procedure

Code of Civil Procedure section 435 provides:

(a) As used in this section:

- (b)(1) Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof, but this time limitation shall not apply to motions specified in subdivision (e).
- (2) A notice of motion to strike the answer or the complaint, or a portion thereof, shall specify a hearing date set in accordance with Section 1005.
- (3) A notice of motion to strike a demurrer, or a portion thereof, shall set the hearing thereon concurrently with the hearing on the demurrer.

Code of Civil Procedure section 436 provides:

The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

California Rules of Court, Rule 329, provides:

A notice of motion to strike a portion of a pleading shall quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count or defense.

1 A motion to strike can be used where the complaint or other pleading has not been drawn
2 or filed in conformity with applicable rules or court orders. (*Code of Civil Procedure*, §436(b).)
3 This provision authorizes "the striking of a pleading due to improprieties in its *form* or in
4 the *procedures* pursuant to which it was filed." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th
5 509, 528.)

6 **IV. Grounds Appear on Face of Pleading and/or From Matters Which the Court Is**
7 **Required To or May Take Judicial Notice (Including As Concurrently Filed)**

8 "The grounds for a motion to strike shall appear on the face of the challenged pleading or
9 from any matter of which the court is required to take judicial notice." (*Code of Civil Procedure*,
10 §437(a).) "When the motion to strike is based on matter of which the court may take judicial
11 notice pursuant to Section 452 or 453 of the Evidence Code, such matter shall be specified in the
12 notice of motion, or in the supporting points and authorities, except as the court may otherwise
13 permit." (*Code of Civil Procedure*, §437(b).)

14 For sake of the Court's convenience and organization, Malkenhorst has set out the
15 supporting memorandum of authorities by subject matter and specifically incorporates the
16 references and documents in full in this memorandum. The matters of which the Respondent
17 seeks Judicial Notice are set out in the incorporated papers and in the attached Request for
18 Judicial Notice as well.

19 **V. Properly Noticed or Set for Hearing**

20 A notice of motion to strike the answer or complaint, or a portion thereof, shall specify a
21 hearing date set in accordance with Section 1005." (*Code of Civil Procedure*, §435(b)(2).)

22 **VI. Compelled. Involuntary Submission of Challenge and Appeal**

23 Respondent Bruce V. Malkenhorst, Sr. does not consent, acquiesce, or submit to
24 CalPERS' jurisdiction or authority in this matter in anyway. Compelled to present information
25 pursuant to *Government Code* section 20128 to prevent an unlawful reduction of Malkenhorst's
26 pension as threatened by CalPERS, Malkenhorst presents facts, legal argument, and information
27 in this document and accompanying filings under protest and with a reservation of rights.
28 Malkenhorst incorporates in full herein the arguments and facts provided in the concurrent

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1 filings, and in related documents, but they are also filed under protest, with a full reservation of
2 rights, and without acquiescence or consent to CalPERS' jurisdiction.

3 The compulsion is that CalPERS will consider a nonresponse to be a default, with the
4 consequence that CalPERS will immediately reduce the pension amount. Without CalPERS
5 continuing to pay the pension, Malkenhorst will not be able to afford counsel to defend himself
6 in litigation to the extent necessary.

7 Counsel has endeavored to make "special appearances" before the OAH prior to the filing
8 of a *Statement of Issues* in order to contest the OAH and CalPERS' "jurisdiction". But there is no
9 means under the Administrative Procedures Act to make a special appearance or the equivalent.

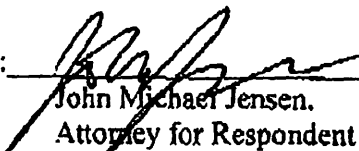
10 By these filings under compulsion, Malkenhorst does not waive any rights. The parties
11 cannot confer jurisdiction by agreement or action.

12 **VII. Conclusion**

13 All of the foregoing matters of the *Statement of Issues* exceed CalPERS' authority
14 pursuant to *Government Code* section 11504 to decide the matters at issue in these administrative
15 proceedings. Based upon the foregoing and concurrently filed motions, memorandums, facts and
16 authorities, Malkenhorst respectfully requests that the Court issue an order striking the *Statement*
17 *of Issues*.

18 Respectfully submitted.

19
20
21 Dated: October 11, 2013

22 By: 
23 John Michael Jensen,
24 Attorney for Respondent
25 Bruce V. Malkenhorst, Sr.

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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) OAH CASE NO.: 2013080917
16 BRUCE V. MALKENHORST, SR., and)
17 CITY OF VERNON,)
18 Respondents.) BRUCE V. MALKENHORST, SR.'S
19) NOTICE OF MOTION AND MOTION IN
20) LIMINE TO EXCLUDE CERTAIN
21) PREJUDICIAL AND INADMISSIBLE
22) EVIDENCE AND TESTIMONY; PAROL
23) EVIDENCE RULE, MEMORANDUM OF
24) POINTS AND AUTHORITIES AND
25) DECLARATION IN SUPPORT;
26) [PROPOSED] ORDER, SET ONE
27)
28) Hearing Dates: October 31, 2013, 10:00 am
) Hearing Location: Los Angeles OAH

21
22 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

23 PLEASE TAKE NOTICE that on October 31, at 10:00 am or as soon thereafter as the
24 matter may be heard, before Presiding Administrative Law Judge Formaker of the Office of
25 Administrative Hearings, Los Angeles, Respondent Bruce Malkenhorst ("Malkenhorst") shall
26 move the Court for an order in limine to exclude certain evidence and testimony which
27 Malkenhorst believes will be offered by CalPERS at the time of trial. This motion is based on the
28 attached Memorandum, the concurrently lodged files, and Declaration and other evidence as may

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1 be introduced at the time of the prehearing conference or at hearing.

2 Malkenhorst files this Motion in Limine to preclude the presentation of testimony and
3 various pieces of prejudicial and irrelevant argument and "evidence", including pursuant to the
4 administrative law judge's inherent power to promote the orderly and prompt conduct of a
5 hearing. (*Government Code*, §§11506, 11511.5(b) (12), 11513(b); *California Rules of Court*,
6 Rule 3.1112(a)-(d),(f).)

7 Malkenhorst has reason to believe and docs believe that certain inadmissible and
8 prejudicial evidence will be introduced or attempted to be introduced at the trial of this cause
9 and, therefore, requests the Office of Administrative Hearings to enter an order suppressing
10 testimony and statements and evidence of any type, that contradicts or violates:

- 11 (1) Conclusive evidentiary presumptions, including of (i) facts contained in a written
12 instrument, and (ii) conduct that may be estopped;
- 13 (2) Matters that cannot be collaterally attacked and are established by collateral
14 estoppel, *res judicata*;
- 15 (3) Matters that cannot be collaterally attacked and are established by judicial
16 estoppel;
- 17 (4) Parol Evidence Rule;
- 18 (5) Charter city autonomy; and
- 19 (6) Written agreements regarding or varying the terms of Malkenhorst's currently
20 calculated pension, pay rate, compensation, office structure, and related matters.

21 The *Statement of Issues* does not state acts or omissions upon which the agency may
22 proceed. (*Government Code*, §11506.) Since the *Statement of Issues* fails to state acts or
23 omission on which the agency may legally proceed, there is no evidence that is relevant and no
24 evidence should be admitted including to contradict (i) Malkenhorst's pay rate or compensation
25 that is governed by charter city autonomy and established in written instruments, (ii) CalPERS'
26 and Vernon's prior statements in related legal proceedings which are subject to judicial estoppel;
27 (ii) previous legal matters that were finally resolved whose reconsideration is barred by collateral
28 estoppel and *res judicata*; and (iii) other matters.

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1 Only relevant evidence can be admitted:

2 Any relevant evidence shall be admitted if it is the sort of evidence on which
3 responsible persons are accustomed to rely in the conduct of serious affairs,
4 regardless of the existence of any common law or statutory rule which might
5 make improper the admission of the evidence over objection in civil actions.
6 (*Government Code*, §11513.)

7 Malkenhorst also moves to exclude all evidence that would directly or indirectly reduce
8 the pension allowance.

9 For organizational reasons, these challenges and the supporting papers, including made
10 pursuant to *Government Code* section 11506, are made in separate pleadings, motions, and points
11 and authorities that each incorporate the other, yet each is filed under protest with a reservation
12 of rights. (*Government Code*, §§11506, 11511.5(b)(12), 11513(b); *California Rules of Court*,
13 Rule 3.1112(a)-(d),(f).) As such, this Points and Authorities incorporates herein all of the
14 concurrently filed points and authorities, motions, and supporting papers. For example,
15 Malkenhorst incorporates herein the facts in the concurrently filed *Memorandum of Points and*
16 *Authorities on Laches, Statute of Limitations, and Other Affirmative Defenses*.

17 Malkenhorst provides these motions and *Memorandum* involuntarily and under protest
18 and does not in any manner waive, nor intend to waive, any of his legal rights. As a foundational
19 matter, CalPERS has no legal right to initiate or conduct an administrative process that is barred
20 by laches, statute of limitations, collateral estoppel, *res judicata*, and other affirmative defenses.

21 Malkenhorst neither consents to CalPERS' administrative process nor waives his
22 challenges to CalPERS' jurisdiction.

23 Malkenhorst requests that the OAH set a time and place for a hearing on this motion and
24 that, after such hearing, the OAH enter its order suppressing all such testimony and statements
25 and evidence of any kind or character, pertaining to the subjects or matters set forth above and
26 ordering the parties and their counsel to advise all witnesses of this order and its effect, prior to
27 testifying.

28 For example, Malkenhorst's motion to exclude is made on the grounds that CalPERS'
29 evidence and testimony attempts to vary the terms in an integrated employment arrangements

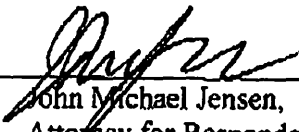
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1 between Malkenhorst and the City of Vernon, where the evidence is inadmissible under the parol
2 evidence rule.

3 This motion is based on this notice; on the concurrently file *Jurisdictional Challenge*.
4 *Motion in Limine*, and supporting papers, including on the accompanying *Memorandum of*
5 *Points and Authorities and Declaration In Support*; on all pleadings, papers and records in this
6 administrative proceeding; and on any additional evidence presented and oral argument made at
7 the hearing on this motion.

8 Respectfully submitted.

9
10 Dated: October 11, 2013

11 By: 
12 John Michael Jensen,
13 Attorney for Respondent
14 Bruce V. Malkenhorst, Sr.

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8

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTIONS IN LIMINE TO BAR INTRODUCTION OF EVIDENCE**

I. FACTUAL BACKGROUND

Malkenhorst incorporates herein the facts in the concurrently filed pleading, particularly the Memorandum of Points and Authorities on Laches, Statute of Limitations, and Other Affirmative Defenses.

II. LAW AND ARGUMENT

A. Motions in Limine Are Appropriate

Motions in limine are well recognized in practice and by case law. (See *People v. Morris* (1991) 53 Cal.3d 152 (disapproved of on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1); see also *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451; and *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1156.)

Malkenhorst makes these motions in limine "at the threshold" of hearing to exclude evidence deemed inadmissible and prejudicial by the moving party. (*People v. Morris, supra; People v. Stansbury, supra; FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, 1168.)

B. The OAH and ALJs Have Discretion to Make Evidentiary Rulings Prior to Trial

The OAH has discretion to rule on evidentiary matters prior to their actual admission into evidence. (*Government Code*, §11506(a)(2)-(3); *Evidence Code*, §402; *People v. Jennings* (1988) 46 Cal.3d 963, 975.)

Explicitly under the *Government Code*, the ALJ is empowered to regulate the admission of evidence if it is irrelevant because the *Statement of Issues* does not (i) state a cause of action or (ii) acts or omissions upon which the agency may proceed. (*Government Code*, §11506.)

Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

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(Government Code, §11513.)

The authority for such motions also may be implied from the hearing officer's inherent power to:

- "provide for the orderly conduct of proceedings before it"
- "control its process and orders so as to make them conform to law and justice"
- exclude irrelevant evidence
- exclude evidence whose probative value is substantially outweighed by the probability that its admission will consume undue time or create substantial danger of undue prejudice, confusion of the issues, or mislead the jury
- curb abuses and promote fair process (see *Peat. Marwick, Mitchell & Co. v. Sup.Ct. (People)* (1988) 200 Cal.App.3d 272, 287; compare *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 164-166.)

With reference to (a) the acts or omissions upon which the agency may proceed on and (b) the cause of actions implied in the *Statement of Issues*, Respondent moves to exclude evidence:

- (1) That would violate the charter city autonomy, appellate court exclusive jurisdiction and other infirmities (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381); and (2) running of the statute of limitations (*In re Demillo* (1975) 14 Cal.3d 598).
- (2) Is barred by or violates collateral estoppel, *res judicata*, issue preclusion, and claim preclusion. See attached and incorporated *Points and Authorities on collateral estoppel and res judicata*.
- (3) Violates the charter cities autonomy to determine compensation and office structure. See attached and incorporated *Points and Authorities on charter city autonomy*.
- (4) Violates the appellate court exclusive jurisdiction to determine the issues that are on appeal. See attached and incorporated *Points and Authorities on collateral estoppel and res judicata*.

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1 (5) Violates judicial estoppel. *See attached and incorporated Points and Authorities*
2 *on judicial estoppel.*

3 (6) Violates the parole evidence rule. *See attached and incorporated Points and*
4 *Authorities on the parole evidence rule.*

5 (7) Is barred by the statute of limitations. *See attached and incorporated Points and*
6 *Authorities on the statute of limitations.*

7 Motions in limine can be used to exclude "any kind of evidence which could be objected
8 to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial."

9 (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451.)

10 C. **Motion To Exclude All Evidence That Would Reduce or Impair Existing**
11 **Pension**

12 Malkenhorst moves to exclude all evidence and makes objection to any and
13 all evidence on the ground the pleadings are fatally defective for failure to state a cause of action
14 and failure to state an act or omissions on which the agency may proceed. (*Government Code*,
15 §§11511.5(b)(12), 11513(b); *California Rules of Court*, Rule 3.1112(a)-(d), (f).)

16 The in limine motion can operate as a general demurrer, a motion for judgment on the
17 pleadings, or the functional equivalent of an order sustaining a demurrer to the evidence, or a
18 nonsuit. (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, review denied, Aug. 8, 2012.)

19 D. **The OAH and ALJs Have Inherent Powers to Grant Motions in Limine That**
20 **Effectively Bar Substantive Claims**

21 Judges have expressly permitted the use of a motion in limine to dispose of causes of
22 action. (*See, e.g., Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 701-702 [affirming
23 judgment on the pleadings based on motions in limine, on the basis that a "court's inherent
24 powers to control litigation and conserve judicial resources authorize it to conduct hearings and
25 formulate rules of procedure as justice may require"]; *Mechanical Contractors Assn. v. Greater*
26 *Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676-677 [motion in limine may properly be used to
27 end the trial without the introduction of evidence]; *Edwards v. Centex Real Estate Corp.* (1997)
28 53 Cal.App.4th 15, 26-27 [same]; *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d

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1 444, 451 [rejecting argument that a motion in limine may not be used as a substitute for a motion
2 for judgment on the pleadings].)

3 **E. Conclusive Presumptions Should Be Upheld**

4 Where law makes certain fact a conclusive presumption, evidence cannot be received to
5 the contrary. (*Williams v. Moon* (1950) 98 Cal.App.2d 214, 219.)

6 One of the motions Motion in Limine presents a basic evidentiary issue: whether
7 CalPERS and Vernon's statements, as set forth in written instruments accepted by all the parties
8 at the time that they were made, are conclusively presumed to be true as between CalPERS and
9 Malkenhorst.

10 *Evidence Code* section 622 creates a presumption that statements made in instruments are
11 conclusively deemed true between the parties.

12 The presumptions established by this article, and all other presumptions declared
13 by law to be conclusive, are conclusive presumptions.
14 (*Evidence Code*, §620.)

15 Wherever from one fact another is said to be conclusively presumed, in the sense the
16 opponent is absolutely precluded from showing by any evidence that the second fact does not
17 exist, the rule is really providing that where the first fact is shown to exist, the second fact's
18 existence is wholly immaterial for the purpose of the proponent's case; to provide this is to make
19 a rule of substantive law and not a rule apportioning the burden of persuading as to certain
20 propositions or varying the duty of coming forward with the evidence. (*People v. Burroughs*
21 (2005) 131 Cal.App.4th 1401, review denied.)

22 **F. Conclusive Presumptions: Facts in Written Instruments**

23 The facts recited in a written instrument are conclusively presumed to be true as
24 between the parties thereto, or their successors in interest; but this rule does not
25 apply to the recital of a consideration.
(*Evidence Code*, §622.)

26 The rule of evidence, providing that facts recited in a written instrument are conclusively
27 presumed to be true as between the parties thereto, is based upon the doctrine of estoppel by
28 contract, i.e., a party to a contract is generally estopped to deny essential facts recited therein. (*In*

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1 *re Marriage of Brooks* (2008) 169 Cal.App.4th 176, rehearing denied, review denied.)

2 **G. Nature of Writing**

3 Written paper or "instrument" for purposes of Evidence Code section creating conclusive
4 presumption that facts recited in written instrument are true as between parties or their successors
5 need not represent an agreement. (*Plaza Freeway Ltd. Partnership v. First Mountain Bank*
6 (2000) 81 Cal.App.4th 616.)

7 **H. Conclusive Presumptions: Estoppel by Conduct**

8 Equitable estoppel precludes party from claiming benefits of a contract while
9 simultaneously attempting to avoid burdens that contract imposes. (*Mundi v. Union Sec. Life Ins.*
10 *Co.* (9th Cir. 2009) 555 F.3d 1042.)

11 Whenever a party has, by his own statement or conduct, intentionally and
12 deliberately led another to believe a particular thing true and to act upon such
13 belief, he is not, in any litigation arising out of such statement or conduct,
14 permitted to contradict it.
(*Evidence Code*, §623.)

15 Conclusive presumptions (written instrument, and estoppel by conduct) prohibit
16 CalPERS from introducing evidence that:

- 17 (1) That would violate the charter city autonomy, appellate court exclusive
18 jurisdiction and other infirmities (*People v. Superior Court (Caswell)* (1988) 46
19 Cal.3d 381); and (2) running of the statute of limitations (*In re Demillo* (1975) 14
20 Cal.3d 598).
- 21 (2) Is barred by or violates collateral estoppel, *res judicata*, issue preclusion, and
22 claim preclusion. *See attached and incorporated Points and Authorities on*
23 *collateral estoppel and res judicata.*
- 24 (3) Violates the charter cities autonomy to determine compensation and office
25 structure. *See attached and incorporated Points and Authorities on charter city*
26 *autonomy.*
- 27 (4) Violates the appellate court exclusive jurisdiction to determine the issues that are
28 on appeal. *See attached and incorporated Points and Authorities on collateral*

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estoppel and res judicata.

(5) *Violates judicial estoppel. See attached and incorporated Points and Authorities on judicial estoppel.*

(6) *Violates the parole evidence rule. See attached and incorporated Points and Authorities on the parole evidence rule.*

(7) *Is barred by the statute of limitations. See attached and incorporated Points and Authorities on the statute of limitations.*

I. Motions in Limine to Exclude Evidence. Unfavorable Facts

Regarding Plaintiff:

Anything unfavorable to plaintiff may be excluded *if irrelevant* to the issues in the case. (see *Evidence Code*, §350.) For example, such things as plaintiff's:

—*criminal record;*

—*traffic citation* received in accident (without a guilty plea or conviction);

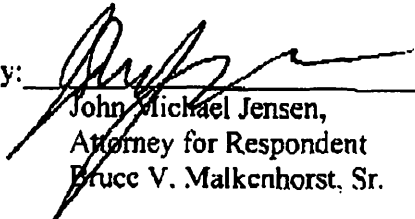
J. Witnesses Not Listed on Witness List

Witnesses not listed on a witness list may be barred from testifying at trial.

VI. CONCLUSION

The Court should grant the motions in limine to exclude evidence.

Dated: October 11, 2013

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

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8 Attorneys for Respondent
9 Bruce V. Malkenhorst, Sr.

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

13 In Re the Matter of) **CALPERS CASE NO.: TBD**
14) **OAH CASE NO.: TBD**
15 **BRUCE V. MALKENHORST, SR., and**)
16 **CITY OF VERNON,**) **BRUCE V. MALKENHORST, SR.'S**
17) **REQUEST FOR EVIDENTIARY**
18) **HEARING OR PREHEARING ON**
19) **COLLATERAL ESTOPPEL, RES**
20) **JUDICATA, CLAIM/ISSUE**
21) **PRECLUSION, CHARTER CITY,**
22) **LACHES, STATUTE OF LIMITATIONS,**
23) **AFFIRMATIVE DEFENSES**
24)
25) **EXHIBITS 1 through *IBD***
26)
27) **Hearing Dates: _____**
28) **Hearing Location: _____**

22 Bruce V. Malkenhorst, Sr. requests a pre-hearing evidentiary hearing to provide
23 testimony and evidence to establish the elements of collateral estoppel, res judicata, issue/claim
24 preclusion, charter city constitutional autonomy, statute of limitations and laches at the threshold
25 to bar any further hearing or proceeding.
26
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1 Malkenhorst seeks witness testimony and the introduction of evidence on these
2 affirmative and jurisdictional defenses prior to holding a hearing on the other matters presented
3 as the defenses would bar further consideration of this matter by CalPERS.

4 Malkenhorst has an absolute right to present evidence in order to establish these
5 jurisdictional and affirmative defenses. In addition, Malkenhorst has an absolute right to an
6 evidentiary hearing on these jurisdictional and affirmative defenses prior to any other hearing as
7 the successful establishment of these defense would bar a further hearing
8

9 A prehearing evidentiary trial on collateral estoppel, res judicata would also be consistent
10 with the trial court finding that the matters had to be exhausted in the administrative process.

11 Malkenhorst has raised collateral estoppel, res judicata, issue/claim preclusion, charter
12 city constitutional autonomy, statute of limitations and laches at the threshold to bar the
13 proceeding, and incorporates in full herein the concurrently filed memorandums of points and
14 authorities on (1) collateral estoppel and res judicata, (2) charter cities; (3) laches and statute of
15 limitations; (4) parol evidence, (5) Motions in limine; and (6) other motions, points and
16 authorities, and supporting documents file concurrently.
17

18 As CalPERS seeks to reduce his vested pension, Malkenhorst has the right to present
19 evidence and testimony in his defense.
20

21 For organizational reasons, these challenges and the supporting papers, including made
22 pursuant to Government Code 11506, are made in separate pleadings, motions, and points and
23 authorities that each incorporate the other, yet each is filed under protest with a reservation of
24 rights. As such, this Points and authorities incorporates herein all of the concurrently filed points
25 and authorities.
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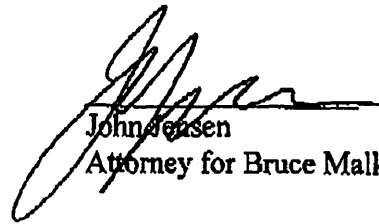
27 Malkenhorst provides this *motion* under protest and does not in any manner waive, nor
28

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1 intend to waive, any of his legal rights. As a foundational matter, CalPERS has no legal right to
2 initiate or conduct an administrative process that is barred by laches, statute of limitations,
3 collateral estoppel, res judicata, and other affirmative defense.

4 Malkenhorst neither consents to CalPERS' administrative process nor waives his
5 challenges to CalPERS' jurisdiction.
6

7
8 Dated October 10, 2013


John Jensen
Attorney for Bruce Malkenhorst

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

9 In Re the Matter of
10 BRUCE V. MALKENHORST, SR and
11 CITY OF VERNON,
12 Respondents.

) CALPERS CASE NO.:
) OAH CASE NO.: 2013080917
)
) **RESPONDENT MALKENHORST'S**
) **NOTICE AND MOTION TO FORCE**
) **CALPERS TO PROCEED BY**
) **ACCUSATION, BEAR BURDEN OF**
) **PROOF; MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN SUPPORT**
)
) Hearing Date: October 31, 2013, 10:00 am
) Hearing Location: Los Angeles OAH
)
) FILED CONCURRENTLY WITH
) MOTIONS, MEMORANDUM OF POINTS
) AND AUTHORITIES, AND SUPPORTING
) PAPERS ON (1) COLLATERAL ESTOPPEL,
) RES JUDICATA, ISSUE PRECLUSION,
) CLAIM PRECLUSION; (2) CHARTER CITY
) AUTONOMY; (3) JUDICIAL ESTOPPEL,
) (4) PAROLE EVIDENCE RULE (4)
) JURISDICTIONAL CHALLENGE; (6)
) DEMURRER;(7) AGENCY FAILURE TO
) STATE ACTS OR OMISSION ON WHICH
) AGENCY MAY PROCEED (GOVERN-
) MENT CODE SECTION 115069(A)(2)-(3));
) (8) MOTIONS IN LIMINE TO EXCLUDE
) EVIDENCE; (9) MOTION TO STRIKE FOR
) INDEFINITENESS; (10) MOTIONS AND
) CHALLENGES REGARDING AGENCY
) JURISDICTION AND AUTHORITY; (11)
) REQUEST FOR JUDICIAL NOTICE

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:
 2 PLEASE TAKE NOTICE that on October 31, 2013, at 10:00 am or as soon thereafter as
 3 the matter may be heard, before Administrative Law Judge Formaker of the Office of
 4 Administrative Hearings, Los Angeles, Respondent Bruce Malkenhorst ("Malkenhorst") shall
 5 move the Court pursuant to *Government Code* section 11500 et seq for an Order compelling
 6 Petitioner California Public Employees' Retirement System ("CalPERS") to proceed by
 7 Accusation and to bear the burden of proof.

8 The Office of Administrative Hearings is located at :

9 320 West Fourth Street, Suite 630
 10 Los Angeles, CA 90013
 11 Located in: The Serra Building
 12 Main Telephone Number: 213.576.7200
 13 Fax: 916.376.6324

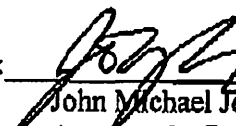
14 Respondent Bruce Malkenhorst will and hereby does moves the OAH to compel
 15 CalPERS to proceed by Accusation and bear the burden of proof, including but not limited to
 16 *Government Code* sections 11500 et seq and 11506(a)(2)-(3)

17 This motion is based upon this Notice, the incorporated points and authorities listed herein,
 18 the Request for Judicial Notice filed concurrently, the Memorandum of Points and Authorities
 19 attached or concurrently filed, the documents concurrently filed under protest in this matter, and
 20 upon such argument and other matters (including the reply memorandum) as may be filed with the
 21 Court or received by the Court at the time of hearing.

22 Respectfully submitted,

23 Dated: October 11, 2013

24 By:


 25 John Michael Jensen,
 26 Attorney for Respondent
 27 Bruce V. Malkenhorst, Sr.
 28

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MEMORANDUM OF POINTS AND AUTHORITIES

Respondent files this motion under protest, with a reservation of rights, and as a "special appearance".

Respondent moves for an order compelling CalPERS to proceed by Accusation and bear the burden of proof, pursuant to Government Code Section 11500 et seq, sections 11506(a)(2)-(3)

A. CalPERS Seeks to Reduce Malkenhorst's Vested Pension, Must Proceed by Accusation; CalPERS Bears the Burden of Proof

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

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

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

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

Malkenhorst does not in any way concede or waive his rights to challenge these administrative proceedings based on jurisdictional, collateral estoppel and other grounds. However, if CalPERS ultimately is held to have authority to go forward with administrative

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1 proceedings, to disallow portions of the monies earned by Malkenhorst and reported to
2 CalPERS, and to reduce his vested pension allowance as a result, this would constitute
3 "revo[cation], suspen[sion], limit[ation] or condition[ing]" of Malkenhorst's "right, authority,
4 license or privilege" to receive the vested pension benefits to which he is entitled and which he
5 has been correctly paid by CalPERS since his retirement. This is all the more the case given that
6 CalPERS has already conducted an administrative review and appeal process of these same
7 issues in 2004 through 2006 and awarded Malkenhorst his full pension at that time.

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

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

15 The proceedings in any hearing on CalPERS' right to reduce Malkenhorst's monthly
16 pension allowance or to make any changes in the reporting of his compensation earnable must be
17 held pursuant to the relevant sections of the *Government Code* governing proceedings initiated
18 by an "accusation".

19 **B. Burden of Proof on CalPERS in an Accusation**

20 Since it is taking away benefits already bestowed and vested, CalPERS bears the burden of
21 proof in this action and on claims brought by accusation.

22
23 CalPERS is trying to reduce a vested benefit. The commonly declared rule that the burden is
24 on the party having "the affirmative of the issue" applies in administrative proceedings. (See *La*
25 *Prade v. Department of Water & Power of Los Angeles* (1945) 27 C.2d 47, 51, 162 P.2d 13
26 [proceeding to discharge municipal employee; "The burden does not rest upon him to refute the
27
28

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1 charges made". In other words, Malkenhorst is not required to refute the allegations that
2 CalPERS makes.

3
4 For example, in a disciplinary proceeding, the burden is on the agency to prove the
5 grounds for suspension or revocation of a license, or for discharge of an employee. (*Walker v.*
6 *San Gabriel* (1942) 20 C.2d 879, 880, 129 P.2d 349; *La Prade v. Department of Water & Power*
7 *of Los Angeles*, supra; *Parker v. Fountain Valley* (1981) 127 C.A.3d 99, 113, 179 C.R. 351
8

9 In the circumstance where an administrative appeal hearing is the first evidentiary inquiry
10 into the facts giving rise to a punitive action, it is axiomatic, in disciplinary administrative
11 proceedings, that the burden of proving the charges rests upon the party making the charges.
12 *Brown v. City of Los Angeles*, 102 Cal. App. 4th 155, 125 Cal. Rptr. 2d 474 (2d Dist. 2002).
13

14 The obligation of a party to sustain the burden of proof requires the production of evidence
15 for that purpose. *Brown v. City of Los Angeles*, 102 Cal. App. 4th 155, 125 Cal. Rptr. 2d 474 (2d
16 Dist. 2002); The mere fact that the licensee has the right to subpoena witnesses does not relieve
17 the agency of meeting its burden of producing competent evidence supporting the discipline.
18 *Daniels v. Department of Motor Vehicles*, 33 Cal. 3d 532, 189 Cal. Rptr. 512, 658 P.2d 1313
19 (1983). Thus, until the agency in a disciplinary proceeding has met its burden of going forward
20 with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations
21 or otherwise respond. *Daniels v. Department of Motor Vehicles*, 33 Cal. 3d 532, 189 Cal. Rptr.
22 512, 658 P.2d 1313 (1983); *Parker v. City of Fountain Valley*, 127 Cal. App. 3d 99, 179 Cal.
23 Rptr. 351 (4th Dist. 1981); *Martin v. State Personnel Bd.*, 26 Cal. App. 3d 573, 103 Cal. Rptr.
24 306 (3d Dist. 1972).
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1 **C. Vesting of Pension Benefit**

2 Public employees' retirement rights are contractual and are vested in the sense that the
3 lawmakers' power to alter them after they have been earned is quite limited. (*California Ass'n of*
4 *Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371; *In re Retirement Cases*
5 (2003) 110 Cal.App.4th 426.) By entering public service, an employee obtains a vested
6 contractual right to earn a pension on terms substantially equivalent to those then offered by the
7 employer. (*California Ass'n of Professional Scientists v. Schwarzenegger, supra.*)

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

15 After the contractual duty to make salary payments has arisen, the employing body may
16 not deny or impair its contingent liability to furnish a pension any more than it can refuse to
17 make the salary payments that are immediately due, since a part of the compensation the
18 employee has at that time earned consists of pension rights. (*Bellus v. City of Eureka* (1968) 69
19 Cal.2d 336 [in this respect the public agency is no different from any other employer or public
20 service institution which induces reliance on a contract that may reasonably be interpreted to
21 afford a protection already impliedly promised]; *Kern v. City of Long Beach* (1947) 29 Cal.2d
22 848.)

23 **D. No Modification Allowed After Retirement.**

24 A pension right may not be destroyed, once vested, without impairing a contractual
25 obligation of the employing public entity. (*Kern v. City of Long Beach, supra*, at 852-853; *Betts*
26 *v. Board of Administration* (1978) 21 Cal.3d 859, 863.)

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I. Conclusion

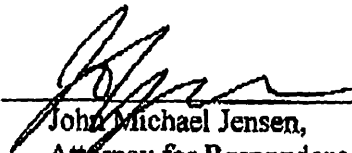
All of the foregoing matters of the *Statement of Issues* exceed CalPERS' authority pursuant to *Government Code* section 11504 to decide the matters at issue in these administrative proceedings.

Based upon the foregoing and concurrently filed motions, memorandums, facts and authorities, Malkenhorst respectfully requests that CalPERS proceed by Accusation and bear the burden of proof and production.

Respectfully submitted,

Dated: October 11, 2013

By: _____



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

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9 Bruce V. Malkenhorst, Sr.

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

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

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

26 **At the threshold to bar CalPERS claim, Malkenhorst seeks a motion hearing to provide**
27 **evidence to establish the elements of collateral estoppel, res judicata, laches, statute of**
28 **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

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

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

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

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

Dated October 9, 2013


John Jensen
Attorney for Bruce Malkenhorst

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6 *Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75 Cal. App. 4th 316, 89 Cal.

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8 *Green v. Obledo*, 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256 (1981).....22

9 *Kirk v. County of San Luis Obispo*, 156 Cal. App. 3d 453, 202 Cal. Rptr. 606 (2d Dist. 1984)...21

10 *Medical Bd. of California v. Superior Court*, 227 Cal. App. 3d 1458, 278 Cal. Rptr. 247 (3d Dist.

11 1991).....1, 21

12 *Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate*

13 *Commission*, 17 Cal. 2d 204, 109 P.2d 918 (1941).....21

14 *Ragan v. City of Hawthorne*, 212 Cal. App. 3d 1361, 261 Cal. Rptr. 219 (2d Dist. 1989).....22, 24

15 *Sinetos v. Department of Motor Vehicles*, 160 Cal. App. 3d 1172, 207 Cal. Rptr. 207 (3d Dist.

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17 *Takahashi v. Board of Education (1988)* 202 Cal.App.3d 146419

18 *Vernon Fire Fighters Assn. v. City of Vernon*, 178 Cal. App. 3d 710, 223 Cal. Rptr. 871 (2d Dist.

19 1986).....24

20 *Wells Fargo Bank v. Goldzband*, 53 Cal. App. 4th 596, 61 Cal. Rptr. 2d 826, 136 O.G.R. 468

21 (5th Dist. 1997).....23

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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

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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.

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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 Malckenhorst'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

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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

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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,

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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

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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

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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 Malckenhorst 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 Malckenhorst's good results. After Ziemer
9 left, the City Council appointed Malckenhorst 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 Malckenhorst 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 Malckenhorst 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 Malckenhorst
24 to serve in that capacity as part of his already existing duties and responsibilities. Malckenhorst
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 Malckenhorst was an able Municipal Employee
28 Relations Representative in large part because Vernon was embroiled in a bitter labor dispute

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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

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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

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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 Malkenhorst 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

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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.

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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

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

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.¹
26

27
28 ¹ 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

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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 ($\$35,302 \times 1.25 =$
\$44,128) as his final compensation.

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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).

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

12 CalPERS rendered a decision in this matter in 2005-6 in Malkenhorst's favor.
13
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. *Gtrms v. Savage*, 61 Cal. 2d 520, 39 Cal. Rptr.
28

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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 ordered².
8

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)]
12

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)]
19

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)]
25

26
27 ² If, however, preparation of the record of the decision to be reviewed is requested within 10
28 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]

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II. LACHES

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

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

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

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

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 agency in making its claim. *Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75 Cal. App. 4th 316, 89 Cal. Rptr. 2d 139 (2d Dist. 1999).

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Several of the analogous statute of limitations are

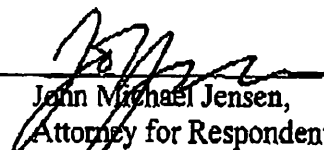
- (1) Code Civ. Proc., § 338, subd. (a), which prescribes a three-year period for bringing an action based on a liability created by statute. [Ragan v. City of Hawthorne, 212 Cal. App. 3d 1361, 261 Cal. Rptr. 219 (2d Dist. 1989)]
- (2) If there is no statute of limitation specifically applicable to the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

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

VI. CONCLUSION

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

Dated: October 11, 2013

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

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

13 In Re the Matter of) **CALPERS CASE NO.: TBD**
14) **OAH CASE NO.: TBD**
15 **BRUCE V. MALKENHORST, SR., and**)
16 **CITY OF VERNON,**) **BRUCE V. MALKENHORST, SR.'S**
17 **Respondents.**) **ASSERTION OF JUDICIAL ESTOPPEL**
18) **TO BAR EVIDENCE , ARGUMENT,**
19) **POINTS AND AUTHORITIES ON**
20) **JUDICIAL ESTOPPEL**
21)
22) **Hearing Dates: _____**
23) **Hearing Location: _____**

24 Bruce V. Malkenhorst, Sr. asserts judicial estoppel against CalPERS and Vernon to prevent
25 the introduction of argument, evidence and testimony that contradicts prior statements made in
26 an administrative or judicial process.

27 CalPERS and Vernon represented in filing in the administrative process that Malkenhorst is
28 entitled to and will receive the higher pension. CalPERS and Vernon undertook a prior
administrative process in 2005-6 where CalPERS and Vernon explicitly agreed that Malkenhorst
is entitled to the higher pension.

At all times, Malkenhorst was entitled to rely on CalPERS and Vernon's representations, and
he did actually rely on those representations in many fundamental and detrimental ways.

CalPERS and Vernon should not be allowed to deny their prior representations. Under

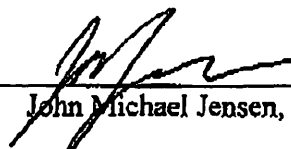
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1 *Government Code* section 11500 et seq and other authority, including Section 11506(a)(5),
2 Malkenhorst submits this evidentiary and jurisdictional defense to CalPERS efforts to reduce his
3 vested pension benefit.

4 Malkenhorst involuntarily submits these documents under protest and with a full reservation
5 of all rights and without waiver of any kind, as they are submitted under CalPERS compulsion
6 and threat of an immediate reduction in his pension.

7 Malkenhorst incorporates in full herein all of the concurrently or previously filed Motions,
8 Memorandum of points and authorities, Notice of Defenses, and other documents on file or
9 lodged in this matter.

10 Dated: October 11, 2013

By: 
John Michael Jensen,

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EVIDENTIARY AND JURISDICTIONAL CHALLENGE,

Under *Gove Government Code* section 11500 et seq and other authority, including Section 11506(a)(5), Malkenhorst submits this evidentiary and jurisdictional defense:

I. CalPERS and the City of Vernon Are Judicially Estopped From Altering The Positions Taken in the 2005-2006 Administrative Proceedings

Malkenhorst asserts that CalPERS and Vernon should be judicially estopped from challenging his pension calculation. CalPERS and Vernon both agreed Malkenhorst was entitled to the higher pension in a prior administrative process.

However, in its newly commenced administrative process, CalPERS is now taking a position 180 degrees opposite the position CalPERS finally took in its 2005-2006 administrative process.

Vernon supported Malkenhorst in the original 2005-6 administrative proceeding is judicially estopped from changing it position now.

CalPERS and Vernon raised exactly the same issues in its 2005-2006 administrative process. CalPERS sought to drastically reduce Malkenhorst's pension based on the same factual and legal theories as those it is now raising.

CalPERS formally initiated the 2005-6 administrative process and required a response to a pre-deprivation letter providing "appeal rights". CalPERS accepted an Appeal from Malkenhorst and Vernon.

After a year of consideration, CalPERS ultimately decided (after accepting evidence and argument in a year of robust and extensive litigation) that CalPERS had acted in error and that Malkenhorst *was entitled to his higher pension.*

CalPERS now seeks to renege on its prior, voluntary findings and take the exact

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1 opposition position it took in 2005-2006, apparently because it is now in CalPERS' political
2 interest to do so.

3 Vernon also seeks to change its position.

4 Malkenhorst asserts that CalPERS and Vernon should be judicially estopped from
5 changing the position that each took in the 2005-2006 process.
6

7 In 2005-6, Vernon joined Malkenhorst in appealing CalPERS' decision. They jointly
8 secured the services of legal counsel to file the joint appeal and jointly asserted that Malkenhorst
9 was paid one pay rate for one position. They jointly argued for CalPERS to reverse its decision.
10 Vernon was successful in its quest.

11 CalPERS ultimately voluntarily accepted the legal and factual arguments and rendered a
12 final decision in Malkenhorst's favor.
13

14 If Vernon seeks to renege on its prior, voluntary assertions and arguments and in any
15 form support CalPERS' efforts to once again cut Malkenhorst's pension, whether for political,
16 financial or other reasons, Vernon should be judicially estopped from doing so.
17

18 **A. The Doctrine of Judicial Estoppel**
19

20 Judicial estoppel has been described as a process which prevents a party from "asserting a
21 position in a legal proceeding that is contrary to a position previously taken in the same or some
22 earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial
23 process." (*Jackson v. Los Angeles* (1997) 60 Cal.App.171, 181.)
24

25 Other courts have described how the doctrine protects the integrity of the judicial process
26 by preventing litigants from playing "fast and loose" with the courts. ((*Russell v. Rolfs* (9th Cir.
27 1990) 893 F.2d 1033, 1037.)

28 Vernon and CalPERS are attempting to reverse positions in an administrative process

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related to the prior process.

CalPERS should be judicially estopped even though it itself conducts and oversees the process.

CalPERS "fast and loose" actions undermine "the integrity of the [quasi]-judicial process".

As a public policy, CalPERS' 1.5 million Members and their beneficiaries have the right to expect they will be treated equitably and fairly in CalPERS' administrative process. Indeed, the ability to count on such fairness is inherent in the language of the California *Constitution* which dictates that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty." (California *Constitution*, Art. XVI, Sec. 17(b).)

Judicial Estoppel should stop CalPERS from playing "fast and loose" with its own process. Judicial Estoppel should stop CalPERS from voluntarily adopting one position in 2005-2006 and then reversing course and taking the exact opposite position nearly a decade later. Judicial Estoppel should stop CalPERS from pervert the quasi-judicial process that it is entrusted to promote.

B. Elements of Judicial Estoppel

In accordance with the purpose of judicial estoppel, we conclude that the doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Jackson v. Los Angeles, supra*, at 183.)

Against CalPERS, Judicial estoppel should apply because : (1) CalPERS has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) CalPERS was successful in asserting the first position (i.e., CalPERS as the

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1 tribunal adopted the position or accepted it as true because it paid the past due pension and
2 then continued to pay the pension); (4) CalPERS' position in that matter is totally
3 inconsistent with its position in this matter; and (5) CalPERS first position was not taken as
4 a result of ignorance, fraud, or mistake.

5 (*Jackson v. Los Angeles, supra*, at 183.)
6

7 **Against Vernon**, Judicial estoppel should apply because : (1) Vernon has taken two
8 positions; (2) the positions were taken in judicial or quasi-judicial administrative
9 proceedings; (3) Vernon was successful in asserting the first position (i.e., Vernon
10 succeeded in CalPERS as the tribunal adopted the position for the higher pension or
11 accepted it as true because Vernon caused CalPERS to pay Malkenhorst the past due
12 pension and then pay the higher pension to Malkenhorst); (4) Vernon's position in that
13 matter is totally inconsistent with its position in this matter; and (5) Vernon's first position
14 was not taken as a result of ignorance, fraud, or mistake.

15 (*Jackson v. Los Angeles, supra*, at 183.)
16
17
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19

20 III. CONCLUSION

21 CalPERS and Vernon are barred by judicial estoppel from changing their prior
22 representations made in the administrative or judicial process.

23 Malkenhorst is entitled to a pension calculated on the basis of his highest City
24 Administrator pay rate, and with a longevity bonus. CalPERS is barred by equitable estoppel and
25 laches from determining otherwise.
26

27 Dated: October 11, 2013

28 By: _____

John Michael Jensen,

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

11
12 In Re the Matter of) CALPERS CASE NO.: 2012-0671
13) OAH CASE NO.: 2013080917
14 BRUCE V. MALKENHORST, SR and)
15 CITY OF VERNON,) **RESPONDENT MALKENHORST'S**
16 Respondents.) **MEMORANDUM OF POINTS AND**
17) **AUTHORITIES REGARDING CHARTER**
18) **CITY AUTONOMY IN SUPPORT OF:**
19)
20) (1) JURISDICTIONAL CHALLENGE;
21) (2) MOTION TO STRIKE;
22) (3) DEMURRER;
23) (4) AGENCY FAILURE TO STATE
24) ACTS OR OMISSION ON WHICH
25) AGENCY MAY PROCEED
26) (GOVERNMENT CODE SECTION
27) 115069(A)(2));
28) (5) MOTION IN LIMINE TO
EXCLUDE EVIDENCE;
(6) MOTION TO STRIKE FOR
INDEFINITENESS;
(7) MOTIONS AND CHALLENGES
REGARDING AGENCY
JURISDICTION AND
AUTHORITY

Hearing Date: October 31, 2013
Hearing Location: Los Angeles OAH

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I. INTRODUCTION TO JURISDICTION AND AGENCY LIMITATION

1
2 CalPERS and the OAH have no jurisdiction to hear or to decide any fact, testimony, document,
3 evidence, or legal issue that invades the "home rule autonomy" of the Charter City of Vernon
4 ("City" or "Vernon"). Respondent Bruce V. Malkenhorst, Sr. does not consent or submit to
5 CalPERS' jurisdiction in this matter in anyway. Malkenhorst incorporates facts provided in the
6 concurrent filings, and in related documents, but they are also filed under protest, with a full
7 reservation of rights, and no consent to CalPERS' jurisdiction.
8

9 **1. Involuntary Submission of Challenge and Appeal.**

10 To prevent an unlawful reduction of Malkenhorst's pension as threatened by CalPERS,
11 we present facts, legal argument, and information in this document and accompanying
12 filings under protest and with a reservation of rights. Compelled, we do not consent by
13 appearance or waive any rights. Presenting information pursuant to *Government Code*
14 section 20128, we do not consent, submit, or acquiesce to CalPERS' jurisdiction or
15 authority, including to adjudicate this matter or to reduce Malkenhorst's pension. We
16 reserve all rights, including to challenge CalPERS' efforts, CalPERS' process, CalPERS'
17 acts in excess of its jurisdiction, and CalPERS' jurisdiction in all venues.
18
19

20 CalPERS exceeds its jurisdiction and the power of the agency to act under its statutory
21 powers, including:

22 1) CalPERS ignores the Charter City autonomy and seeks to invade or to
23 determine the compensation and structure of the governmental offices.
24

25 2) CalPERS invades Vernon's Charter City autonomy unconstitutionally.

26 CalPERS has limited jurisdiction to calculate Malkenhorst's pension based only on the
27 compensation that Vernon paid pursuant to the only existing pay schedules.
28

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1 As an affirmative limitation of its jurisdiction, an administrative agency may
2 constitutionally hold hearings, determine facts, apply the law to those facts, and order relief –
3 including certain types of monetary relief – as long as such activities are authorized by statute or
4 legislation and are reasonably necessary to effectuate the administrative agency's primary,
5 legitimate regulatory purposes. (*Village Trailer Park, Inc. v. Santa Monica Rent Control Bd.*
6 (2002) 101 Cal. App. 4th 1133, as modified (Sept. 24, 2002); 2 Cal. Jur. 3d, *Administrative Law*.
7 §360.)
8

9 CalPERS has no authority or jurisdiction to make determinations of charter city rights or
10 to make determinations that conflict with the prior decision of charter cities made pursuant to
11 those rights.
12

13 2. **CalPERS Intrudes on Charter City Autonomy On Governance Structure**

14 **and Compensation.** Using the PERL allegedly applied by contract to replace
15 Vernon's vested governance structure and compensation decisions, CalPERS
16 seeks to intervene contrary to Vernon's decisions. CalPERS seeks to unilaterally
17 determine that Malckenhorst worked numerous "separate" positions, with
18 "separate" hours of work and "separate" salaries¹ in order to reduce his pension.
19

20 Without evidence or authority, CalPERS argues that the payrate was high so Vernon must
21 have paid Malckenhorst for taking on *additional and separate* responsibilities, which as overtime
22 will not increase his "payrate" for pension purposes. On this basis, CalPERS seeks to disallow
23

24
25
26 ¹ CalPERS also invades Vernon's autonomy when CalPERS argues that Vernon
27 failed to provide publicly available pay schedules for these imaginary "separate"
28 positions.

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most of Malckenhorst's compensation that Vernon reported to CalPERS and reduce Malckenhorst's pension.²

3. CalPERS' Rejection of Compensation and Office Structure. CalPERS

wrongfully and unlawfully rejected the charter city's decisions made under the City's reserved charter powers, seven or more years after the fact. Malckenhorst demanded that CalPERS utilize the pay rate and office structure determined and paid by Vernon.³ CalPERS refused.

4. Unknown Criteria: SOI is Indefinite

In this matter, CalPERS seeks to calculate Malckenhorst's pension based on something other than Vernon's protected decisions on salary and office structure.

CalPERS has no expertise or power to fix or ascertain the charter city rights (including as to compensation) either expressly or impliedly conferred. CalPERS is authorized to determine the amount of an individual's pension based on information provided by employers. *Government Code*, §20134. CalPERS' officials have no discretion to withhold a pension or refuse to pay a pension. *Lockyer v. CCSF, supra*, at 1081.

CalPERS cannot hear, much less adjudicate, the constitutional issues including the superiority and autonomy of charter cities' compensation practices. In effect, CalPERS says that it will not even consider those issues. *Cal. Const.*, art. III, §3.5; see also *Lockyer v. CCSF, supra*;

² CalPERS threatens to cut Malckenhorst's "PERSible" final compensation (and thus his pension) by approximately 80% by limiting him to the salary earned by a different individual working at a different time in a different job, i.e., the person hired to work as "Acting City Clerk" after Malckenhorst's retirement. (3CT:723-731.)

³ Vernon's compensation otherwise complies with publicly available pay schedules, longevity pay, special compensation, etc.

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1 *Cal. Const., art. XI, §§4-6; Cal Fed, supra.*

2 CalPERS does not possess 'broad' or remedial powers. See *International Assn. of*
3 *Firefighters Local Union 230 v. City of San Jose, supra*, at 1214.

4 **5. Effect of CalPERS' Lack of Jurisdiction**

5 Administrative action that is not authorized by, or is inconsistent with, acts of the
6 legislature is void. (*Schneider v. California Coastal Com. (2006) 140 Cal.App.4th 1339;*
7 *Hamilton v. Gourley (2002) 103 Cal.App.4th 351; Kaiser Foundation Health Plan, Inc. v.*
8 *Zingale (2002) 99 Cal.App.4th 1018.*)

9
10 Once Vernon has designated and paid the full time "base salary" compensation, CalPERS
11 has the ministerial and mandatory duty to accept the compensation and to pay a pension
12 accordingly. While CalPERS can determine and require Vernon to fund the actuarial value of
13 Vernon's associated pension liabilities as a consequence of contracting with CalPERS, CalPERS
14 officials have no discretion to hold a hearing to determine or withhold a pension or refuse to pay
15 a pension based on information received from a Charter City. (*Locker v. City and County of San*
16 *Francisco, supra*, at 1081.)

17
18 Full relief cannot be had in a CalPERS administrative hearing because CalPERS is
19 unable jurisdictionally to consider the constitutional superiority and autonomy of Charter cities
20 compensation practices and it is not allowed to determine that its own statutes are
21 unconstitutional or fail to enforce the PERL as unconstitutional. (*Cal. Const., art. III, §3.5.*)
22 CalPERS exceeds or acts outside of its authority when it fails to honor Vernon's compensation
23 information and seeks to utilize its own compensation values, definitions or terms, invading the
24 Charter Cities autonomy on a municipal issue. (See *Locker v. City and County of San Francisco,*
25 *supra; Cal. Const., art. XI, §§ 4, 5, 6; see also California Fed. Savings & Loan Assn. v. City of*
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Los Angeles, supra.)

6. No Consent, No Waiver, No Estoppel, No Voluntary Appearance

Reserving all other rights, Malkenhorst understands that CalPERS could initially consider the compensation he received from Vernon as City Administrator for purposes of calculating his CalPERS pension in the first appeal, though this would be limited to ministerially utilizing the base salary and special compensation designed and reported by Vernon.

CalPERS undertook such a quasi-judicial administrative process in 2005—2006 and found in favor of continuing Malkenhorst's pension in the higher amount. *See Collateral estoppel, Res Judicata, Issue Preclusion, and Claim Preclusion motions and supporting papers which are concurrently filed, and incorporated in full herein.* However, that appeal has now been resolved. CalPERS does not have the right to proceed now as it is barred by collateral estoppel and other issues raised here and elsewhere. CalPERS has no initial or continuing jurisdiction to invade Vernon's Charter City autonomy.

Malkenhorst is being compelled to appear, including to protect his vested rights to the higher pension and other rights.

PROCEDURAL HISTORY

1. Procedural Background of Charter City Autonomy Litigation

1. On July 25, 2012, Malkenhorst responded to CalPERS' request for additional information by lodging formal jurisdictional challenges and related documents under *Government Code* section 20128. .

2. The July 25, 2012 documents expressly challenged CalPERS' jurisdiction and put CalPERS on notice that Malkenhorst was filing a Complaint on charter city and other jurisdictional grounds in Orange County Superior Court.

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1 3. No administrative process commenced.

2 4. On August 3, 2012, Malkenhorst filed a *Complaint for Declaratory Relief,*
3 *Injunctive Relief, and Petition for Writ of Mandate* in the Orange County Superior Court
4 (*Malkenhorst v. CalPERS*, Case No. 30-2012-00588466). (1CT:16-67⁴.)

5 5. On behalf of charter entities, himself and the 100,000 or so employees of charter
6 entities that contract with CalPERS, Malkenhorst sought to preclude CalPERS from invading the
7 constitutional rights to determine the compensation of its employees for pension purposes and
8 the structure of municipal offices.⁵ (1CT:16-67.)

9 6. Malkenhorst asserted the charter entities' and employees' rights (including as third
10 party beneficiaries) to be free of CalPERS' invasion of a charter entity's autonomy and decisions
11 on municipal affairs. ((1CT:16-67.) Vernon was named as a Real Party In interest.

12 7. Malkenhorst pled that (1) charter entities retain the autonomous rights to
13 designate compensation and office structure for pension purposes; (2) the charter entities'
14 constitutional rights are not preempted by the PERL statutes; (3) a charter entity does not (and
15 cannot) waive, transfer or delegate its constitutional "home rule" rights by contract (including
16 pursuant to an implied term or a contract based partly on statute); (4) CalPERS was required to
17 ministerially accept and utilize the compensation and other decisions made by a charter entity in
18 the calculation of an employee's pension benefit; (5) a writ on behalf of charter entities and
19 100,000 similarly situated individuals is not subject to the exhaustion of administrative
20 remedies; and (6) and other theories, grounds, and reasons. (1CT:16-67.)

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27 ⁴ The CT terms refer to Clerk's transcripts which will be lodged with the OAH.

28 ⁵ CalPERS actually conducted an investigation of these same issues in 1995-1996, and then conducted a formal administrative review on the same law and facts which led to a final decision in Malkenhorst's favor in 2005-2006.

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8. CalPERS appeared. (2CT:509-527.) The chartered City of Vernon ("Vernon") was named as Real Party in Interest and appeared. (2CT:506-508.)

9. CalPERS filed a *Demurrer* arguing that (a) the PERL preempted charter entities' determination on compensation, pensions, and government structure (and everything else that could be involved in a pension calculation), (b) the charter entities delegated these decisions to CalPERS based on the CalPERS-charter city contract, (c) Malkenhorst failed to exhaust administrative remedies, and (d) Malkenhorst was required to exhaust his administrative remedies even on writ, declaratory relief, and constitutional issues when as a representative of 100,000 other employees. (2CT:558-579.)

10. Vernon's counsel appeared at oral argument on the *Demurrer*. (Reporter's Transcript ("RT"), p. 1.) Although the substance of Vernon's position was not clear, Vernon's counsel sided with CalPERS.

11. On October 19, 2012, the Hon. Jamoa A. Moberly granted CalPERS' *Demurrer*, ruling that Malkenhorst was required to exhaust his administrative remedies. (3CT:663-666.) No preemption analysis was performed.⁶

⁶ After Judge Moberly sustained the *Demurrer* without leave to amend, CalPERS made a "final" audit determination. (3CT:723-731.) Malkenhorst responded under protest. Malkenhorst timely appealed Judge Moberly's ruling to this Court.

Subsequent to the filing of the appeal, CalPERS provided documents under a prior Public Records Act Request that showed that CalPERS had previously held an administrative process that considered and accepted Malkenhorst's and Vernon's compensation and office structure determinations for pension purposes. Upon receipt of this documentary proof, Malkenhorst filed a separate *Petition for Writ of Mandate* in Los Angeles Superior Court to abate CalPERS' second administrative process on collateral estoppel/*res judicata* grounds. (*Malkenhorst v. CalPERS*, Los Angeles Superior Court Case No. BS141275.)

CalPERS demurred that (1) the Orange County case provided "concurrent exclusive jurisdiction"; (2) Vernon was an indispensable party in the Los Angeles *Petition*; and (3) Malkenhorst failed to exhaust his administrative remedies. Even though CalPERS was informed that the Appeal of Judge Moberly's ruling was already filed (and involved a different primary

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12. Malkenhorst timely filed an appropriate *Motion for Reconsideration* asserting new facts or law, including that CalPERS was required to perform a substantive *Cal Fed* preemption analysis. CalPERS argued that the charter city's autonomy was preempted by the PERL or contract. (3CT:667-684.) Malkenhorst requested leave to amend the *Complaint and Petition* to plead and identify the unconstitutional sections of the PERL statutes. (3CT:679, lines 6-9; 3CT:710, lines 19-21.)

13. The *Motion for Reconsideration* was accepted and heard by Judge Moberly on November 30, 2012, and taken under submission. (RT:35-41.)

14. On December 21, 2012, under compulsion at the risk of immediate loss of the continuing pension payment, Malkenhorst filed a Jurisdictional Challenge (Exhibit 3).

15. On December 28, 2012, Judge Moberly performed a preemption "finding" without the *Cal Fed* analysis, denied the *Motion for Reconsideration*, and granted the *Demurrer* without leave to amend. (3CT:782-783.) CalPERS argues that preemption occurred by virtue of the charter city contracting with CalPERS to administer pension benefits under *Marsille, supra*. *Marsille* had been distinguished as no longer authoritative. *See infra*.

16. On January 23, 2013, Judge Moberly signed and filed a *Judgment of Dismissal*

right), the Los Angeles trial court accepted all three arguments, sustained the demurrer, and ruled that Malkenhorst failed to exhaust his administrative process. The Los Angeles trial court did not transfer the matter to Orange County, and could not do so as this case was already on appeal.

Malkenhorst appealed the Los Angeles trial court decision to the Second District Court of Appeals and filed a *Petition for Writ of Supersedeas* in Division Seven. Division Seven denied the *Petition and Request for Stay*. In Division Seven, Malkenhorst then filed a *Petition for Transfer* to the Fourth District in order to address the flawed "exclusive concurrent jurisdiction" ruling, but the Second District denied the transfer. That matter remains on appeal before the Second District Court of Appeal, Division 7.

On September 27, 2013, CalPERS initiated a *Statement of Issues* in the second administrative process. On September 30, 2013, Malkenhorst also filed a *Petition for Writ of Supersedeas and Request for Stay* before the Second District Division 7 on the collateral estoppel, re judicata, claim preclusion, and issue preclusion grounds.

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1 based on CalPERS' *Demurrer*. (3CT:786-788.)

2 17. On January 25, 2013, an appeal was timely filed. (3CT:789-790.)

3 18. Malkenhorst moved to clarify that Vernon was named as a Real Party In interest
4 in the Appeal as well as the Superior Court. The Court formally named Vernon as a Real Party
5 in Interest on the Appeal.
6

7 19. On September 6, 2013, Malkenhorst's counsel received a notice from the Office of
8 Administrative Hearing ("OAH") that CalPERS sought to schedule a hearing in the Malkenhorst
9 matter for March 5 and 6, 2014, before the OAH.

10 20. CalPERS had not filed a "Statement of Issues" or other document that
11 established jurisdiction in the OAH. *Declaration of John Michael Jensen, attached*
12

13 21. On September 12, 2013, Malkenhorst challenged CalPERS action by "special
14 appearance" letter to the OAH informing them of the appeal.

15 22. On September 13, 2013, CalPERS responded with various allegations and
16 argument.
17

18 23. On September 13, 2013, Malkenhorst wrote another letter as a "special
19 appearance" letter challenging jurisdiction and power.

20 24. In the week of September 18, 2013, the OAH staff telephoned the parties to
21 schedule a further teleconference on these issues.
22

23 25. On September 20, 2013, presiding Judge Formaker of the Los Angeles office of
24 the OAH informed counsel for Malkenhorst and for the City of Vernon during a conference call
25 that some time prior to that date, CalPERS had filed and sent a "draft" *Statement of Issues*
26 pleading (not served on, provided to or even disclosed to Malkenhorst) to one or more of the
27 judges of the Los Angeles branch of the OAH.
28

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26. During the September 20, 2013 phone call, Presiding ALJ Formaker clarified that there were no rights or power to make a special appearance to challenge jurisdiction under the APA or before the OAH.

27. On September 27, 2013, CalPERS attempted to initiate a new "second" administrative process in the Office of Administrative Hearings (OAH) by filing a statement of issues.

28. On September 30, 2013, Malkenhorst filed a request for stay and Petition for Writ of Supersedeas in Fourth District Court of Appeals along with supporting motions and papers.

29. On October 10, 2013, the Fourth District Court of Appeal denied the writ and stay.

30. On October __ 2031, Malkenhorst filed A Petition for Review on the charter city autonomy issues.

II. FACTS

This memorandum incorporates herein in full the Facts of the concurrently filed Appeal

1. Introduction to Charter Cities Issues

Charter cities enjoy "autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, 'subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law.'" *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 363; see *Home Gardens Sanitary Dist. v. City of Corona* (2002) 96 Cal.App.4th 87, 93.

Two core "municipal affairs" reserved for determination by charter cities are (i) the compensation of municipal employees and (ii) the structure of municipal government (including

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1 the structure of offices and job positions).

2 Factly, Vernon is a Charter City established under the California Constitution, Art. XI,
3 §§ 3(a), 5(a) and (b). (*Cal. Const., Art XI, §5.*) Granting and accepting the broadest grant of
4 autonomy possible under the Constitution, Vernon's *Charter* grants the City the "full power and
5 authority to adopt, make, exercise and enforce all legislation, law, and regulations, and to take all
6 action in respect to municipal affairs, without limitations, which may lawfully be adopted, made,
7 exercised, taken or enforced under the Constitution of the State of California, subject only to
8 such limitations as may be provided by this Charter." (*Vernon City Charter, CH: 2.1, General*
9 *Powers.*) Vernon accepted all of the power and authority provided by the State Constitution's
10 grant of plenary authority to Charter Cities, including to determine their employees'
11 compensation and how to structure their internal governance and offices.
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15 2. Vernon's Charter City Powers

16 Vernon's Charter broadly authorizes it to make and enforce all ordinances and regulations
17 in respect to municipal affairs except as provided in the charter, generally has complete power
18 over municipal affairs, otherwise lawfully exercised, subject only to clear and explicit limitations
19 and restrictions contained in the charter. (*City of Glendale v. Trondsen* (1957) 48 Cal.2d 93;
20 *Ruane v. City of San Diego* (1968) 267 Cal.App.2d 548; *City of Santa Monica v. Grubb* (1966)
21 245 Cal.App.2d 718.) Under the home-rule doctrine, Vernon's has full power to regulate
22 municipal affairs, and ordinances governing municipal affairs supersede general laws insofar as
23 the latter conflict with the ordinance, unless the state has preempted the field.
24
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26 The enumeration of specified powers in Vernon's charter does not result in the exclusion
27 or limitation of powers not otherwise specified. (*Domar Electric, Inc. v. City of Los Angeles,*
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supra; Social Services Union v. City and County of San Francisco (1991) 234 Cal.App.3d 1093.)
Any such power not expressly forbidden may be exercised by Vernon, and any limitations on its exercise are those only that have been specified in the charter.

Unless the charter expressly prohibits Vernon from exercising its authority in a manner not otherwise limited by state or federal law, the city retains that authority. (*Social Services Union v. City and County of San Francisco, supra.*)

Therefore, it is not necessary to enumerate specifically in Vernon's charter all the powers relating to municipal affairs, in order to remove the city as to those matters from the operation of the general laws. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56.)

It is sufficient that Vernon has availed itself of the offer extended to it by the California Constitution and incorporated in its charter an acceptance of the privilege tendered. (*City of Pasadena v. Charleville* (1932) 215 Cal. 384, overruled in part on other grounds by *Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566.) Vernon availed itself of all powers and rights available.

Vernon's charter provisions are construed in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction on that power that is not expressly stated in the charter. (*Domar Electric, Inc. v. City of Los Angeles, supra; City of Santa Monica v. Grubb, supra.*) Thus, restrictions on Vernon's chartered city power may not be implied. (*Domar Electric, Inc. v. City of Los Angeles, supra; City of Grass Valley v. Walkinshaw, supra; Social Services Union v. City and County of San Francisco, supra.*) Restrictions on Vernon's power must be expressly stated in the charter. (*City of Grass Valley v. Walkinshaw, supra; City and County of San Francisco v. Callanan* (1985) 169 Cal.App.3d 643.)

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1 **3. City of Vernon's Practice and Interpretation of Charter**

2 Vernon's city council's interpretation of its charter provision is entitled to great deference,
3 especially because there has been a consistent administrative construction of the provisions
4 relating to the city administrator, compensation, and job duties, etc. over many years. Since the
5 words of Vernon's charter are clear, a court may not add to them or alter them to accomplish a
6 purpose that does not appear on the face of the charter or from its legislative history. A court is
7 required to accord Vernon's charter provisions reasonably, and to construe it in favor of Vernon's
8 City Council's exercise of power over municipal affairs and against the existence of any
9 limitation or restriction that is not expressly stated in the charter. (*City of Los Angeles v. Superior*
10 *Court* (1995) 40 Cal.App.4th 593, as modified on denial of reh'g, Nov. 22, 1995.)
11
12

13 The rule that Vernon as a chartered city is subject to general laws on municipal affairs as
14 to all subjects as to which its charter is silent is no longer applicable. (*Bellus v. City of Eureka*
15 (1968) 69 Cal.2d 336.) Vernon as a charter city is independent of the general law except as the
16 charter itself may make it subject to the general law. (*City of Glendale v. Trondsen* (1957) 48
17 Cal.2d 93.) However, Vernon's charter properly did include any and all matters within the sphere
18 of municipal affairs. (*Ex parte Jackson* (1904) 143 Cal. 564.)
19

20 **4. Charter City Autonomy in California Constitution**

21 The California Constitution allows cities to insulate themselves from statewide
22 preemption and regulation of local matters by adopting charters. The constitutional provision
23 was designed to emancipate municipal governments from the authority and control once
24 exercised over them by the Legislature. This is apparent from the fact that a charter, when
25 enacted, cannot be amended by the Legislature. The Legislature cannot abridge the constitutional
26 power conferred on a city or a city and county that fulfills the requirements of the constitution.
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1 (*People ex rel. Johnson Atty. Gen. v. Bagley* (1890) 85 Cal. 343.)

2 California cities may adopt charters that enable them to make and enforce all legislation
3 regarding "municipal affairs." This gives them greater autonomy because powers granted in their
4 charters must supersede all inconsistent state laws in that area. (*City of Roseville v. Tulley* (1942)
5 55 Cal. App. 2d 601, 605 [chartered cities more autonomous than general law cities or chartered
6 counties by virtue of their superseding power over municipal affairs], review denied, Jan. 14,
7 1943.) In other words, once a city is chartered, if the laws of a chartered city do not address a
8 particular municipal affair, it does not necessarily follow that State law on that issue controls.

10 **5. Constitution Vests Power in Charter City**

11 City charters adopted pursuant to the California Constitution supersede, with respect to
12 municipal affairs, all inconsistent laws. (*Cal. Const.*, Art. XI, § 5, subd. (a).) Under this theory of
13 "municipal home rule," municipalities have supreme authority in the field of "municipal affairs,"
14 i.e., matters of internal or local concern, free from interference by the Legislature. (See
15 *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 146; *Bishop v. San Jose* (1969) 1 Cal.3d 56, 61;
16 *Sonoma County Organization of Public Employees v. Sonoma* (1979) 23 Cal.3d 296, 314; *Fresno*
17 *v. Pinedale County Water Dist.* (1986) 184 Cal.App.3d 840, 844-845 citing the text; *Johnson v.*
18 *Bradley* (1992) 4 C.4th 389, 397.)

21 The *charter* is the "constitution" of a municipality; and ordinances, whether adopted by
22 the city council or by the initiative process, are invalid to the extent that they conflict with
23 governing charter provisions. (*Brown v. Berkeley* (1976) 57 C.A.3d 223, 231, 129 C.R. 1) Under
24 the California Constitution, a charter city may make and enforce all ordinances and regulations
25 in respect to municipal affairs, subject only to restrictions and limitations provided in the charter.
26 (*Cal. Const.*, Art. XI, § 5, subd. (a).)
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The Constitution's specific enumeration of allowable provisions covers only a small part of the powers that may be set forth in a charter. The fact that a matter is not included in the enumeration does not mean that the city has no power to deal with it. This is true because the charter is merely a limitation on the powers of a city, and not a grant of powers. (*Los Angeles City School Dist. of Los Angeles County v. Longden* (1905) 148 Cal. 380; *Adams v. Wolff* (1948) 84 Cal.App.2d 435.)

"[T]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 170, quoting *Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595; 9 *Summary* (10th), *Taxation*, §310.) Unless there are clear limitations and restrictions in the charter, which may not be implied, the city has all powers over municipal affairs, including the awarding of public contracts. The mere failure of the City's charter to expressly grant the power does not deny the city the power to act. (*Domar Electric, Inc. v. City of Los Angeles, supra.*)

For example, a Charter City is granted plenary authority to provide in the charter the method and manner in which municipal officers and employees may be compensated, appointed, as well as the method of appointment, qualifications, tenure of office, and removal of it municipal employees. (*Cal. Const.*, Art. XI, § 5, subd (a)-(b).)

Of necessity, the charters of the various cities throughout the state differ in detail, in order to conform to the varying needs of the different localities. (*Stern v. Council of City of Berkeley* (1914) 25 Cal.App. 685.)

6. Extent of Power Granted By Charter Of Vernon: Charter Issues

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1 Although it is unclear, CalPERS seems to believe that Vernon only sought power of
2 particular municipal affairs by specific declaration in the charter controlling that particular
3 municipal subject matter. (*Murphy v. City of Piedmont* (1936) 17 Cal.App.2d 569.) But there is
4 no doubt about Vernon's control over all municipal affairs, including those which the city has not
5 attempted to legislate. Vernon removed all municipal affairs from the control of the legislature,
6 even without any additional legislative enactment by the city covering them. In addition, it
7 sought control over specific municipal affairs. (*Murphy v. City of Piedmont, supra.*)

9 **7. No General Incorporation of Reference to Statute**

10 A reference to specific parts of a statute, in a charter, has the effect of making the specific
11 parts of a statute also a part of the charter. (*Ransome-Crummey Co. v. Bennett* (1918) 177 Cal.
12 560.) However, the incorporation is narrowly construed and limited to the actual terms
13 referenced. For example, a charter provision requiring municipal officers to discharge all duties
14 imposed on them by general law does not incorporate into the charter the provisions of the
15 general laws in any other respect. (*Mullins v. Henderson* (1946) 75 Cal.App.2d 117.) Charter
16 cities that possess complete power over municipal affairs may adopt part of the general law in an
17 ordinance governing a municipal affair without, by so doing, being bound by all provisions of
18 that general law. (*Bellus v. City of Eureka, supra.*)

21 **8. Municipal Affairs**

22 The extent of a chartered city's autonomy turns on the meaning of "municipal affairs."
23 The State Constitution includes a non-exclusive list: (1) the makeup, regulation, and
24 management of city police forces; (2) "subgovernment" in all or part of a city; (3) conduct of city
25 elections; (4) the manner and method in which a city elects, appoints, pays or removes its
26 municipal officers; and (5) the qualifications, methods of appointment, tenure, removal and
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1 number of deputies, clerks and other city employees. Otherwise, the definition is not fixed or
2 exact.

3 California courts, not the Legislature, define municipal affairs case by case, by looking at
4 their dialectical opposite, "statewide concerns." If the subject of a state law fails to qualify as one
5 of statewide concern, by default a chartered city's conflicting ordinance on the same subject is a
6 municipal affair.
7

8 Generally, the term "municipal affairs" has reference to the internal business affairs of a
9 city. (*City of Walnut Creek v. Silveira* (1957) 47 Cal.2d 804.)

10 The election of municipal officers, and the hiring and compensation of municipal
11 employees generally are matters pertaining to municipal affairs. (*Scheafer v. Herman* (1916) 172
12 Cal. 338; *Department of Water and Power of City of Los Angeles v. Inyo Chemical Co.* (1940) 16
13 Cal.2d 744.) Pensions of municipal officers or employers and questions arising in connection
14 with their retirement are municipal affairs. (*Murphy v. City of Piedmont, supra*; *Heard v. Board*
15 *of Administration of All City Employees' Retirement System of City of Los Angeles* (1940) 39
16 Cal.App.2d 685.)
17

18 The efficiency of municipal employees is a municipal affair. (*Butterworth v. Boyd* (1938)
19 12 Cal.2d 140.)
20

21 **9. Introduction to Factual Issues of Charter City**

22 In 1978, Vernon determined that "the administrative affairs of the Municipal Government
23 of the City would be handled more expeditiously, efficiently, and satisfactorily through an
24 office, who acting on behalf of the Council, would attend to such administrative affairs, to
25 correlate and coordinate various municipal activities, compile data, prepare reports relating to
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the affairs of the City government, and to generally act as the agent of the Council in discharge of administrative duties." (*Ord. 883, Vernon City Code, Sec. 2.7*).

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

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

"The city administrator shall be the administrative head of the government of the city, under the direction and control of the council. He shall be responsible for the efficient administration of all of the affairs of the city that are under his control. In addition to his general powers as administrative head, and not as a limitation thereon, he shall have the following powers and duties: (a) *General supervision.* To execute on behalf of the council its

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administrative supervision and control of such affairs of the city as may be placed in his charge, or which are not otherwise provided for by the council, and to exercise control over and to supervise in general all departments and division of the city government and all appointive offices and employees thereof." (*Vernon City Code, Sec 2.8, Powers and Duties.*)

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

Since becoming a Charter City, Vernon structured its charter city government pursuant to its constitutional right to determine the office, positions, duties, and subgovernment structure. Vernon structured the office of City Administrator to be responsible for various duties and responsibilities. Over the years, Vernon's City Council changed the duties and responsibilities of various positions, increasing them or decreasing them, at its discretion. Vernon utilized different words, titles and duties in various full time jobs.

Vernon hired Bruce Malckenhorst to be City Administrator. Vernon determined the salary, payrate, and compensation to pay its employees, including Malckenhorst, pursuant to its constitutional autonomy to compensate municipal employees. Vernon compensated Malckenhorst only in the position as City Administrator. The amount of compensation that Vernon determined and paid Malckenhorst as City Administrator is a municipal issue. Vernon's salary resolutions

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1 specifically state that no additional compensation will be paid for the performance of
2 responsibilities outside those of City Administrator.

3 **III. FACTUAL BACKGROUND OF VERNON, MALKENHORST, CALPERS**

4 1. **City of Vernon Contracts with CalPERS.** Vernon has contracted with CalPERS
5 for pension benefits since about 1948. (2CT:535-536.)
6

7 2. **Vernon Becomes a Charter City** Vernon became a charter city in 1988.

8 (1CT:38.) Accepting the broadest grant of autonomy possible under the Constitution,
9 Vernon's *City Charter* grants Vernon the "full power and authority to adopt, make,
10 exercise and enforce all legislation, laws, and regulations, and to take all action in respect
11 to municipal affairs, without limitation, which may lawfully be adopted, made, exercised,
12 taken or enforced under the Constitution of the State of California, subject only to such
13 limitations as may be provided by this Charter." (*Vernon City Charter, CH:2.1, General
14 Powers.*) (1CT:42) Vernon accepted and acted upon its plenary authority to determine
15 "municipal affairs", including its employees' compensation and how to structure its
16 internal governance and offices. (*Ibid.*)
17
18

19 Vernon's charter explicitly reserved to its city council the mandatory obligation and right
20 to determine the compensation of city employees, including the City Administrator. (*Vernon City
21 Charter, CH:6.3, Compensation.*) (1CT:56.)
22

23 Vernon's charter has no express pension provisions and does not incorporate state
24 pension law.

25 3. **Reservation of Right to Structure Subgovernmental Offices in Charter City.**

26 On August 1, 1978, the Vernon City Council passed Ordinance No. 883, replacing
27 its Administrative Officer with a "City Administrator". (1CT:71, lines 6-19.) The
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City Council then appointed Malkenhorst to the position. He continuously held the position of City Administrator until he retired on June 30, 2005. (ICT:71, lines 20-22.)

4. **Charter City Designation of Government Structure and Compensation: The City Administrator Position Was A Single Job, With a Single Salary.**

Vernon's *City Charter* charges the City Administrator with broad duties and responsibilities, including all of the tasks for which Malkenhorst received compensation from Vernon, including for CalPERS' purposes. (*Vernon City Charter, CH:6.4, Duties.*) (ICT:56.)

Vernon Ordinance No. 883 provided that "the administrative affairs of the Municipal Government of the City would be handled more expeditiously, efficiently, and satisfactorily through an officer [City Administrator], who acting on behalf of the Council, would attend to such administrative affairs, to correlate and coordinate various municipal activities, compile data, prepare reports relating to the affairs of the City government, and to generally act as the agent of the Council in discharge of administrative duties." (*Ord. 883; Vernon City Code⁷, Sec. 2.7.*)⁸

"The city administrator shall be ... responsible for the efficient administration of all of the affairs of the city ... [and] shall have the following [additional] powers and duties: (a) *General supervision.* To execute on behalf of the council its administrative supervision and

⁷ Vernon's current City Code is available on line at: http://www.amlegal.com/nxt/gateway.dll/California/vernon_ca/thecodeofthecityofvernoncalifornia.

⁸ "The city administrator shall be responsible to the city council for the proper and efficient management of all the affairs of the city and those specific duties assigned to the city administrator by this charter or by the city council. The specific duties of the city administrator may be specified by ordinance, resolution, or order of the city council." (*Vernon City Charter, CH:6.4, Duties.*) (ICT:56.)

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1 control of such affairs of the city as may be placed in his charge, or which are not otherwise
2 provided for by the council, and to exercise control over and to supervise in general all
3 departments and divisions of the city government and all appointive offices and employees
4 thereof." (*Vernon City Code, Sec 2.8, Powers and Duties.*) [Now at *Vernon City Code, Sec. 2.6-*
5 *6.*]

6
7 The charter provides that "The city council may appoint the city administrator to any
8 other office in the city and direct the city administrator to carry out the duties of that office or
9 any other position of employment with the city in addition to his or her duties as city
10 administrator." (*Vernon City Charter, CH:6.7, Other Positions.*) (1CT:57.) "The city
11 administrator is hereby appointed to serve as the city clerk and shall have the powers and duties
12 provided for in the government code of the State of California." (*Vernon City Code, Sec 2.7.3,*
13 *City Clerk, see also Ord. No. 883, section 4.*)

14
15 Periodically over time, the City Council increased the job responsibilities of the City
16 Administrator.

17
18 **5. Compensation Under Vernon Charter.** Vernon's charter mandated that the City
19 Council *shall* set the compensation of the City Administrator.

20 "Compensation for the city administrator shall be set by the city council." (*Vernon City*
21 *Charter, CH:6.3, Compensation.*) (1CT:56.)

22 Under its ordinances, the City assumed the obligation and responsibility to pay for the
23 compensation and to fund the pension. The Code provided that: "The city administrator shall
24 receive such compensation and expense allowances as the council shall, from time to time,
25 determine, and such compensation and expenses shall be a proper charge against such funds of
26 the city as the council shall designate." (*Vernon City Code, Sec. 2.7.2, Compensation and*
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1 *Expenses; see also Ord. No. 883, Section 4.)*

2 Vernon's city council regularly enacted salary resolutions, paid Malкенhorst pursuant to
3 its charter powers, and made decisions on Malкенhorst's compensation and deferred
4 compensation pursuant to this reserved power. (1CT:70-2CT:501.)

5 Pursuant to its charter, the City Council established a single "payrate" and compensation
6 amount that it paid the City Administrator for performing all duties that the City Council
7 assigned to that single position. (*Vernon City Charter, CH:6.4, Duties.*) (1CT:56.) Malкенhorst
8 received no additional salary for any of his duties and responsibilities outside of the salary he
9 received as City Administrator. (1CT:72, lines 12-17.)

11 **6. Pursuant to Charter, City Council Established Deferred Compensation**

12 **Rights, Pension Rights, and Malкенhorst's Salary As It Enacted Pay**

13 **Schedules, Minutes, Resolutions.** Exercising its reserved charter authority,

14 Vernon's city council set, contracted for, and documented the compensation,

15 single salary and the pension that it agreed and promised to pay Malкенhorst as

16 City Administrator. (1CT:70-2CT:501.) Vernon's city council established the

17 deferred compensation and pension rights of Malкенhorst on pay schedules and in

18 Resolutions and Minutes of public City Council meetings, (*ibid.*) as well as

19 contracts, agreements, and contract amendments. The City reported the pay rate

20 and compensation to CalPERS, and paid contributions based on the reported

21 payrate.

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25 Factually, for about 37 years, Malкенhorst received the compensation that the City
26 designated. The City periodically reported the compensation to CalPERS. The City paid pension
27 contributions on or resulting from the designated compensation (including as a percentage of the
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1 compensation). The City periodically transferred the pension contributions in trust to CalPERS.

2 CalPERS accepted Vernon's decision regarding compensation to the employee, including
3 accepting contributions based as a percentage of the actual compensation paid. For seven years
4 after the employee's retirement, CalPERS accepted the compensation decisions that Vernon
5 made and paid a pension in the correct amount to Malкенhorst.
6

7 **7. Vernon Contracted with CalPERS to Administer Pension Benefits.** Starting in

8 1948, and amended through at least 1990 (after Vernon became a charter city in
9 1988), Vernon contracted with CalPERS to facilitate the administration of its
10 employees' pension benefits.
11

12 There is no express or implied preemption of the charter city's rights in the contract, or
13 under the PERL. The contract does not bind or limit the charter city's power to designate
14 compensation, office structure and pensions under the charter or the Constitution. The contract
15 does not expressly or impliedly delegate or transfer the charter city's rights or subject the City to
16 the provisions of the PERL.
17

18 For example, the language of the 1948 CalPERS-Vernon contract reads:
19 "11. Public Agency shall contribute to said Retirement System as follows: ...

20 b. 10.477 per cent of total salaries paid by Public Agency each month to its employees
21 who are members of said Retirement System,...." (2CT:536.)
22

23 The contract explicitly contemplated that Vernon retained authority to set the salaries.
24 Under the contract, Vernon's uncontested responsibility and obligation was to pay appropriate
25 contributions as a percentage of the designated salaries in order to fund pensions in an amount
26 corresponding to the salary.

27 The contract language adopted in 1990 reads:

28 Public Agency shall participate in the Public Employees Retirement System from

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and after November 1, 1948, *making its employees as hereinafter provided, members of said System subject to all provisions of the Public Employees' Retirement Law except such as apply only on selection of a contracting agency and are not provided for herein [italics added]* and to all amendments of said Law hereafter enacted except those, which by express provisions thereof, apply only on the election of a contracting agency. (2CT:537.)

At most, the language of the 1990 contract subjects only the *employees* to the provisions of the PERL. Applying the PERL to the employee-member does not limit the employer.

Secondly, the contract only applies selected sections of the PERL to the employees. The language shows that neither Vernon nor CalPERS intended to incorporate all of the PERL statutes in the contract.

Thirdly, by allowing employers to select which PERL statutes apply to their employees, it is clear that the Legislature did not intend to preempt local decision-making on pensions (especially for charter cities).

8. Vernon's Pension Contributions Were Super-Funded, Actuarially Based on Higher Pension. CalPERS previously calculated that the pension assets of the City of Vernon were super-funded (with more than sufficient assets [105%] on deposit with CalPERS) to fund future pension obligations, including the higher pension amount, as of the date of Malkenhorst's retirement in 2006.

Vernon previously supported Malkenhorst rights against CalPERS intrusion and revision, in an administrative process. See footnote 5 above.

IV. LAW AND ARGUMENT

Exceeding its jurisdiction, CalPERS is attempting to (i) unilaterally and retroactively revise and reduce the compensation and pension of a charter city employee below that already

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1 designated by the charter city council pursuant to its mandatory reserved charter powers, (ii)
2 unilaterally and retroactively revise and restructure a charter entity's local offices that were
3 established under charter, and (iii) unilaterally and retroactively divide a single position's duties
4 into separate positions contrary to the charter city's determination.

5 Exceeding its jurisdiction, CalPERS argues or assumes that (1) the PERL preempts
6 directly "conflicting" decisions on compensation, government structure and pension made by the
7 charter city; (2) charter cities can waive, transfer, abdicate, or delegate their constitutional,
8 charter, and reserved duties to designate compensation, deferred compensation, and government
9 structure, including delegation of mandatory duties to determine compensation; (3) transfer,
10 waiver or delegation occurs by contract with an implied term not explicit in statute and/or not
11 explicit in the contract; (4) a representative action or writ on behalf of 100,000 individuals is
12 subject to the exhaustion of administrative remedies; (5) a preemption analysis was not required;
13 and (6) CalPERS can reduce the vested pension of charter employees after their retirement,
14 based on its own authority.

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18 1. Charter Cities "Home Rule" Autonomy Provisions in California
19 Constitution.

20 Constitutional Reservation of Autonomy to Charter Cities. Article XI, sections 5(a) and
21 (b) of the California Constitution represents an affirmative grant "of 'all powers appropriate for a
22 municipality to possess ...' and [includes] the important corollary that 'so far as "municipal
23 affairs" are concerned,' charter cities are 'supreme and beyond the reach of legislative enactment.'
24 " *State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547,
25 556 ("*City of Vista*"), quoting *California Fed. Savings & Loan Ass'n v. City of Los Angeles*
26 (1991) 54 Cal.3d 1, 12 ("*Cal Fed*"). Under "home rule," municipalities are free from interference
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1 by the Legislature (by statute or agency jurisdiction) on matters of internal or local concern.

2 Bishop v. City of San Jose (1969) 1 Cal.3d 56, 61.

3 **2. Constitutional Interpretation.**

4 Unlike the federal Constitution, which is a grant of power to Congress, the
5 California Constitution is a limitation or restriction on the powers of the
6 Legislature. [Citations.] ...

7 In other words, 'we do not look to the Constitution to determine whether the
8 legislature is authorized to do an act, but only to see if it is prohibited.' [Citation.]

9
10 *County of Riverside v. Superior Court (2003) 30 Cal.4th 278, 284-285 ("County
11 of Riverside").*

12 **3. Language of California Constitution, art. XI, §5.**

13 Sec. 5. (a) It shall be competent in any city charter to provide that the city
14 governed thereunder may make and enforce all ordinances and regulations in
15 respect to municipal affairs, subject only to restrictions and limitations provided
16 in their several charters and in respect to other matters they shall be subject to
17 general laws. City charters adopted pursuant to this Constitution shall supersede
18 any existing charter, and with respect to municipal affairs shall supersede all laws
19 inconsistent therewith.

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

31 *Cal. Const., art. XI, §5.*

32 **4. Purpose and Meaning of Charter Cities' Reservation of Powers.**

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The charter city⁹ provision:

"enable[s] municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. *It was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs....*

This amendment, then, was intended to give municipalities the *sole* right to regulate, control, and govern their internal conduct independent of general laws...." (*Id.*, at p. 387, 58 P. 923 (per Garoutte, J.)

Johnson v. Bradley (1992) 4 Cal.4th 389, 395 (italics in original).

The purpose of adopting a city charter is to move control over "municipal affairs" from the state legislature to the local government. When a city adopts a charter, state statutes are generally displaced as to "municipal affairs" covered by the charter. Such "municipal affairs" are then "unaffected by general laws on the same subject matters." (*City of Santa Monica v. Grubb* (1966) 245 Cal.App.2d 718, 724, 54 Cal.Rptr. 210, quoting *City of Roseville v. Terry* (1958) 158 Cal.App.2d 75, 76, 322 P.2d 44; cf. Cal. Const., art. 11, §5.

First Street Plaza Partners v. City of Los Angeles (1998) 65 Cal.App.4th 650, 660.

5. Rights Reserved to Charter Cities.

Article XI, section 5(a) of the Constitution sets out the general principle of local self-governance. Subdivision (b) sets out a nonexclusive list of four "core" categories that are, by definition, "municipal affairs", including the "subgovernment in all or part of a city"; and the compensation of "municipal officers". It provides, "(4) *plenary authority* is hereby granted, subject only to the restrictions of this article, to provide [in all city charters for] *the manner in*

⁹For charter counties, "Article XI, section 1(b) was ... approved by voters in November 1970, to" restore home rule, and place the responsibility for setting local salaries where it belongs [in the charter counties]. *Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1255-56.

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1 *which, the method by which, the times at which, and the terms of' compensation for municipal*
2 *officers. See Johnson v. Bradley, supra, at 397-98.*

3 Similarly, in *Sonoma County Organization of Public Employees v. County of*
4 *Sonoma, supra, 23 Cal.3d at page 317, 152 Cal.Rptr. 903, 591 P.2d 1, we cited*
5 *section 5's reference to compensation of employees to conclude that determining*
6 *the wages of employees of charter cities and counties is a matter of local rather*
7 *than statewide concern.*

8 *(Ibid.)*

9 **6. Vernon's Charter.**

10 Vernon's charter accepts the full powers granted to a charter city. (ICT:38-67.)

11 In construing a charter, the objective is to determine legislative intent, and the prime
12 determinant is the plain meaning of the language of the charter. "Where the words of the
13 charter are clear, we may not add to or alter them to accomplish a purpose that does not
14 appear on the face of the charter or from its legislative history." (*Domar Electric, supra,*
15 *9 Cal.4th 161, 172, 36 Cal.Rptr.2d 521, 885 P.2d 934.*)

16
17
18 *First Street Plaza Partners, supra, at 663.*

19
20
21 [T]he Supreme Court has recently stated that "it is well settled that a charter city
22 may not act in conflict with its charter ... [a]ny act that is violative of or not in
23 compliance with the charter is void." (*Domar, supra, at 171, 36 Cal.Rptr.2d 521,*
24 *885 P.2d 934.*)

25 *Id., at 669.*

26 **7. Charter City Reserved Right To Determine Compensation of Municipal**
27 **Employees.**

28 Right to Determine Compensation. Article XI, Section 5 (a)-(b), of the California

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1 Constitution expressly gives charter cities authority to determine their employees'
2 compensation.¹⁰ "[T]he determination of the wages paid to employees of charter cities as well as
3 charter counties is a matter of local rather than statewide concern." *County of Riverside, supra*, at
4 288, quoting *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23
5 Cal.3d 296, 317 ("*Sonoma County*").¹¹
6

7 Vernon's charter is fairly typical of the compensation provisions in many city charters. In
8 Charter Section 6.3 and related sections, Vernon's City Council is required to set the
9 compensation of the City Administrator.¹² (1CT:54-56.)
10

11 The compensation, pension amount, and the deferred compensation were set by the City
12 Council in its pay schedules and various enactments. (1CT:70-2CT:501.) Vernon and
13 Malkenhorst agreed and contemplated that Vernon would determine and pay a pension based on
14 the highest compensation paid.

15 Pension provisions of a city charter or ordinance form an integral part of the employment
16 contract. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852; *Dryden v. Board of Pension*
17 *Com'rs.* (1936) 6 Cal.2d 575, 579. Pensions relate to compensation and are municipal affairs
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20 ¹⁰ Although the language does not expressly limit the power of the Legislature, it does so
21 by "necessary implication". *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.
22 An express grant of authority to the charter entity necessarily implies the Legislature does not
have that authority.

23 ¹¹ For charter counties (which have less autonomy or power), Article XI, Section 1,
24 subdivision (b) provides: "The governing body [of each county] shall provide for the number,
25 compensation, tenure, and appointment of employees.' ... The constitutional language is quite
clear and specific: the [charter] county, not the state, not someone else, shall provide for [amount
of] the compensation of its employees." *County of Riverside, supra*, at 285.

26 ¹² "Compensation for the city administrator shall be set by the city council." (*Vernon City*
27 *Charter, CH:6.3, Compensation*, emphasis added.) "The city administrator shall receive such
28 compensation and expense allowances as the council shall, from time to time, determine, and
such compensation and expenses shall be a proper charge against such funds of the city as the
council shall designate." (*Vernon City Code, Sec. 2.7.2, Compensation and Expenses*, emphasis
added; see also *Ord. No. 883, Section 4.*)

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1 within the meaning of the Constitution. See, *Bellus v. City of Eureka* (1968) 69 Cal.2d 336.

2 "[W]here a legislative body having jurisdiction over pension rights has enacted specific
3 provisions on the subject, the public policy on that subject is established thereby." *McCarthy v.*
4 *City of Oakland* (1943) 60 Cal.App.2d 546, 549.

5 When cities reserve their charter rights to determine compensation to the fullest extent (as
6 here), the law is clear: the compensation of charter city employees is a municipal affair and not a
7 statewide concern regardless of any possible economic effect that compensation might have
8 beyond the borders of the city. *Sonoma County, supra*, at 316-317; *City of Vista, supra*, at 557.

9
10 Vernon's charter generally and specifically make provision for compensation of
11 municipal officers and employees. (*Neal Pub. Co. v. Rolph* (1915) 169 Cal. 190.) As Vernon's
12 charter controls, the legislature (via the PERL or otherwise) is divested of authority to fix the
13 compensation of those officers and employees. If this were not so, the legislature would have the
14 power to amend a charter contrary to the Constitution. (*Milliken v. Meyers* (1914) 25 Cal.App.
15 510).

16
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18 **8. Charter City Office Compensation**

19 There is no implied obligation by a city to pay its officers. The right to compensation
20 must be expressly given by law, ordinance, or contract. (*Rowe v. Kern County* (1887) 72 Cal.
21 353.) Thus, where an office is created by charter, but the charter fails to provide compensation
22 for it, the incumbent cannot recover for his or her services. (*Woods v. Potter* (1908) 8 Cal.App.
23 41.) Moreover, not even the fact that persons act as deputies of a municipal officer at his or her
24 request entitles them to enforce a claim against the city, where there is nothing in the charter or
25 any city ordinance allowing them to receive salaries payable out of the city treasury. (*Fleming v.*
26 *Hance* (1908) 153 Cal. 162.)
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1 Where duties that might properly be segregated into two offices are by charter combined
 2 in a single office, such as auditor and assessor, the incumbent is entitled to the salary fixed for
 3 the single office only. (*City of Oakland v. Snow* (1904) 145 Cal. 419.) Furthermore, an assistant
 4 who temporarily performs the services of a superior whose office has become vacant is not
 5 entitled to the salary of the superior officer. (*Dunn v. Civil Service Commission of City and*
 6 *County of San Francisco* (1935) 3 Cal.App.2d 554.)

8 Employees of a city are entitled to pay only to the extent provided in the charter and
 9 ordinances. (*San Francisco City etc. Employees Internal Union v. City and County of San*
 10 *Francisco* (1975) 49 Cal.App.3d 272.)

11 **9. Reasonableness of Compensation**

12 Courts will not question the terms or reasonableness of compensation. California courts
 13 are reluctant to intervene in issues involving compensation for municipal officers and employees.
 14 (See *Merritt v. Weldon* (1908) 154 Cal. 545, et al.) Although a court may disagree with the
 15 conclusion of a city legislative body as to reasonableness of the compensation fixed for a
 16 particular officer, the court cannot interfere in the absence of fraud or bad faith on the part of the
 17 legislative body. *City and County of San Francisco v. Boyd*, 22 Cal. 2d 685, 140 P.2d 666
 18 (1943); *De Merritt v. Weldon*, 154 Cal. 545, 98 P. 671 (1908).
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22 **10. Pensions Are Compensation.**

23 As deferred compensation, pensions are a "manner" of compensation protected under the
 24 constitution and within the city's plenary authority to act on "municipal affairs". *Johnson v.*
 25 *Bradley, supra*, at 403. See *Bellus, supra*, at 345, 351-352.
 26

27 Most prominently, [the Supreme Court has] limited or invalidated state laws that
 28 unduly interfere with the prerogative of local governments to set the salaries of

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1 their own employees. (See *County of Riverside v. Superior Court* (2003) 30
2 Cal.4th 278, 132 Cal.Rptr.2d 713, 66 P.3d 718; *San Francisco Labor Council v.*
3 *Regents of the University of California* (1980) 26 Cal.3d 785, 163 Cal.Rptr. 460,
4 608 P.2d 277; *Sonoma County Organization of Public Employees v. County of*
5 *Sonoma* (1979) 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (*County of*
6 *Sonoma*).

7 *City of Vista, supra*, at 25.¹³

8 Interference with employee salaries would thus have an enormous, ongoing
9 impact on city finances. And if the state sought to control the salaries of only
10 some city employees, such control would interfere with the city's ability to set
11 salary schedules and pay differentials for its employees, decisions which in turn
12 affect matters of employee morale, retention, and workforce cohesion that indeed
13 go to the heart of municipal autonomy. **Interference with employee salaries**
14 **would also likely affect a municipality's long-term pension obligations.**

15 *Id.* at 562, emphasis added.

16 The salary, compensation and deferred compensation amount of the City Administrator
17 clearly falls within a city's municipal affairs. *Cal. Const.*, art. XI, §5(b)(2)-(4); see *Bishop v. City*
18 *of San Jose, supra*; *City of Vista, supra*.

19 **11. Pensions Are "Manner" of Compensation.**

20 Specifically, pensions relate to compensation and are municipal affairs within the "home
21 rule" provisions. *City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621 ("City of
22
23

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

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1 Downey"); see, *Bellus, supra*, at 351-352.¹⁴ Pensions are municipal affairs irrespective of
 2 whether the duties of the office are exacted by the charter or imposed by state law. *Butterworth*
 3 *v. Boyd* (1938) 12 Cal.2d 140, 147.

4 **12. Pensions Are Deferred Compensation.**

5 Pension payments are compensation, deferred as to time. *In re Retirement Cases* (2003)
 6 110 Cal.App.4th 426, 451. A charter city's constitutional grant of autonomy reserves to the city
 7 the right to designate the terms of the compensation that are utilized by CalPERS. *Murphy v. City*
 8 *of Piedmont, supra; Richards v. Wheeler, supra*. Questions arising in connection with retirement
 9 are also municipal issues. *Heard v. Board of Administration of All City Employees' Retirement*
 10 *System of City of Los Angeles, supra*. As an employer paying deferred compensation in the form
 11 of a pension, the city and the employees fund the actuarial value of the pension obligations
 12 arising from its compensation promises to employees. *City of Vista, supra*, at 562.

13 **13. Constitutional Home Rule Issues in Pension.**

14 Article XI, section 5, subdivision (b) of the California Constitution does give full
 15 power to charter cities to provide for the compensation of their employees. It is
 16 clear that provisions for pensions relate to compensation and are municipal affairs
 17 within the meaning of the Constitution. (See, *Bellus v. City of Eureka* (1968) 69
 18 Cal.2d 336, 345, 351—352.) It is also clear that a charter city has full control over
 19 its municipal affairs, and in respect to them is not subject to general law except as
 20 the charter may provide. (*City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 599,
 21 *City of Roseville v. Terry*, 158 Cal.App.2d 75—76.; *City of Santa Monica v.*
 22 *Grubb*, 245 Cal.App.2d 718, 724, 54 Cal.Rptr. 210.)

23 *City of Downey, supra*, at 629.

24
 25
 26
 27 ¹⁴ See also *Murphy v. City of Piedmont* (1936) 17 Cal.App.2d 436; *Richards v. Wheeler*
 28 (1935) 10 Cal.App.2d 108; *Heard v. Board of Administration of All City Employees' Retirement*
System of City of Los Angeles (1940) 39 Cal.App.2d 685.

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1 Analogously, when ruling that prevailing wage laws do not apply to charter cities, the
2 Supreme Court observed that "while the statute purports to establish a minimum wage, it in
3 effect determines the wage." *City of Vista, supra*, at 563.

4 **14. Enabling Acts Not Applicable, No Charter or Ordinance Provision for**
5 **Pension.**
6

7 Vernon did not enact specific pension provisions in its charter or ordinances. If Vernon
8 had enacted specific pension provisions, they would control. Shealor v. City of Lodi (1944) 23
9 Cal.2d 647.

10 In its charter and ordinances, Vernon legislated to require the City Council to determine
11 compensation. Pensions relate to compensation and are municipal affairs as a manner or form of
12 compensation. Generally, the authority granted to a political subdivision to devise a plan to pay
13 pensions necessarily conveys the power to prescribe all details not expressly prohibited.
14 Bowman v. Los Angeles City Bd. of Ed. (1941) 46 Cal.App.2d 319. Reserving all of its powers,
15 Vernon did not expressly or impliedly adopt or incorporate state pension law or the PERL. A
16 charter city has full control over its municipal affairs, unless there is preemption arising from a
17 conflict and the matter is adjudicated a statewide concern.
18

19
20 CalPERS ruled that the CalPERS and Vernon contract incorporated the PERL or
21 preempted charter city decisions that "conflict" with CalPERS' interpretation of the
22 PERL, even though the contract explicitly reserves compensation decisions to the City,
23 only applies selected provisions of the PERL to *employees* (not employers), and does not
24 delegate compensation, office structure and pension decisions. Even if the city
25 incorporated part of a general statute, there is no requirement that the city must
26 incorporate all related statutory provisions. Bellus supra
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15. Employer-Employee Privity for Pensions.

Charter entities promise their employees deferred compensation and pensions as consideration for working. Typically, the pension is a function of the highest salary that the charter city pays, and is calculated by multiplying (i) *the employee's years of work*; ~~x~~ (ii) *his highest payrate compensation*; ~~x~~ (iii) *the actuarial pension formula.*

The charter cities negotiate compensation (and resulting pensions) directly with employees. When negotiating, the charter cities' promises are not premised on the pension administrator's approval. The compensation (and resulting pension) is not negotiated or subject to arbitration, interruption, condition or limitation by the pension administrator. The pension administrator (CalPERS in this case) is not a party to the employment agreement between the charter city and the employee.¹⁵

16. Structure of City Government Offices is a Municipal Issue.

The Constitution empowers charter cities to establish the form and type of subgovernment in all or part of a city. *Cal. Const.*, art. XI, §5(a)-(b). A chartered city has rights to create offices not provided for by law. Lesem v. Getty (1937) 23 Cal.App.2d 57.

Vernon's *Charter* governs the structure of local offices. Vernon could structure the City Administrator's position so that it requires performance of a wide range of activities, or has unique names. (*Vernon City Charter, CH:6.4, Duties, CH:6.7, Other positions.*) (1CT:56-57.) CalPERS cannot intrude on Vernon's decision to structure the office, duties, and pay of the City Administrator.

Statutes that seek to micromanage municipal affairs without any clear extra municipal objective have been held inapplicable to charter cities. (See, e.g.,

¹⁵ The city does not satisfy its obligation to the employees by making contributions to the pension administrator(CalPERS); rather the city satisfies it obligation to the employee by making sure that the employee is timely paid the promised pension.

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County of Sonoma, supra, 23 Cal.3d at pp. 317–318, 152 Cal.Rptr. 903, 591 P.2d 1.

City of Vista, supra, at 556.

CalPERS' efforts to force Vernon to separate the City Administrator position into separate "titles" in several offices interferes with Vernon's protected municipal autonomy.

17. Structure of Employment and Offices is Vernon's Choice

Vernon could structure its city government as it pleases, pursuant to its *Charter*. Vernon could structure the City Administrator's position so that it performs a wide range of activities, or has unique names. Vernon can give the City Administrator one or many titles, honorary or otherwise, and as many or as few duties, responsibilities, or obligations as its wishes. Unless prohibited by charter provision, one person may generally perform the functions of two or more municipal offices (*Whitehead v. Davie* (1922) 189 Cal. 715; *Prince v. City of Fresno* (1891) 88 Cal. 407; *Raymond v. Bartlett* (1946) 77 Cal.App.2d 283.)

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

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

The City of Vernon paid Malkenhorst for his full-time work in his singular position of "City Administrator/City Clerk". There is no question that CalPERS' efforts to reject

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1 Malкенhorst's compensation relating to concurrent "title" of several responsibilities
2 simultaneously interferes with Vernon's protected municipal autonomy. CalPERS invades
3 Vernon's local prerogative expressly protected by constitutional text. CalPERS' use of the PERL
4 in this case excessively interferes with municipal autonomy that is expressly prevented by *City of*
5 *Vista, supra.*

6
7 Without legal support, CalPERS essentially argues that Vernon cannot pay Malкенhorst a
8 salary in the City Administrator position that qualifies as "pay rate" for CalPERS' final
9 compensation purposes if Vernon also allows Malкенhorst to hold multiple duties or
10 responsibilities that may have at one time been associated with other positions.

11
12 **18. Vernon's Constitutional Autonomy on City Procedures and City Structure,**
13 **Structure of Municipal Government is a Municipal Affair**

14 The Constitution also permits the charter to provide for the constitution, regulation, and
15 structure of subgovernment and offices in all or part of the city. (*Cal. Const.* Art. XI, § 5, subd
16 (a)-(b).) The creation and organization of the various law enforcement and other departments of
17 a municipal government are generally considered municipal affairs. (*Dumas v. City of Oakland*
18 (1933) 135 Cal.App. 411.) Thus, the organization, maintenance, and operation of municipal
19 government departments by a chartered city including matters relating to compensation, pension,
20 and removal of officers, are municipal affairs, not subject to the control of the legislature.
21 (*Murphy v. City of Piedmont, supra; Richards v. Wheeler* (1935) 10 Cal.App.2d 108; *Lossman v.*
22 *City of Stockton* (1935) 6 Cal.App.2d 324.)

23
24 Similarly, matters relating to the membership of local boards constitute municipal affairs.
25 (*Barendt v. McCarthy* (1911) 160 Cal. 680; *Weaver v. Reddy* (1902) 135 Cal. 430; *People ex rel.*
26 *Lawlor v. Williamson* (1902) 135 Cal. 415.)
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1 Unless prohibited by charter provision, one person may generally perform the functions
2 of two or more municipal offices. (*Whitehead v. Davie* (1922) 189 Cal. 715; *Prince v. City of*
3 *Fresno* (1891) 88 Cal. 407; *Raymond v. Bartlett* (1946) 77 Cal.App.2d 283.)

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

6
7
8 Cal. Const., Art. 11, § 5(a). It shall be competent in any city charter to provide
9 that the city governed thereunder may make and enforce all ordinances and
10 regulations in respect to municipal affairs, subject only to restrictions and
11 limitations provided in their several charters and in respect to other matters they
12 shall be subject to general laws. City charters adopted pursuant to this
13 Constitution shall supersede any existing charter, and with respect to municipal
14 affairs shall supersede all laws inconsistent therewith.
15 (*Cal. Const., art. XI, §5.*)

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

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

25
26 **V. PERL AND PREEMPTION ISSUES**

27 **1. Statutory Construction.**

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1 CalPERS ruled that the PERL preempted charter city rights. There is no plain language in
2 the PERL statutes that supports preemption.

3 In determining the Legislature's intent, " 'a court must look first to the words of
4 the statute themselves, giving to the language its usual, ordinary import and
5 according significance, if possible, to every word, phrase and sentence in
6 pursuance of the legislative purpose.... The words of the statute must be
7 construed in context, keeping in mind the statutory purpose, and statutes or
8 statutory sections relating to the same subject must be harmonized, both internally
9 and with each other, to the extent possible.' " *Quintano v. Mercury Casualty Co.*,
supra, 11 Cal.4th at p. 1055. We are to give the words of a statute " 'plain and
10 commonsense meaning' " unless the statute specifically defines the words to give
11 them a special meaning. *MacIsaac, supra*, 134 Cal.App.4th at p. 1083.

12 *People v. Mgebrov* (2008) 166 Cal.App.4th 579, 585.

13 Neither CalPERS nor CalPERS identified any language in the PERL where the
14 Legislature explicitly or impliedly intended to preempt the charter city's rights.

15 Moreover, "pension statutes are to be liberally construed in favor of those to whom such
16 rights are granted, and such rights may not be taken away by strained construction (citations)."
17 *Larson v. Board of Police and Fire Pension Com'rs of City of Long Beach* (1945) 71 Cal.App.2d
18 60, 63.

19 **2. PERL is Optional and Voluntary; Not Statewide.**

20 The PERL is not statutory law of general application or statewide. The PERL only
21 applies to contracting agencies and *only to the extent of the "pension administration" duties*
22 *transferred*. The PERL is not related to resolution of a putative statewide concern.¹⁶

23 **VI. PREEMPTION ANALYSIS REQUIRED**

24 A genuine actual "conflict" between the PERL and core "municipal affairs" arose when
25
26
27

28 ¹⁶ Constitutional conflicts can be easily avoided by actuarially charging the city the
resulting cost of a pension based on the compensation paid.

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1 CalPERS asserted that Vernon's designated pay rate conflicts with the "pay rate" that CalPERS
2 will use to calculate the pension. (2CT:569, lines 5-17.) CalPERS independently changed (or
3 sought to change) the charter city's compensation and office structure decisions after the fact.

4 CalPERS never articulated a statewide concern, the rights reserved under the city charter,
5 and that the pension administration contract does not explicitly or implicitly preempt, limit,
6 delegate, or transfer the charter city's powers.¹⁷ (*Ibid.*) *Bishop v. City of San Jose, supra*, at 62;
7 *Cal Fed, supra*, at 17.

9 1. Constitutional Construction in Preemption Analysis.

10 The "home rule" provisions turn ultimately on the meaning and scope of the state law in
11 question and the relevant state constitutional provisions. Interpreting that law and those
12 provisions presents a legal question, not a factual one. *County of Riverside, supra*, at 286-287;
13 *Sonoma County, supra*, at 316; *Bishop v. City of San Jose, supra*, at 63; *City of Vista, supra*, at
14 558.

16 "In broad outline, a court asked to resolve a putative conflict between a state
17 statute and a charter city measure initially must satisfy itself that the case presents
18 an actual conflict between the two. If it does not, a choice between the
19 conclusions 'municipal affair' and 'statewide concern' is not required." (*CalFed,*
supra, 54 Cal.3d at p. 16, 283 Cal.Rptr. 569, 812 P.2d 916.) ...

20 When the local matter under review "implicates a 'municipal affair' and poses a
21 genuine conflict with state law, the question of statewide concern is the bedrock
22 inquiry through which the conflict between state and local interests is adjusted. If
23 the subject of the statute fails to qualify as one of statewide concern, then the
24 conflicting charter city measure is a 'municipal affair' and 'beyond the reach of
25 legislative enactment.' ... If, however, the court is persuaded that the subject of
26 the state statute is one of statewide concern and that the statute is reasonably
related [and 'narrowly tailored'] to its resolution, then the conflicting charter city
measure ceases to be a 'municipal affair' pro tanto and the Legislature is not

27 ¹⁷ Likely, even the City could not retroactively change the compensation or
28 pension without breaching its promises.

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prohibited by article XI, section 5 [, subdivision] (a), from addressing the statewide dimension by its own tailored enactments."

Cal Fed, supra.

2. Preemption Analysis Would Show No Statewide Concern.

The state is not legitimately interested in regulating compensation, office structure or pensions. The PERL is voluntary, narrow and particularized in its application. *San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d 785; *City of Pasadena v. Charleville* (1932) 215 Cal. 384; *City of Vista, supra*, at 564. "Uniformity" is no justification for a statewide concern. *Johnson v. Bradley, supra*, at 406.

3. Constitutional Limitations on Legislature's Power to Regulate Compensation.

The constitution expressly grants the charter cities the right to determine compensation and office structure. An express grant of authority necessarily implies the Legislature does not have the authority to regulate compensation. *County of Riverside, supra*, at 285.

The legislature has also enacted the PERL:

"[T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs ...; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." (1 Cal.3d at p. 63, 81 Cal.Rptr. 465, 460 P.2d 137; see also *id.*, at p. 63, fn. 6, 81 Cal.Rptr. 465, 460 P.2d 137 [disapproving contrary cases]; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317, 152 Cal.Rptr. 903, 591 P.2d 1.) As we explained in *CalFed, supra*, 54 Cal.3d 1, 283 Cal.Rptr. 569, 812 P.2d 916, our inquiry regarding statewide concern focuses not on the legislative body's intent, but on "the identification of a convincing basis for legislative action originating in extra municipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations."

Johnson v. Bradley, supra, at 405.

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1 In this case, we conclude that no statewide concern has been presented justifying
 2 the state's regulation of the wages that charter cities require their contractors to
 3 pay to workers hired to construct locally funded public works. In light of our
 4 conclusion that there is no statewide concern here, we need not determine whether
 5 the state's prevailing wage law is "reasonably related to ... resolution" of that
 concern. (*California Fed. Savings, supra*, 54 Cal.3d at p. 17, 283 Cal.Rptr. 569,
 812 P.2d 916) and is "narrowly tailored" to avoid unnecessary interference in
 local governance (*id.* at p. 24, 283 Cal.Rptr. 569, 812 P.2d 916).

6 *City of Vista, supra*, at 12.

7
 8 **4. No Extra-Municipal Concerns Arising From Charter City Designation of**
 9 **Compensation, Office Structure and Pensions.**

10 CalPERS never admitted or offered any evidence or argument on "extra-municipal
 11 concerns" arising in a substantial way from the exercise of the charter city's control. See *Cal Fed,*
 12
 13 *supra.*

14 We further explained, "The phrase 'statewide concern' ...discloses a *focus on*
 15 *extramunicipal concerns as the starting point for analysis. By requiring, as a*
 16 *condition of state legislative supremacy, a dimension demonstrably transcending*
 identifiable municipal interests, the phrase resists the invasion of areas which are
 of intramural concern only, preserving core values of charter city government. ...

17 *Johnson v. Bradley, supra*, at 398-400.

18
 19 [T]he controlling inquiry is how the state Constitution allocates governmental
 20 authority between charter cities and the state. The answer to that constitutional
 21 question does not necessarily depend on whether the municipal activity in
 22 question has some regional or statewide effect. **For example, we have said that**
 23 **the salaries of charter city employees are a municipal affair and not a**
 24 **statewide concern regardless of any possible economic effect those salaries**
might have beyond the borders of the city (emphasis added). (*Sonoma County*
Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296,
 316-317, 152 Cal.Rptr. 903, 591 P.2d 1 (*Sonoma County*).)

25 *City of Vista, supra*, at 557.

26
 27 As a manner of deferred compensation of municipal employees, a charter city's pension
 28 decisions are not statewide concerns, regardless of whether they affect extra-municipal concerns.

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1 Employer and employees fund the pension obligations of the city. Factually, Vernon's
2 pension obligations were more than fully funded (considering the higher compensation and
3 pension resulting) at the time of the employee's retirement, and the employee had worked for 30
4 years at the city (1CT:71, lines 20-22). Neither CalPERS nor the State of California provide any
5 funds. From the beginning, CalPERS is supposed to inform and cause the city and its employees
6 to make adequate contributions. The employer pays or incurs an administrative fee associated
7 with CalPERS' administration. If there is any limited "net" cross subsidization between
8 employees and/or employers participating in the retirement system, any overall "net" effect
9 should be insubstantial (or calculated to be actuarially and mathematically neutral).
10

11 Consideration of "extra-municipal" effects requires an evidentiary hearing. Resolving a
12 preemption analysis on demurrer sustained without leave to amend is inappropriate.
13

14 5. Statewide Concern: Preempt Entire Field or Impose Procedural Restrictions.

15 If the Legislature had identified a statewide concern, it could either preempt the whole
16 field of local government consideration of compensation and office structure, or it could impose
17 procedural restrictions. The PERL itself does not authorize CalPERS to negotiate or determine
18 the compensation rights between city employers and employees (including unionized
19 employees).
20

21 In matters of statewide concern, the state may, if it chooses preempt the entire
22 field to the exclusion of all local control. If the state chooses instead to grant some
23 measure of local control and autonomy, it has authority to impose procedural
24 restrictions on the exercise of the power granted.

25 *Voters for Responsible Retirement v. Board of Supervisors (1994) 8 Cal.4th 765,*
26 779.

27 In the PERL, the Legislature neither preempted the entire field of pensions nor imposed
28 procedural restrictions. See *Bellus* and *City of Downey*, infra.

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The scope of preemption that CalPERS desires is very broad, and intrudes upon the essential and basic terms of each city's negotiation, agreement or contract with its employees. CalPERS argues that the PERL is incorporated into every employment contract with every municipal employee such that CalPERS can ultimately or retroactively determine the compensation and pension paid to the employee. Under this interpretation, CalPERS can restructure the municipal government at its option, to change designations, jobs, or office of government employees.

Conceptually, CalPERS positions itself as the supra-employer, "watchdog", or supra-government,¹⁸ with ultimate control and determination of compensation and other "municipal issues" after the fact and without ever entering into negotiations with the specific employees.

But clearly, the Legislature did not intend the voluntary PERL statutes (i) to preempt, to control, or to rewrite the basic terms of employment agreements after the fact, (ii) to punish retirees who relied on their charter employer's representations, (iii) to sanction a unilateral retroactive adjustment of vested rights, (iv) to encourage gamesmanship and bad faith negotiations, and (v) to arbitrarily review and reduce compensation and deferred compensation after retirement.

As an analogy to voters retroactively changing vested employment rights, CalPERS uses the PERL to retroactively revise the charter city employee's compensation and pension after retirement:

If the [challenged] power of referendum existed, then the Legislature would in effect be sanctioning a kind of bad faith bargaining process in which those who possess the ultimate reservation of rights to approve the collective bargaining agreement—i.e., the electorate—are completely absent from the negotiating table.

¹⁸ See analogously: http://en.wikipedia.org/wiki/Supranational_union#Origin_as_a_legal_concept

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1 *Voters for Responsible Retirement, supra*, at 783.
 2 The Legislature did not sanction a bad faith breach of the inducement offered the employee to
 3 work.

4
 5 **6. Test Whether CalPERS' Regulations Trump or Are In Conflict with**
 6 **Vernon's Rules and Actions**
 7

8 Starting 80 years ago in *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 389
 9 (*Charleville*) and continuing through last month in *City of Vista, supra*, the Supreme Court has
 10 repeatedly found that the compensation of local public employees are municipal affairs (that is,
 11 exempt from state regulation), and that these wage levels are not a statewide concern (that is,
 12 subject to state legislative control).
 13

14 **7. CalPERS' Burden of Proof that Its Regulations or Statutes Conflict With**
 15 **(and Trump) Charter City Law**

16 The party claiming that general state law preempts a local ordinance has the burden of
 17 demonstrating preemption. (*Citizens for Planning Responsibly v. County of San Luis Obispo*, 176
 18 Cal. App. 4th 357, 2009 WL 2371075 (2d Dist. 2009).) CalPERS has the burden of proof that
 19 Vernon's compensation authority and definitions do not apply, and the dispute, if pressed, must
 20 be adjudicated in a neutral forum.
 21

22
 23 **8. Analogy to Prevailing Wage Law.**
 24

25 In *City of Vista*, the Supreme Court ruled that state prevailing wage laws did not apply to
 26 charter city construction projects:

27 [T]he question presented is whether the state can require a charter city to exercise
 28 its purchasing power in the construction market in a way that supports regional
 wages and subsidizes vocational training, while increasing the charter city's costs.

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1 No one would doubt that the state could use *its own* resources to support wages
2 and vocational training in the state's construction industry, but can the state
3 achieve these ends by interfering in the fiscal policies of charter cities?

4 *City of Vista, supra*, at 561-562.

5 **9. Cal Fed Test Re Whether CalPERS' Regulations Trump or Conflict.**

6 CalPERS' demands for separate positions and hours conflict with Vernon's self-
7 governance and compensation policies. CalPERS' arguments are not reasonably related to
8 legitimate statewide concerns and are not "narrowly tailored" to avoid unnecessary interference
9 in local governance. See *City of Pasadena v. Charleville, supra*, at 389; *City of Vista, supra*.

10 **VII. MARSILLE V. CITY OF SANTA ANA**

11 **Distinguished.** Based on a simplified interpretation of *Marsille, supra*, about disability
12 rights, CalPERS fails to consider subsequent distinguishing cases and found that the City
13 *contractually* delegated (and preempted) its power.
14

15 Although unclear, CalPERS argues that the charter city transferred (or the PERL
16 preempted) its reserved rights by virtue of the City agreeing to CalPERS' standard pension
17 administration contract (which is based and authorized solely on selected PERL statutes).
18 (3CT:782-783.) CalPERS overlooks that (i) the City's charter mandated and reserved the rights
19 to the City Council which determined the Malkenhorst's compensation (and benefits), and (ii)
20 nothing in the CalPERS-Vernon contract delegates that authority to CalPERS.
21

22 **1. No Precedent.**

23 So far as Malkenhorst is aware, the courts have not considered the issue of preemption in
24 the context of compensation. Malkenhorst knows of no precedent on whether the PERL preempts
25 the right of charter cities to set compensation, payrate and base salary for pension purposes.
26 Thus, this is a matter of first impression for this Court to decide.
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2. Rights Are Determined Locally.

Marsille and City of Los Altos v. Board (1978) 80 Cal.App.3d 1049, do not support preemption. (2CT:568, lines 3-18.) They are no longer good authority.

The rationale of *Marsille* appears to be that *entitlement* to [benefits] is *established* by reference to state, rather than local, law and in this we find it unacceptable....[L]ocal authorities acting for a contracting agency are free (within the constraints of negotiation with their contracting members where unions or associations are involved) to determine *entitlement* to [benefits]."

(*Campbell v. City of Monrovia, supra*, at 348.)

In *Batters*, the court all but overturned *Marsille* and its progeny:

[We rule that] employees' rights could "only be properly understood by reference to the rules and regulations established by the member's employer which define the member's rights.... [T]hese rights arise solely out of and are determined by reference to local laws, rules and regulations." (Italics in original.)

Batters v. City of Santa Monica, supra, at 605.

In other words, the PERL does not preempt the charter city's local decisions establishing the entitlement to and amount of employment benefits, including compensation, pay rate, or pension. There is no conflict and no preemption by the PERL.¹⁹

VIII. CONTRACT ISSUES

1. Contracting Is A Municipal Affair.

¹⁹ No conflict arises between the "payrate" definition of compensation in the PERL and the charter city "payrate". The charter city designated a bi-weekly pay rate for the full time City Administrator position that it paid in cash pursuant to publicly available pay schedules. This satisfies the PERL's statutory definition of "payrate".

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If a city charter specifies the manner in which that city may enter into a contract, the terms of the charter control over otherwise applicable state law. [Citation]

First Street Plaza Partners, supra, at 661.

2. Contract Language and Intent

The language and intent of the contract between CalPERS and Vernon does not preempt or delegate the employer's right to determine compensation and pension, including under the charter. (2CT:537540.) At most, the language binds the employees' exercise of rights that the employees would separately hold, independent of the amounts agreed to between the City and the employee.

3. Ministerial Duties, Not Adjudicative.

For administrative ease, a city contracts for ministerial duties regarding pension administration and investing pension funds. As administrator, CalPERS regularly receives payroll reports from cities during the employment, calculates the employers' and employees' contributions (including as a percentage of the compensation) that the city agreed to pay, and informs the cities of the amount of money that the cities need to actuarially set aside to fund the cities' future pension obligations consistent with their reported payroll.

CalPERS has no financial stake. Neither the State of California nor CalPERS contributes any substantial funding or money to a city's pension funds. The city pays an administration fee to CalPERS for CalPERS' superior investing prowess.

The administration duties do not transfer adjudicative rights. CalPERS' subsequent changes are legislative or adjudicative efforts that are (1) beyond the scope of the ministerial duties transferred and (2) in direct conflict with the decisions that the charter city previously made.

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1 **4. Principles of Contract Construction; Intent of the Parties.**

2 When considering preemption by contract, CalPERS failed to consider the language of
3 the contract and the mutual intent of the parties.

4 We interpret a contract so as to give effect to the mutual intention of the
5 contracting parties at the time the contract was formed. (Civil Code, § 1636.) We
6 ascertain that intention solely from the written contract if possible, but also
7 consider the circumstances under which the contract was made and the matter to
8 which it relates. (*Id.*, §§ 1639, 1647.) We consider the contract as a whole and
interpret its language in context so as to give effect to each provision, rather than
interpret contractual language in isolation. (*Id.*, § 1641.)

9
10 *Service Employees Inter. Union, Local 99 v. Options—A Child Care and Human*
11 *Services Agency* (2011) 200 Cal.App.4th 869 ("*Service Employees Inter. Union*").

12 All contracts, whether public or private, are to be interpreted by the same rules, except as
13 otherwise provided by the *Civil Code*. *Roth v. Department of Veterans Affairs* (1980) 110
14 Cal.App.3d 622, as modified on denial of reh'g, Sept. 25, 1980.

15
16 The mutual intention is determined by objective manifestations of the parties' intent,
17 including the words used in the agreement, the surrounding circumstances under which the
18 parties negotiated or entered into the contract; the object, nature, and subject matter of the
19 contract; and the subsequent conduct of the parties. Intent may be inferred from acts and conduct
20 of a party to a contract even in the face of his or her express declarations to the contrary. H. S.
21 Crocker Co. v. McFaddin (1957) 148 Cal.App.2d 639, 307. Courts will not enforce a party's
22 unexpressed intention; rather, the law imputes to a person the intention corresponding to the
23 reasonable meaning of his language, acts, and conduct. *Habitat Trust for Wildlife, Inc. v. City of*
24 *Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1339.

25
26 Under the contract, the City did not preempt or transfer any charter or reserved rights to
27 CalPERS.
28

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1 Under its charter and as an employer, Vernon mandatorily retained the right to determine
2 compensation, including for pension purposes. Vernon made compensation decisions. Vernon
3 supported Malkenhorsts' right to the higher pension amount in an administrative action against
4 CalPERS. (See footnote 5 above.)

5 Including after Vernon became a charter city in 1988, CalPERS accepted the
6 administration duties and contract on terms consistent with charter rights that required Vernon to
7 determine compensation and office structure, including for pension purposes.
8

9 **5. Law Incorporated into Contract; Charter, Constitution.**

10 All applicable laws in existence when an agreement is made, which laws the parties are
11 presumed to know and to have had in mind, necessarily enter into the contract and form a part of
12 it, without any stipulation to that effect, as if they were expressly referred to and incorporated.
13

14 Castillo v. Express Escrow Co. (2007) 146 Cal.App.4th 1301; Edwards v. Arthur Andersen LLP
15 (2008) 44 Cal.4th 937.

16 This principle embraces:

17 (1) provisions of the constitution (Schroeter v. Bartlett Syndicate Bldg. Corp. (1936) 8
18 Cal.2d 12; In re College Hill Land Ass'n of City of San Diego (1910) 157 Cal. 596); and
19

20 (2) provisions of city charters (Los Angeles Athletic Club v. Board of Harbor Com'rs of
21 Los Angeles (1933) 130 Cal.App. 376).

22 The PERL is not incorporated in the agreement in a manner that would bind or limit the
23 City, especially contrary to decisions that the City made.
24

25 **6. Contract Cannot Expand Scope of Statute.**

26 An agreement cannot alter legislative intent or expand the scope of the statute. Such an
27 agreement therefore cannot make directly subject to a statute a person [or a city] who otherwise
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1 is not directly subject to the statute. *Service Employees Inter. Union, supra*, at 883.

2 **7. Extent of Delegation and Incorporation.**

3 The California Supreme Court recently ruled that a contract delegates only that power
4 that is within the contemplation of the agreement, and not in conflict with the agreement or other
5 parts. *City of Los Angeles v. Superior Court (Engineers & Architects Association)* (June 13,
6 2013, WL 3064811) ("*Engineers & Architects Association*").

7 CalPERS assumes that (1) there are implied statutory terms in the Vernon-CalPERS
8 contract that binds Vernon or delegates compensation decisions to CalPERS and (2) those
9 implied terms override the charter rights reserved to Vernon's City Council.

10 No specific contract provision delegated or restricted the City's exercise of its
11 compensation and other prerogatives for pension purposes. The language of the contract does not
12 support the implication that Vernon intended the CalPERS contract to affect its reserved charter
13 rights—rights that Vernon acted on.

14 CalPERS and Vernon seem to argue that if a city's decisions are not compliant with the
15 PERL, then the city's decisions are void to the extent of noncompliance. (See *Engineers &*
16 *Architects Association, supra*.) For example, if a city paid compensation and promised a pension
17 greater than CalPERS (as "interpreter" of the PERL) allows, Vernon and CalPERS argue that
18 CalPERS can void (or fail to perform on) the charter city's decisions and deny altogether the city
19 (and the employee) the right to determine compensation and the individual's right to a higher
20 pension. Vernon seems to argue that Malkenhorst is not entitled to any recovery or other benefit
21 beyond what CalPERS will provide. (2CD:590-3CT:605.)

22 In effect, both Vernon and CalPERS are asserting technicalities to deny Malkenhorst a
23 promised substantive benefit, after the fact, without recourse for the employee. Vernon is
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1 supporting CalPERS' rights to determine compensation in order that Vernon may free itself of its
2 obligation to pay the pension benefit that it promised to Malkenhorst. Both Vernon and CalPERS
3 are supporting each other to deny Malkenhorst recovery on a benefit that they have funded for 30
4 years or paid for the last seven years.

5 Also, in constitutional effect, CalPERS is transforming charter cities into general law
6 cities.
7

8 **8. Bellus v. City of Eureka.**

9 Charter cities can adopt part of the PERL without adopting other parts of the PERL.
10 *Bellus, supra*, at 345-352.

11 Charter cities which possess complete power over municipal affairs may adopt
12 part of a general law in an ordinance governing a municipal affair without thereby
13 being bound by all the provisions of that general law. (*City of Redondo Beach v.*
14 *Taxpayers, Property Owners, etc., City of Redondo Beach* (1960) 54 Cal.2d 126,
15 137, 5 Cal.Rptr. 10, 352 P.2d 170; *City of Santa Monica v. Grubb* (1966) 245
16 Cal.App.2d 718, 723—726, 54 Cal.Rptr. 210; cf. *Mullins v. Henderson* (1946) 75
17 Cal.App.2d 117, 130, 170 P.2d 118, 127; 'none of (the cases involving charters
expressly incorporating general laws) hold that a reference to a general law for
one express purpose also incorporates the law in any other respect.') The City here
agrees that establishment of an employee pension plan is a municipal affair.

18 ...
19 The State Pension Act by its own terms makes clear that its provisions are not
20 intended to preempt the field of pensions for municipal employees. (See section 1,
supra, fn. 3; cf. *Grace v. City of Los Angeles* (1967) 249 Cal.App.2d 577, 584, 58
Cal.Rptr. 388.)

21 The City contends, however, that because its charter contains no express
22 provision relating to pension plans the City was required to incorporate all of the
23 State Pension Act. The City's contention rests on *Blake v. City of Eureka* (1927)
24 201 Cal. 643, 258 P. 945, a decision which conflicts with the purpose of the 1914
25 amendment to the California Constitution and the general case law on the power
of charter cities. We therefore now overrule *Blake*.

26 ...
27 We are therefore not obligated to construe the pension ordinance in light of
28 the State Pension Act, but rather must construe the state act in light of its
incorporation (whether it be partial or whole) into an ordinance governing a
municipal affair adopted by a city with 'all-embracing' power over municipal
affairs. (Emphasis added) (See *Sunter v. Fraser, supra*, 194 Cal. 337, 343, 228

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P. 660.)

Bellus, supra, at 345-352.

CalPERS must utilize the compensation determined by Vernon, not the other way around.

The rationale underlying the rule of construction in *England*—that the City's liability for pension payments is not limited to the pension fund unless the pension plan clearly specifies that limitation—and the general rule that pension plans be liberally construed to promote their beneficent purpose (see, e.g., *Dillard v. City of Los Angeles*, supra, 20 Cal.2d 599, at p. 602,) rests on the same duty of fair dealing and obligation to protect the reasonable expectations of those whose reliance is induced that underlie the rules of construction in favor of the insured in insurance cases and in favor of the party of reduced bargaining power in cases involving other standardized contracts. (See, e.g., *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 269—271, and cases and authorities cited therein.)

The pension provisions of a city charter or ordinance form an integral part of the employment contract. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852; *Dryden v. Board of Pension Com'rs.* (1936) 6 Cal.2d 575, 579.) One purpose of providing pensions for municipal officers is to induce them to enter and continue in the service of the city. ...

As we explained in *England*, 'We must ... reject any theory that the provisions of the (ordinance) were designed to create an appearance of granting pensions while at the same time withholding the benefits by providing inadequate funds. Cf. *Gibson v. City of San Diego* (1945) 25 Cal.2d 930, 935, 156 P.2d 737 ...

The existence of a pension plan is of course a strong factor inducing persons to enter into or remain in a particular employment. Moreover, the employee(s) involved here (were) required to contribute a portion of (their) salary to the pension fund. ...

We conclude that a charter city, possessed of plenary power to adopt a pension system imposing upon it a general obligation, cannot escape liability for those pension payments which it has led its employees reasonably to expect. In this respect it is no different than any other employer or public service institution which induces reliance upon a contract which may reasonably be interpreted to afford that protection which has been impliedly promised.

Bellus, supra, at 345-352.

IX. NO DELEGATION, TRANSFER OR WAIVER OF RESERVED CHARTER

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1 **POWERS**

2 1. **No Delegation.**

3 Charter entities almost universally reserve to the city council or other legislative body the
4 right to determine the compensation of municipal employees. The language of charters is strictly
5 construed, with the plain meaning. *Richards v. Wheeler, supra*, at 112-13.
6

7 [U]nless a statute expressly allows them to do so, public agencies and officers
8 may not surrender or delegate to subordinates any powers involving the exercise
9 of judgment or discretion. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d
10 22, 24, 132 Cal.Rptr. 668, 553 P.2d 1140; *California Sch. Employees Assn. v.*
11 *Personnel Commission* (1970) 3 Cal.3d 139, 144, 89 Cal.Rptr. 620, 474 P.2d
12 436.) ... [The Court of Appeal] was also the powers to set salaries and fix the
13 budget as discretionary powers.

14 *Engineers & Architects Association, supra.*

15 By entering into the PERL contract, the charter city did not make discretionary choices to
16 delegate salary-setting and budget-making authority to CalPERS. (*Ibid.*) At most, CalPERS' role
17 "is confined to interpreting and applying terms which the employer itself has created or agreed
18 to and which it is capable of making more or less precise." (*Taylor v. Crane* (1979) 24 Cal.3d
19 442, 453.)" (*Ibid.*)

20 Vernon's charter requires the City Council to designate compensation. By necessary
21 implication, the charter prohibits delegation of the compensation question to another entity.
22 Delegation would be forbidden especially where the third party could substantively *change or*
23 *revise the compensation or pension terms* that the employer has promised or agreed to.

24 The Supreme Court ruled that "it is well settled that a charter city may not act in conflict
25 with its charter ... [a]ny act that is violative of or not in compliance with the charter is void."
26 *First Street Plaza Partners, supra*, at 669, citing *Domar, supra*, at 171.
27

28 Additionally, a municipality may not delegate or contract away its primary legislative and

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1 governmental functions. *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724,
2 734. If a local entity loses control of the final decision, then a contract or other delegation
3 amounts to a local entity's impermissible 'surrender,' 'abnegation,' 'divestment,' 'abridging,' or
4 'bargaining away' of its control of municipal function and is void to the extent of that
5 overextension. *County Mobilehome Positive Action Committee, Inc. v. County of San Diego*
6 (1998) 62 Cal.App.4th 727, 734, 738; *108 Holdings, Ltd. v. City of Rohnert Park* (2006) 136
7 Cal.App.4th 186, 194.

9 Analogously, given the constitutional dimension of local government autonomy, the
10 Legislature may not compel a city or county to submit involuntarily to binding interest
11 arbitration that conflicts with the prior decision of the entity. *Cal. Const.*, art. XI, §1; *City of San*
12 *Jose v. International Assn. of Firefighters, Local 230, supra.* See *City of Vista, supra.*; *City of*
13 *Downey, supra.*; *Bishop v. City of San Jose, supra.*

15 2. **Distinguishing City of Downey Decision: No Conflict.**

16 In *City of Downey, supra*, the court considered amendments to the PERL which changed
17 the contributions rate and reduced the mandatory retirement age. The court found that the
18 provisions of chapter 170 do not conflict with local regulation, nor do they involve a question of
19 preemption. Therefore, the court found that the home rule doctrine is not properly resorted to at
20 all.
21

22 In this case, CalPERS argues the PERL preempts local decision-making and CalPERS
23 has the power to designate compensation and offices.
24

25 The court in *City of Downey* found:

26 While the [improper delegation] doctrine prohibits the delegation of legislative
27 power, as applied to a city (*City of Redwood v. Moore*, 231 Cal.App.2d 563, 576;;
28 *Kugler v. Yocum*, 69 Cal.2d 371, 375,) that doctrine is limited in its scope.
(*Kugler* at pp. 375—376, 71 Cal.Rptr. 687, 445 P.2d 303.) Its purpose is to assure

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1 that truly fundamental issues are resolved by the legislative body and that any
2 grant of authority is accompanied by sufficient guides adequate to prevent its
3 abuse. This is upon the premise that while the legislative body must effectively
4 resolve the fundamental issues, the complexities of modern life make it
5 imperative to delegate some functions. (*Id.* at pp. 376, 383, 384, 71 Cal.Rptr. 687,
6 445 P.2d 303.)

7 'Only in the event of a total abdication of (legislative) power, through failure
8 either to render basic policy decisions or to assure that they are implemented as
9 made [emphasis added], will (a) court intrude on legislative enactment because it
10 is an 'unlawful delegation,' and then only to preserve the representative character
11 of the process of reaching the legislative decision.' (*Id.* at p. 384, 71 Cal.Rptr. at p.
12 695, 445 P.2d at p. 311.)

13 *City of Downey, supra.*

14 In Vernon's case, the compensation decision for the City Administrator was non-
15 delegable and was not delegated.

16 **3. Deprives City.**

17 CalPERS' interpretation of the PERL *deprives* the charter city or county entirely of its
18 authority to set employee salaries for pension purposes. *County of Riverside, supra*, at 287-288.
19 As CalPERS' arguments negate the charter cities' compensation and pension decisions instead of
20 clarifying them, the ruling is similar to arbitration laws that were found unconstitutional as
21 interfering with a charter entity's money (by potentially requiring the entity to pay higher salaries
22 than it chooses) and to perform municipal functions (determining compensation for county
23 employees). *County of Riverside, supra*, at 291; *Cal. Const.*, art XI, §11(a).

24 We there concluded that state law could not force a county into binding
25 arbitration over the compensation paid to county employees. Our decision applied
26 two state constitutional provisions: one giving all counties authority to "provide
27 for the ... compensation ... of [their] employees" (Cal. Const., art. XI, § 1, subd.
28 (b)), the other prohibiting the Legislature from "delegat[ing] to a private person or
body power to ... interfere with county or municipal corporation ... money" (*id.*,

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§ 11, subd. (a)). In the course of our analysis, we considered whether the state law at issue might be enforceable because it governed a matter of statewide concern. (*County of Riverside*, at pp. 286, 291, 132 Cal.Rptr.2d 713, 66 P.3d 718.) We rejected the Legislature's assertion that the matter involved a statewide concern. (*Id.* at pp. 286-287, 132 Cal.Rptr.2d 713, 66 P.3d 718.) Instead, we concluded that the state law in question impinged too much on local rights, "depriving the county entirely of its authority to set employee salaries." (*Id.* at p. 288, 132 Cal.Rptr.2d 713, 66 P.3d 718; see also *id.* at p. 293, 132 Cal.Rptr.2d 713, 66 P.3d 718.)

City of Vista, supra, at 563-564.

Rather than delegating, the cities and counties have made explicit compensation and pension decisions and promises, which CalPERS initially accepted, then rejected and voided after the fact.

4. **Ministerial Duty: CalPERS is Required to Administer Pension Benefits Based on Compensation Designated by Charter City.**

Pursuant to constitutional reservation of powers to the charter cities, CalPERS had a ministerial duty to calculate Malkenhorst's pension based on the compensation and office structure decision supplied by the charter city. *Engineers & Architects Association, supra*. CalPERS cannot alter the Constitution by contract, by statute in the PERL, or otherwise. CalPERS can and should direct the city to fund its pension contributions in correlation to the higher payroll and pension promises that it is making.

X. **CONSTITUTIONAL CONFLICTS**

If one accepts CalPERS' argument that CalPERS can change vested compensation decisions, then the PERL is unconstitutional to the extent it allows a decision materially different than explicitly set by the employer.

1. **Unconstitutional Statutes in the PERL.**

If CalPERS ruling's broad implications are considered, the PERL does not *minimally* impinge on a specific constitutional directive; it *contravenes* that directive entirely as it takes that

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1 authority away from cities. *County of Riverside, supra*, at 288. In effect, the ruling finds that the
2 PERL unconstitutionally forces a charter entity to give up, arbitrate, or retroactively change the
3 previously vested compensation decisions (and pension amounts) that was not contemplated by
4 the employer or employee.

5 **2. PERL Is Not a Procedural Law, It Is Substantive.**

6 Rather than being procedural, the PERL dictates the *substance* of a public employee labor
7 issue and impinges much more on local affairs.
8

9 "A procedural (state) law leaves the ultimate decision making authority about
10 employee compensation, job qualifications, or reasons to terminate in the hands of
11 the charter county and thus can be applied to it. [Citation.]" (*Id.* at pp. 1289–1290,
12 83 Cal.Rptr.3d 576.) "A substantive law, on the other hand, takes away a charter
13 county's ability to establish local salaries and control working conditions.
14 [Citation.]" (*Id.* at p. 1290, 83 Cal.Rptr.3d 576.)

15 *International Assn. of Firefighters Local Union 230 v. City of San Jose* (2011)
16 195 Cal.App.4th 1179, 1201.

17 Substantive laws have been found unconstitutional. *City of Vista, supra*, at 564.

18 **3. No Constitutional Conflicts with Retirement System Powers.**

19 Importantly, the charter cities' designation of compensation and municipal structures does
20 not infringe on or conflict with the pension system powers under Section 17 of article XVI of the
21 California Constitution. The charter cities' decisions do not intrude on the pension system's
22 power to set actuary rates or administer the system. The charter cities use compensation terms
23 that are consistent with the language of the underlying statutes.
24

25 **4. Unconstitutional as Applied, "Compensation", "Pay Rate".**

26 Facially, there is no conflict concerning the substance of the underlying pay rates.
27 CalPERS rejects the charter city's designated pay rate even though the terminology, procedure,
28

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and characteristics otherwise satisfy all the PERL requirements for the statutory definition of "payrate". "Payrate" ... means the normal monthly rate of pay or base pay of the member, paid in cash and pursuant to a publicly available pay schedules, for services rendered on a full-time basis during normal working hours...." (*Government Code*, §20636(a)-(b).) (2CT:548-555; 3CT:723-731.)

Instead, CalPERS seeks to unilaterally determine that Malkenhorst worked numerous "separate" positions, with "separate" hours of work and "separate" salaries. Then CalPERS argues that the charter city failed to provide publicly available pay schedules for these imaginary "separate" positions. (2CT:548-555; 3CT:723-731.)

CalPERS cannot even get to the issue of revising or reducing Malkenhorst's pension allowance unless it *initially* violates the charter city constitutional authority to determine "pay rate" and compensation in a manner that otherwise satisfies the PERL.

5. Employees' Rights

As independent grounds for relief, charter entity employees are entitled as employees, contractors, beneficiaries, in privity with their employer, and as third party beneficiaries to the benefit of compensation decisions that formed the basis of the employment relationship and pension. The pension provisions of a city charter or ordinance form an integral part of the employment contract. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852; *Dryden v. Board of Pension Com'rs.* (1936) 6 Cal.2d 575, 579. CalPERS cannot breach the employee-employer agreement and revise the pension.

XI. ATTORNEY FEES

1. Attorney Fees, Private Attorney General, Public Right to Make CalPERS

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Respect the PER, Government Code Section 800; CalPERS' Violation of the PER is Arbitrary and Capricious; Request for Attorney's Fees

In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under any provision of state law, except actions resulting from actions of the California Victim Compensation and Government Claims Board, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, a complainant who prevails in the civil action and is personally obligated to pay attorney's fees may collect reasonable attorney's fees, computed as prescribed, from the public entity, in addition to any other relief granted or other costs awarded. (*Government Code*, § 800, subd. (a); *Code of Civil Procedure*, § 1021.5.)

2. Attorney Fees Under Private Attorney General, Code of Civil Procedure Section 1021.5

Malckenhorst is vindicating the constitutional right of charter entities, the public's right to have a valid administrative process, the prohibition against the government ignoring the Parol Evidence Rule, and compelling CalPERS to recognize its limited jurisdiction.

A court may award attorney fees, upon motion, to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:

- A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons;
- The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate;

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- Such fees should not in the interest of justice be paid out of the recovery, if any.

With respect to actions involving public entities, this provision applies to allowances against, but not in favor of, public entities, and no claim will be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim will be required to be filed. (16 Cal. Jur. 3d, *Costs*, §121.)

The benefits and cost of the claimant's legal effort transcends Malkenhorst's mere personal interest.

3. Attorney Fees Under Government Code 800: CalPERS' Arbitrary and Capricious Behavior, Denial of Parol Evidence Rule, Denial of Undisputed Amounts

Arbitrary or capricious conduct encompasses conduct not supported by a fair or substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal dispute. (*Government Code*, §800; *Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 Cal.App.4th 249.) In this case, CalPERS is proceeding arbitrarily and capriciously, without fair or substantial reason, with a stubborn insistence or bad faith even though barred by collateral estoppel, invading a charter city's constitutional autonomy, and in violation of parol evidence rule, and applying laws retroactively that do not apply retroactively.

An award of attorney's fees is proper where the agency relies on a patently invalid regulation. (*Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal.App.3d 957.)

Failure to pay Malkenhorst can also be seen as lack of good faith, breaching its fiduciary duties, prejudicing Malkenhorst by unfairly denying him the financial wherewithal to mount a solid legal defense, etc. Malkenhorst seeks fees under *Code of Civil Procedure* section 1251.5 and *Government Code* section 800.

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1 4. Amount of Attorney Fees

2 In *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1,
3 the Court provides detailed guidance to a trial court in assessing an attorney's fees motion.

4 Where it is possible to quantify the benefit, CalPERS must first estimate the monetary value of
5 the benefits obtained by the successful litigant. In this case, it is very difficult to actually quantify
6 the benefit in purely monetary terms. The test is *reasonableness*. (*Hewlett v. Squaw Valley Ski*
7 *Corp.* (1997) 54 Cal.App.4th 499.)²⁰

8 In *California Common Cause v. Duffy*, (1987) 200 Cal.App.3d 730, the court held that it
9 was improper to reduce the amount of attorney's fees to less than market rate on the basis of what
10 a public attorney would earn.
11

12
13
14 Our Supreme Court has approved a "market value" approach to awarding attorney
15 fees, approving an award to a public attorney based on the prevailing market rate
16 rather than a "cost plus" approach. *Serrano v. Unruh, supra*, 32 Cal.3d at pp. 641-
17 642, 186 Cal.Rptr. 754, 652 P.2d 985.) The Supreme Court has observed an
18 approach which awarded lower fees to public-interest attorneys would "inspire
19 'lesser incentive to settle a suit without litigation than would be the case if a high-
20 priced private firm undertook plaintiffs representation.' [Citations.]" (Id. at p. 642,
21 186 Cal.Rptr. 754, 652 P.2d 985.) The Supreme Court has also rejected the
22 argument that awarding fees at a market rate to a public interest attorney would
23 result in a windfall: " 'We do not think ... that compensating a public interest
24 organization ... on the same basis as a private practitioner results in ... a
25 windfall.... Indeed, we are concerned that compensation at a lesser rate would
26 result in a windfall to the defendants.' [Citations.]" (*Ibid.*) Subsequent decisions
27 by the Courts of Appeal have also approved awards to public interest attorneys
28 based on a prevailing market rate, noting "the market value approach is more
likely to entice competent counsel to undertake representation of difficult and
otherwise unrewarding cases." (*Margolin v. Regional Planning Com.* (1982) 134
Cal.App.3d 999, 1004, 185 Cal.Rptr. 145; *San Bernardino Valley Audubon*
Society, Inc. v. County of San Bernardino, supra, 155 Cal.App.3d at p. 755, 202
Cal.Rptr. 423.)"

29 ²⁰ Malkenhorst requests a hearing to establish that both the hourly rate and amount of time
30 spent in this case are reasonable, which we request to allow additional evidence as to fees, time
spent, reasonableness, and related issues.

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1 (California Common Cause, *supra.*, at 756.)
2 **XII. No Modification Allowed After Retirement**

3 A pension right may not be destroyed, once vested, without impairing a contractual
4 obligation of the employing public entity. (*Kern v. City of Long Beach, supra*, at 852-853; *Betts*
5 *v. Board of Administration* (1978) 21 Cal.3d 859, 863.)
6

7 **1. Malkenhorst Vested in Law at the Time of His Retirement, Laws Were Not**
8 **Retroactive**

9 In several places, CalPERS seeks to apply statutes that became effective after
10 Malkenhorst retired. CalPERS cannot use laws that were passed after Malkenhorst retired in a
11 retroactive manner to divest Malkenhorst of his rights. For example, written agreement and
12 changes to special compensation rules changed in 2011. (*Cal. Code Regs. tit. 2, § 571.*)
13

14 Many of the laws affecting Charter Cities, procedures, and CalPERS compensation
15 changed materially after Mr. Malkenhorst's retirement. The changes cannot be applied to
16 Malkenhorst.
17

18 Under California law, statutes are not to be given a retrospective operation unless it is
19 clearly made to appear that such was the legislative intent. (*Gadda v. State Bar of Cal., supra*; 58
20 Cal.Jur.3d, *Statutes*, §32..) CalPERS is trying to retroactively bind Malkenhorst with rules and
21 regulations that did not yet have the force and effect of law.
22

23 A retrospective or retroactive statute is one that operates on matters that occurred, or on
24 rights, obligations, and conditions that existed, before the time of its enactment, giving them an
25 effect different from that which they had under previously existing law (*Myers v. Philip Morris*
26 *Companies, Inc.* (2002) 28 Cal.4th 828; *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450.)
27 Every statute that takes away or impairs vested rights acquired under existing laws or creates a
28

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1 new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or
2 considerations already past, must be deemed retrospective (*Strauss v. Horton* (2009) 46 Cal.4th
3 364, as modified, (June 17, 2009).)

4 **2. No Consent, No Waiver, No Estoppel, No Voluntary Appearance, Response**
5
6 **Under Protest**

7 Although jurisdiction can be conferred by consent, Malkenhorst does not consent and
8 does not waive his rights to contest jurisdiction and venue. Malkenhorst submits information to
9 CalPERS in this matter involuntarily, under compulsion, and for very limited purposes of
10 responding to CalPERS' requirement that Malkenhorst file an Appeal so that CalPERS does not
11 immediately reduce his pension.
12

13 **To prevent an unlawful reduction of Malkenhorst's pension as threatened, we**
14 **present the information in this Appeal under protest.**

15 **We do not consent by appearance or waive any rights. We reserve all rights,**
16 **including to challenge CalPERS' efforts, authority, and jurisdiction.**
17

18
19 **CONCLUSION**

20 CalPERS does not have jurisdiction to proceed. CalPERS must terminate the
21 administrative process immediately and continue to pay Malkenhorst the higher pension.
22

23 Charter cities have the right to determine compensation and office structure for pension
24 purposes. The PERL does not preempt the charter cities' autonomous decisions on compensation
25 and office structure. The contract between CalPERS and the charter city does not delegate,
26 transfer, waive, or abdicate control or give CalPERS the right to revise the charter city
27 determination. CalPERS must accept and use the compensation and office structure decisions
28

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1 made by the contracting charter cities when calculating the pension benefits of the charter
2 employees.

3 Respectfully submitted,

4 Dated: October 11, 2013

5 By: 

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

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

14 In Re the Matter of
15
16 BRUCE V. MALKENHORST, SR., and
17 CITY OF VERNON,
18 Respondents.
19

) CALPERS CASE NO.: TBD
) OAH CASE NO.: TBD
)
) MALKENHORST'S POINTS AND
) AUTHORITIES ON PAROL EVIDENCE
) RULE
)
) EXHIBITS 1 through TBD
)
) Hearing Dates: _____
) Hearing Location: _____
)
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)

21
22 Bruce V. Malkenhorst, Sr. submits these Points and authorities on the Parol Evidence
23 Rule that bars introduction of evidence that contradicts terms set in an integrated writing.

24 Dated October 10, 2013

25 
26 John Jensen
27 Attorney for Bruce Malkenhorst
28

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MEMORANDUM

1
2 **1. Exclude Irrelevant Evidence**

3 No evidence is admissible except relevant evidence. (*Evidence Code*, § 350.) Irrelevant
4 matter, though pleaded, is still irrelevant. (*Decter v. Stevenson Properties* (1952) 39 Cal.2d 407,
5 247 P.2d 11.) (*Government Code*, §§11506, 11511.5(b) (12), 11513(b); *California Rules of*
6 *Court*, Rule 3.1112(a)-(d),(f).)
7

8 **2. Parol Evidence Rule**

9
10 **Code of Civil Procedure § 1856. Terms in writing intended as final expression
of agreement; exclusion of parol evidence; exceptions**

11 (a) Terms set forth in a writing intended by the parties as a final expression of
12 their agreement with respect to such terms as are included therein may not be
13 contradicted by evidence of any prior agreement or of a contemporaneous oral
agreement.

14 (b) The terms set forth in a writing described in subdivision (a) may be explained
or supplemented by evidence of consistent additional terms unless the writing is
15 intended also as a complete and exclusive statement of the terms of the
agreement.

16 (c) The terms set forth in a writing described in subdivision (a) may be explained
or supplemented by course of dealing or usage of trade or by course of
17 performance.

18 (d) The court shall determine whether the writing is intended by the parties as a
19 final expression of their agreement with respect to such terms as are included
therein and whether the writing is intended also as a complete and exclusive
20 statement of the terms of the agreement.

21 (e) Where a mistake or imperfection of the writing is put in issue by the pleadings,
this section does not exclude evidence relevant to that issue.

22 (f) Where the validity of the agreement is the fact in dispute, this section does not
exclude evidence relevant to that issue.

23 (g) This section does not exclude other evidence of the circumstances under
which the agreement was made or to which it relates, as defined in Section 1860,
24 or to explain an extrinsic ambiguity or otherwise interpret the terms of the
agreement, or to establish illegality or fraud.

25 (h) As used in this section, the term agreement includes deeds and wills, as well
26 as contracts between parties.

27 Code Civ. Proc., § 1856

28 **3. Relevancy: Parol Evidence Rule Bars Consideration of First Contract**

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1 Because parol evidence cannot alter or vary the terms of an integrated writing, evidence
2 of prior or collateral oral agreements is *legally irrelevant*. (*Tahoe Nat'l Bank v. Phillips*, supra, 4
3 C3d at 23, 92 CR at 714; *Casa Herrera, Inc. v. Beydoun*, supra, 32 C4th at 344, 9 CR3d at 103;
4 *BMW of No. America, Inc. v. New Motor Veh. Bd.*, supra, 162 CA3d at 990, 209 CR at 57; *Cal.*
5 *Prac. Guide Civ. Trials & Ev. Ch. 8E-G.*)
6

7 Even though the parol evidence rule "results in the exclusion of evidence, it is *not* a rule
8 of evidence *but is one of substantive law*." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 C4th 336,
9 343, 9 CR3d 97, 102 (emphasis in original; internal quotes omitted); *Tahoe Nat'l Bank v. Phillips*
10 (1971) 4 C3d 11, 22–23, 92 CR 704, 713–714; *BMW of No. America, Inc. v. New Motor Veh. Bd.*
11 (1984) 162 CA3d 980, 990, 209 CR 50, 56; *Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-G.*)
12

13 4. **Prevent Any Mention of Excluded Evidence**

14 In addition to excluding highly prejudicial evidence, the court may instruct opposing
15 counsel to *avoid any mention* of the evidence in question during trial or in argument; and to
16 direct persons under their control (counsel's associates, clients, witnesses, etc.) likewise to avoid
17 such mention. (L.A. Sup.Ct. Rule 8.92; see *Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757,
18 793, 174 CR 348, 371; *Cal. Prac. Guide Civ. Trials & Ev. Ch. 4-F.*)
19

20 5. **CalPERS as Third Party Bound by Parol Evidence Rule**

21 The parol evidence rule precludes introduction of extrinsic evidence to impeach a written
22 agreement even though one of parties to the action is a stranger to the contract. (*Kern County*
23 *Water Agency v. Belridge Water Storage Dist.* (App. 5 Dist. 1993) 22 Cal.Rptr.2d 354, 18
24 Cal.App.4th 77.)
25

26 Dated October 10, 2013

27 
28 John Jensen
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9
10
11 **BEFORE THE BOARD OF ADMINISTRATION**
12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
13

14 In Re the Matter of

15 BRUCE V. MALKENHORST, SR. and
16 CITY OF VERNON,

17 Respondents.

- 18) CALPERS CASE NO.: 2012-0671
- 19) OAH CASE NO.: 2013080917
- 20)
- 21) **RESPONDENT MALKENHORST'S**
- 22) **MEMORANDUM OF POINTS AND**
- 23) **AUTHORITIES REGARDING**
- 24) **COLLATERAL ESTOPPEL, RES**
- 25) **JUDICATA, ISSUE PRECLUSION AND**
- 26) **CLAIM PRECLUSION IN SUPPORT OF:**
- 27)
- 28) **(1) JURISDICTIONAL CHALLENGE;**
-) **(2) MOTION TO STRIKE;**
-) **(3) DEMURRER;**
-) **(4) AGENCY FAILURE TO STATE**
-) **ACTS OR OMISSIONS ON**
-) **WHICH AGENCY MAY**
-) **PROCEED (*GOVERNMENT CODE***
-) **SECTION 115069(A)(2));**
-) **(5) MOTION IN LIMINE TO**
-) **EXCLUDE EVIDENCE;**
-) **(6) MOTION TO STRIKE FOR**
-) **INDEFINITENESS;**
-) **(7) MOTIONS AND CHALLENGES**
-) **REGARDING AGENCY**
-) **JURISDICTION AND**
-) **AUTHORITY**

Hearing Date: October 31, 2013
Hearing Location: Los Angeles OAH

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27 *Olive Proration Program Committee for Olive Proratino Zone No. 1 v. Agricultural*

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INTRODUCTION

1
2 Overwhelmingly, legal authority supports barring a state agency from holding a second
3 quasi-judicial administrative hearing process to re-litigate the same issues that it resolved in a
4 prior quasi-judicial administrative process. An administrative agency action to determine facts
5 within its jurisdiction, and relating to individual rights, will often be held binding in a subsequent
6 proceeding before the agency itself, where the statute does not expressly give the agency power
7 to modify its decisions. (*Olive Proration Program Committee for Olive Proration Zone No. 1 v.*
8 *Agricultural Prorate Com.* (1941) 17 Cal.2d 204, 209.)

9 In 2005-2006, CalPERS finally determined all of the factual and legal issues that
10 CalPERS now attempts to raise again in a second administrative process. No new facts have
11 arisen. No new facts could arise as Malkenhorst's employment with the City of Vernon ("City" or
12 "Vernon") terminated in 2005. Malkenhorst was already retired in 2006 when CalPERS made its
13 prior final determination.

14 In 2005-2006, CalPERS forced Malkenhorst to engage counsel to litigate these identical
15 issues. Malkenhorst did everything in his power to pursue and timely secure all his legal rights
16 under CalPERS' regulations and law.

17 In the 2005-2006 quasi-judicial process, Malkenhorst's and Vernon's legal counsel (Loeb
18 & Loeb LLP) jointly filed at least two formal "Notice(s) of Appeal" with supporting evidence.

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

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

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1 After CalPERS deliberated the resolution of the dispute for more than a year (while
2 continuing to withhold a portion of Malkenhorst's pension throughout that time), CalPERS
3 finally and unequivocally determined in several writings that Malkenhorst was entitled to the
4 higher pension.

5 On August 17, 2006, CalPERS formally "ruled" on all the presented issues and held
6 that "*CalPERS has determined*" that Malkenhorst was entitled to the higher pension, including
7 the PERSible benefit of his 25% longevity pay. CalPERS informed Malkenhorst and Vernon that
8 the Benefits Division will "make the adjustment to Mr. Malkenhorst's allowance."

9 On or about November 30, 2006, CalPERS' Benefit Services Division adjusted
10 Malkenhorst's final compensation to \$44,128 per month.¹ (Letter from CalPERS to Malkenhorst,
11 November 30, 2006)

12 CalPERS paid Malkenhorst a lump sum of \$176,105.79 to make up for the cumulative
13 underpayment during the pendency of the CalPERS appeal process. (Letter from CalPERS to
14 Malkenhorst, November 30, 2006)

15 By its formal determination letters, CalPERS resolved all outstanding issues raised in the
16 compulsory quasi-judicial process in Malkenhorst's favor. (Letter from Alinda Heringer of
17 CalPERS to Marla Aspinwall of Loeb & Loeb, August 17, 2006) CalPERS waived or abandoned
18 any other challenges to Malkenhorst's pension when it resumed paying him the higher pension
19 and paid him the lump sum retroactive benefits. The correction of the "final compensation" and
20 payment of the lump sum confirmed the final resolution of the issues.

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

25

26 ¹ CalPERS informed Malkenhorst that CalPERS would use the full \$35,302 monthly base
27 salary he received for his service as City Administrator during his final year at Vernon pursuant
28 to the City's pay schedules plus 25% longevity pay special compensation ($\$35,302 \times 1.25 =$
 $\$44,128$) as his final compensation.

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1 From 2006 to the present, CalPERS has consistently paid Malkenhorst the higher
 2 pension, without reservations.

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

6 The U.S. Supreme Court has established: "When an administrative agency is acting in a
 7 judicial capacity and resolves disputed issues of fact properly before it which the parties have
 8 had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to
 9 enforce repose". (*United States v. Utah Construction & Mining Company* (1966) 384 U.S. 394.)
 10 A final administrative decision binds the parties on the issues contested. (*Miller v. City of Los*
 11 *Angeles* (2008) 169 Cal.App.4th 1373.) The litigation of issues that could and should have been
 12 pursued in a prior proceeding action is also barred. (*Takahashi v. Board of Education, supra.*)
 13 Unreviewed findings of a state administrative agency are entitled to preclusive effect. (*Brand v.*
 14 *Regents of Univ. of California* (2008) 159 Cal.App.4th 1349.) An administrative adjudicatory
 15 decision which has not been overturned through the courts is absolutely immune from collateral
 16 attack. (*Bank of America Nat. Trust & Savings Ass'n v. Mundo* (1951) 37 Cal.2d 1.)² Collateral
 17 estoppel (issue preclusion) and res judicata (claim preclusion) bar CalPERS from reopening the
 18 same issues,³ especially under the recent precedential case of *Murray v. Alaska Airlines* (2010)
 19 50 Cal.4th 860.

20 No exception to collateral estoppel/res judicata applies.

21 On May 25, 2012 CalPERS sent a letter to Malkenhorst indicating that CalPERS was
 22 examining whether Malkenhorst had held numerous *separate* jobs at Vernon, each with its own
 23 separate duties and responsibilities, hours of work, and compensation. All of these issues were
 24

25 ² CalPERS and Vernon are bound by collateral estoppel even in an "erroneous" decision,
 26 as it was not timely challenged in a judicial review or writ. (*Gilb v. Chiang* (2010) 186
 26 Cal.App.4th 444.)

27 ³ CalPERS actually conducted an investigation of these same issues in 1995-1996, and
 28 then conducted a formal administrative review on the same law and facts which led to a final
 decision in Malkenhorst's favor in 2005-2006.

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1 addressed within the 2005-6 hearing process.

2 In June 2012, CalPERS initiated an audit, requesting documents. Malkenhorst responded
3 under compulsion, reserving all of his rights to challenge CalPERS' process and jurisdiction,
4 including on grounds of collateral estoppel/*res judicata*. CalPERS also seeks to violate
5 constitutional autonomy of charter cities to designate compensation and office structure for
6 pension purposes. *See Charter City Points and Authorities'*, motion based on charter city issues,
7 motions and supporting papers which are concurrently filed and incorporated by reference
8 herein.

9 CalPERS is also barred by laches, equitable estoppel, and unreasonable delay. *See*
10 *concurrently filed Motions, points and authorities and other matters related to equitable*
11 *estoppel, laches, unreasonable delay, concurrently filed and incorporated by reference herein.*

12 In addition, CalPERS has failed and refused to produce records under the Public Records
13 Act and Information Practices Act relevant to Malkenhorst's collateral estoppel and *res judicata*
14 claims.

15 **INTRODUCTION TO JURISDICTION AND AGENCY LIMITATION**

16 CalPERS is barred at the threshold from proceeding with a second administrative
17 process on the same matters that it previously resolved in a quasi-judicial administrative
18 process.

19 Once barred by collateral estoppel, *res judicata*, issue preclusion, and claim preclusion,
20 CalPERS and the Office of Administrative Hearings ("OAH") have no continuing jurisdiction to
21 hear or to decide any fact, testimony, document, evidence, or legal issue.

22 **I. Compelled, Involuntary Submission of Challenge and Appeal**

23 Respondent Malkenhorst does not consent, acquiesce, or submit to CalPERS' jurisdiction
24 or authority in this matter in anyway. Presenting information pursuant to *Government Code*
25 section 20128 to prevent an unlawful reduction of Malkenhorst's pension as threatened by
26 CalPERS, Malkenhorst presents facts, legal argument, and information in this document and
27 accompanying filings under protest and with a full reservation of rights. Malkenhorst
28 incorporates in full herein the arguments and facts provided in the concurrent filings, and in

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1 related documents, but they are also filed under protest, with a full reservation of rights, and
2 without acquiescence or consent to CalPERS' jurisdiction.

3 The compulsion is that CalPERS will consider a non-response to be a default, with the
4 consequence that CalPERS will immediately reduce Malkenhorst's pension amount. Without
5 CalPERS continuing to pay the pension, Malkenhorst will not be able to afford counsel to
6 defend himself in litigation to the extent necessary.

7 Counsel has endeavored to make "special appearances" before the OAH prior to the filing
8 of a CalPERS *Statement of Issues* in order to contest the OAH and CalPERS' "jurisdiction". But
9 there is no means under the APA to make a special appearance or the equivalent.

10 By these filings under compulsion, Malkenhorst does not waive any rights. The parties
11 cannot confer jurisdiction by agreement or action.

12 CalPERS exceeds its jurisdiction and the power of the agency to act under its statutory
13 powers, including:

14 1) CalPERS previously resolved the matters associated with Malkenhorst's
15 pension in a contested quasi-judicial process where attorneys submitted evidence and
16 argument to CalPERS in a formal "notice of Appeal".

17 2) CalPERS is barred by collateral estoppel, *res judicata*, issue preclusion,
18 and claim preclusion from proceeding with a second administrative process.

19 3) CalPERS fails to provide a pre-hearing process that provides individuals
20 with the due process rights to effectively litigate defenses of collateral estoppel, *res*
21 *judicata*, issue preclusion, and claim preclusion. Full relief cannot be had in a CalPERS
22 administrative hearing because the OAH is unable to provide a procedural mechanism to
23 abate a barred administrative process at the threshold.

24 4) CalPERS and its administrative process are biased, without necessary due
25 process.

26 5) CalPERS is undertaking arbitrary and capricious actions that is not in
27 accordance with law.

28 6) CalPERS is acting in excess of its statutory authority.

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1 7) CalPERS is violating Malkenhorst's due process and equal protection
2 rights guaranteed by the California and United States *Constitutions*.

3 8) No jurisdiction to determine jurisdiction re *res judicata* and collateral
4 estoppel. The doctrine of jurisdiction to determine jurisdiction is probably inapplicable to
5 an administrative agency's determinations of its own jurisdiction. (See *San Francisco v.*
6 *Padilla* (1972) 23 Cal.App.3d 388, 400.)

7 **II. Effect of CalPERS' Lack of Jurisdiction**

8 CalPERS and its Board are an administrative agency of limited jurisdiction.
9 Administrative agencies 'have only such powers as have been conferred on them, expressly or by
10 implication, by constitution or statute.' (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103;
11 *United States F. & G. Co. v. Superior Court* (1931) 214 Cal. 468, 471.) "An administrative
12 agency, therefore, must act within the powers conferred upon it by law and may not validly act in
13 excess of such powers. (Citations.)" (*Ferdig v. State Personnel Bd., supra*, at 104.) Accordingly,
14 it is well settled that "when an administrative agency acts in excess of, or in violation, of the
15 powers conferred upon it, its action thus taken is void." (*Ibid*; see *Aylward v. State Board of*
16 *Chiropractic Examiners* (1948) 31 Cal.2d 833, 839.) "In view of these principles it is apparent
17 that it is the strong policy of the law, because of the limited jurisdiction of agencies such as the
18 Board, to require that such agencies proceed within their jurisdiction." (*City and County of San*
19 *Francisco v. Padilla* (1972) 23 Cal.App.3d 388.)

20 Prior to the first administrative process, CalPERS had limited jurisdiction to calculate
21 Malkenhorst's pension based only on the compensation that Vernon paid pursuant to the only
22 existing pay schedules. As an affirmative limitation of its jurisdiction, an administrative agency
23 may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief
24 – including certain types of monetary relief – as long as such activities are authorized by statute
25 or legislation and are reasonably necessary to effectuate the administrative agency's primary,
26 legitimate regulatory purposes. (*Village Trailer Park, Inc. v. Santa Monica Rent Control Bd.*
27 (2002) 101 Cal. App. 4th 1133, as modified (Sept. 24, 2002); 2 Cal. Jur. 3d, *Administrative Law*.
28 §360.)

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1 Administrative action that is not authorized by, or is inconsistent with, acts of the
2 Legislature is void. (*Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339;
3 *Hamilton v. Gourley* (2002) 103 Cal.App.4th 351; *Kaiser Foundation Health Plan, Inc. v.*
4 *Zingale* (2002) 99 Cal.App.4th 1018.)

5 CalPERS is not allowed to determine that its own statutes are unconstitutional or fail to
6 enforce the Public Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et seq.*) as
7 unconstitutional. (Cal.Const., art. III, §3.5.) CalPERS exceeds or acts outside of its jurisdiction
8 and authority when it fails to give effect to collateral estoppel, *res judicata*, and issue/claim
9 preclusion at the threshold to stop a barred second process. (See *Lockyer v. City and County of*
10 *San Francisco* (2004) 33 Cal.4th 1055; Cal. Const., art. XI, §§4, 5, 6; see also *California Fed.*
11 *Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, reh'g denied, September 19,
12 1991.)

13 **FACTS**

14 *Malkenhorst incorporates herein in full the facts of his employment, vesting and salary*
15 *contained in other documents he is filing with CalPERS.)*

16 **PROCEDURAL BACKGROUND**

17 **Malkenhorst's Employment as Vernon's City Administrator**

18 1. The City of Vernon hired Malkenhorst in September 1975. In 1978 Vernon
19 appointed Malkenhorst as City Administrator. Vernon paid Malkenhorst only in his position as
20 City Administrator. Malkenhorst served as City Administrator until he retired on June 30, 2005.
21 (Notice of Motion for Injunctive Relief (Declaration of Bruce Malkenhorst) filed on February.
22 21, 2013.)

23 **CalPERS' 1994-1996 Review**

24 2. In late 1994 or early 1995, CalPERS investigated Malkenhorst's compensation,
25 positions, and pension allowance. CalPERS asked for information about Malkenhorst's
26 compensation and position as City Administrator (and/or "City Administrator/City Clerk").
27 Vernon responded. (Notice of Motion for Injunctive Relief (Declaration of Bruce Malkenhorst)
28 filed on Feb. 21, 2013.)

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1 3. In 1996, CalPERS ended the administrative review with no adverse action.
2 CalPERS maintained the information in Malkenhorst's member file. (Notice of Motion for
3 Injunctive Relief (Declaration of Bruce Malkenhorst) filed on February 21, 2013.)

4 **CalPERS' 2005-2006 Administrative Review, Appeal and Determination**

5 4. Almost ten (10) years later, Malkenhorst retired. (Notice of Motion for
6 Injunctive Relief (Declaration of Bruce Malkenhorst) filed on February 21, 2013.)

7 5. CalPERS' July 18, 2005 letter⁴ started a *compulsory* formal quasi-judicial
8 administrative process against Malkenhorst about his compensation, earnings, positions, and
9 longevity pay at Vernon, a charter city. Acting pursuant to its statutory authority to resolve and
10 determine disputed issues of law and fact, CalPERS required Malkenhorst to file a formal appeal
11 within thirty (30) days if Malkenhorst wanted to challenge the immediate reduction in his
12 pension.⁵ CalPERS withheld or reduced part of Malkenhorst's pension pending CalPERS' formal
13 resolution.⁶ (Letter from Alinda Heringer of CalPERS to Martha Valenzuela of Vernon, July 18,
14 2005.)

15 6. Vernon supported its employee Malkenhorst against CalPERS in the 2005-2006
16 administrative process. Vernon was in privity with Malkenhorst and CalPERS.

17 7. On August 11, 2005, Malkenhorst's (and Vernon's) attorneys, Loeb & Loeb,
18 timely filed a formal "Notice of Appeal" meeting the appeal requirements of CalPERS' quasi-
19 judicial process. (Letter from Marla Aspinwall of Loeb & Loeb to Lori McGartland of CalPERS,
20

21 ⁴ In early 2005, CalPERS commenced a formal review of Malkenhorst's pension. (Notice
22 of Motion for Injunctive Relief (Declaration of Bruce Malkenhorst) filed on February 21, 2013.)

23 ⁵ If Malkenhorst did not timely file an appeal that contained all the facts and law
24 supporting his position, CalPERS would immediately decide against him, reduce his pension,
25 and the quasi-judicial process would be over. (See 2 Title CA Regs, §§555 *et seq.*) The
26 administrative process included the ultimate right to file a *Petition for Writ of Administrative*
Mandamus. (*Code of Civil Procedure*, §1094.5.) However, Malkenhorst could establish an
27 administrative record only if he timely "appealed".

28 ⁶ If Malkenhorst challenged CalPERS in superior court in 2005-2006 prior to completing
the administrative process (i.e., without filing an administrative appeal), CalPERS would likely
demur based on failure to exhaust administrative remedies. Now, Malkenhorst has already
exhausted his administrative remedies on these same issues (in 2005-6).

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1 August 11, 2005.) Loeb & Loeb supplied proper legal argument, facts, and documentary
2 evidence to rebut CalPERS' arguments, foundation, and reasoning about Malkenhorst's
3 compensation, earnings, positions, and longevity pay at Vernon. (*Ibid.*) Malkenhorst's counsel
4 argued the facts and law of compensation, earnings, positions, and longevity pay. (*Ibid.*)

5 8. On September 23, 2005, CalPERS acknowledged and accepted the Notice of
6 Appeal and documentation. (Letter from Alinda Heringer of CalPERS to Marla Aspinwall of
7 Loeb & Loeb, September 23, 2005.)

8 9. CalPERS' 2005-2006 review relied in part on files, documents, and records that
9 CalPERS generated in its earlier 1995-1996 review.⁷ For example, CalPERS contended that
10 Malkenhorst held numerous positions at Vernon, that he was paid "overtime" or separate
11 salaries, and challenged his longevity pay for pension purposes. (*Ibid.*)

12 10. In the 2005-2006 quasi-judicial process, Loeb & Loeb provided evidence and
13 argument to rebut CalPERS' contentions. (Letter from Marla Aspinwall of Loeb & Loeb to Lori
14 McGartland of CalPERS, August 11, 2005; Letter from Marla Aspinwall of Loeb & Loeb to
15 Alinda Heringer of CalPERS, November 3, 2005.)

16 **Malkenhorst Exhausted CalPERS' Administrative Remedies and Process in 2005-2006**

17 11. Near the end of 2005, Malkenhorst had timely and fully complied with his
18 obligations to supply law and facts to fully pursue CalPERS' adversarial, quasi-judicial
19 administrative process. Vernon continued to support him. CalPERS withheld part of his pension.
20 CalPERS had a duty and obligation to present all facts and law that involved the same core
21 nucleus of operative facts.

22 12. Months passed. CalPERS had the opportunity to undertake the available formal
23 adversarial and evidentiary APA hearing. (*Government Code*, §§11500, *et seq.*)

24
25

26 ⁷ For example, a July 18, 2005 "Pension Abuse Detail" sheet identified Heringer as
27 analyst and quoted the March 13, 1996 letter from CalPERS to Vernon: "It would be logical that
28 Mr. Malkenhorst would receive retirement benefits calculated on the position of City
Administrator/ City Clerk. However, the other duties for the positions listed above would be
considered overtime."

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1 13. However, CalPERS chose not to proceed to a contested APA hearing. (*Ibid.*)

2 **Final Determination and Decision in Quasi-Judicial Process in 2005-2006**

3 14. On August 17, 2006, CalPERS formally "ruled" by determination letter. It held
4 that "*CalPERS has determined*" that Malkenhorst was entitled to the higher pension, including
5 the inclusion of his 25% longevity pay as part of the "compensation earnable" used to calculate
6 the pension allowance. CalPERS informed Malkenhorst and Vernon that CalPERS' would "make
7 the adjustment to Mr. Malkenhorst's allowance." (Letter from Alinda Heringer of CalPERS to
8 Marla Aspinwall of Loeb & Loeb, August 17, 2006.)

9 15. The determination letter could also be seen as a voluntary dismissal of the
10 administrative process, with prejudice,⁸ especially in light of the fact that CalPERS was the
11 entity that originally challenged Malkenhorst's right to the higher pension, then essentially
12 conceded that he was right. Since CalPERS controlled the administrative process, it could simply
13 have gone forward with the process had it felt there was any merit to pursuing its original
14 decision to reduce the pension. CalPERS did not reserve any right to re-litigate the matter.

15 16. On November 30, 2006, CalPERS informed Malkenhorst that it would use
16 \$44,128 per month as his final compensation.⁹ (*Ibid.*)

17 17. CalPERS paid Malkenhorst a lump sum amount of \$176,105.79 as a cumulative
18 underpayment. (Letter from CalPERS to Malkenhorst, November 30, 2006.)

19 18. CalPERS resolved in Malkenhorst's favor all outstanding issues that were raised
20 or could have been raised in the compulsory quasi-judicial process. (Letter from Alinda Heringer
21 of CalPERS to Marla Aspinwall of Loeb & Loeb, August 17, 2006.) The correction of the "final
22 compensation" and payment of the lump sum confirmed it. (Letter from CalPERS to

23

24 ⁸ A voluntary dismissal acts as a final judgment on the merits. A dismissal with prejudice
25 is the modern name for a common law retraxit. Dismissal with prejudice is determinative of the
26 issues in the action and precludes the dismissing party from litigating the issues again. (*Estate of*
27 *Redfield* (2011) 193 Cal.App.4th 1526, 1533. See also *Federal Home Loan Bank of San*
28 *Francisco v. Countrywide Financial Corporation* (April 1, 2013, First Appellate District)
pending, A135898.)

⁹ CalPERS used the full \$35,302 monthly base salary plus 25% longevity pay that
Vernon paid.

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1 Malkenhorst, November 30, 2006.)

2 19. CalPERS' August 17, 2006, determination letter did not explicitly mention
3 Malkenhorst's single full time position or single base salary. However, all the legal or factual
4 issues that arose from the core nucleus of operative facts of his Vernon employment had been
5 presented or should have been considered by CalPERS when it paid Malkenhorst the higher
6 pension and the lump sum. (*Ibid.*) CalPERS had earlier acknowledged that Malkenhorst's single
7 full time position and single base salary had been raised in the appeal. CalPERS resolved these
8 challenges as part of the litigation of the 2005-2006 process. (Letter from Alinda Heringer of
9 CalPERS to Marla Aspinwall of Loeb & Loeb, August 17, 2006.)

10 20. Malkenhorst believed all issues were finally resolved. CalPERS acquiesced and
11 consented. Malkenhorst detrimentally relied.

12 **Six Years Passed**

13 21. Another six (6) years passed without any notice of dispute from CalPERS.

14 22. From 2006 to 2012, Malkenhorst was well known as the highest paid pensioner in
15 the CalPERS system. (See, for example, April 29, 2009 article in The State Worker blog at the
16 *Sacramento Bee*.)

17 **CalPERS' Second Process, Audit**

18 23. On May 25, 2012, under the guise of conducting an "audit", CalPERS requested
19 that Malkenhorst provide additional information, documentation and argument. (Letter from
20 Tomi Jimenez of CalPERS to Malkenhorst, May 25, 2012.) CalPERS examined whether
21 Malkenhorst held numerous *separate* concurrent jobs at Vernon, each with its own separate
22 duties, hours of work, and compensation.

23 24. On May 31, 2012, CalPERS released a statement to the media: "*CalPERS Slashes*
24 *Pension of Former City of Vernon Official, Pension Fund denies membership to other officials.*"
25 CalPERS' Chief Executive wrote that Malkenhorst's pension was "an affront to ... hundreds of
26 thousands of public employees...." (The statement remains on CalPERS' website.)

27 25. CalPERS made Malkenhorst's new 2012 determination letter publicly available.

28 26. Malkenhorst sought documents by public records act, including those related to

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1 the 2005-2006 administrative process. (Letter from John Michael Jensen to CalPERS, June 5,
2 2012.)

3 27. Under protest, in which he also reserved and addressed laches, collateral estoppel
4 and charter entity autonomy issues, Malkenhorst responded on July 25, 2012.

5 **Orange County Declaratory Relief Action Re Charter Cities/Counties' Constitutional**
6 **Home Rule Autonomy**

7 28. On behalf of himself and 100,000 employees of charter cities and counties,
8 Malkenhorst initiated a *Complaint for Declaratory Relief* in the Orange County Superior Court¹⁰
9 challenging CalPERS' invasion of the constitutional "home rule" autonomy of charter entities to
10 determine compensation and office structure for pension purposes.¹¹

11 29. The primary right at issue was charter entities' rights to determine local
12 compensation and office decisions. The wrong alleged was CalPERS' invasion of charter cities'
13 and counties' autonomy to determine compensation and offices for pension purposes. The relief
14 requested sought to compel CalPERS to act on its ministerial duty to utilize the compensation
15 and offices designated by charter entities. As applied, the writ sought to prohibit CalPERS'
16 review or revision of the compensation that Vernon paid Malkenhorst and the office structure of
17 Vernon's local government.

18 30. CalPERS opposed and Vernon appeared and argued in the Orange County case.

19 31. On October 19, 2012, the Hon. Jamoa A. Moberly of the Orange County Superior
20 Court ruled that charter entities waive their constitutional "home rule" rights when they contract
21 with CalPERS to administer pension benefits for their employees. (Minute Order of the Hon.
22

23 ¹⁰ *Malkenhorst v. CalPERS*, Orange County Superior Court case no. 30-2012-00588466
24 was initiated on behalf of approximately 100,000 employees of charter cities and counties that
25 contract with CalPERS for benefits.

26 ¹¹ CalPERS' audit response was not a final determination. Malkenhorst hoped that
27 CalPERS would recognize that it was estopped and abate the start of a "second" process. He was
28 still investigating and seeking documents regarding the 2005-2006 administrative process to
ascertain whether collateral estoppel/*res judicata* would bar a second process. Further, among
other things, a writ on collateral estoppel would be premature and speculative as a response to
the "audit".

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1 Jamoa A. Moberly, October 19, 2012.) As a result, Judge Moberly ruled that Malkenhorst failed
2 to exhaust his administrative remedies.

3 **Earlier Start of CalPERS' Second Administrative Process Against Malkenhorst**

4 32. On October 22, 2012, *after* Judge Moberly sustained CalPERS' demurrer without
5 leave to amend, CalPERS issued a "final determination" letter that announced the initiation of
6 the second administrative process. CalPERS specifically asserted the legal and factual issues
7 already resolved in the 2005-2006 review.¹² (Letter from Tomi Jimenez of CalPERS to
8 Malkenhorst, October 22, 2012.)

9 **Ruling on Demurrer to Charter City Home Rule Autonomy Issues, Dismissal**

10 33. On December 28, 2012, the Judge Moberly slightly changed her order to reflect
11 preemption by contract, denied Malkenhorst's motion for reconsideration, sustained CalPERS'
12 *Demurrer*, and ruled that Vernon's constitutional "home rule" autonomy was preempted by the
13 city contracting with CalPERS pursuant to *Marsille v. City of Santa Ana* (1976) 64 Cal.App.3d
14 764.) (Minute Order of the Hon. Jamoa A. Moberly, December 28, 2012.) Judge Moberly
15 dismissed the case on January 23, 2013.

16 34. On January 28, 2013, Malkenhorst timely appealed Judge Moberly's ruling (Case
17 No. G047959 in the Fourth Appellate District, Division 3.

18 **Obtaining Additional Information About CalPERS' 2005-2006 Administrative Process**

19 35. Malkenhorst had long sought documents under the Public Records Act from
20 CalPERS.

21 36. Although the PRA requests were narrowly targeted and specific, CalPERS
22 provided approximately one hundred and forty thousand (140,000) copies or electronic pages of
23 Bates stamped documents.

24

25
26 ¹² In its 2012 review, CalPERS contends that Malkenhorst held multiple positions with
27 separate duties and responsibilities, work hours and salaries for each position, and thus was not
28 entitled to utilize the base salary he'd received as City Administrator for pension calculation; and
it contends that Malkenhorst was not entitled to the 25% longevity pay special compensation
previously approved by CalPERS.

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1 37. The vast majority of the approximately 140,000 pages are irrelevant.

2 38. CalPERS refused to provide documents related to its 2005-2006 review and
3 resolution of Malkenhorst's job, compensation and pension calculations.

4 39. In November or December 2012, counsel discovered an August 17, 2006 letter
5 from CalPERS to Marla Aspinwall of Loeb & Loeb. (Letter from Alinda Heringer of CalPERS
6 to Marla Aspinwall of Loeb & Loeb, August 17, 2006) that mentioned an administrative process
7 in 2005.

8 **Contacts with Former Counsel for Records, Documents**

9 40. Beginning in or around mid-December 2012, Malkenhorst's counsel directly
10 contacted Marla Aspinwall, the Loeb & Loeb attorney who handled the administrative appeal in
11 2005-2006.

12 41. On December 14, 2012, counsel demanded Loeb & Loeb provide the client files
13 of its prior representation of Malkenhorst.

14 42. On December 18 and 19, 2012, Loeb & Loeb supplied new documents containing
15 the "Notices of Appeal" in the 2005-2006 process.

16 43. Malkenhorst's and Vernon's joint "Notices of Appeal" in 2005-2006 (Letter from
17 Marla Aspinwall of Loeb & Loeb to Lori McGartland of CalPERS, August 11, 2005; Letter from
18 Marla Aspinwall of Loeb & Loeb to Alinda Heringer of CalPERS, November 3, 2005) involve
19 compensation, pay, offices, structure, pension, and related issues. These are the same issues
20 CalPERS is asserting in the current administrative process. (See, for example, letter from Tomi
21 Jimenez of CalPERS to Malkenhorst, October 22, 2012.)

22 44. On December 18, 2012, Malkenhorst informed CalPERS that collateral
23 estoppel/*res judicata* applied to bar a second administrative process. (Letter from John Michael
24 Jensen to Tomi Jimenez and Scott Yates of CalPERS, December 18, 2012.)

25 45. CalPERS' 30-day administrative deadline was approaching. CalPERS failed to
26 respond timely to abate the second process on collateral estoppel, etc. grounds. Counsel filed
27 under protest a formal appeal of CalPERS' "final determination" to reduce Malkenhorst's pension
28 on December 21, 2012. Malkenhorst specifically reserved his rights to assert jurisdictional,

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1 collateral estoppel, *res judicata*, and other issues.

2 **Procedural Background of the Collateral Estoppel Writ**

3 46. On January 16, 2013, Malckenhorst filed his *Verified Petition* in the Los Angeles
4 County Superior Court, case no. BS141275, to preclude CalPERS from re-litigating issues.

5 47. It was served on January 16, 2013.

6 48. On January 22, 2013, Malckenhorst requested that CalPERS stay the
7 administrative proceedings. (Letter from John Michael Jensen to Scott Yates, Tomi Jimenez and
8 Renee Salazar of CalPERS, January 22, 2013.)

9 49. On February 5, 2013, CalPERS rejected the stay offer. (Letter from Renee Salazar
10 of CalPERS to John Michael Jensen, February 5, 2013.)

11 50. CalPERS filed a *Demurrer*. (Notice of Demurrer to Verified Petition & Demurrer
12 of Respondent to Petitioner's Verified Petition filed on February 13, 2013.)

13 51. Malckenhorst opposed the *Demurrer*, requested Judicial Notice, filed a declaration
14 and exhibits, and filed a *Motion for Preliminary Injunction* with supporting documents.
15 (Petitioner's Opposition to Demurrer, Exhibits 1-31 filed on March 4, 2013; Request for Judicial
16 Notice & Proof of Service filed on March 7, 2013) (Notice of Motion for Injunctive Relief filed
17 on February 21, 2013; Request for Judicial Notice in Support filed on February 21, 2013.)

18 52. Malckenhorst filed an ex parte request to expedite hearing on the stay. (Ex Parte
19 Application filed on February 26, 2013.) CalPERS opposed in writing and appeared. By
20 telephone, Judge O'Brien denied the ex parte expediting the *Motion for Preliminary Injunction*
21 hearing.

22 53. On March 15, 2013 at the *Demurrer* hearing, Judge O'Brien heard about 5
23 minutes of oral argument. At about 3 PM, Judge O'Brien took the matter under submission.

24 54. Apparently on Friday March 15, 2013 at about 5 PM, Judge O'Brien left the
25 bench in Department 86.

26 55. On Monday, March 18, 2013, Judge O'Donnell was assigned to Department 86.

27 56. On Tuesday March 19, 2013, Judge O'Brien, apparently no longer assigned or
28 presiding, issued his order. (Minute Order of the Hon. Robert O'Brien, March 19, 2013.)

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1 57. The order granted demurrer to the *Verified Petition* without leave to amend as
2 discussed.

3 58. The ruling on failure to exhaust administrative remedies ignores that Malkenhorst
4 had *already* exhausted in 2005-2006. CalPERS has no jurisdiction to determine collateral
5 estoppel/*res judicata*.

6 59. Malkenhorst filed an appeal of Judge O'Brien's dismissal of the action on March
7 21, 2013.

8 60. A Petition for Writ of Supersedeas, Prohibition and/or Other Relief was filed in
9 the Second District Court of Appeals on April 2, 2013.

10 **CalPERS Attempts to Commence Second Administrative Process**

11 61. On September 6, 2013, Malkenhorst's counsel received a notice from the Office
12 of Administrative Hearing ("OAH") that CalPERS sought to schedule a hearing in the
13 Malkenhorst matter for March 5 and 6, 2014, before the OAH.

14 62. CalPERS had not filed a "*Statement of Issues*" or other document that established
15 jurisdiction in the OAH.

16 63. On September 12, 2013, Malkenhorst challenged CalPERS action by "special
17 appearance" letter to the OAH informing it of the appeals challenging the grant of demurrer in
18 both the Los Angeles and Orange County actions.

19 64. On September 13, 2013, CalPERS responded with various allegations and
20 argument.

21 65. On September 13, 2013, Malkenhorst wrote another letter as a "special
22 appearance" letter challenging CalPERS' and the OAH's jurisdiction and power.

23 66. On September 18, 2013, OAH staff telephoned the parties to schedule a
24 teleconference on these issues.

25 67. On September 20, 2013, presiding Judge Formaker of the Los Angeles office of
26 the OAH informed counsel for Malkenhorst and for the City of Vernon during a conference
27 call that some time prior to that date, CalPERS had filed and sent a "draft" *Statement of Issues*
28 pleading (not served on, provided to or even disclosed to Malkenhorst) to one or more of the

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1 judges of the Los Angeles branch of the OAH.

2 68. During the September 20, 2013 phone call, Presiding ALJ Formaker clarified that
3 there were no rights or power to make a special appearance to challenge jurisdiction under the
4 APA or before the OAH.

5 69. On September 27, 2013, CalPERS attempted to initiate a new "second"
6 administrative process in the OAH by filing a *Statement of Issues*. CalPERS faxed a copy of
7 the *Statement of Issues* to counsel for Malkenhorst later that afternoon, but only after
8 Malkenhorst's counsel telephoned CalPERS and requested a copy. The *Statement of Issues* has
9 apparently never been mailed to Malkenhorst or his counsel.

10 70. On September 30, 2013, Malkenhorst filed a *Petition for Writ of Supersedeas,*
11 *Prohibition, and Request for Stay* in the Second District Court of Appeal, Division Three,
12 along with supporting motions and papers, on the charter cities constitutional issues, seeking to
13 halt CalPERS' efforts to begin a second administrative process while the appeal was pending.

14 71. On October 1, 2013, Malkenhorst also filed a *Petition for Writ of Supersedeas,*
15 *Prohibition, and Request for Stay* before the Second District Court of Appeal, Division seven,
16 7 on the collateral estoppel, re judicata, claim preclusion, and issue preclusion grounds, again
17 seeking to halt CalPERS' second administrative process while the appeal was pending.

18 72. On October 3, 2013, the Second District Court of Appeal denied the *Petition for*
19 *Writ and Request for Stay* without explanation.

20 73. On October 10, 2013, Malkenhorst filed a *Petition for Review* with the Supreme
21 Court requesting review of the Second District's denial.

22 74. No decision has yet been rendered on Malkenhorst's *Petition for Writ and Request*
23 *for Stay* pending with the Fourth District Court of Appeal.

24 LAW AND ARGUMENT

25 I. Introduction to Validity and Finality of 2005-2006 Process: CalPERS' Authority to 26 Make Determinations

27 The management and control of the retirement system is vested in CalPERS' Board.
28 (*Government Code*, §20120.) The Board may make such rules as it deems proper. (*Government*

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1 Code, §20121.) The Board shall determine and may modify benefits pursuant to the Public
2 Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et seq.*). (*Government Code*,
3 §20123.) The Board can adjust benefits. (*Government Code*, §20124.) CalPERS is the sole judge
4 of the conditions under which persons may continue to receive benefits. (*Government Code*,
5 §20125.)

6 CalPERS does not need to undertake a formal evidentiary hearing to finally resolve
7 disputed issues in its quasi-judicial administrative process. Formal evidentiary APA hearings are
8 discretionary. (*Government Code*, §20134.) The Board may, in its discretion hold a hearing for
9 the purposes of determining any question presented to it involving any right, benefit, obligation.
10 "The Executive Officer is hereby authorized ... to fix and authorize the payment of any refund,
11 allowance or benefit to which such applicant may be found to be entitled.... The Executive
12 Officer *may refer* the question of an applicant's entitlement to any refund, allowance or benefit
13 ... to a hearing officer for hearing." (*California Code of Regulations*, §555, emphasis added.)

14 When CalPERS decides to hold a formal evidentiary hearing, it shall be conducted
15 pursuant to the APA, *Government Code* section 11500. The Board shall have all of the agency
16 powers under the APA. In any case, if it is impracticable to determine compensation, the Board
17 may estimate the compensation. (*Government Code*, §20224.)

18 **II. Collateral Estoppel and Res Judicata**

19 "Res judicata" describes the preclusive effect of a final judgment on the merits.
20 Res judicata, or claim preclusion, prevents re-litigation of the same cause of
21 action in a second suit between the same parties or parties in privity with them.
22 Collateral estoppel, or issue preclusion, "precludes re-litigation of issues argued
and decided in prior proceedings."

23 (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, quoting *Lucido v.*
24 *Superior Court* (1990) 51 Cal.3d 335, 341.)

25 **Difference Between Collateral Estoppel and Res Judicata.** In res judicata or claim
26 preclusion, where the subsequent suit is between the same parties or parties in privity with
27 them, on the same cause of action, the prior judgment operates as a complete bar to the second
28 action. (See *People v. Barragan* (2004) 32 Cal.4th 236; *In re Crow* (1971) 4 Cal.3d 613.)

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1 Once a quasi-judicial process has decided an issue of fact or law necessary to its
2 judgment, collateral estoppel precludes re-litigation of the issue in a suit on a *different* cause of
3 action involving a party to the first case. (*San Remo Hotel, L.P. v. City and County of San*
4 *Francisco, Cal.*, 125 S.Ct. 2491, 162 L. Ed. 2d 315 (U.S. 2005).)

5 Thus, a final judgment in a previous action between the same parties, or their privies,
6 operates as an estoppel or conclusive adjudication as to whatever issues in the second cause of
7 action on a different claim or cause of action were actually and necessarily litigated in the first,
8 or *could have been litigated* in the other action. (*Louis Stores, Inc. v. Department of Alcoholic*
9 *Beverage Control* (1962) 57 Cal.2d 749; *Taylor v. Hawkinson* (1957) 47 Cal.2d 893.)

10 A prior final judgment on the merits settles not only every issue that was raised but also
11 every issue that might have been raised in the first action. (*Adam Bros. Farming, Inc. v. County*
12 *of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010).)

13 A prior adjudication of a litigated issue is conclusive as to any facts that might have been
14 litigated in support of the first cause of action or in support of any defense to the cause of action.
15 (*Shore v. Shore* (1954) 43 Cal.2d 677; *Krier v. Krier* (1946) 28 Cal.2d 841; *Sutphin v. Speik*
16 (1940) 15 Cal.2d 195.)

17 **III. Collateral Estoppel Applies to Agencies and CalPERS in This Matter**

18 Collateral estoppel/*res judicata* applies to agencies acting in a quasi-judicial capacity.

19 An administrative agency acts in a judicial capacity when it resolves disputed
20 issues of fact properly before it and provides the parties with an opportunity to
21 present evidence and to litigate fully the issues. (*United States v. Utah Constr.*
Co., *supra*, 384 U.S. at p. 422 [16 L. Ed.2d at pp. 660-661].)

22 (*Rymer v. Hagler* (1989) 211 Cal.App.3d. 1171, 1178-1179.)

23 Collateral Estoppel and Res Judicata Apply to Agencies. An administrative order
24 determining facts within its jurisdiction, and relating to individual rights, will often be held
25 binding in a subsequent proceeding before the agency itself, where the statute does not expressly
26 give the agency power to modify its decisions. (*Olive Proration Program Committee for Olive*
27 *Proration Zone No. 1 v. Agricultural Prorate Com.* (1941) 17 C.2d 204, 209, 109 P.2d 918;
28 *Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 C.2d 749, 756, 22 C.R. 14.

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1 371 P.2d 758, see *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321.,

2 It is now generally recognized that res judicata applies in administrative proceedings to
3 decisions of an administrative agency made pursuant to its judicial function. (*Hollywood Circle,*
4 *Inc. v. Dept. of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732-733, 13 Cal.Rptr. 104,
5 361 P.2d 712.)

6 **No Statute allows CalPERS to revisit its prior decisions.** Although CalPERS is
7 obligated to address errors and omission, it is not empowered to revisit its prior determinations
8 and void res judicata.

9 **Opportunity to Litigate Standard** The U.S. Supreme Court held: "When an
10 administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly
11 before it which the parties have had an adequate opportunity to litigate, the courts have not
12 hesitated to apply *res judicata* to enforce repose". (*United States v. Utah Construction & Mining*
13 *Company* (1966) 384 U.S. 394.)

14 **Final Decision.** The doctrine of collateral estoppel is applicable to final decisions of
15 administrative agencies acting in a judicial or quasi-judicial capacity. (*United States v. Utah*
16 *Constr. Co.* (1966) 384 U.S. 394, 421-422 16 L.Ed.2d 642, 660-661, 86 S.Ct. 1545]; *People v.*
17 *Sims* (1982) 32 Cal.3d 468, 480-481 [186 Cal.Rptr. 77, 651 P.2d 321]; *French v. Rishell* (1953)
18 40 Cal.2d 477 [254 P.2d 26].) A final administrative decision binds the parties on the issues
19 contested. (*Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373.)

20 **No Requirement for Court to Review.** Unreviewed findings of a state administrative
21 agency are entitled to preclusive effect. (*Brand v. Regents of Univ. of California* (2008) 159
22 Cal.App.4th 1349.) An administrative adjudicatory decision which has not been overturned
23 through the courts is absolutely immune from collateral attack. (*Bank of America Nat. Trust &*
24 *Savings Ass'n v. Mundo* (1951) 37 Cal.2d 1.)¹³

25

26

27 ¹³ CalPERS and Vernon are bound by collateral estoppel even in an "erroneous" decision,
28 as it was not timely challenged in a judicial review or writ. (*Gilb v. Chiang* (2010) 186
Cal.App.4th 444.)

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1 **IV. "Judicial" or "Quasi-Judicial" Character of CalPERS' Administrative Process**

2 CalPERS' 2005-2006 administrative process was quasi-judicial in that CalPERS required
3 Malkenhorst to hire attorneys to present contested law and facts to CalPERS where it was
4 authorized to make determinations of these matters.¹⁴ CalPERS' prior administrative process met
5 the threshold requirements:

6 ... 'First, the issue sought to be precluded from re-litigation must be identical to
7 that decided in a former proceeding. Second, this issue must have been actually
8 litigated in the former proceeding. Third, it must have been necessarily decided in
9 the former proceeding. Fourth, the decision in the former proceeding must be final
10 and on the merits. Finally, the party against whom preclusion is sought must be
11 the same as, or in privity with, the party to the former proceeding. [Citations.] The
12 party asserting collateral estoppel bears the burden of establishing these
13 requirements.' [Citation.]" ... If all of these threshold requirements of collateral
14 estoppel are met, the analysis determining whether that doctrine applies to give
15 preclusive effect then looks to " 'the public policies underlying the doctrine before
16 concluding that [it] should be applied in a particular setting.' [Citation.]"

(*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174
Cal.App.4th 339, 356-357, quoting *Pacific Lumber Co. v. State Water Resources
Control Bd.* (2006) 37 Cal.4th 921, 943-944.)

16 **V. Applying the Threshold Requirements of Collateral Estoppel/Res Judicata Doctrine**

17 This controversy meets all five threshold requirements:

18 1) **Identical to issue litigated in former process.** CalPERS asserts the same
19 issues in 2012-2013 as it asserted in 2005-2006: that Malkenhorst held numerous separate
20 positions with separate pay schedules, separate salaries and separate hours of work.
21 CalPERS attempted to reduce his "compensation earnable" for pension calculation
22 purposes, and exclude his 25% longevity pay.

23 2) **Issue must have had opportunity to be litigated.** CalPERS has the right

24
25 ¹⁴ Although Malkenhorst has disputed the scope and nature of CalPERS' authority in this
26 and other pending actions or papers, CalPERS asserts that it is authorized by the PERL and the
27 California Constitution to determine the right to and amount of benefits payable to Members,
28 including Malkenhorst, and to initiate administrative processes to make those determinations, by
itself, by its Board, and by delegation, including to the OAH under the APA, and to hold
hearings, if necessary to make those determinations.

1 and power to make pension determinations. (*Government Code*, §§20099, 20123.) Once
2 CalPERS advised Malkenhorst in 2005 that it was cutting his pension and accepted his
3 appeal, the quasi-judicial administrative process had begun. CalPERS has the power
4 under statute to decide these issues, and decide whether to hold a hearing under the APA
5 or not. (*Government Code*, §§20123, 20134; *California Code of Regulations*, §§555,
6 555.4.)¹⁵ CalPERS initiated a compulsory administrative process for Malkenhorst that
7 included the ultimate right to file a writ of administrative mandamus if the process led to
8 an adverse ruling against Malkenhorst. (*Government Code*, §§11500, 11523.) The *only*
9 reason the process ended early is because CalPERS formally and finally resolved the
10 issues in Malkenhorst's favor.

11 *Sims* explained that "[a]n issue is actually litigated '[w]hen [it] is properly raised,
12 by the pleadings or otherwise, and is submitted for determination, and is
13 determined A determination may be based on a failure of ... proof' (Rest.2d.
14 Judgments (1982) § 27, com. d, p. 255, italics added.) (*Sims, supra*, 32 Cal.3d at
p. 484, 186 Cal.Rptr. 77, 651 P.2d 321.)

15 (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 871.)

16 But it is *the opportunity* to litigate that establishes whether the agency acted in a
17 quasi-judicial manner. If that party had the *opportunity* to litigate in the former process,
18 he or she will be bound by the results in the second.

19 In *Murray v. Alaska Airlines, Inc., supra*, the Supreme Court found that the
20 Department of Labor's administrative process met the "actual litigation" requirement *even*
21 *though plaintiff (Murray) had no opportunity to participate in a contested process up to*
22 *that point*. The Court ruled that his ability to challenge the proposed order *would* provide
23 such rights and that his failure to do so collaterally estopped him from re-litigating his
24 claims.

25
26 ¹⁵ The Administrative Procedures Act would lead to a formal OAH hearing, the right to
27 require testimony under oath, to cross examine witnesses, to introduce evidence and argument, to
28 be heard before an Administrative Law Judge, the issuance of an ALJ's *Proposed Decision*,
preparation of an administrative record, and ultimately the right to appeal to the courts.

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1 CalPERS clearly had such opportunity to bring the matter through the
2 administrative process, but chose to finally resolve it without completing an adversarial
3 process. *Res judicata*, collateral estoppel, issue preclusion, and claim preclusion apply at
4 the threshold to bar a second administrative hearing. (See *Murray v. Alaska Airlines*,
5 *supra*.)

6 3) **Issue necessarily raised in former process.** The issues raised now were
7 either decided and/or had to be raised for decision by CalPERS in 2005-2006. The
8 alleged existence of separate offices, separate pay and separate hours of work were
9 necessarily decided when CalPERS provided Malkenhorst the higher pension amount and
10 paid him the lump sum of \$176,000 after it initially reduced his pension.

11 CalPERS cannot "reserve" the right to reopen a certain cause of action based on
12 the same underlying core nucleus of facts about positions and pay.¹⁶

13 4) **Decision final and on the merits.** After CalPERS issued its July 18, 2005
14 "denial" letter offering appeal rights, there were three outcomes:

15 (a) Malkenhorst could choose not to appeal (i.e., he could accept
16 CalPERS' decision), suffer a reduced pension therefor, and thus be collaterally
17 estopped in any future action;

18 (b) Malkenhorst could appeal and CalPERS could take the matter through
19 the entire OAH process and obtain a ruling in its favor; or

20 (c) Malkenhorst could appeal and CalPERS could make a determination
21 of the matter and thereby resolve it, completing the administrative process without
22 undertaking a full hearing before an ALJ (or a full hearing before the Board)
23 under its own authority.

24 Once CalPERS had forced Malkenhorst to engage lawyers to prepare a formal
25 Notice of Appeal, Malkenhorst had appeared and taken his opportunity to litigate the
26

27 ¹⁶ In 2006, CalPERS neither asserted a right to re-litigate the issues in the future nor
28 obtained an agreement from Malkenhorst that it would be permitted to do so.

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1 matter. CalPERS already generated a denial letter with appeal rights that had established
2 that CalPERS had the opportunity to litigate the issues.

3 In fact, both Malkenhorst and CalPERS actually litigated the issues.

4 CalPERS' decision to resolve the 2005-2006 administrative process by letter was
5 no different for purposes of collateral estoppel than if the full evidentiary OAH process
6 (or a full hearing before the Board, etc.) was carried through and Malkenhorst prevailed.

7 CalPERS is not required by statute to make every binding quasi-judicial decision
8 in any particular way. (*Government Code*, §§20120 et seq, 20123, 20134; *California*
9 *Code of Regulations*, §§555, 555.4.)

10 5) **Same party as in former process or one in privity.** Both parties—
11 CalPERS and Malkenhorst—are identical in the 2005-2006 process and the current
12 administrative process. Malkenhorst is in privity with Vernon and CalPERS. Vernon is in
13 privity with CalPERS.

14 **VI. Settlement, Dismissal is Sufficient for Collateral Estoppel and Res Judicata.**

15 A voluntary dismissal acts as a final judgment on the merits. A dismissal with prejudice
16 is the modern name for a common law retraxit. Dismissal with prejudice is determinative of the
17 issues in the action and precludes the dismissing party from litigating the issues again (*Estate of*
18 *Redfield, supra*, at 1533.)

19 A dismissal with prejudice terminates the action and determines the rights of the parties.
20 (*Gagnon Co. v. Nevada Desert Inn* (1955) 45 Cal.2d 448; *Roybal v. University Ford* (1989) 207
21 Cal.App.3d 1080.)

22 Such a dismissal is equivalent, for purposes of *res judicata*, to a judgment on the merits
23 in favor of the defendant who is dismissed, and as such bars further litigation on the same subject
24 matter between the parties. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813.)

25 It is a bar not only to a subsequent action on the same cause, but also to preclude further
26 litigation of issues raised in the dismissed pleadings. (*Torrey Pines Bank v. Superior Court,*
27 *supra.*) And it is not subject to collateral attack unless the order is void, particularly when it was
28 made and entered for a consideration. (*Wouldridge v. Burns* (1968) 265 Cal.App.2d 82.)

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1 Moreover, a dismissal with prejudice need not be supported by consideration to have the
2 effect of a judgment. (*Roybal v. University Ford, supra.*)

3 **Dismissal by Consent of Both Parties: Retraxit.** Where the dismissal is by consent or
4 stipulation of both parties after a compromise or settlement of the action, it is intended to operate
5 as a retraxit, and the judgment, entered with prejudice, will bar a new action. (See *Goddard v.*
6 *Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47, 55 [dictum]; *Sears v. De Mota* (1958)
7 157 Cal.App.2d 216, 220 *Datta v. Staab* (1959) 173 Cal.App.2d 613, 621; *Louie Querioolo*
8 *Trucking v. Superior Court* (1967) 252 Cal.App.2d 194, 200; *Sylvester v. Soulsburg* (1967) 252
9 Cal.App.2d 185, 193; *Kronkright v. Gardner* (1973) 31 Cal.App.3d 214, 219.)

10 **Where Record Does Not Indicate Reason for Dismissal** For purposes of applying the
11 doctrine of *res judicata*, a dismissal with prejudice is the equivalent of a final judgment on the
12 merits, even when the record does not indicate the reason for the dismissal. (*Boeken v. Philip*
13 *Morris USA* (2010) 48 Cal.4th 788, 793 [plaintiff's dismissal of action for loss of consortium was
14 final judgment, barring her later wrongful death action].)

15 **Collateral Estoppel Effect of Dismissal.** A dismissal *with* prejudice bars any later
16 lawsuit on the *same claim*. A judgment of dismissal entered thereon is a final judgment *on the*
17 *merits*, entitled to *res judicata* effect. (*Boeken v. Philip Morris USA, supra*, at 793; *Rice v. Crow*
18 (2000) 81 Cal.App.4th 725, 733-734.)

19 The *res judicata* effect of a voluntary dismissal with prejudice is the same as for any
20 other final judgment on the merits: It precludes parties from re-litigating the same cause of action
21 in a subsequent suit. (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Cas. &*
22 *Sur. Co. of America* (2005) 133 Cal.App.4th 1319, 1331 [voluntary dismissal with prejudice "is
23 given the same finality as if the matter were adjudicated and proceeded to a final judgment on
24 the merits"]; see *Le Parc Comm. Ass'n v. Workers' Comp. App. Bd.* (2003) 110 Cal.App.4th
25 1161, 1172-1173 [dismissal with prejudice of personal injury action against uninsured employer
26 no bar to workers' compensation claim because different rights involved].)

27 In *Torrey Pines Bank v. Superior Court, supra*, the court held that a voluntary dismissal
28 with prejudice not only operated as a bar (*res judicata*), but also as a collateral estoppel, barring

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1 litigation of affirmative defenses. (*Torrey Pines Bank v. Superior Court, supra*, at 822, 824.)

2 **No Written Consent That Ruling Was Without Prejudice.** "Thus, any party, including
3 the plaintiff, may voluntarily dismiss an action without prejudice *at any time* prior to entry of a
4 final order upon the *written consent* of all other parties." (*321 Henderson Receivables*
5 *Origination LLC v. Ramos* (2009) 172 Cal.App.4th 305, 314, emphasis added.)

6 **Example Applied:** "Under no stretch of the imagination in the present case can the
7 payment of \$218,837 on the \$262,600 judgment (83 percent of the judgment) be considered a
8 judgment on the merits for [the manufacturer]; rather, it reflects a considered decision by [the
9 manufacturer] that pursuing the appeal to its conclusion would result in [the manufacturer]
10 paying the full judgment plus interest. [The manufacturer's] facade of continued nonliability by
11 use of stereotyped language in the settlement agreement does not alter the fact that the plaintiff
12 prevailed in the lawsuit because of the jury's finding of a product defect." It is the nature of the
13 action and the character of the judgment, not recitals in the judgment, that determine whether it is
14 *res judicata*. (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 940, citing *Goddard v.*
15 *Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47, 52.)

16 **Settlement is Entitled To Collateral Estoppel, Res Judicata Effect.** A compromise
17 settlement of one action is entitled to *res judicata* effect in a second action, operating as a merger
18 and bar of all pre-existing claims and causes of action in the first settled action. (*Smith v. Golden*
19 *Eagle Ins. Co.* (1999) 69 Cal.App.4th 1371, 1374-75; *Citizens for Open Access to Sand & Tide,*
20 *Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1065-67.) One court found the contention that
21 *res judicata* did not apply to a settlement "absurd." (*Eichman v. Fotomat Corp.* (1983) 147
22 Cal.App.3d 1170, 1177.)

23 **Retraxit.** Retraxit is equivalent to a judgment on the merits and as such bars further
24 litigation on the same subject matter between the parties or their privies. (*Rice v. Crow, supra*.)
25 A "retraxit" is generally defined as a settlement in which the defendant pays the plaintiff money
26 in return for a dismissal with prejudice. (*Id.*, at 733.) Although the judgment of dismissal is in
27 favor of the defendant, the payment of money to the plaintiff reflects that the plaintiff achieved at
28 least a portion of the relief sought. (*Sandoval v. Superior Court, supra*, at 939 ["To hold

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1 otherwise would exalt form over substance"].)

2 As between plaintiff and defendant, the dismissal with prejudice given in exchange for
3 consideration bars further litigation on the cause of action at issue based on the theory that the
4 plaintiff cannot recover twice for the same cause of action. (*Kronkright v. Gardner* (1973) 31
5 Cal.App.3d 214, 218.) In this sense, one may say that the "defense of retraxit has been subsumed
6 into the doctrines of res judicata and collateral estoppel."

7 " 'Where the parties to an action settle their dispute and agree to a dismissal, it is a retraxit and
8 amounts to a decision on the merits and as such is a bar to further litigation on the same subject
9 matter between the parties.' " *Rodriguez v. Fireman's Fund Ins. Co.*, 142 Cal.App.3d 46, 54, 190
10 Cal.Rptr. 705, 709 (2d Dist.1983) (emphasis omitted), quoting *Wouldridge v. Burns*, 265
11 Cal.App.2d 82, 85, 71 Cal.Rptr. 394, 396 (1st Dist.1968), quoting 17 Am. Jur. § 91 (1957).

12 Where the evidence and proceedings before a trial court show a retraxit, the defense may
13 be availed of, even though not affirmatively set up by a defendant. Common law retraxit, i.e.. a
14 voluntary renunciation by plaintiff in open court of his suit and cause thereof by which plaintiff
15 forever lost his action, is now accomplished by a dismissal with prejudice. (*Aerojet-General*
16 *Corp. v. Commercial Union Ins. Co.* (2007) 155 Cal.App.4th 132.)

17 VII. Public Policies Underlying Collateral Estoppel/Res Judicata

18 In *Murray v. Alaska Airlines, Inc.*, the Supreme Court ruled the importance of collateral
19 estoppel and *res judicata* "include[s] conserving judicial resources and promoting judicial
20 economy by minimizing repetitive litigation, preventing inconsistent judgments which
21 undermine the integrity of the judicial system, and avoiding the harassment of parties through
22 repeated litigation." (*Murray v. Alaska Airlines, Inc.*, *supra*, at 879.)

23 Re-litigating the 2005-2006 issues wastes the legal and quasi-judicial resources. The
24 public pays the expense of wasteful or duplicative process.

25 Re-litigating the same issues shakes the faith of litigants, CalPERS Members and the
26 public. In *People v. Sims*, *supra*, the Supreme Court "reasoned that allowing re-litigation would
27 diminish the value of the administrative process, which was the defendant's sole means of
28 challenging the administrative charges." (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th
477, 483, citing to *Sims* at 488.) Re-litigation runs the risk of reaching a decision inconsistent

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1 with the previous one.

2 Finally, re-litigating is driven by "harassment of parties [Malckenhorst] through repeated
3 litigation". CalPERS cannot take a "second bite at the apple" now that the political winds have
4 perhaps changed and harass Malckenhorst, including by forcing him to pay more legal fees and
5 suffer a political circus.

6 **VIII. Application Against CalPERS as Agency Under *Murray v. Alaska Airlines***

7 Malckenhorst (the individual) seeks to preclude CalPERS (the agency) from re-litigating
8 issues. CalPERS initiated the administrative process in 2005 and accepted a formal appeal in a
9 quasi-judicial manner to resolve disputed issues of fact. CalPERS provided the parties with an
10 opportunity to present evidence and to litigate for more than a year. CalPERS decided against a
11 formal evidentiary hearing in 2006, although obviously it was available.

12 That earlier process meets all the requirements of a "quasi-judicial" proceeding subjecting
13 future proceedings to issue preclusion as set forth in the Supreme Court's detailed opinion in
14 *Murray v. Alaska Airlines, supra*:

15 (i) CalPERS initiated a formal quasi-judicial process subject to the APA by
16 informing Appellant that it was slashing his expected pension allowance;

17 (ii) CalPERS granted Appellant and his former employer (City of Vernon) appeal
18 rights if they wished to contest CalPERS' determination;

19 (iii) CalPERS received and accepted two separate Notices of Appeal filed with
20 CalPERS by Appellant's counsel, which enumerated facts and law supporting Appellant's proper
21 pension allowance and attached supporting documents;

22 (iv) CalPERS and counsel for Appellant engaged in extensive discussion and
23 evaluation of Appellant's position, including correspondence between CalPERS and Appellants'
24 counsel, over the course of more than a year;

25 (v) CalPERS made a decision to resolve the dispute without the necessity of a hearing
26 before the OAH as provided by the APA;

27 (vi) CalPERS issued a "determination" letter which acceded to Appellant's position
28 and acknowledged he was entitled to the full pension allowance he claimed;

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1 (vii) CalPERS' Board of Administration did nothing to challenge the administrative
2 resolution of the dispute, to seek the allowable OAH hearing and a Proposed Decision by an
3 Administrative Law Judge, or to conduct its own Board hearing on the matter as provided by
4 *Government Code* section 20134; and

5 (viii) CalPERS subsequently paid Appellant all of the funds that CalPERS had
6 underpaid and withheld from the time of his retirement and during the period when CalPERS
7 was contesting the amount of the pension allowance.

8 Despite this—including the fact that *CalPERS itself* determined in the course of *its own*
9 *quasi-judicial proceeding* that Appellant was entitled to the full pension allowance that CalPERS
10 had initially challenged—and despite the fact that CalPERS did nothing to timely challenge the
11 resolution of that quasi-judicial proceeding, allowing it to proceed to the equivalent of a final
12 nonappealable order, CalPERS is now attempting to re-litigate the exact same issues in a new,
13 second quasi-judicial administrative process.

14 **IX. CalPERS' Authority to Make Decision; Discretionary Administrative Hearing**
15 **Process**

16 Prior to the initial hearing, the CalPERS Board, or the Executive Officer acting on the
17 Board's behalf, is authorized to determine or modify benefits for service. (*Government Code*,
18 §§20099, 20123.)

19 Moreover, the PERL and Regulations adopted by CalPERS make the holding of a formal
20 OAH hearing optional. If a Member receives a reduction but does not file an appeal, CalPERS
21 does not hold an evidentiary hearing. If the Board *agrees* with a Member as to benefits, it may
22 also make a formal binding decision without an evidentiary hearing. "The board may, *in its*
23 *discretion*, hold a hearing for the purpose of determining any question presented to in involving
24 any right, benefit, or obligation of a person under this part." (*Government Code*, §20134,
25 emphasis added.) "The Executive Officer is hereby authorized ... to fix and authorize the
26 payment of any refund, allowance or benefit to which such applicant may be found to be
27 entitled.... The Executive Officer *may refer* the question of an applicant's entitlement to any
28 refund, allowance or benefit ... to a hearing officer for hearing." (*California Code of*

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1 *Regulations*, §555, emphasis added.)

2 CalPERS had authority to resolve all issues in 2006 in a formal binding manner that is
3 sufficiently judicial to support collateral estoppel, without having a formal evidentiary hearing.
4 CalPERS can assert estoppel against those Members who fail to appeal an adverse determination.
5 Similarly, Malкенhorst can assert collateral estoppel against CalPERS as a party after CalPERS
6 has initiated a quasi-judicial process that was resolved formally in his favor.

7 **X. 2005-2006 Administrative Process**

8 CalPERS admits that it initiated a formal compulsory quasi-judicial process in 2005-
9 2006. CalPERS staff has the authority.¹⁷ (*Title 2 Reg. 555.*) The Executive Officer may refer
10 questions for hearing but a hearing is not required. (*Government Code*, §20134; *California Code*
11 *of Regulations*, §555.) Exhaustion is only required in the "first instance" of an administrative
12 dispute. (*Reich v. Webb* (1963) 218 Cal.App.2d 862, 868.) In 2005, Malкенhorst was initially
13 dissatisfied with CalPERS' reduction of his pension based on longevity, special compensation,
14 positions, and pay. He and Vernon timely appealed to the CalPERS Board by written notice,
15 filed by counsel, Loeb & Loeb. (*Title 2 Reg. 555.1.*)

16 Formally on behalf of Malкенhorst and Vernon, Loeb & Loeb filed at least two
17 documents, one labeled "Notice of Appeal" with documentation and evidence to rebut CalPERS
18 determinations of compensation, positions, longevity, over time, and related issues and a second
19 follow-up letter with additional documentation and evidence. (*Title 2 Reg. 555.1.*) (Letter from
20 Marla Aspinwall of Loeb & Loeb to Lori McGartland of CalPERS, August 11, 2005; Letter from
21

22 _____
23 ¹⁷ The Public Employees' Retirement Law (PERL) and regulations require submission of
24 *certain* disputes that are expressly limited to technical matters within the CalPERS expertise.
25 Nowhere in the PERL is there evidence that Legislature intended to abrogate collateral
26 estoppel/*res judicata*. (*Coast & Southern Fed. S. & L. Assn. v. Trans-Coast S. & L. Assn.* (1971)
27 16 Cal.App.3d 205, 210.) The PERL legislation is not so "general and comprehensive" as to
28 imply a legislative intent to displace or preclude common law rights, such as collateral estoppel
and *res judicata*. Statutes do not supplant the common law unless the Legislature intended to
cover the entire subject. (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285; *Rojo*
v. Kliger, supra, at 80.)

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1 Marla Aspinwall of Loeb & Loeb to Alinda Heringer of CalPERS, November 3, 2005.) CalPERS
2 accepted the "Notice of Appeal", evidence and argument. (Letter from Alinda Heringer of
3 CalPERS to Marla Aspinwall of Loeb & Loeb, September 23, 2005; Letter from Alinda Heringer
4 of CalPERS to Marla Aspinwall of Loeb & Loeb, August 17, 2006.) Malkenhorst was not
5 required and could not compel CalPERS to hold an APA hearing. CalPERS itself could have
6 initiated and undertaken an available APA process, but CalPERS choose not to.

7 Malkenhorst exhausted the available administrative process that was in his power to
8 advance in 2005-2006. Malkenhorst could do no more. If CalPERS continued to reduce his
9 pension, then Malkenhorst could seek an APA hearing. (*Title 2 Reg. 555.4.*) As it was,
10 Malkenhorst fully prosecuted and exhausted his administrative remedies in 2005-2006 and
11 waited for a final decision.

12 Explicitly "ruling" on evidence and argument that CalPERS had or received in its quasi-
13 judicial process, CalPERS' staff made a written decision in Malkenhorst's favor. (Letter from
14 Alinda Heringer of CalPERS to Marla Aspinwall of Loeb & Loeb, August 17, 2006.) CalPERS
15 considered all of the facts upon which the right to benefits depends and made a ruling on the
16 merits. (*Ibid.*) No new facts have or could have arisen as Malkenhorst retired prior to the 2005-
17 2006 administrative process. CalPERS' final determination letters to Vernon and Malkenhorst
18 were appropriately construed as adjudicatory action. (*Kirkpatrick v. City of Oceanside* (1991)
19 232 Cal.App.3d 267, 279.) Intending the "ruling" to have substantial effect, CalPERS sought for
20 all parties to rely on its findings.¹⁸ CalPERS paid Malkenhorst a lump sum to resolve the
21 underpayments or reduction since retirement, and then continued to pay his higher pension for
22 the next 6 years. In 2006, the administrative remedy for issues about Malkenhorst's positions,
23 compensation, longevity, special compensation, and related issues were exhausted. (*Abelleira v.*
24 *District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 293.) The August 2006 decision
25 became final. (*Abelleira, supra, at 284.*)

26
27 ¹⁸ If nothing else, CalPERS August 17, 2006 determination letter is in the nature of a
28 settlement agreement, binding on CalPERS. (See *San Diego Police Officers' Ass'n v. San Diego*
City Employees' Retirement System (9th Cir. 2009) 568 F.3d 725, 735.)

1 **Malkenhorst Did Everything in His Power to Exhaust in 2005-2006.** Malkenhorst did
2 everything in his power to adjudicate his rights in the administrative process in 2005-2006. If
3 CalPERS had engaged in a formal evidentiary hearing, either before the Office of Administrative
4 Hearings or otherwise, it may have prevailed, or it may not have.

5 But if CalPERS prevailed before the ALJ and then subsequently adopted a final decision
6 adverse to Malkenhorst, Malkenhorst would have had the choice to file a writ of administrative
7 mandamus or be bound by the decision. Any other avenue, forum, or attempt to unsettle the
8 decision in 2005-2006 would be barred by collateral estoppel/*res judicata*. (See *Murray v.*
9 *Alaska Airlines, Inc., supra.*)

10 **No Abandonment in 2005-2006.** CalPERS wrongly implies that Malkenhorst simply
11 initiated the process and then abandoned it without awaiting CalPERS' final outcome. (*Reich v.*
12 *Webb, supra*, at 868.) After the appeal is initiated, a party cannot abandon the administrative
13 proceedings and avoid the result. The parties would have to await a final decision and, if it was
14 adverse, then file a petition for writ of mandate to overturn the decision. Otherwise, the
15 administrative decision "has issue and claim preclusive effect. ..." (*Miller, supra*, citing *Page v.*
16 *Los Angeles County Dept.* (2004) 123 Cal.App.4th 1135, 1142.) CalPERS' August 2006 decision
17 was final and entitled to collateral estoppel effect. It is also proof that Malkenhorst exhausted his
18 administrative remedies. (*Castillo v. City of Los Angeles, supra*, at 481-487.)

19 **Final Decision.** In 2006, CalPERS made a final determination that Malkenhorst was
20 entitled to the higher pension. CalPERS resumed paying the higher pension. CalPERS paid
21 Malkenhorst a lump sum of approximately \$176,000 for the accumulated underpaid monies that
22 CalPERS withheld during the 20056 administrative process.

23 All parties understood that the agreement was final. There was no consent to allow
24 CalPERS to re-litigate the issues.

25 **Res Judicata As to Vernon and CalPERS.** The party challenging the 2006 decision
26 timely exhaust any available judicial avenues for reversal of adverse findings. (*Johnson v. City of*
27 *Loma Linda, supra*, at 69-72.)

28 Neither Vernon nor CalPERS timely filed a judicial action to overturn the letter

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1 determination. Malkenhorst did not have an obligation to appeal or file a writ petition to secure
2 his favorable decision. Malkenhorst was not aggrieved. At that time, Vernon desired the decision
3 that it sought. If a party considers the findings adverse to it, they must seek judicial review.

4 "[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse
5 findings made in that proceeding, by means of a mandate action in superior court,
6 those findings are binding ... decision has achieved finality due to the aggrieved
7 party's failure to pursue the exclusive *judicial* remedy for reviewing
8 administrative action."

9 (*Miller v. City of Los Angeles, supra.*)

10 For present purposes, CalPERS and Vernon received an "adverse" decision in 2006. They
11 failed to challenge it in court. "Failure [of Vernon and CalPERS] to do so will result in any
12 quasi-judicial administrative findings achieving binding, preclusive effect and may bar further
13 relief on the same claims." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45
14 Cal.4th 88, 113, citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76; *Pacific Lumber*
15 *Co. v. State Water Resources Control Bd.* (2011) 37 Cal.4th 921, 944; *Runyon v. Board of*
16 *Trustees of Calif. State Univ.* (2011) 48 Cal.4th 760, 773.)

17 Parties suffering an adverse decision can get judicial review by filing a petition for a writ
18 of mandate. (*Government Code*, §11523.) If so, this Court is the proper jurisdiction for that
19 challenge. CalPERS and Vernon's claims are time barred.

20 **Application Against CalPERS as Agency Under *Murray v. Alaska Airline.*** Often,
21 collateral estoppel arises against an individual who receives a final administrative determination
22 but fails to challenge it by a writ. Collateral estoppel bars the individual party from re-litigating
23 the issues in a separate suit or different forum.

24 In this case, however, Malkenhorst (the individual) seeks to preclude CalPERS (the
25 agency) from re-litigating issues.

26 If CalPERS had engaged in a formal evidentiary hearing, either before the Office of
27 Administrative Hearings or otherwise, it may have prevailed, or it may not have.

28 But if CalPERS prevailed before the ALJ and then subsequently adopted a final decision
adverse to Malkenhorst, Malkenhorst would have then had a choice how to resolve the matter.

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1 Malkenhorst would then either have filed a writ of administrative mandamus or he would be
2 bound by the final order. Any other avenue, forum, or attempt by Malkenhorst to seek a different
3 result of the process started in 2005-2006 would be barred by collateral estoppel/*res judicata*.
4 (See *Murray v. Alaska Airlines. supra.*) As it was, the issues were resolved in 2005-2006 by
5 CalPERS' determination in Malkenhorst's favor.

6 Collateral estoppel/*res judicata* applies to both parties in a prior adjudication. CalPERS
7 was a party to the 2005-2006 determination after initiating a quasi-judicial process, and thus
8 CalPERS should now be estopped. If they once existed, CalPERS has forfeited its right to litigate
9 those issues again.

10 **CalPERS Has Consented To Its Administrative Decision.** In *People v. Sims. supra.*, the
11 Supreme Court found that collateral estoppel barred a subsequent criminal prosecution for
12 welfare fraud. In *Sims*, the Department of Social Services had already conducted an
13 administrative process where it was found that no fraud had been committed. Sims presented
14 evidence, but Sonoma County, a party to the DSS hearing process, declined to participate fully
15 and present evidence. The hearing officer concluded there was no fraud. The DSS adopted the
16 decision. Sonoma County neither requested rehearing nor sought judicial review of the decision.
17 The Court found that Sonoma County was collaterally estopped to challenge the prior
18 administrative decision.

19 In this case, CalPERS initiated the 2005-2006 process based on evidence that it possessed
20 or received from Malkenhorst's attorneys, including assertions about Malkenhorst's employment
21 situation and demanding Malkenhorst produce responses and documentation under compulsion.
22 At the end of that process, CalPERS freely *conceded* that Malkenhorst was right and issued a
23 "determination" letter which awarded Malkenhorst the full pension.

24 As the agency which had commenced and controlled the administrative process,
25 CalPERS was under no obligation to resolve the matter short of a full-blown OAH evidentiary
26 hearing and issuance of an ALJ's *Proposed Decision*. If CalPERS had prevailed in the
27 administrative process, Malkenhorst would have been bound by it unless he prevailed on a writ
28 of administrative mandamus. The fact that CalPERS finally and formally *agreed to accept*

1 Malkenhorst's position and terminated the compulsory administrative process before reaching the
2 stage of an OAH hearing similarly constitutes final resolution.

3 **XI. Judicial Estoppel**

4 CalPERS and Vernon would be subject to judicial estoppel as: (1) the same party who
5 has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative
6 proceedings; (3) the party was successful in asserting the first position; (4) the two positions are
7 completely inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or
8 mistake. (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 34.) There is no right
9 to be joined only to be barred by judicial estoppel.

10 **Vernon Actively Litigated On Behalf of Malkenhorst in the 2005-6 Process.** As it
11 would be judicially estopped from changing its prior testimony, Vernon's non-joinder does not
12 expose Vernon to "a substantial risk of incurring double, multiple, or otherwise inconsistent
13 obligations." (*Code of Civil Procedure*, §389(a), cl. (2)(ii).) Vernon remains liable for
14 contribution for the pension, for which Vernon became obligated at Malkenhorst's retirement.
15 There is no potential risk of greater obligations. In effect, CalPERS is asserting Vernon as an
16 indispensable party to allow Vernon an illicit potential gain.¹⁹ CalPERS is asserting that Vernon
17 may benefit by lowering its current pension contributions if Vernon is allowed to contradict its
18 prior administrative positions and reduce Malkenhorst's pension.

19 A court should consider fairness and equity in deciding whether a party is indispensable.
20 A court has the power to proceed with a case even if indispensable parties are not joined. (*People*
21 *ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 876.) In any
22 event, CalPERS can litigate the issues sufficiently as administrator and fiduciary on Vernon's
23 behalf

24 **Vernon is Barred.** As a basic issue, Vernon would also be barred by collateral
25 estoppel/*res judicata*.

26
27 ¹⁹ Vernon's pension obligation to CalPERS was super funded (i.e. more assets than
28 needed to fund actuarial expectations) at the time of Malkenhorst' retirement.

1 Vernon is not trying to start a hearing.²⁰ Vernon will not be "impaired or impeded" from
2 any legitimate interest by not being joined as a party. (*Code of Civil Procedure*, §389(a)(2)(i).)
3 Joinder is required only when the absentee's nonjoinder precludes the court from rendering
4 complete justice *among those already joined* [i.e., CalPERS and Malkenhorst]." (*Arkwright-*
5 *Boston Mfrs. Mut. v. City of New York* (2d Cir.1985) 762 F.2d 205, 209.)

6 **XII. CalPERS' Process is Inadequate, Futile, Excused in 2012**

7 In 2012, CalPERS' administrative process is inadequate, excused, and futile. (*Kirkpatrick*
8 *v. City of Oceanside, supra*, at 278.) Collateral estoppel excuses or renders exhaustion to be
9 absurd. The process is inadequate as barred. (*Rojo v. Klinger, supra*, at 87.) Exhaustion of non-
10 statutory claims is not required. (*Ibid.*) Submitting collateral estoppel claims is also futile
11 because you suffer the legal harm to be avoided.

12 These collateral estoppel/*res judicata* claims are also based on common law not subject
13 to administrative exhaustion.

14 Futile. The administrative remedy is *inadequate, unavailable, and futile to pursue*.
15 (*Jonathan Neil & Assocs., Inc. v. Jones* (2004) 33 Cal.4th 917, 935.) CalPERS has already
16 declared its ruling. (*Ibid.*) The "inadequate" process fails to provide basic due process
17 protections, including not recognizing collateral estoppel. (*Glendale City Employees' Ass'n, Inc.*
18 *v. City of Glendale* (1975) 15 Cal.3d 328, 342-343; *City of San Jose v. Operating Engineers*
19 *Local Union No. 3* (2010) 49 Cal.4th 597, 609.)

20 The failure to adhere to collateral estoppel is unconstitutional and excuses the
21 administrative process.

22 Administrative Process Already Satisfied; Res Judicata. Malkenhorst satisfied the
23 exhaustion requirement in 2005-2006 when the substance of the claim was tried and
24 "determined". (7 Witkin, Cal. Procedure (4th ed. 1997), *Judgment*, §313, p. 864; *Johnson v. City*
25 *of Loma Linda* (2000) 24 Cal.4th 61, 77.) He does not need to exhaust again.

26 _____
27 ²⁰ Vernon was named as a real party in interest in the Orange County case because
28 Vernon was one holder of the charter city right to determine compensation and government
structure. Malkenhorst was a third party beneficiary of Vernon's charter city constitutional rights.

1 **No Present Requirement to File Administrative Appeal.** CalPERS is without
2 jurisdiction to proceed or require a (logically incompatible) administrative hearing to determine
3 if collateral estoppel applies. It is not necessary for parties to file *pro forma* requests raising
4 issues already fully argued before the agency and decided in the administrative decision.
5 (*Ruryon v. Board of Trustees of Calif. State Univ.* (2010) 48 Cal.4th 760.)

6 **Relevance to Appeal: Due Process Violation: No Remedies or Means to Assert**
7 **Collateral Estoppel or Res Judicata in APA Administrative Process at Threshold.** CalPERS
8 can and does make many binding final quasi-judicial decisions without undertaking an
9 adversarial evidentiary process.

10 However, CalPERS conducts adversarial and evidentiary administrative hearings
11 pursuant to the APA in the OAH. (Government Code §20134; *California Code of Regulations*,
12 §555.4.) Once the agency establishes jurisdiction in the OAH by filing a formal *Statement of*
13 *Issues* or other pleading, the adversarial administrative process must continue in the OAH until it
14 is concludes with an Administrative Law Judge ("ALJ") writing a *Proposed Decision*.
15 (Government Code §11425.)

16 The APA contains two statutory chapters governing administrative adjudications by
17 certain state agencies. (Government Code §§11340, *et seq.*) The first chapter contains general
18 procedural provisions. (Government Code §§11400-11475.70.) Those general procedural
19 provisions apply to all statutorily and constitutionally required state agency adjudicative
20 proceedings, including formal proceedings. The second chapter covers formal administrative
21 hearings. (Government Code §§11500-11529.) A state statute or a federal statute or regulation
22 applicable to a particular agency or decision prevails over a conflicting or inconsistent provision
23 in the APA general procedural provisions. (Government Code §11415.20.)

24 Within the APA and OAH, an "adjudicative proceeding" means an adversarial
25 evidentiary hearing for determination of facts pursuant to which an agency formulates and issues
26 a decision. (Government Code §11405.20.) Once an agency files a *Statement of Issues* with the
27 OAH, an evidentiary hearing for determination of facts is required for formulation and issuance
28 of the decision. (Government Code §§11410.10, 11415.10.) The APA provides limited due

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1 process in evidentiary matters, allowing the person notice and an opportunity to present and
2 rebut evidence. (Government Code §11425.10.)

3 But once a formal adversarial administrative process starts in the OAH by CalPERS
4 instituting a pleading, neither the individual nor the ALJ has any power or authority to stop it.
5 (Government Code §§11370, *et seq.*; Chapter 3.5 (commencing with Government Code §11340),
6 Chapter 4 (commencing with Government Code §11370), Chapter 4.5 (commencing with
7 Government Code §11400), and Chapter 5 (commencing with Government Code §11500)
8 constitute, and may be cited as, the Administrative Procedure Act. See concurrently filed *Request*
9 *for Judicial Notice of the APA.*)

10 For example, within the APA process, an ALJ has no independence or power to dismiss
11 or to terminate a case. (*Kramer v. State Bd of Accountancy* (1962) 200 Cal.App.2d 163.)
12 Appellant has no right or ability to make a "special appearance" to challenge jurisdiction under
13 the APA.

14 Demurrers are not authorized. Dispositive prehearing motions are not authorized.
15 Prehearing conferences are limited to exploring settlement, clarifying issues, witness
16 identification, evidentiary objections, motions for intervention, and any other matters as shall
17 promote the orderly and prompt conduct of the hearing. (Government Code §11511.5.)

18 The APA provides the individual with no absolute right to continuance. (Government
19 Code §11524.) An individual may only request a stay under the APA *after* the ALJ renders a
20 *Proposed Decision*. (Government Code §§11519, 11521.) Moreover, a stay is available only in
21 the short period after the agency's governing board considers the *Proposed Decision* and before
22 the board's decision becomes final. (*Ibid.*)

23 Once an agency begins an APA proceeding in the OAH by issuing a *Statement of Issues*,
24 the respondent has only 15 days to file a *Notice of Defense*. (Government Code §11506.) "Failure
25 to file a notice of defense shall constitute a waiver of respondent's right to a hearing...."
26 (Government Code §11506(c).)

27 A waiver by inaction may be the procedural result of a failure to act. (Law Revision
28 Commission Comment to Gov. Code, §11415.40.)

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1 **Statement of Issues: Effect of APA Renders Collateral Estoppel, Res Judicata,**
 2 **Defenses Meaningless, Without Remedy on Appeal and In Administrative Process.** Even
 3 though Appellant has substantive legal right to abate a barred process at the threshold under
 4 collateral estoppel, issue preclusion, claim preclusion, and *res judicata*, the OAH administrative
 5 process under the APA provides no remedy for an individual to avail himself of or act on those
 6 rights and defenses. It is possible that even submitting the defenses of collateral estoppel and *res*
 7 *judicata* to the adversarial administrative process ironically waives those defenses by appearing
 8 and "consenting" to the process.

9 Without even a mechanism in the APA or the OAH to meaningfully adjudicate the
 10 defenses or bars, the agency is allowed to cause the harm (re-litigation) otherwise prevented by
 11 collateral estoppel and *res judicata*.

12 The individual suffers the very harm that the defenses are supposed to protect against.
 13 Effectively, CalPERS or other state agencies can repeatedly assert jurisdiction in the
 14 OAH under the APA, deprive the courts and reviewing courts of oversight, and force individuals
 15 to serially litigate adversarial claims without end. This is especially true for political cases where
 16 an individual's rights are perceived to be "controversial".

17 **XIII. Attorney Fees**

18 **A. Attorney Fees, Private Attorney General, Public Right to Make CalPERS**
 19 **Respect the PER, Government Code Section 800; CalPERS' Violation of the**
 20 **PER is Arbitrary and Capricious; Request for Attorney's Fees**

21 In any civil action to appeal or review the award, finding, or other determination of any
 22 administrative proceeding under any provision of state law, except actions resulting from actions
 23 of the California Victim Compensation and Government Claims Board, where it is shown that
 24 the award, finding, or other determination of the proceeding was the result of arbitrary or
 25 capricious action or conduct by a public entity or an officer thereof in his or her official capacity,
 26 a complainant who prevails in the civil action and is personally obligated to pay attorney's fees
 27 may collect reasonable attorney's fees, computed as prescribed, from the public entity, in
 28 addition to any other relief granted or other costs awarded. (*Government Code*, § 800, subd. (a);

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1 *Code of Civil Procedure, § 1021.5.)*

2 **B. Attorney Fees Under Private Attorney General, Code of Civil Procedure**
3 **Section 1021.5**

4 Malkenhorst is vindicating the constitutional right of charter entities, the public's right to
5 have a valid administrative process, the prohibition against the government ignoring the Parol
6 Evidence Rule, and compelling CalPERS to recognize its limited jurisdiction.

7 A court may award attorney fees, upon motion, to a successful party against one or more
8 opposing parties in any action which has resulted in the enforcement of an important right
9 affecting the public interest if:

- 10 • A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the
- 11 general public or a large class of persons;
- 12 • The necessity and financial burden of private enforcement, or of enforcement by one
- 13 public entity against another public entity, are such as to make the award appropriate;
- 14 • Such fees should not in the interest of justice be paid out of the recovery, if any.

15 With respect to actions involving public entities, this provision applies to allowances
16 against, but not in favor of, public entities, and no claim will be required to be filed therefor,
17 unless one or more successful parties and one or more opposing parties are public entities. in
18 which case no claim will be required to be filed. (16 Cal. Jur. 3d, *Costs*, §121.)

19 The benefits and cost of the claimant's legal effort transcends Malkenhorst's mere
20 personal interest.

21 **C. Attorney Fees Under Government Code 800: CalPERS' Arbitrary and**
22 **Capricious Behavior, Denial of Parol Evidence Rule, Denial of Undisputed**
23 **Amounts**

24 Arbitrary or capricious conduct encompasses conduct not supported by a fair or
25 substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal
26 dispute. (*Government Code, §800; Zuehlsdorf v. Simi Valley Unified School Dist. (2007) 148*
27 *Cal.App.4th 249.*) In this case, CalPERS is proceeding arbitrarily and capriciously, without fair
28 or substantial reason, with a stubborn insistence or bad faith even though barred by collateral

1 estoppel, invading a charter city's constitutional autonomy, and in violation of parole evidence
2 rule, and applying laws retroactively that do not apply retroactively.

3 An award of attorney's fees is proper where the agency relies on a patently invalid
4 regulation. (*Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal.App.3d 957.)

5 Failure to pay Malkenhorst can also be seen as lack of good faith, breaching its fiduciary
6 duties, prejudicing Malkenhorst by unfairly denying him the financial wherewithal to mount a
7 solid legal defense, etc. Malkenhorst seeks fees under *Code of Civil Procedure* section 1251.5
8 and *Government Code* section 800.

9 **D. Amount of Attorney Fees**

10 In *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1,
11 the Court provides detailed guidance to a trial court in assessing an attorney's fees motion.
12 Where it is possible to quantify the benefit, CalPERS must first estimate the monetary value of
13 the benefits obtained by the successful litigant. In this case, it is very difficult to actually quantify
14 the benefit in purely monetary terms. The test is *reasonableness*. (*Hewlett v. Squaw Valley Ski*
15 *Corp.* (1997) 54 Cal.App.4th 499.)²¹

16 In *California Common Cause v. Duffy*, (1987) 200 Cal.App.3d 730, the court held that it
17 was improper to reduce the amount of attorney's fees to less than market rate on the basis of what
18 a public attorney would earn.

19 Our Supreme Court has approved a "market value" approach to awarding attorney
20 fees, approving an award to a public attorney based on the prevailing market rate
21 rather than a "cost plus" approach. *Serrano v. Unruh, supra*, 32 Cal.3d at pp. 641-
22 642, 186 Cal.Rptr. 754, 652 P.2d 985.) The Supreme Court has observed an
23 approach which awarded lower fees to public-interest attorneys would "inspire
24 'lesser incentive to settle a suit without litigation than would be the case if a high-
25 priced private firm undertook plaintiffs representation.' [Citations.]" (Id. at p. 642,
26 186 Cal.Rptr. 754, 652 P.2d 985.) The Supreme Court has also rejected the
27 argument that awarding fees at a market rate to a public interest attorney would
28 result in a windfall: "We do not think ... that compensating a public interest

²¹ Malkenhorst requests a hearing to establish that both the hourly rate and amount of
time spent in this case are reasonable, which we request to allow additional evidence as to fees,
time spent, reasonableness, and related issues.

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1 organization ... on the same basis as a private practitioner results in ... a
2 windfall.... Indeed, we are concerned that compensation at a lesser rate would
3 result in a windfall to the defendants.' [Citations.]" (*Ibid.*) Subsequent decisions
4 by the Courts of Appeal have also approved awards to public interest attorneys
5 based on a prevailing market rate, noting "the market value approach is more
6 likely to entice competent counsel to undertake representation of difficult and
7 otherwise unrewarding cases." (*Margolin v. Regional Planning Com.* (1982) 134
8 Cal.App.3d 999, 1004, 185 Cal.Rptr. 145; *San Bernardino Valley Audubon*
9 *Society, Inc. v. County of San Bernardino, supra*, 155 Cal.App.3d at p. 755, 202
10 Cal.Rptr. 423.)"
11 (*California Common Cause, supra.*, at 756.)

8 **XIV. No Modification Allowed After Retirement**

9 A pension right may not be destroyed, once vested, without impairing a contractual
10 obligation of the employing public entity. (*Kern v. City of Long Beach, supra*, at 852-853; *Betts*
11 *v. Board of Administration* (1978) 21 Cal.3d 859, 863.)

12 **A. Malkenhorst Vested in Law at the Time of His Retirement, Laws Were Not** 13 **Retroactive**

14 In several places, CalPERS seeks to apply statutes that became effective after
15 Malkenhorst retired. CalPERS cannot use laws that were passed after Malkenhorst retired in a
16 retroactive manner to divest Malkenhorst of his rights. For example, written agreement and
17 changes to special compensation rules changed in 2011. (*Cal. Code Regs. tit. 2, § 571.*)

18 Under California law, statutes are not to be given a retrospective operation unless it is
19 clearly made to appear that such was the legislative intent. (*Gadda v. State Bar of Cal., supra*; 58
20 Cal.Jur.3d, *Statutes*, §32..) CalPERS is trying to retroactively bind Malkenhorst with rules and
21 regulations that did not yet have the force and effect of law.

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

1 364, as modified, (June 17, 2009).)

2 **B. No Consent, No Waiver, No Estoppel, No Voluntary Appearance, Response**
3 **Under Protest**

4 Although jurisdiction cannot be conferred by consent, Malkenhorst does not consent and
5 does not waive his rights to contest jurisdiction and venue. Malkenhorst submits information to
6 CalPERS in this matter involuntarily, under compulsion, and for very limited purposes of
7 responding to CalPERS' requirement that Malkenhorst file an Appeal so that CalPERS does not
8 immediately reduce his pension.

9 **To prevent an unlawful reduction of Malkenhorst's pension as threatened, we**
10 **present the information in this Appeal under protest. We do not consent by appearance or**
11 **wave any rights. We reserve all rights, including to challenge CalPERS' efforts, authority,**
12 **and jurisdiction.**

13 **CONCLUSION**

14 CalPERS does not have jurisdiction to proceed. CalPERS must terminate the
15 administrative process immediately and continue to pay Malkenhorst the higher pension.

16 Legal authority overwhelmingly supports barring the re-litigation of issues resolved in a
17 previous quasi-judicial administrative hearing process.

18 In this case, CalPERS should be barred from initiating a second administrative process
19 based on the same facts and law that were already fully considered (or could have been
20 considered) by CalPERS in its earlier process.

21 Respectfully submitted,

22
23
24 Dated: October 11, 2013

By: 

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

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BEFORE THE BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of

BRUCE V. MALKENHORST, SR., and
CITY OF VERNON,

Respondents.

-) CALPERS CASE NO.: TBD
-) OAH CASE NO.: TBD
-)
-) **MALKENHORST'S REQUEST FOR**
-) **OFFICIAL AND JUDICIAL NOTICE**
-)
-) Hearing Dates: _____
-) Hearing Location: _____
-)
-) INCORPORATING CONCURRENTLY
-) FILED MOTIONS, MEMORANDUM OF
-) POINTS AND AUTHORITIES, AND
-) SUPPORTING PAPERS ON (1)
-) COLLATERAL ESTOPPEL, RES
-) JUDICATA, ISSUE PRECLUSION, CLAIM
-) PRECLUSION; (2) CHARTER CITY
-) AUTONOMY; (3) JUDICIAL ESTOPPEL,
-) (4) PAROLE EVIDENCE RULE (4)
-) JURISDICTIONAL CHALLENGE; (6)
-) DEMURRER;(7) AGENCY FAILURE TO
-) STATE ACTS OR OMISSION ON WHICH
-) AGENCY MAY PROCEED (GOVERN-
-) MENT CODE SECTION 115069(A)(2)-(3));
-) (8) MOTIONS IN LIMINE TO EXCLUDE
-) EVIDENCE; (9) MOTION TO STRIKE FOR
-) INDEFINITENESS; (10) MOTIONS AND
-) CHALLENGES REGARDING AGENCY
-) JURISDICTION AND AUTHORITY; (11)
-) DEMURRER; (12) REQUEST FOR
-) JUDICIAL NOTICE (13) SUPPORTING
-)

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1 Bruce V. Malkenhorst, Sr. Malkenhorst requests Official Notice and Judicial Notice of
2 various matters.

3 The Official and Judicial Notice offers evidence for consideration at the threshold as bars
4 to jurisdiction and authority of CalPERS or the OAH.

5 Malkenhorst seeks Official and Judicial Notice of:

6 (1) Petition for Reviews filed in the Supreme Court on the collateral estoppel , res
7 judicata matter, seeking review of the Second District Court of Appeal's denial of a
8 writ of supersedeas and request for stay;

9 (2) An appeal before the Fourth District Court of appeal or the Supreme Court involving
10 the charter cities autonomy, including a writ of supersedeas that may involve a future
11 Petition for Review;


12 (3) CalPERS' official acts and records involved in the prior initiation of an Appeal
13 process in 2005 and 2006;

14 (4) All of the files or correspondence or official acts by CalPERS involving or arising
15 from the 2005-6 administrative appeal;

16
17 Respondent files this motion under protest, with a reservation of rights, and as a "special
18 appearance". Concurrently filed motions and supporting papers are incorporated in full herein.

19 Respectfully submitted,

20
21 Dated: October 11, 2013

22 By: 
23 John Michael Jensen,

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Government Code section 11515 and Evidence Code sections 452 and 453, Administrative agencies may take judicial or "official" notice of certain matters in a proceeding of an adjudicatory nature. *Southern Pacific Transportation Co. v. State Bd. of Equalization*, 191 Cal. App. 3d 938, 237 Cal. Rptr. 191 (3d Dist. 1987);

Official and Judicial Notice Of Court Records and Official Acts and Records

Official Acts. Malkenhorst seeks official and judicial notice of CalPERS' official acts and records of the 2005-2005 administrative hearing (including letters from CalPERS to Malkenhorst) and the files in the 2005-6 administrative process

As part of the 2005-6 administrative process, the letters and files are an official act and record of a government agency and subject to judicial notice under Evidence Code Section 452, or 453 and 459. The Appellate court shall take judicial notice of them and any matter specified in Section 452 as Appellant requests it and has:

- (a) Given each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
- (b) Furnished the court with sufficient information to enable it to take judicial notice of the matter. Evid. Code § 453.

Matters Subject to Permissive Judicial Notice:

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Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

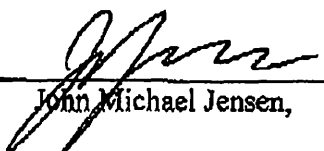
(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Court Records of Appellate and Supreme Court.

Judicial notice of court records would doubtless be sanctioned by Ev.C. 452(c), supra, §19, as "[o]fficial acts of the ... judicial departments." (See Law Rev. Com. Comment to Ev.C. 452.) But to make the right to unlimited judicial notice unmistakably clear, Ev.C. 452(d) specifies that judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

Respectfully submitted,

Dated: October 11, 2013

By: 
John Michael Jensen,

Attachment H (B)
Malckenhorst's Motions
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1 PROOF OF SERVICE BY MAIL & FAX

2 I am a resident of the State of California, over the age of eighteen years, and not a party to
3 the within action. My business address is Law Offices of John Michael Jensen, 11500 W.
4 Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.
5

6 On October 11, 2013, I served the following document(s) by the method indicated below:

- 7
- 8 1) **Bruce V. Malckenhorst's, Sr.'s Objections to and Challenges CalPERS' and OAH's**
9 **Jurisdiction or Authority, Including under Government Code 11506**
 - 10 2) **Bruce V. Malckenhorst's, Sr.'s Points and Authorities on Laches, Statute of Limitations,**
11 **Affirmative Defenses**
 - 12 3) **Respondent Malckenhorst's Demurrer, Including Under Government Code Sections 11505**
13 **(a) (2)-(3)**
 - 14 4) **Bruce V. Malckenhorst, Sr.'s Assertion of Judicial Estoppel to Bar Evidence, Argument,**
15 **Points and Authorities on Judicial Estoppel**
 - 16 5) **Bruce V. Malckenhorst's, Sr.'s Request for Evidentiary Hearing or Prehearing on**
17 **Collateral Estoppel, Res Judicata, Claim/Issue Preclusion, Charter City, Laches, Statute of**
18 **Limitations, Affirmative Defenses**
 - 19 6) **Respondent Malckenhorst's Notice and Motion to Force CalPERS to Proceed by**
20 **Accusation, Bear Burden of Proof; Memorandum of Points and Authorities in Support**
 - 21 7) **Bruce V. Malckenhorst, Sr.'s Notice of Motion and Motion in Limine to Exclude Certain**
22 **Prejudicial and Inadmissible Evidence and Testimony; Parol Evidence Rule, Memorandum**
23 **of Points and Authorities and Declaration in Support; [Proposed] Order, Set One**
 - 24 8) **Respondent Malckenhorst's Notice and Motion to Strike Statement of Issues; Memorandum**
25 **of Points and Authorities in Support; [Proposed] Order**
 - 26 9) **Respondent Malckenhorst's Memorandum of Points and Authorities Regarding Charter**
27 **Cities in Support of:**
 - 28 10) **Malckenhorst's Request for Official and Judicial Notice;**
 - 11) **Malckenhorst's Memorandum of Points and Authorities regarding Collateral Estoppel Res**
12) **Malckenhorst's Points and Authorities on Parol Evidence Rule**

Attachment H (B)
Malkenhorst's Motions
Page 226 of 226

1 By placing the document(s) listed above in a sealed envelope(s) and consigning it First
2 class mail through the U.S. Postal Service to the address (es) set forth below.

3
4 Renee R. Salazar
5 California Public Employees' Retirement System
6 Legal Office
7 P.O. Box 942707
8 Sacramento, CA 94229-2707
9 Fax: (916) 795-3659

10 I declare under penalty of perjury under the laws of the State of California that the above
11 is true and correct. Executed on October 11, 2013, at Los Angeles, California.

12 
13 _____
14 Griselda Montes De Oca
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