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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
) BRUCE V. MALKENHORST, SR.'S
) NOTICE OF DEFENSE INCLUDING
) AFFIRMATIVE DEFENSES,
) POINTS AND AUTHORITIES ON
) EQUITABLE ESTOPPEL, LACHES,
) JUDICIAL ESTOPPEL, STATUTE OF
) LIMITATIONS
)

Hearing Dates: _____
Hearing Location: _____

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1 Bruce V. Malkenhorst, Sr. raises affirmative defenses of equitable estoppel and laches in
2 response to CalPERS' *Statement of Issues* and its attempts to commence an administrative
3 process to reduce his pension allowance.

4 CalPERS and Vernon serially represented to Malkenhorst that he would receive the higher
5 pension. CalPERS and Vernon undertook a prior administrative process in 2005-6 where
6 CalPERS and Vernon explicitly agreed that Malkenhorst is entitled to the higher pension.

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

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

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

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

16 **I. SPECIAL NOTICE OF DEFENSE,**

17 **AFFIRMATIVE DEFENSES AND NEW MATTER**

18 Under *Government Code* section 11506(a)(5), Malkenhorst submits the following new
19 matter:

20 **A. CalPERS is Equitably Estopped from Denying the Use of Malkenhorst's Highest**
21 **Earnings at Vernon in Calculating His Pension Allowance**

22 Malkenhorst is entitled to equitably estop CalPERS from denying its representation to
23 him.

24 Rather than immunize CalPERS, the estoppel promotes the Constitution and qualifies as
25 an "exceptional case" where "justice and right require" such estoppel in the words of the
26 precedential Supreme Court decision in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.

27 **B. Elements of Equitable Estoppel**

28 It is well-established that the doctrine of estoppel may be applied against a government

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1 body where justice and right require it. (*Mansell, supra; Piazza Properties, Ltd. v. Department of*
2 *Motor Vehicles* (1977) 71 Cal.App.3d 622, 631.)

3 **C. Elements of Estoppel.** The requisite elements for equitable estoppel are the same
4 whether applied against a private party or the government: (1) the party to be estopped
5 was apprised of the facts, (2) the party to be estopped intended by conduct to induce
6 reliance by the other party, or acted so as to cause the other party reasonably to believe
7 reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4)
8 the party asserting estoppel suffered injury in reliance on the conduct. (*Mansell, supra*, at
9 489.)

10 **D. Equitable Estoppel Against CalPERS.** All four elements of estoppel are satisfied here:
11 (1) CalPERS knew or should have known that it promised pension benefits to
12 Malkenhorst based upon his highest year of compensation at Vernon, even though
13 CalPERS now claims it is unauthorized to provide those benefits; (2) CalPERS either
14 intended this representation of pension benefits to be relied upon, or Malkenhorst had the
15 right to believe it was so intended; (3) Malkenhorst was unaware of the fact that
16 CalPERS would later disavow such representations; and (4) Malkenhorst relied upon the
17 conduct of CalPERS in making his career plans to his injury. (See *Driscoll v. City of Los*
18 *Angeles* (1967) 67 Cal.2d 297, 305.)

19 **E. Malkenhorst Can Prove All Elements.** Malkenhorst can establish that he meets all
20 essential elements of estoppel. CalPERS explicitly or implicitly represented to
21 Malkenhorst that it would grant him the pension rights and benefits flowing from his
22 highest year of compensation at Vernon.

23 Further, if CalPERS now contends that Vernon's reporting of Malkenhorst's base salary
24 and longevity pay special compensation for his final year of employment at Vernon was
25 improper, Malkenhorst will prove that he "did not have actual knowledge of the true facts [and]
26 did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit
27 of which would have led to actual knowledge." (*Banco Mercantil v. Sauls, Inc.* (1956) 140
28 Cal.App.2d 316.)

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1 Nothing from CalPERS put Malkenhorst on notice that CalPERS would disallow the use
2 of his highest year of compensation received from Vernon in the calculation of his pension
3 benefits before he retired. If anything, the fact that CalPERS commenced a formal administrative
4 proceeding in 2005-2006 seeking to reduce Malkenhorst's pension and after a year of litigation
5 issued a quasi-judicial decision finding that Malkenhorst *was* entitled to the full pension
6 provided further reassurance to Malkenhorst that CalPERS would continue to provide him a
7 pension based on his highest earnings at Vernon.

8 **F. Evidence Not in Conflict.** Although estoppel is generally a question of fact, when the
9 evidence is not in conflict and is susceptible of only one reasonable inference, the
10 existence of an estoppel is a question of law. (*Driscoll v. City of Los Angeles, supra*, at
11 305.)

12 **G. Estoppel Is Available Against Government Agencies**

13 In *Mansell, supra*, the Supreme Court justices spoke of "the principle of justice and fair
14 dealing inherent in [the estoppel] doctrine". (*Mansell*, at 492.) The Court then put forth what has
15 become foundational jurisprudence on the question of estoppel against the government:

16 It is settled that '(t)he doctrine of equitable estoppel may be applied against the
17 government where justice and right require it' [citations omitted]. Correlative to
18 this general rule, however, is the well-established proposition that an estoppel will
19 not be applied against the government if to do so would effectively nullify 'a
20 strong rule of policy, adopted for the benefit of the public' [citations omitted]. The
tension between these twin principles makes up the doctrinal context in which
concrete cases are decided. (*Id.*, at 493.)

21 As discussed below, this is most definitely a case where the equities – the "justice and right" of
22 the matter – call for the imposition of estoppel against CalPERS.

23 CalPERS' argument pivots on its interpretation of the statements that "estoppel is barred
24 where the government agency to be estopped does not possess the authority to do what it
25 appeared to be doing" (quoting from *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864,
26 870) and that "principles of estoppel are not invoked to contravene statutes and constitutional
27 provisions that define an agency's powers" (quoting from *Fleice v. Chualar Union Elementary*
28 *School Dist.* (1988) 206 Cal.App.3d 886, 893). CalPERS' interpretation of both is flawed.

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1 **H. CalPERS' Fiduciary Duties to Correctly and Accurately Inform its Members**

2 Pursuant to the California *Constitution*, CalPERS owes extremely high fiduciary duties to
3 its Members. "A retirement board's duty to its participants and their beneficiaries shall take
4 precedence over any other duty." (Cal. Const., art. XVI, §17.) The courts have interpreted
5 CalPERS' constitutionally-mandated duty to its Members to include the mandate that CalPERS
6 owes "a fiduciary duty to provide timely and *accurate* information to its members." (*City of*
7 *Oakland v. Public Employees' Retirement System, supra*, at 40.) This standard is also insisted on
8 in CalPERS' own Precedential Decision 99-01, *In re Application of William R. Smith* (1999),
9 where CalPERS adopted the ALJ's finding that "[t]he duty to inform and deal fairly with
10 members also requires that the information conveyed be complete and unambiguous."

11 CalPERS is required to and clearly does "possess the authority" to carry out its fiduciary
12 duties to timely and accurately inform its Members of matters bearing directly on critical, vested
13 pension rights and in fact is *required* to do so by the express language in the Constitution. The
14 failure to carry out these duties is precisely the type of action that would "contravene statutes and
15 constitutional provisions that define an agency's powers".

16 **I. CalPERS' Authority to Effect What Estoppel Would Accomplish**

17 CalPERS asserts that estoppel is never available against it because it is mandated to apply
18 the provisions of the PERL and CalPERS' Regulations (or at least CalPERS' *interpretation* of
19 those provisions) and estoppel is never available "where the government agency to be estopped
20 does not possess the authority to do what it appeared to be doing."

21 In fact, CalPERS *does* have authority to allow the use of Malkenhorst's highest year of
22 compensation at Vernon in calculating his pension, attested to by the fact that CalPERS has
23 *already previously reached exactly this conclusion* at the end of the 2005-2006 administrative
24 process.

25 First, CalPERS has "plenary authority and fiduciary responsibility for ... administration
26 of the system", subject among other things to the mandate that "[a] retirement board's duty to its
27 participants and their beneficiaries shall take precedence over any other duty." (Cal. Const., art.
28 XVI, §17.) If CalPERS is permitted to seriously and repeatedly misinform a Member in ways

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1 that cause the Member permanent, irreparable and substantial harm, this would eviscerate the
2 mandate to put the interest of Members above all other duties. The constitutionally mandated
3 fiduciary duties certainly give CalPERS the authority to now award Malkenhorst a pension based
4 on his highest year of compensation at Vernon, even if that compensation does not meet all of
5 the technical requirements that CalPERS (wrongly) asserts.

6 Second, *Government Code* section 20125 states that CalPERS is the "sole judge of the
7 conditions under which persons may be admitted to and continue to receive benefits under this
8 system".

9 For example, *Crumpler v. Board of Administration* (1983) 32 Cal.App.3d 567 involved a
10 case in which the court found that CalPERS had broad authority to reclassify Members' pension
11 benefits. In *Crumpler*, the city had misclassified animal control officers as police officers and
12 had made representations to those employees that they were entitled to greater safety Member
13 benefits. When the misclassification came to CalPERS' attention, it reclassified the officers
14 retroactively as miscellaneous Members with less pension benefits, and the employees then sued.
15 The Court of Appeal affirmed the trial court's set-aside of CalPERS' decision, in part on estoppel
16 grounds. (*Id.*, at 583-584.) Specifically the court found that, "in view of the statutory powers
17 conferred upon the board by section 20124 [since renumbered as 20125], this is not a case where
18 the governmental agency 'utterly lacks the power to effect that which an estoppel against it
19 would accomplish.' " (*Id.* at 584, quoting *City of Long Beach v. Mansell, supra*, at 499.)

20 Section 20125, the portion of the PERL relied upon by the court in *Crumpler*, is the same
21 statute cited by CalPERS in its *Statement of Issues* as one of the applicable statutes in this case.
22 The *Crumpler* court found that Section 20125 gave CalPERS sufficiently broad authority to
23 reclassify the animal control officers, otherwise subject to a miscellaneous classification, to the
24 safety Member classification. Thus, *Crumpler* suggests CalPERS has broad enough authority to
25 determine that Malkenhorst's retirement pension should be calculated based upon his highest
26 year of compensation at Vernon.

27 Third, CalPERS also has authority under the so-called "correction statutes" to permit
28 Malkenhorst the use of his highest year of compensation at Vernon in calculating his pension

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1 benefits as a correctable error, if indeed the reporting of that compensation was incorrect.

2 Fourth, the prohibition against granting estoppel where the governmental agency (in this
3 case CalPERS) allegedly "utterly lacks the power to effect that which an estoppel against it
4 would accomplish" is inapplicable. For example, in other instances CalPERS has cited to the
5 case of *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, for support of
6 this position. In *City of Pleasanton*, the trial court awarded increased retirement benefits to a
7 CalPERS Member seeking the right to include standby pay in the calculation of his "final
8 compensation" and therefore his pension benefits, in part based on estoppel claims. The Court of
9 Appcal reversed, finding that "[b]ecause we ... find section 20636 did at all times preclude
10 PERS from treating [plaintiff] Linhart's standby pay as pensionable compensation, we hold any
11 award of benefits to Linhart based on estoppel is barred as a matter of law. (*Id.*, at 543.)

12 In other words, there was simply no statutory authority allowing standby pay to be used
13 in the formula for calculating a Member's pensionable compensation, no statute which could
14 have provided Linhart the pension benefits he was claiming through standby pay other than
15 estoppel.

16 The PERL, however, *does* provide CalPERS with authority to correctly look at the
17 compensation earned by Malkenhorst in his final year as City Administrator and calculate his
18 pension on that basis precisely as described in the PERL, including the fact that Malkenhorst's
19 base salary and longevity pay special compensation squarely qualify as "compensation earnable"
20 under *Government Code* section 20636 and *California Code of Regulations* section 571.

21 In fact, the PERL requires CalPERS to provide a pension based on the pay rate and
22 special compensation.

23 **J. Foundational Holding in *City of Long Beach v. Mansell***

24 The *Mansell* case stands for the proposition that estoppel is available against a
25 government entity, whether or not the requested relief is within the legal authority of the
26 government agency in question, "when the elements requisite to such an estoppel against a
27 private party are present and ... the injustice which would result from a failure to uphold an
28 estoppel is of sufficient dimension to justify any effect upon public interest or policy which

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1 would result from the raising of an estoppel." (*Id.*, at 496-497.)

2 The situation the Supreme Court confronted in *Mansell* was the need to balance a clear
3 constitutional prohibition barring the alienation of tidelands on the one hand, against the
4 competing fact that insistence on that prohibition would have caused great harm to the thousands
5 of homeowners who had purchased such lands in the City of Long Beach in detrimental reliance
6 on the assurances that those lands were available for sale.

7 There was no question that the *Mansell* property fell under the alienation prohibition. "It
8 must therefore be concluded that those lands, to the extent they are in fact public 'tidelands'
9 within the meaning of article XV, section 3, of the California Constitution, have not been
10 withdrawn from that category by proper legislative action and remain subject to the prohibition
11 against alienation contained in that section." (*Id.*, at 487.) But the Supreme Court nevertheless
12 found estoppel was warranted against the State and the City of Long Beach, opining:

13 We conclude without hesitation that the activities, representations, and conduct of
14 the state and its subtrustee the city during the period here in question rise to the
15 level of culpability necessary to support an equitable estoppel against them
16 relative to the lands described in section 2(a) of chapter 1688. The stipulated facts
17 clearly establish that from an early date the state and city have been aware of the
18 serious and complex title problems in the Alamitos Bay area. More importantly,
19 those public entities have been in a position to resolve such problems and to
20 determine the true boundaries between public and private lands. This they have
21 not done. Instead they have conducted themselves relative to settled and
22 subdivided lands in the section 2(a) area as if no title problems existed and have
23 misled thousands of homeowners in the process. Under these circumstances we
24 think it clear that knowledge of the true boundaries between state and private
25 lands in the section 2(a) area must be imputed to the public entities in question,
26 and that their conduct in light of this imputed knowledge must be deemed so
27 culpable that fraud would result if an estoppel were not raised.

28 (*Id.*, at 492.)

The Supreme Court then went on to apply the "balancing test" cited above, weighing
considerations of "justice and right" favoring estoppel on the one hand against the proscription
that "estoppel will not be applied against the government if to do so would effectively nullify 'a
strong rule of policy, adopted for the benefit of the public' " on the other. (*Id.*, at 493.)

As part of its analysis, the Supreme Court did a detailed comparison to the cases of

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1 *County of San Diego v. Cal. Water and Tel. Co.* (1947) 30 Cal.2d 817 (where estoppel was *not*
2 upheld) with *City of Imperial Beach v. Algert* (1962) 200 Cal.App.2d 48 (where estoppel was
3 imposed). As the Court put it in its analysis of the *Algert* case:

4 [The appellate] court went on to point out that the case before it, unlike *County of*
5 *San Diego* and related cases, involved an impressive combination of
6 governmental acts encouraging reliance. [Fn. omitted.] Viewing this combination
7 as a whole, the court concluded: 'We are not prepared to say what portion of this
8 total chain of events, if missing, would vitiate the use of equitable estoppel. What
9 we do hold is that the sum total of all the facts actually here presented convinces
us, as it did the trial judge, that this case presents one of those exceptional
conditions in which estoppel against a governmental agency is justified and
should be applied.' [Citation omitted.]

10 (*Mansell, supra.*, at 495-496.)

11 The Supreme Court concluded its analysis by stating the following rule governing
12 equitable estoppel against the government: "The government may be bound by an equitable
13 estoppel in the same manner as a private party when the elements requisite to such an estoppel
14 against a private party are present and, in the considered view of a court of equity, the injustice
15 which would result from a failure to uphold an estoppel is of sufficient dimension to justify any
16 effect upon public interest or policy which would result from the raising of an estoppel."

17 Importantly, the Supreme Court then went on to discuss the argument that estoppel may
18 not be imposed if the public entity being estopped does not have the power to do what the
19 estoppel will accomplish indirectly "because to do so would effectively enlarge the powers of the
20 public entity involved." The Court returned to the *City of San Diego* and *Algert* cases. It found
21 that in both cases the public entities lacked the authority to do what estoppel would require them
22 to do (to abandon the specific property sought by the private plaintiffs seeking estoppel without
23 going through the proper legal procedures).

24 However, the Supreme Court also found that upholding estoppel in the first case would
25 frustrate a strong rule of public policy (by permitting evasion of strict statutory procedures
26 governing abandonment), whereas the interests of justice and equity weighed in favor of estoppel
27 in the second. Malkenhorst's situation is more similar to the *Algert* case in that the interests of
28 justice and equity outweigh any minor impact the granting of estoppel would have on public

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1 policy overall – something CalPERS itself already concluded at the end of the 2005-2006
2 administrative process concerning Malkenhorst's pension calculation.

3 **K. CalPERS Is Estopped From Now Disallowing Malkenhorst's Highest Year of**
4 **Compensation at Vernon**

5 The doctrine of equitable estoppel is based on the theory that the party estopped has
6 misled the other party to its prejudice, and may be applied against a governmental body where
7 justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School*
8 *District* (2004) 114 Cal.App.4th 1018.) Whenever a party has, by his own statement or conduct,
9 intentionally and deliberately led another to believe a particular thing to be true and to act upon
10 such belief, he is not, in any litigation arising out of such statement or conduct, permitted to
11 contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4th 394; *California Evidence Code*
12 §623.)

13 The requisite elements for equitable estoppel are met in this case: (1) The party to be
14 estopped (CalPERS) was apprised of the facts; (2) the party to be estopped (CalPERS) intended
15 by its conduct to induce reliance by the other party (Malkenhorst) on the explicit and implicit
16 promises that Malkenhorst could utilize his highest year of compensation at Vernon in the
17 calculation of his eventual pension (and acting in such a way as to cause Malkenhorst reasonably
18 to believe reliance was intended); (3) the party asserting estoppel (Malkenhorst) was ignorant of
19 the facts, if indeed any facts exist, which would otherwise support CalPERS' recent refusal to
20 provide a pension based upon Malkenhorst's highest year of compensation at Vernon; and (4) the
21 party asserting estoppel (Malkenhorst) suffered injury in reliance on CalPERS' conduct, to wit:
22 he accepted continued employment at Vernon, made his retirement plans and left Vernon's
23 employment believing that his highest year of compensation at Vernon was PERSible.

24 Malkenhorst retired from CalPERS with this understanding and thereby ended his career.

25 He then actively participated in a full-blown administrative process in 2005-2006,
26 including filing an Appeal of CalPERS' decision to reduce his pension, litigating the matter for
27 more than a year, and ultimately receiving and accepting CalPERS' quasi-judicial determination
28 that he was in fact eligible for the higher pension.

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1 Now he finds himself facing a second, barred administrative review that is re-raising
2 identical allegations that have already been finally resolved in his favor, both threatening him
3 with receiving a far smaller pension allowance from CalPERS than he had been promised and
4 subjecting him once again to the same administrative allegations and process, at great financial
5 and emotional cost, that was already conclusively resolved in 2006.

6 If those estoppel elements are established against the government, the court must then
7 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the
8 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,
9 400-401.) As the doctrine of equitable estoppel states, justice and right require that CalPERS be
10 estopped from now disallowing use of Malkenhorst's highest year of compensation at Vernon in
11 the calculation of his retirement pension.

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

14 Malkehorst asserts that CalPERS should be judicially estopped from challenging his
15 pension calculation in its newly-commenced administrative process because CalPERS is taking a
16 position 180 degrees opposite the position CalPERS took in its 2005-2006 administrative
17 process.

18 CalPERS raised exactly the same issues in its 2005-2006 administrative process,
19 drastically reduced Malkenhorst's pension based on the same factual and legal theories as those it
20 is now raising, accepted an Appeal of CalPERS' decision from Malkenhorst and Vernon, and
21 ultimately decided after a year of robust and extensive litigation that CalPERS had acted in error
22 and that Malkenhorst *was entitled to* his higher pension. CalPERS now seeks to renege on its
23 prior, voluntary findings and take the exact opposition position it took in 2005-2006, apparently
24 because it is now in CalPERS' political interest to do so.

25 Malkenhorst also asserts that Vernon should be judicially estopped from changing the
26 position it took in the 2005-2006 process. Vernon joined Malkenhorst in appealing CalPERS'
27 decision, retained and paid for the services of legal counsel to file the joint appeal and then argue
28 for CalPERS to reverse its decision, and ultimately voluntarily accepted CalPERS' decision in

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

4
5 **A. The Doctrine of Judicial Estoppel**

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

10 Other courts have described how the doctrine protects the integrity of the judicial process
11 by preventing litigants from playing "fast and loose" with the courts. ((*Russell v. Rolfs* (9th Cir.
12 1990) 893 F.2d 1033, 1037.)

13 The fact that CalPERS is attempting to reverse positions in an administrative process that
14 it itself conducts and oversees does nothing to diminish the need "to protect the integrity of the
15 [quasi]-judicial process". CalPERS' 1.5 million Members and their beneficiaries have the right to
16 expect they will be treated equitably and fairly in CalPERS' administrative process. Indeed, the
17 ability to count on such fairness is inherent in the language of the California *Constitution* which
18 dictates that "[a] retirement board's duty to its participants and their beneficiaries shall take
19 precedence over any other duty." (*California Constitution*, Art. XVI, Sec. 17(b).)

20 If CalPERS is allowed to play "fast and loose" with its own process by voluntarily
21 adopting one position in 2005-2006 and then reversing course and taking the exact opposite
22 position nearly a decade later, it would pervert the entire process.

23 **B. Elements of Judicial Estoppel**

24 In accordance with the purpose of judicial estoppel, we conclude that the doctrine
25 should apply when: (1) the same party has taken two positions; (2) the positions
26 were taken in judicial or quasi-judicial administrative proceedings; (3) the party
27 was successful in asserting the first position (i.e., the tribunal adopted the position
28 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.)

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1 [Need to fill in this part by applying the five criteria to both CalPERS' and Vernon's
2 actions.]

3 **III. CalPERS Is Barred By Laches**

4 Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render
5 the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304; 30
6 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of
7 the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco*
8 (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The
9 defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act
10 about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v.*
11 *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical*
12 *Center* (1980) 27 Cal.3d 614.)

13 **A. Laches in Administrative Hearings**

14 The elements of unreasonable delay and resulting prejudice, which must be established in
15 order for the defense of laches to operate as a bar to a claim by a public agency, may be "met" in
16 two ways: first, they may be demonstrated by the evidence in the case, and the person arguing in
17 favor of a finding of laches has the burden of proof on the laches issue; second, the element of
18 prejudice may be "presumed" if there exists a statute of limitations which is sufficiently
19 analogous to the facts of the case, and the period of such statute of limitations has been exceeded
20 by the public administrative agency in making its claim. (*Fountain Valley Regional Hospital &*
21 *Medical Center v. Bonta* (1999) 75 Cal.App.4th 316; 2 Cal.Jur.3d, *Administrative Law*, §440.)

22 **B. Acquiescence By CalPERS**

23 CalPERS had sufficient information in its possession from the time Vernon hired
24 Malkenhorst as City Administrator and began reporting the compensation associated with that
25 position to determine that the compensation fully met the requirements of the PERL or, in the
26 alternative, to determine how that compensation should be reported to CalPERS so as to make it
27 PERSible for use in the calculation of Malkenhorst's' eventual pension allowance.

28 Further, CalPERS used the compensation earned by Malkenhorst during his final year at

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1 Vernon to calculate the purchase price of 5 years of Additional Retirement Service Credit by
2 Malkenhorst.

3 Moreover, CalPERS conducted a full, robust administrative review of Malkenhorst's
4 pension calculation during the year following his retirement, complete with the submission of an
5 Appeal by Malkenhorst, the exchange of information, argument and documents between
6 CalPERS and Malkenhorst's legal counsel. After a year of extensive litigation on the issues,
7 CalPERS ultimately reached a quasi-judicial final determination that Malkenhorst was entitled to
8 the full pension allowance he had been promised. CalPERS has been paying that full pension for
9 more than eight years since Malkenhorst's retirement.

10 Thus CalPERS has not only known of Malkenhorst's compensation at Vernon for an
11 extended period of time, including starting years before his retirement, but has explicitly
12 challenged the PERSibility of that compensation and then *settled* its administrative challenge of
13 Malkenhorst's pension calculation with a final quasi-judicial determination in Malkenhorst's
14 favor.

15 **C. Undue Prejudice and Injury To Malkenhorst**

16 Malkenhorst was injured by CalPERS' delay in waiting to raise its disallowance of his
17 highest year of compensation at Vernon. Moreover, Malkenhorst is entitled to rely upon
18 CalPERS' resolution of its 2005-2006 administrative process in Malkenhorst's favor and to
19 consider the matter fully resolved.

20 Based on CalPERS' representations that he would earn an eventual pension that could be
21 calculated based upon his PERSible highest year of compensation at Vernon, Malkenhorst made
22 career and life choices – including, *inter alia*, continuing employment at Vernon and later
23 retiring from CalPERS when he did – to his detriment. Malkenhorst would have made different
24 job, career, or work choices had he known that CalPERS would later deny him a pension based
25 on that compensation.

26 Malkenhorst suffered prejudice because he relied on CalPERS' representations about how
27 his highest year of compensation at SDRMA should be reported to make it PERSible in planning
28 his retirement and in his job selection and generally planning his life. The large and small,

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1 conscious and unconscious, decision matrix that an individual uses to plan his life, his
2 retirement, his activities is founded on the accepted facts of one's life. Material changes of
3 condition, including retirement, have taken place between the parties during that period of
4 CalPERS' neglect. CalPERS should not now be able to unsettle Malkenhorst's expectations by
5 belatedly and prejudicially asserting that it has a right to change its mind.

6 **D. CalPERS' Delay Creates An Injustice**

7 Malkenhorst suffered prejudice in that he continued employment at Vernon and retired
8 based on CalPERS' representations that his highest year of compensation at Vernon was being
9 properly reported to CalPERS and associated contributions were being properly made, such that
10 he would be entitled to a pension based upon that compensation. CalPERS' delay would, were
11 the claim upheld, permit the imposition of an unwarranted injustice. Malkenhorst could not now
12 easily begin to look for other work, make alternative jobs choices, or seek other benefits.

13 **E. Laches is Appropriate**

14 Malkenhorst may assert laches against CalPERS to prevent relief of a strictly legal nature
15 because of CalPERS' failure to make the correction, or to prosecute it with diligence. In some
16 cases of delay, equity may bar an administrative proceeding, and the courts will apply notions of
17 laches borrowed from the civil law. (30 Cal.Jur.3d, *Equity*, §36.)

18 The doctrine of laches and statutes of limitations are both designed to promote justice by
19 preventing surprises through the revival of claims that have been allowed to slumber until
20 evidence has been lost, memories have faded, and witnesses have disappeared. These policies
21 also guard against other injuries caused by a change of position during a delay. While a statute of
22 limitations bars proceedings without proof of prejudice, laches requires proof of delay that
23 results in prejudice or change of position.

24 **IV. CONCLUSION**

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

28 Dated: October 11, 2013

By: _____

John Michael Jensen,

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

11 In Re the Matter of) CALPERS CASE NO.: TBD
12) OAH CASE NO.: TBD
13 BRUCE V. MALKENHORST, SR., and)
14 CITY OF VERNON,) BRUCE V. MALKENHORST, SR.'S
15 Respondents.) NOTICE OF DEFENSE, AFFIRMATIVE
16) DEFENSES AND NEW MATTER
17)
18) EXHIBITS 1 through TBD
19)
20) Hearing Dates: _____
21) Hearing Location: _____

22 Bruce V. Malkenhorst, Sr. hereby submits this *Notice of Defense, Affirmative Defenses*
23 *and New Matter* (hereinafter "*Notice of Defense*") in response to CalPERS' *Statement of Issues*
24 dated September 26, 2013. A copy of the *Statement of Issues* was faxed to Malkenhorst's
25 counsel's office on September 27, 2013, but only after his counsel discovered that it had been
26 served on the Office of Administrative Hearings and specifically requested that CalPERS
27 provide him with a copy. No mailed copy of the *Statement of Issues* has ever been received by
28 Malkenhorst's counsel.

Malkenhorst provides this *Notice of Defense* involuntarily, under protest and does not in
any manner waive, nor intend to waive, any of his legal rights. CalPERS is compelling
Malkenhorst to involuntarily submit these pleadings under threat of an immediate reduction in

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1 his pension, even though Malkenhorst has actively contested CalPERS' lack of jurisdiction and
2 authority. CalPERS has no authority outside that granted to it by the Public Employees'
3 Retirement Law ("PERL", *Government Code*, §§20000, *et seq.*)

4 As threshold or foundational matters, CalPERS has no legal right to initiate or conduct an
5 administrative process concerning the calculation of Malkenhorst's pension benefits unless and
6 until courts of law issue final rulings on two challenges to CalPERS' authority to proceed which
7 have been filed by Malkenhorst:

8 1) Malkenhorst's constitutional challenge bars CalPERS from invading charter city
9 autonomy. Malkenhorst contests CalPERS' assertion that the PERL preempts Charter Cities'
10 constitutional autonomy to establish governance structure and compensation, as was done by the
11 City of Vernon, which is currently on appeal in *Malkenhorst v. CalPERS*. Court of Appeal,
12 Fourth Appellate District, Division Three, case no. G047959; and

13 2) Malkenhorst's challenge to CalPERS' authority to conduct this administrative
14 proceeding on grounds it is barred by collateral estoppel, *res judicata* and issue preclusion,
15 which is currently on appeal in *Malkenhorst v. CalPERS*, Court of Appeal, Second Appellate
16 District, Division Seven, case no. B247676.

17 Malkenhorst also has submitted various motions and challenges to jurisdiction and
18 actions in this case, including a motion to strike and a demurrer. Malkenhorst challenges
19 CalPERS' and the OAH's authority to commence an administrative proceeding and/or to require
20 him to respond to CalPERS' *Statement of Issues*. Malkenhorst also challenges CalPERS
21 authority and jurisdiction in violation of the parol evidence rule and based on CalPERS' fiduciary
22 duties to Malkenhorst and the other Members of the CalPERS system.

23 Malkenhorst expresses incorporates in full the concurrently and previously filed Motions,
24 pleadings, Declarations, exhibits, supporting papers, and points an authorities into this Notice of
25 Defense.

26 In filing this *Notice of Defense*, Malkenhorst neither consents to CalPERS'
27 administrative process nor waives his challenges to CalPERS' jurisdiction.

28 This *Notice of Defense* specifically denies each part of the *Statement of Issues* that is not

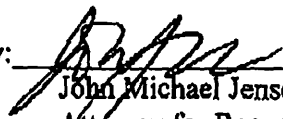
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1 expressly admitted. The *Notice of Defense* also sets forth special defenses and objections to the
2 *Statement of Issues*.

3

4 Dated: October 11, 2013

By: _____


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

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I. INTRODUCTION

1
2 CalPERS is incorrectly and unjustly seeking to deny Malkenhorst the vested pension
3 benefits that accrued during his nearly three decades of employment with the City of Vernon
4 ("City" or "Vernon"), including the last 27 of those years in the position of City Administrator
5 (sometimes also referred to as "City Administrator/City Clerk").

6 Vernon contracted with Malkenhorst to work for the city. As an integral and material part
7 of Malkenhorst's employment, Vernon contracted with Malkenhorst to provide him with pension
8 benefits based upon his Vernon base salary and longevity pay special compensation.

9 Vernon contracts with CalPERS to administer retirement benefits for city employees.
10 CalPERS was supposed to administer that pension on the terms that Vernon established.
11 CalPERS has no power or authority to intercede and unilaterally reduce Malkenhorst's pension
12 below the amounts directly or indirectly designated by the employer, Vernon, through pay rate,
13 longevity, and other promised PERSible compensation.

14 In 2005 and 2006, CalPERS conducted a full administrative review of the facts and law
15 regarding Malkenhorst's pension. Malkenhorst was already retired when CalPERS made its
16 review. All of his pay rates, compensation, and office structure was already established facts in
17 CalPERS knowledge and possession. No new facts have arisen since that time.

18 In 2005 and 2006, Malkenhorst and Vernon submitted formal "Notices of Appeal" in
19 support of Malkenhorst in response to CalPERS providing appeal rights. In the Appeals, Vernon
20 and Malkenhorst provided formal legal arguments and evidence of Malkenhorst's compensation,
21 job held, and related pension calculations in 2005-2006.

22 CalPERS acknowledged receipt and took the matter under consideration. CalPERS
23 initially withheld part of Malkenhorst pension while the matter was pending. CalPERS reviewed
24 the legal evidence and argument that supported Malkenhorst's higher pension. After a year of
25 consideration, CalPERS ultimately decided in Malkenhorst's favor in a quasi-judicial final
26 determination in 2006. CalPERS concluded that Malkenhorst was entitled to and should continue
27 to receive his correct pension.

28 In 2006, CalPERS resumed paying Malkenhorst the higher pension and paid him

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1 \$176,000 in accumulated underpayments for the monies underpaid or withheld during CalPERS'
2 2005-6 administrative review.

3 From 2006 to the present, CalPERS has paid Malkenhorst the correct pension allowance
4 for more than eight years. The correct allowance is based upon his base salary and longevity pay
5 special compensation earned and paid in a single job for Vernon.

6 Now, however, CalPERS has unilaterally decided to re-litigate the same issues already
7 previously resolved in 2005-6.

8 Vernon previously litigated on Malkenhorst's behalf and argued formally that
9 Malkenhorst was entitled to the single highest compensation and longevity bonus for performing
10 the job that Vernon's City Council required him to do. Vernon is judicially estopped from now
11 changing these representations. CalPERS however again seeks to change the compensation and
12 office decision that Vernon made. CalPERS seeks the right to unilaterally determine
13 Malkenhorst's pay rate, and other compensation, as well as the positions that he held at Vernon.

14 There is no statutory or other support for CalPERS' actions to change the pay rate or job
15 positions.

16 Politically motivated, CalPERS seeks this second administrative review with the aim of
17 drastically slashing Malkenhorst's pension benefits to make an example of him in the political
18 realm. Lumped unfairly and prejudicially with unrelated partisan agendas, this administrative
19 action is based upon CalPERS' unauthorized new refusal to accept the base salary and longevity
20 pay that Vernon chose to pay Malkenhorst.

21 **A. CalPERS' Allegations:**

22 *Government Code* section 11503 requires that "[a] hearing to determine whether a right,
23 authority, license or privilege should be revoked, suspended, limited or conditioned shall be
24 initiated by filing an accusation. The accusation shall be a written statement of charges which
25 shall set forth in ordinary and concise language the acts or omissions with which the respondent
26 is charged, to the end that the respondent will be able to prepare his defense. It shall specify the
27 statutes and rules which the respondent is alleged to have violated, but shall not consist merely of
28 charges phrased in the language of such statutes and rules."

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1 **Accusation Required.** Since the administrative proceedings initiated by CalPERS are an
2 attempt to take away a vested pension benefit that Malkenhorst has been properly receiving for
3 nearly a decade, CalPERS must proceed by *Accusation*, whether CalPERS entitles its initial
4 pleading that or calls it a *Statement of Issues*. The jurisdictional challenges, Section 11506
5 challenges to the agencies authority, and Notice of Defenses are patently available when an
6 agency proceeds by *Accusation*.

7 In any event, the September 27, 2003 *Statement of Issues* provides none of the specificity
8 required by the *Government Code*.

9 **Statement of Issues Fails to Provide Notice, Violates Due Process,** Malkenhorst thus
10 finds himself confronting a phantom. CalPERS' *Statement of Issues* does little more than to quote
11 sections of the PERL and the *California Code of Regulations* that CalPERS contends have
12 relevance. It makes no attempt to apply those statutes and regulations to any concrete fact in
13 Malkenhorst's employment history.

14 It provides no clue whatsoever about how CalPERS has reached its decision to reduce
15 Malkenhorst's pension. The *Statement of Issues* fails to provide sufficient details to satisfy due
16 process or notification. Malkenhorst has requested to strike and demurrer to the defective
17 pleading.

18 **Multiple Positions, Other Assumptions.** Based on CalPERS' 2012 Audit Report and its
19 October 22, 2012, "final determination" letter, it appears to Malkenhorst that CalPERS is
20 proceeding on an incorrect assumption (made without legal justification or authority) that
21 Malkenhorst held *multiple* positions simultaneously at Vernon, each with its own hours of work
22 and pay rate.

23 Based upon this foundationless *presumption*, CalPERS has chosen to ignore the clear,
24 consistent and documented evidence, including *inter alia*:

- 25 a) That Vernon intended and acted to employ Malkenhorst in the single full-
26 time position of City Manager throughout his last 27 years at Vernon;
- 27 b) That this single position required Malkenhorst to perform multiple duties
28 and responsibilities, but all as part of the defined job duties of City Manager;

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1 c) That at times Vernon assigned Malkenhorst various *ex-officio* titles or
2 hyphenated job names, but none of this changed the fact that all such work was always a
3 component part of the single full-time position of City Manager;

4 d) That Vernon intended and acted to pay Malkenhorst a single salary plus
5 applicable longevity pay for his full-time City Manager position;

6 e) That Malkenhorst's City Manager salary plus applicable longevity pay was
7 always documented by publicly approved City Council resolutions, ordinances, minutes
8 or other official City documents;

9 f) That Malkenhorst's City Manager salary plus applicable longevity pay was
10 properly and timely reported to CalPERS;

11 g) That employer and employee contributions attributable to that
12 compensation were properly and timely paid to CalPERS and accepted by CalPERS; and
13 finally

14 h) That CalPERS has already previously spent more than a year litigating
15 precisely these same issues in 2005-2006 in a robust administrative process, conducted
16 after formal appeal by Malkenhorst and Vernon and pursuant to the provisions of the
17 Administrative Procedures Act ("APA", *Government Code*, §§13400, *et seq.*).

18 **Collateral Estoppel, Res Judicata.** At the conclusion of the 2005-2006 quasi-judicial
19 administrative process, CalPERS finally determined that Malkenhorst *was* entitled to a pension
20 based on the reported compensation. CalPERS is now barred from re-litigating those matters
21 already litigated to final determination. Malkenhorst incorporates in full the concurrently filed or
22 previously filed *Motions and Memorandum of Points and Authorities' on Collateral Estoppel*
23 *and Res Judicata.*

24 **Judicial Estoppel.** Vernon is also barred from altering or renegeing on its previous
25 judicial positions taken in the 2005-2006 administrative process support of Malkenhorst's
26 entitlement to the higher pension. Malkenhorst has the right to rely on such previous positions
27 taken by Vernon. Malkenhorst incorporates in full the concurrently filed or previously filed
28 *Motions and Memorandum of Points and Authorities on Judicial Estoppel.*

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1 **Charter City Autonomy.** CalPERS has no legal or constitutional right to interfere with
2 Vernon's right to structure its municipal affairs. (*Sonoma County Organization of Public*
3 *Employees v. County of Sonoma* (1979) 23 Cal.3d 296.) CalPERS certainly has no authority to
4 arbitrarily decide that Vernon must split the City Administrator position into multiple jobs, each
5 with its own pay rate and required hours of work, apparently for the purpose of reaching a pre-
6 determined outcome that would permit CalPERS to cut Malkenhorst's pension. Malkenhorst
7 incorporates in full the concurrently filed or previously filed *Motions and Memorandum of*
8 *Points and Authorities on Charter City Autonomy.*

9 **II. SPECIAL DEFENSES AND RESPONSE TO STATEMENT OF ISSUES**

10 Malkenhorst specifically denies each part of the *Statement of Issues* that is not expressly
11 admitted. Malkenhorst hereby presents the following special defenses, specific denials, and
12 responses to the *Statement of Issues* pursuant to *Government Code* section 11506.

13 1. Malkenhorst recognizes that Petitioner CalPERS makes and files the *Statement of*
14 *Issues* [i.e. Accusation] in its official capacity.

15 2. Under protest and compulsion, Malkenhorst timely filed an appeal and requested
16 a hearing, albeit an appeal filed under protest and without conceding or waiving any of his rights
17 to contest CalPERS' authority to conduct an administrative process in the first place.

18 3. The appeal should not be limited to the narrow issues that CalPERS proposes.

19 **III. SPECIAL NOTICE OF DEFENSE,**

20 **AFFIRMATIVE DEFENSES AND NEW MATTER**

21 Under *Government Code* section 11506(a)(5), Malkenhorst submits the following new
22 matter:

23 **IV. FACTUAL BACKGROUND**

24 **A. Governmental Structure of the City of Vernon As Determined by the City Council**

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

27 2. Vernon is fairly unique among California cities. It has few residents, few schools,
28 and provides few social services, which are typically a large amount of the work of a city

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1 council. The Vernon City Council instead focused much of its attention on matters of concern to
2 the large number of industries and businesses that were located in Vernon. The businesses in
3 Vernon wanted an efficiently run city with reduced electrical costs, lower taxes, and low
4 infrastructure costs. At the same time, the businesses in Vernon wanted superior fire protection
5 and superior business-related municipal services. The Vernon City Council in part structured its
6 municipal government and affairs in response to the concerns and needs of its business
7 components, property owners, and related constituents.

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

12 4. Prior to the mid-1970's, the City Council structured its municipal government
13 affairs such that the department heads reported directly to the City Council. Up through the mid-
14 1970's, Vernon's governmental structure required the City Council to directly manage and
15 oversee a number of separate individuals working as department heads or otherwise undertaking
16 responsibility for some aspect of city affairs. The City Council would manage these individuals
17 and office holders in open meetings.

18 5. The City Council had a regular policy and practice of establishing a position and
19 then determining which duties and responsibilities that position would be responsible for. The
20 City Council also had a regular policy and practice of naming a single position with hyphenated
21 words or a hyphenated title. In certain cases, the City Council established a position (or the title
22 to a position) so that it was named with words that contained or described multiple duties, but the
23 position functioned and was intended to function as a single position, albeit with multiple duties
24 and responsibilities. In certain cases, the City Council required a position to act in an *ex officio*
25 manner wherein the position performed additional duties with different titles or names.

26 6. For example, in or about the fall of 1975, Vernon listed a job opening for the
27 position as "Deputy City Clerk/Deputy Director of Finance". The "Deputy City Clerk/Deputy
28 Director of Finance" was one title for one position that was responsible for various duties,

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1 including overseeing accounts payable and receivables.

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

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

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

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

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

26 12. During the same period that it was consolidating various city management
27 responsibilities and duties into existing positions, and as a component part of its
28 reconceptualization and reorganization of city management structure, the City Council began

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1 developing plans to create a single position in city administration that would be responsible for
2 an increased number of duties and responsibilities. The City Council wanted to establish a
3 centralized position to handle many of the duties involved in running the city and transforming
4 Vernon into a stronger municipal entity.

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

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

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

23 16. Ordinance No. 883 further appointed the City Administrator to simultaneously
24 serve as the City Clerk, the Municipal Employee Relations Representative, and the Personnel
25 Director and the duties and responsibilities of City Clerk, Municipal Employee Relations
26 Representative, and Personnel Director were incorporated into the single position of City
27 Administrator. This was a continuation and formal ratification of policies begun earlier whereby
28 the duties and responsibilities of previously existing positions were incorporated into the duties

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1 and responsibilities of existing city management positions. Pursuant to Ordinance No. 883, the
2 authority for this organizational structure was also incorporated in the Vernon City Code.

3 17. At many times, Vernon designated the new position simply as City Manager. At
4 other times, Vernon designated the new single position as "City Administrator/City Clerk" and
5 used that designation to refer to all duties and responsibilities incorporated in the single position.
6 On other occasions, Vernon referred to individual duties by *ex officio* titles such as "City Clerk"
7 or other titles. However, even when individual duties were referred to by such an *ex officio* title,
8 those duties were simply a part of the overall duties and responsibilities of the single City
9 Administrator position and were performed as part of the regular duties and responsibilities of
10 that position.

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

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

19 20. Up until mid-1981, Vernon retained the services of an outside contractor to obtain
20 electrical power from Southern California Edison. That contractor had promised that the rate
21 charged to Vernon would be below the rate Southern California Edison charged other
22 commercial customers in the area but when he presented Vernon with a new contract, Vernon
23 was actually being charged rates *above* those charged to other commercial customers. The City
24 Council recognized that it was not in the City's interests to sign such a contract and it terminated
25 its relationship with the outside contractor. At the same time, the City Council reorganized
26 Vernon's Department of Light and Power to rectify the problems.

27 21. On or about May 5, 1981, the City Council adopted Resolution No. 4803, which
28 revised the structure of the Department of Light and Power and created several new positions

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1 within the department. One of these positions was a Chief Executive Officer ("CEO") with
2 responsibility for coordinating the development of policies involving all phases of the electrical
3 department. In adopting Resolution No. 4803, the City Council continued its existing practice of
4 incorporating new duties and responsibilities into the duties and responsibilities of an existing
5 position by appointing the City Administrator to serve as the CEO of the Electrical Department.
6 Furthermore, the City Council mandated that no separate compensation be paid for performing
7 these duties or responsibilities.

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

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

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

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

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1 Department were incorporated into the duties and responsibilities of the existing position of City
2 Administrator responsibilities. The City Council mandated that no separate compensation was to
3 be paid for performing these duties or responsibilities.

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

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

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

19 28. Bruce V. Malkenhorst, Sr. has superior business, organizational, and managerial
20 skills.

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

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

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

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

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

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

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

26 36. The job opening at Vernon appealed to Malkenhorst, in part because he had
27 worked as an assistant finance director at Manhattan Beach and was familiar with the duties. He
28 also thought that going to work at Vernon might increase his opportunities to become a City

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

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

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

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

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

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

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

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

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

26 45. On or about June 30, 1978, the then-current City Treasurer of Vernon terminated
27 his employment with the City. On or about July 16, 1978, the City Council appointed
28 Malkenhorst to undertake the duties of the City Treasurer. Again, the City Council assigned the

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

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

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

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

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

28 50. On August 1, 1978, the City Council adopted Vernon Ordinance No. 883,

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

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

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

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

25 54. When the City Council adopted Resolution No. 4803 on or about May 5, 1981,
26 which revised the structure of the Department of Light and Power and created several new
27 positions within the department, it also established the new position of Chief Executive Officer
28 ("CEO") with responsibility for coordinating the development of policies involving all phases of

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

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

20 56. Importantly, the City of Vernon grew and prospered. Its economics improved, its
21 tax base improved, more businesses began to want to locate in Vernon. The city council
22 members were pleased with the economic results and indicated that Malkenhorst was greatly
23 responsible for the superior economic performance of the city because of his superior
24 management skills, strategic thinking, and organizational skills.

25 57. As of July 1, 1986, Malkenhorst had been serving as Vernon's City Administrator
26 for approximately eight years. Pursuant to the terms of the new longevity program adopted by
27 the City Council effective July 1, 1986 pursuant to Resolution No. 5294, Malkenhorst began
28 receiving additional compensation in the form of longevity pay equal to five percent (5%) of his

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1 base salary. From that point forward until the end of his tenure as Vernon's City Administrator,
2 Malkenhorst received additional special compensation in the form of longevity pay based on the
3 terms of Vernon's longevity pay program, including as that program was amended over time.

4 58. As time passed, the City of Vernon continued to grow and prosper. More and
5 more businesses began to want to locate in Vernon because of the municipal advantages that
6 Vernon offered. Vernon offered superior firefighting, more responsive municipal government,
7 and lower costs. As Vernon continued to prosper, the city council members wanted the good
8 economic results to continue. In general, the city council continued to recognize that
9 Malkenhorst was greatly responsible for the superior economic performance of the city. The city
10 council wanted the city continue to grow.

11 59. 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 60. On June 30, 2005, Malkenhorst retired from his employment at Vernon after
20 nearly 30 years of work at the City, 27 of them as City Administrator.

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

22 61. When Malkenhorst retired, Vernon likely confronted a situation where nobody
23 among its current employees had the skill, knowledge and experience to step in and take over the
24 role Malkenhorst had played as City Administrator with its multiple and complex duties and
25 responsibilities, nor was Vernon likely to find an eligible candidate for the position among the
26 general public.

27 62. Pursuant to its Charter City status and the *Vernon City Charter*, the City Council
28 possessed the authority to establish or alter the governance structure of the City to best

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1 accomplish its goals. During the period of Malkenhorst's tenure, this often took the form of the
2 City Council adding various duties and responsibilities to the City Administrator job
3 requirements.

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

10 **V. LAW AND ARGUMENT**

11 **A. Malkenhorst's Compensation, Job Duties and Publicly Available Pay Schedules**

12 **Meet the Requirements of the PERL**

13 Malkenhorst's compensation and position throughout his employment at Vernon satisfy
14 the requirements of the PERL.

15 CalPERS violates the express terms of the PERL in attempting to find otherwise.
16 CalPERS attempts to disregard the regular and special compensation earned by Malkenhorst as
17 Vernon's City Administrator.

18 Disregarding the statutory limits in the PERL to play politics, CalPERS arbitrarily seems
19 to assume that Malkenhorst held multiple separate positions, with separate salaries and separate
20 required hours of work for each assumed separate position. This directly contradicts Vernon's
21 documentation which was provided to CalPERS for years.

22 In the Statement of Issues or elsewhere, CalPERS is unable to provide either legal
23 authority or factual support for this assumption.

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

27 **B. CalPERS' Improper and Unsubstantiated Assumptions**

28 CalPERS' *Statement of Issues* contains little more than the recitation of allegedly

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1 applicable law and regulation, and the unsupported and unexplained conclusion that Malkenhorst
2 is not entitled to his full pension. CalPERS fails to set forth specific information or allegations to
3 allow Malkenhorst to respond to CalPERS' inquiries or claims. CalPERS has failed to provide
4 Malkenhorst with sufficient notice of what CalPERS believes was nonconforming, required
5 correction, or was deficient. *Government Code Section 11506.*

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

14 Given the need to defend himself vigorously at each step of every process in the
15 appropriate forum, Malkenhorst is forced to look at CalPERS' prior statements, including its
16 2012 Audit Report and its October 22, 2012, "final determination" letter, to try to ascertain the
17 arguments CalPERS intends to make. Those arguments essentially revolve around several
18 interrelated, and false, assumptions and assertions:

- 19 • CalPERS falsely assumes that Malkenhorst worked in multiple positions
20 simultaneously, when the facts are clear that Malkenhorst worked full time and
21 performed all of his duties and responsibilities in the single position of City
22 Administrator. CalPERS further assumes that Malkenhorst earned separate salaries
23 for each allegedly separate position, when the facts are clear that Malkenhorst was
24 compensated for the singular position of City Administrator and received no other
25 salary connected with his multiple duties and responsibilities.
- 26 • CalPERS further falsely assumes that each purported "separate" job had its own set of
27 job duties, pay schedule, and required hours of work. The facts are clear that
28 Malkenhorst performed all of his duties and responsibilities in the single position of

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- 1 City Administrator and was compensated for that singular position. The City Council
2 mandated that no separate compensation was to be paid for performing any of his
3 particular duties or responsibilities beyond that paid for the singular position of City
4 Administrator.
- 5 • CalPERS further falsely assumes that a portion of Malkenhorst's earnings at the City
6 of Vernon must be considered "overtime" under the PERL and non-reportable to
7 CalPERS, based on the unsupported conclusion that Malkenhorst held numerous full-
8 time positions. CalPERS does so even though Malkenhorst worked in one exempt
9 position where there was no overtime payable.
 - 10 • CalPERS further falsely assumes that Malkenhorst received "exceedingly high salary
11 increases" during his tenure at the City of Vernon. In fact, Malkenhorst's salary
12 increased an average of just over 3.5% for the last ten years of his employment at
13 Vernon.
 - 14 • CalPERS further falsely assumes that Malkenhorst received 3% salary increases only
15 during his final three years of employment, rather than just over that percentage
16 during his last ten years of employment. CalPERS' intent in speaking only of
17 Malkenhorst's final three years at Vernon appears to aimed at falsely implying that
18 Malkenhorst and Vernon radically reduced Malkenhorst's pay raises during his final
19 three years at Vernon for purposes of avoiding "anti-spiking" allegations. Further,
20 CalPERS' construct assumes that Vernon would have offered Malkenhorst higher pay
21 increases which he declined.
 - 22 • CalPERS further falsely assumes that Malkenhorst's greatest period of "exceedingly
23 high salary increases" (1985 through 1992 according to CalPERS' audit) coincided
24 with, and represented additional compensation for, Malkenhorst's appointment to
25 "additional positions". In fact, Malkenhorst was assigned additional duties and
26 responsibilities throughout his nearly three decade tenure at Vernon, not just during
27 the seven year period identified by CalPERS. The City Council mandated that no
28 separate compensation was to be paid for performing these duties or responsibilities.

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1 Malkenhorst's salary increases were awarded in recognition of his superior
2 performance and proficiency at carrying on the duties and responsibilities of single
3 position of City Administrator.

4 • CalPERS further falsely assumes that the City of Vernon over-reported the longevity
5 pay special compensation earned by Malkenhorst. CalPERS already conducted a full
6 administrative review and appeal on this issue in 2005-2006 and reached a final
7 quasi-judicial conclusion at the end of that process that Malkenhorst was entitled to a
8 pension allowance calculated in part on the longevity pay reported to CalPERS.

9 **C. Malkenhorst Held a Single Job at Vernon, with a Single Pay Rate**

10 CalPERS makes the unsubstantiated and incorrect assumption that Malkenhorst worked
11 in multiple positions simultaneously. CalPERS assumes that each one of the multiple positions
12 had its own set of job duties, pay schedule, and required hours of work.

13 CalPERS ignores that the Vernon City Council mandated that all of the duties undertaken
14 by Malkenhorst were specifically designated as part of his City Administrator duties. No separate
15 compensation was to be paid for performing these duties or responsibilities.

16 Based on its false assumptions, CalPERS complains that neither Vernon nor Malkenhorst
17 have provided separate pay schedules, salary rates, hours of work, job descriptions and similar
18 materials on each of the allegedly "separate" positions.

19 Using circular logic and assuming the conclusion it seeks to reach, CalPERS then claims
20 that since Vernon and/or Malkenhorst have failed to provide pay schedules, job descriptions and
21 designated hours of work for imagined (and nonexistent) separate positions, CalPERS can ignore
22 the pay schedules, job description and designated hours of work of the single existing position,
23 City Administrator, and deny Malkenhorst the pension allowance he has rightfully earned.

24 As a subpart of this argument, CalPERS also apparently simply assumes—without any
25 evidence to support it—that the allegedly separate "payrates and earnings [of the nonexistent
26 separate positions] were combined and reported as one item indicating one position". (See
27 CalPERS' Audit, page 10.)

28 As discussed in detail above and demonstrated in the documents previously provided to

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1 CalPERS, Vernon enacted a form of governance which relies on a strong City Administrator,
2 who works under the direction and control of the Vernon City Council. Malkenhorst served as
3 City Administrator (also designated at times by Vernon as "City Administrator/City Clerk") and
4 the City Administrator position had multiple responsibilities, all within the singular position of
5 City Administrator.

6 **Vernon's Decision on Governance.** The City of Vernon also chose a form of
7 governance whereby it paid Malkenhorst a single salary for his City Administrator employment,
8 compensating him for all of his duties and responsibilities with a single salary for a single
9 position. The City Council mandated that no separate compensation was to be paid for
10 performing these other duties or responsibilities.

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

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

18 CalPERS not only fails to provide a single bit of evidence to support its "multiple
19 positions" theory, it does not even *allege* this in the *Statement of Issues* beyond a cursory
20 statement at the outset of the *Statement of Issues* that Malkenhorst "was employed by respondent
21 City of Vernon, at times in numerous positions simultaneously...."

22 The Constitution and the PERL no more allow CalPERS to interfere with the power and
23 authority of Vernon (as a charter city) to establish its governance structure, offices and
24 compensation structure than they allow CalPERS to arbitrarily split the position of any
25 management level CalPERS Member into two or more "separate" positions with "separate"
26 duties, hours of work and compensation, simply because CalPERS objects to the "high" salary
27 paid that employee for a single position.

28 **D. Malkenhorst's Base Salary Qualifies as "Pay rate" and "Compensation Earnable"**

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1 **Under the PERL**

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

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

8 Vernon reported the pay rate to CalPERS and made contributions associated with the
9 reported pay. CalPERS accepted those contributions for nearly 30 years without objection.

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

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

16 ***Government Code* § 20630.**

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

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

(*Government Code*, §20630, emphasis added.)

23 *Government Code* section 20636 determines "compensation earnable" and reads in
24 relevant part:

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

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

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1 (b)(1) "Payrate" means the normal monthly rate of pay or base pay of the
2 member paid in cash to similarly situated members of the same group or class of
3 employment for services rendered on a full-time basis during normal working
4 hours, pursuant to publicly available pay schedules. "Payrate," for a member who
5 is not in a group or class, means the monthly rate of pay or base pay of the
6 member, paid in cash and pursuant to publicly available pay schedules, for
7 services rendered on a full-time basis during normal working hours, subject to the
8 limitations of paragraph (2) of subdivision (e).

9 ...
10 (e)(2) Increases in compensation earnable granted to an employee who is not in
11 a group or class shall be limited during the final compensation period applicable
12 to the employees, as well as the two years immediately preceding the final
13 compensation period, to the average increase in compensation earnable during the
14 same period reported by the employer for all employees who are in the same
15 membership classification, except as may otherwise be determined pursuant to
16 regulations adopted by the board that establish reasonable standards for granting
17 exceptions.
18 (*Government Code*, §20636, emphasis added.)

19 Malkenhorst's base salary for the City Administrator position was unquestionably paid in
20 cash out of funds controlled by the City of Vernon. (Section 20630.) The salary was in payment
21 for his services as City Administrator (including all other duties and responsibilities arising from
22 that single position pursuant to decisions of the Vernon City Council) performed during normal
23 working hours (Sections 20630, 20636) and on a full-time basis (Section 20636). It was paid
24 pursuant to publicly available pay schedules approved in public meetings of the Vernon City
25 Council and made available to anyone from the general public wishing to see them by the City of
26 Vernon. (Section 20636.)

27 We have already provided CalPERS with hundreds of pages of exhibits which
28 demonstrate the pay rate and the publicly available pay schedules. We anticipate providing a
similar number of documents again.

29 **E. "Longevity Pay" Qualifies as Special Compensation and is Eligible to Be Included**
30 **"Compensation Earnable" Under the PERL**

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

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

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

4 ...
5 (c)(1) Special compensation of a member includes a payment received for
6 special skills, knowledge, abilities, work assignment, workdays or hours, or other
7 work conditions.

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

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

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

20 Vernon adopted a longevity pay program effective on or about July 1, 1986, which
21 provided long-term City employees with additional compensation as a percentage of their base
22 salary, based on how long they had been working for Vernon. Pursuant to that longevity pay
23 program, Malkenhorst began receiving longevity pay in mid-1986 at the rate of an additional five
24 percent (5%) of his base salary because at that point he had served as City Administrator for
25 approximately eight years.

26 Pursuant to the terms of the longevity pay program, including as amended over time by
27 the Vernon City Council, Malkenhorst earned an additional five percent (5%) of his base salary
28 for all time served as City Administrator between five and ten years; an additional ten percent
(10%) of his base salary for all time served as City Administrator between ten and fifteen years;
an additional fifteen percent (15%) of his base salary for all time served as City Administrator
between fifteen and twenty years; an additional twenty percent (20%) of his base salary for all
time served as City Administrator between twenty and twenty-five years; and an additional
twenty-five percent (25%) for all time served as City Administrator in excess of twenty-five
years.

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1 The longevity pay received by Malkenhorst met the definition of "longevity pay".
2 (*California Code of Regulations*, §571(a)(1).) It also conformed with the requirements for
3 eligible special compensation in that it was paid pursuant to a labor policy or agreement
4 (Resolution No. 5294 and subsequent Resolutions amending or reauthorizing the program), was
5 available to similarly situated members of a group or class (i.e., those eligible for such additional
6 compensation based upon the number of years they had held their job position), and was in
7 addition to pay rate. (Section 20636.)

8 Vernon reported the longevity pay special compensation to CalPERS and made
9 contributions associated with the reported pay. CalPERS accepted those contributions without
10 objection.

11 **F. All of Malkenhorst's Base Pay and Longevity Pay Special Compensation Were Paid**
12 **Pursuant to Publicly Available Pay Schedules in Compliance with the PERL**

13 CalPERS has received hundreds or thousands of pages of exhibits that prove that
14 Malkenhorst's single pay rate and longevity pay for the single position were on publicly
15 available pay schedules.

16 But CalPERS makes the following statements in its October 22, 2012, "final
17 determination" letter to Malkenhorst:

18 As detailed below, not all pay schedules provided appear to have included
19 amounts solely attributable to one position. [Fn. 1 then lists positions CalPERS
20 asserts Malkenhorst served in simultaneously.] The pay schedules provided by
21 you and the City list the positions of City Administrator/City Clerk. Moreover, the
22 documentation provided confirms that Mr. Malkenhorst served in the capacity of
23 several positions simultaneously. Since more than one position has been
24 identified, each position Mr. Malkenhorst occupied must have the corresponding
25 payrate listed on all publicly available pay schedules. [Fn. 2 omitted.] CalPERS
26 has yet to receive copies of publicly available pay schedules for each of these
27 positions. Also, to discern the amount of service credit attributable to each
28 position and the payrate associated with each position, CalPERS must receive
information verifying the proportionate amount of service rendered in each
respective position.

...

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

...

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1 As a result, CalPERS has preliminarily concluded that the amounts reported to
2 CalPERS by the city for your services do not appear to have been paid "pursuant
3 to publicly available pay schedules" under the meaning of that phrase in the
4 statutory and regulatory definitions for payrate.
(See CalPERS' October 22, 2012, "final determination" letter to Malkenhorst, p. 2
and 4.)

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

8 The documents provided to CalPERS thus far prove conclusively that Vernon established
9 the City Administrator position as a single, full-time position with multiple duties, honors, and
10 responsibilities. The City Administrator received a single base salary for performing all of the
11 duties and responsibilities of the position.

12 In other words, Malkenhorst worked only one job.

13 As Vernon grew more prosperous and sophisticated, there were more responsibilities,
14 accolades, or "titles". But the additional "titles", honors, duties or responsibilities were not
15 separately or additionally compensated. The Vernon City Council then amended the
16 responsibilities and duties of the City Administrator position over the next two-plus decades.

17 **But the changes in the responsibilities and duties of the City Administrator position**
18 **do not coincide in time or in effect with increases in the base salary of the City**
19 **Administrator position.**

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

26 In fact, all of Malkenhorst's reported base salary throughout his 30 years as City
27 Administrator was meticulously set forth in pay schedules included in regular City Council
28 salary resolutions. Each such salary resolution was approved in public City Council meetings and

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1 available to any member of the public that wanted to inspect them. Changes in Malkenhorst's job
2 duties and requirements over the years were regularly documented and included in publicly
3 approved and available City Council resolutions and Council-approved City ordinances. And
4 further, public and fully transparent adoption of each of the salary resolutions, pay schedules and
5 ordinances is documented in City Council meeting minutes.

6 CalPERS has chosen to ignore all of this, despite the fact that it has been provided with
7 all of this material. Once CalPERS' baseless assumption about "multiple positions" is excluded,
8 it becomes readily apparent that Malkenhorst was paid pursuant to publicly available pay
9 schedules throughout the entire time period he worked as City Administrator. The salary
10 schedules for the City Administrator position clearly meet the requirements of "publicly
11 available pay schedules" under the terms of the PERL.

12 CalPERS strategy to reduce Malkenhorst's pension is to assume that he had more than
13 one job, and then divide his compensation (and pension) as a result. In other words, CalPERS
14 tries to effect an unlawful reduction in Malkenhorst's pension by asserting baseless, and
15 politically motivated, *presumptions that Malkenhorst held multiple jobs*. Under that false
16 assumption, Vernon's existing (and legitimate) resolutions, ordinances and pay schedules were a
17 sham because Malkenhorst held numerous *separate* positions, each with its own salary, duties
18 and hours of work.

19 There is no evidence of any of this.

20 In fact, extensive reliable undisputed evidence shows just the opposite was actually the
21 case. Nevertheless, CalPERS insists on moving to cut Malkenhorst's pension based on its
22 completely unsupported and unsupportable assumption that CalPERS knows better.

23 **G. None of Malkenhorst's Compensation Constituted "Overtime" Under the PERL**

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

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

5 Finally, CalPERS complains that the lack of proof of its false assumption is because
6 Malkenhorst and/or Vernon have failed to provide that proof. Essentially, CalPERS complains
7 that Vernon failed to provide documentation to establish the hours and pay received for each of
8 Malkenhorst's purported "separate" positions. But CalPERS never pauses to consider the obvious
9 - that the reason Malkenhorst and Vernon have failed to offer documentation of Malkenhorst's
10 "separate" positions is because *the separate positions never existed in the first place*. In other
11 words, the allegedly separate positions are nothing but a figment of CalPERS' imagination.¹

12 CalPERS then takes the next illogical leap by giving itself the authority to unilaterally
13 limit Malkenhorst's compensation to a *different and fictional office that Malkenhorst never held*.
14 CalPERS has decided that Malkenhorst's final compensation shall be limited to the compensation
15 earned by a different individual working at a different time in a different job, i.e. the person hired
16 to work as "Acting City Clerk" after Malkenhorst's retirement.

17 *Government Code* section 20635 defines what constitutes "overtime" compensation and
18 reads:

19 **Section 20635.**

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

28 ¹ CalPERS offers an odd trick. First, allege something untrue. Second, require the other
person to provide documentation of the untrue thing. When the other person cannot prove the
falsehood, use that person's failure to do so as justification for reaching the false result that you
want anyway. "Heads I win, tails you lose." It is not a proper legal proceeding, instead it is an
endlessly cyclical, capricious, (and cynical) political maneuver to the agency's benefit.

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

6 **Vernon's Governance, Charter, and Council Decisions.** As described above,
7 Malkenhorst worked in a single City Administrator position. As part of its *City Charter* and
8 organizing laws, the City Council of Vernon mandated and decided that the City Administrator
9 position would include various duties and responsibilities, including various other titles or
10 honorifics, as were from time to time established by the City Council. The City Council had
11 complete authority under its charter city powers to establish the City of Vernon governance
12 structure and the responsibilities and duties of the City offices as it saw fit. It did so for the
13 position of City Administrator, including designating that as a single job and paying a single base
14 salary for the position, regardless of any duties and responsibilities the City Council assigned to
15 the office.

16 The City Council was free to use and include whatever duties, responsibilities, titles or
17 words that it wanted to use in structuring the position of City Administrator. The Vernon City
18 Council could call the office any name that it wanted to, including nonstandard terms or standard
19 terms in nonstandard ways, as is the autonomous power of a charter city to do. Pursuant to its
20 charter, the Vernon City Council had complete freedom and authority to assign *ex officio*
21 responsibilities, consolidate responsibilities, or otherwise adjust its government, organization,
22 and management of municipal affairs.

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

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

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1 "the hours of work considered normal" for such exempt employees.²

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

9 **H. CalPERS Relies On Inapplicable and Later-Adopted Regulations to Support Its**
10 **Reduction in Malkenhorst's "Final Compensation" and Resulting Pension**

11 To get its desired result, CalPERS retroactively applies regulations that were passed years
12 after Malkenhorst retired. Specifically, CalPERS relies upon *California Code of Regulations*,
13 §570.5, to argue that Malkenhorst's compensation did not comply with requirements that it be
14 pursuant to a "publicly available pay schedule", and on that basis decides that it will pay
15 Malkenhorst a pension based on a *different* job held by a *different* person at a *different* point in
16 time.

17 CalPERS begins with the foundationless assumption that Malkenhorst worked numerous
18 separate positions with their own salaries, job duties and hours of work, and then insists that
19 Vernon provide publicly available pay schedules for those non-existent positions. When Vernon
20

21 ² Without conceding or endorsing CalPERS' "logic", for purposes of argument assume
22 that CalPERS could somehow prevail on its argument that Malkenhorst worked numerous
23 positions in excess of full-time status – a contention that Malkenhorst firmly rejects. Even if true,
24 CalPERS would still be bound by the terms of *Government Code* section 20635. Section 20635
25 states that the exclusion of overtime "shall apply only to service rendered on or after July 1,
26 1994." Malkenhorst was making a base salary of \$23,037 per month just prior to July 1, 1994,
27 and would thus be entitled at minimum to have that salary, plus applicable cost of living
28 increases, and longevity pay at the time of his retirement, used to calculate his pension
allowance. However, this is explicitly not within Malkenhorst's contemplation. He is entitled to
the full benefit of his service.

³ Since CalPERS membership has been extended from state workers to all employees of
CalPERS-contracting agencies not excluded by statute or contract, this same provision would
apply to local agencies, including the City of Vernon.

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1 is unable to do so (because those positions did not exist, and therefore there *were* no publicly
2 available pay schedules for them), CalPERS cites Section 570.5 which empowers CalPERS to
3 look to the last pay rate received by a Member pursuant to a pay schedule with the same
4 employer but for a *different* position. It then looks at the Vernon pay schedule for "Acting City
5 Clerk" after Malkenhorst's retirement, says that Malkenhorst once worked as City Clerk prior to
6 his appointment as City Administrator more than three decades earlier, and establishes that as
7 Malkenhorst's "publicly available" pay rate.

8 There are so many things wrong with this "analysis" that it is hard to know where to
9 begin – (i) it starts with the false *a priori* conclusion that Malkenhorst simultaneously held
10 numerous separate positions (rather than the fact that he held the single position of City
11 Administrator), (ii) concludes that there are no "separate pay schedules" for these positions (and
12 rejects the pay schedule for City Administrator because of the assumption that there is no such
13 single position), (iii) argues that CalPERS must therefore look to some *previous* position held by
14 Malkenhorst, namely his position as City Clerk back in the mid-1970's, (iv) does a slight of hand
15 by comparing a three-decades-old City Clerk position to a new "Acting City Clerk" position after
16 Malkenhorst retired, and (v) then establishes that position's salary as the only salary CalPERS
17 can accept for Malkenhorst's tenure at Vernon.

18 None of the above assumptions have any validity. All require CalPERS to explicitly
19 reject and ignore the fact that Vernon explicitly designated the City Administrator position as a
20 single job, albeit with multiple duties; that it authorized a single base salary for that single job;
21 and that it meticulously authorized and documented the pay schedules covering that job
22 throughout Malkenhorst's three decades as City Administrator in pay schedules attached to
23 publicly approved and publicly available City Council resolutions, ordinances and meeting
24 minutes.

25 Further, even assuming *arguendo* that there was an iota of truth in CalPERS' false
26 assumptions, Section 570.5 became effective on August 11, 2011, more than five years after
27 Malkenhorst retired. CalPERS cannot use laws that were passed after Malkenhorst retired in a
28 retroactive manner to divest Malkenhorst of his rights. For example, written agreement and

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1 changes to special compensation rules changed in 2011. (*Cal. Code Regs.* tit. 2, § 571.)

2 Under California law, statutes are not to be given a retrospective operation unless it is
3 clearly made to appear that such was the legislative intent. (*Gadda v. State Bar of Cal.*, 511 F.3d
4 933 (9th Cir. 2007); 58 Cal.Jur.3d, *Statutes*, §32.) CalPERS is trying to retroactively bind
5 Malkenhorst with rules and regulations that did not yet have the force and effect of law.

6 A retrospective or retroactive statute is one that operates on matters that occurred, or on
7 rights, obligations, and conditions that existed, before the time of its enactment, giving them an
8 effect different from that which they had under previously existing law (*Myers v. Philip Morris*
9 *Companies, Inc.* (2002) 28 Cal.4th 828; *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450.)

10 Every statute that takes away or impairs vested rights acquired under existing laws or creates a
11 new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or
12 considerations already past, must be deemed retrospective (*Strauss v. Horton* (2009) 46 Cal.4th
13 364, as modified, (June 17, 2009).)

14 **I. Malkenhorst's Salary Increases Were For His Performance in the Single Position of**
15 **City Administrator**

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

22 The salary of the City Administrator position was not increased for or as a result of
23 "assuming the additional duties and positions". Vernon required that no compensation was
24 payable for performing these duties, honors, accolades, and responsibilities, including in the
25 form of increases in the City Administrator pay.

26 The City Council clearly required the office of the City Administrator to perform all the
27 duties, honors, and responsibilities put on it. No extra, additional, or special compensation was

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1 Malkenhorst's raises or pay increases solely attributable to his City Administrator position.

2 Importantly, none of the pay raises coincided in time or consequence with Malkenhorst
3 assuming "additional positions" as CalPERS alleges. The increases or raises to the City
4 Administrator position were not linked in time to the time that the City Council increased or
5 added responsibility, honors, or duties to the City Administrator position. The case law is clear
6 that no pay is associated with undertaking a duty, honor, or responsibility unless compensation is
7 provided for prior to taking the position.

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

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

15 As indicated above, the assumption that Malkenhorst held numerous "separate and
16 distinct" positions is without merit. The related assumption that he was paid more because he
17 assumed extra honors or duties is without merit. CalPERS' assumption is based on nothing but
18 speculation and an effort to reach a desired result, i.e., to disqualify a portion of Malkenhorst's
19 compensation from his "final compensation".

20 **J. Malkenhorst's Salary Increases Were Based on His Superior Performance**

21 Vernon prospered under the City Council and Malkenhorst's leadership. More businesses
22 decided to locate in Vernon because of its superior municipal services for industrial businesses,
23 its firefighting, and the municipality's superior responsiveness to business.

24 As Vernon grew, the City Council recognized that Malkenhorst provided valuable
25 leadership. The City Council credited Malkenhorst with great respect. The City Council wanted
26 to keep the good times coming and wanted to grow further. Over time, the City Council
27 recognized Malkenhorst for his significant contributions to the City and its prosperity.

28 All of Malkenhorst's base salary increases were paid in recognition of his superior

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1 performance as City Administrator. As discussed above, the Vernon City Council established the
2 City Administrator position after finding and determining "that the administrative affairs of the
3 Municipal Government of the City would be handled more expeditiously, efficiently, and
4 satisfactorily through an officer, who acting on behalf of the Council, would attend to such
5 administrative affairs, to correlate and coordinate various municipal activities, compile data,
6 prepare reports relating to the affairs of City government, and to generally act as the agent of the
7 Council in the discharge of administrative duties." (Vernon City Ordinance No. 883.)

8 Unlike the vast majority of California cities which typically focus their attention on
9 meeting the social service and civil protection need of their citizenry, Vernon has few residents
10 and instead focuses its attention on issues of concern to the large number of industries and
11 businesses located in the City. Those businesses want an efficiently run city with reduced utility
12 costs and low taxes and infrastructure expenses. Malkenhorst excelled at providing such services,
13 and in exchange city revenues (primarily from tax revenues paid by the successful businesses
14 located in Vernon) grew significantly during his tenure as City Manager.

15 The City Council regularly increased Malkenhorst's compensation both to recognize him
16 for the excellent job he was doing and as an inducement for him to remain as City Administrator.

17 **K. CalPERS' Prejudicial and Inaccurate Statements About Malkenhorst's Salary**
18 **Increases**

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

27 The implication of CalPERS' statement is that Malkenhorst (apparently aided by the City
28 of Vernon) was focusing on and gaming CalPERS. CalPERS implies that Malkenhorst declined

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1 higher pay increases (without any evidence that they were offered) in order to keep the history of
2 his salary increases to a low rate during his final three years of employment in order to avoid the
3 limitations of *Government Code* section 20636(e)(2). In fact, Malkenhorst's base salary increases
4 were between 3% and 4.5% for every single fiscal year during his final ten years of employment
5 at the City of Vernon, and his salary increased an average of just over 3.5% per year for the
6 entire period from July 1, 1995, through June 30, 2005.

7 **L. There is Nothing In the PERL Which Requires that Malkenhorst's Reportable**
8 **Compensation Match His Total Compensation**

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

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

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

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

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1 with the PERL.

2 **M. Pension Law: CalPERS Is Required To Provide Malkenhorst Pension Benefits**

3 **Based On His Final Compensation Earned At the City of Vernon**

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

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

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

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

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

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

28 After an employee has retired and all conditions precedent to the obligation of the public

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1 body are fulfilled, the pension payments may not be changed to the employee's detriment.
2 (*Kavanagh v. Board of Police Pension Fund Com'rs* (1901) 134 Cal. 50.) The employee's status
3 being fixed by the happening of the contingency make the pension due and payable. A retired
4 employee is entitled to the fulfillment of the contract which he or she already has performed
5 without detrimental modification. (*Allen v. Board of Administration* (1983) 34 Cal. 3d 114.)

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

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

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

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

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

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

26 CalPERS conducts all of its administrative reviews and appeals pursuant to the
27 Administrative Procedures Act, *Government Code* sections 11500, *et seq.* (*Government Code*,
28 §20134.) *Government Code* section 11503 states in pertinent part, "A hearing to determine

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1 whether a right, authority, license or privilege should be revoked, suspended, limited or
2 conditioned shall be initiated by filing an accusation."

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

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

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

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

25 **P. Vesting of Pension Benefit**

26 Public employees' retirement rights are contractual and are vested in the sense that the
27 lawmakers' power to alter them after they have been earned is quite limited. (*California Ass'n of*
28 *Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371; *In re Retirement Cases*

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1 (2003) 110 Cal.App.4th 426.) By entering public service, an employee obtains a vested
2 contractual right to earn a pension on terms substantially equivalent to those then offered by the
3 employer. (*California Ass'n of Professional Scientists v. Schwarzenegger, supra.*)

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

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


19 **Q. No Modification Allowed After Retirement.**

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

23 **VI. CONCLUSION**

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

26 Dated: October 11, 2013

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

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PROOF OF SERVICE BY MAIL & FAX

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Law Offices of John Michael Jensen, 11500 W. Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.

On October 11, 2013, I served the following document(s) by the method indicated below:

1) Bruce V. Malkenhorst, Sr.'s Notice of Defense including Affirmative Defenses, Points and Authorities on Equitable Estoppel, Laches, Judicial Estoppel, Statute of Limitations

2) Bruce V. Malkenhorst, Sr.'s Notice of Defense, Affirmative Defenses and New Matter

By placing the document(s) listed above in a sealed envelope(s) and consigning it First class mail through the U.S. Postal Service to the address (es) set forth below.

Renee R. Salazar
California Public Employees' Retirement System
Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
Fax: (916) 795-3659

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 11, 2013, at Los Angeles, California.


Griselda Montes De Oca