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12 **BOARD OF ADMINISTRATION**
13 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**
14 **STATE OF CALIFORNIA**

15 In the Matter of the Calculation of Final) **CASE NO. 2012-0671**
16 Compensation of:)
17) **OAH NO. 2013080917**
18 BRUCE MALKENHORST, SR.,)
19 Respondent,) **CALPERS' MOTION IN LIMINE**
20 and.) **TO EXCLUDE FROM EVIDENCE**
21) **PLEADINGS IN OTHER**
22 CITY OF VERNON,) **LITIGATION**
23 Respondent.) **Prehearing Conference Date:**
24) **June 13, 2014**
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I. INTRODUCTION

This administrative proceeding concerns Malkenhorst's retirement allowance under the Public Employees' Retirement Law ("the PERL," Government Code Section 20000 et seq.). CalPERS recently recalculated Malkenhorst's retirement allowance, and the parties disagree whether the recalculation is consistent with the PERL. Malkenhorst also asserts several legal and equitable defenses against the recalculation of his retirement allowance.

In addition to pursuing an administrative remedy, Malkenhorst challenged the recalculation of his retirement allowance through several civil lawsuits. Malkenhorst now wants to use the civil litigation pleadings and briefs (the "Civil Pleadings") at the administrative hearing, claiming they "contain a more extensive discussion" of Malkenhorst's defenses.

The OAH should exclude the Civil Pleadings from the record. They are not evidence and they are not relevant to any issue to be decided.

II. LEGAL AND FACTUAL BACKGROUND

CalPERS is a defined benefit plan. Under the PERL, a retiree's benefit formula takes three factors into account: a member's credited years of service, final compensation, and age at retirement. (See, *Prentice v. Board of Administration* (2007) 57 Cal.App.4th 983, 989.) Of these three factors, only the amount of Malkenhorst's "final compensation" is in dispute.

In 2012, CalPERS recalculated Malkenhorst's "final compensation," and Malkenhorst responded by filing several civil lawsuits against CalPERS. But the lawsuits were dismissed because Malkenhorst had failed to exhaust administrative remedies. The dismissals are now on appeal.

Malkenhorst's final compensation is also the subject of this administrative proceeding. After receiving CalPERS' Statement of Issues, Malkenhorst denied that the recalculation was consistent with the PERL and filed motions purporting to state legal and equitable defenses to the recalculation. The defenses included collateral estoppel, the "charter city" status of

1 Malkenhorst's employer, statute of limitations, and laches. CalPERS responded to all the
2 motions on May 16, 2014.

3 On May 19, 2014, the parties filed their Joint Prehearing Statement, which included
4 Malkenhorst's exhibit list. Malkenhorst's exhibit list included more than a dozen pleadings
5 from his civil lawsuits (the "Civil Pleadings").¹ When asked to explain the relevance of the
6 Civil Pleadings, Malkenhorst stated: "While I tried to include as many of my arguments and
7 legal analyses as I could in the motions I filed with the OAH in response to CalPERS'
8 Statement of Issues, those pleadings were prepared under an extremely short time deadline and
9 may not have fully covered all of the relevant issues."² In other words, Malkenhorst wants the
10 OAH to consider his Civil Pleadings because they "contain a more extensive discussion" of his
11 defenses.³

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14 **III. THE CIVIL PLEADINGS SHOULD BE EXCLUDED**

15 Administrative law judges may consider only relevant evidence. (Gov. Code § 11513,
16 subd. (c).) Evidence is relevant if it has "any tendency in reason to prove or disprove any
17 disputed fact that is of consequence to the determination of the action." (Ev. Code § 210.)

18 By listing the Civil Pleadings on his exhibit list, Malkenhorst was suggesting they
19 would somehow prove or disprove a disputed fact of consequence. But Malkenhorst never
20 identified the disputed facts he thinks might be proved or disproved by something said during
21 the civil lawsuits. Instead, Malkenhorst indicated that the Civil Pleadings were not intended as
22 actual evidence at all – they were meant as supplemental briefs on his defenses.
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26 _____
27 ¹ See Exhibit 1, extract from Malkenhorst Exhibit List.

28 ² See Exhibit 2, Malkenhorst Letter dated May 12, 2014.

³ See Exhibit 2, Malkenhorst Letter dated May 12, 2014.

EXHIBIT “1”

**Proposed Exhibit List
 (subject to revision)**

Respondent's Exhibits	Description	CalPERS' Objections	City of Vernon's Objections	# of Pages	Brief Synopsis	What the exhibit is being offered to prove
FFFFF	City of Vernon, Minutes of the City Council Meeting of the City of Vernon held November 21, 1995			8	City Council minutes re adoption of ordinance	
GGGGG	City of Vernon, Ordinance No. 616 (COV-MALSR 00015269-00015277)			9	Vernon ordinance	
HHHHH	1997 California Planners' Book of list; List of California's Charter Cities and Counties	X - Hearsay; Relevance		3	List of charter cities and counties in California	
IIIII	June 5, 2012, Public Records Act Request to CalPERS Office of Stakeholder Relations & Tomi Jimenez, Manager Compensation and Employer Review	X - Hearsay; Relevance		2	Public Records Act requests	
JJJJJ	Contract between City Council of City of Vernon and the Board of Administration of CALPERS dated Oct. 23, 1948			3	Vernon-CalPERS pension administration contracts	
KKKKK	January 31, 2012, Response By City of Vernon to December 2011 Draft Audit Report Client-Matter: RI424/001			24	CalPERS' 2012 audit of Vernon	
LLLLL	Report of City of Vernon General-Purpose Financial Statements and Supplemental Combining Statements with Independent Auditor's Reports Fiscal Year Ended June 30, 2002 from Macias, Gini & Company LLP a Certified Public Accountants and Management Consultants (CalPERS 011556-011591)				Vernon's financial reports	
MMMMM	Documentation of Contributions by Vernon to CalPERS; for period of 1990 to 2014		X		Vernon's contributions to CalPERS	
NNNNN	Documentation of CalPERS' reporting of Vernon's contributions		X		Vernon's contributions to CalPERS	
OOOOO	Malkenhorst's request to purchase Additional Retirement Service Credit				Malkenhorst's ARSC purchase documents	
PPPPP	Malkenhorst's annual member statements, for the period of 1990 to 2014				Malkenhorst's CalPERS annual member statements	
QQQQQ	Complaint for Declaratory Relief, Injunctive Relief, Petition for Writ of Mandate Case No. 30-2012-00588466	X - Hearsay; Relevance		52	Charter cities lawsuit	

**Proposed Exhibit List
 (subject to revision)**

Respondent's Exhibits	Description	CalPERS' Objections	City of Vernon's Objections	# of Pages	Brief Synopsis	What the exhibit is being offered to prove
RRRRR	Respondent CalPERS Amended Demurrer to Petition Case No. 30-2012-00588466	X - Hearsay; Relevance		19	Charter cities lawsuit	
SSSSS	Opposition to Demurrer to Complaint for Declaratory Relief, Injunctive Relief, Petition for Writ of Mandate Case No. 30-2012-00588466	X - Hearsay; Relevance		23	Charter cities lawsuit	
TTTTT	Reply to Opposition to Demurrer to Complaint for Declaratory Relief, Injunctive Relief, Petition for Writ of Mandate Case No. 30-2012-00588466	X - Hearsay; Relevance		7	Charter cities lawsuit	
UUUUU	October 18, 2012, Moberly Tentative Ruling	X - Hearsay; Relevance		1	Charter cities lawsuit	
VVVVV	Petitioner and Plaintiff's Notice of Motion and Motion for Reconsideration of Court's Order Granting CalPERS' Demurrer to Complaint for Declaratory Relief, Injunctive Relief, Petition for Writ of Mandate, Case No. 30-2012-00588466	X - Hearsay; Relevance		2	Charter cities lawsuit	
WWWWW	Respondent's Points and Authorities in Opposition to Motion for Reconsideration; Request for Sanctions, Case No. 30-2012-00588466	X - Hearsay; Relevance			Charter cities lawsuit	
XXXXX	Reply to Opposition to Motion for Reconsideration of Court's Order and Opposition to Request for Sanctions, Case No. 30-2012-00588466	X - Hearsay; Relevance		9	Charter cities lawsuit	
YYYYY	December 28, 2012, Minute Order Orange County Superior Court Case #30-2012-00588466	X - Hearsay; Relevance		3	Charter cities lawsuit	
ZZZZZ	January 23, 2013 Revised [Proposed] Judgment Case #30-2012-00588466	X - Hearsay; Relevance		3	Charter cities lawsuit	
AAAAAA	City of Vernon General-Purpose Financial Statements and Supplemental Combining Statements with Independent Auditor's Reports Fiscal Year Ended June 30, 2002				Vernon's financial reports	
BBBBBB	2010/2011 CalPERS Comprehensive Annual Financial Report Fiscal Year Ended June 30, 2011				Status of Vernon's funding obligations to CalPERS	

**Proposed Exhibit List
 (subject to revision)**

Respondent's Exhibits	Description	CalPERS' Objections	City of Vernon's Objections	# of Pages	Brief Synopsis	What the exhibit is being offered to prove
CCCCC	Appellant's Opening Brief, Case No. G047959	X - Hearsay; Relevance		94	Charter cities lawsuit	
DDDDD	CalPERS Opposition, Case No. G047959	X - Hearsay; Relevance		63	Charter cities lawsuit	
EEEEE	Request for Judicial Notice filed in Case No. G047959	X - Hearsay; Relevance		28	Charter cities lawsuit	
FFFFF	ARSC purchase documents (CALPMF0000023-000033), (CALPMF 000054-000061), CALPMF 000081-000104)			43	ARSC purchase documents	
GGGGG	Verified Petition for Writ of Mandate; Extraordinary Relief and Damages; and Complaint for Declaratory Injunctive, & other relief (BS141275)	X - Hearsay; Relevance		27	Collateral estoppel/res judicata lawsuit	
HHHHH	Demurrer of Respondent to Petitioner's Verified Petition for Writ of Mandate; Memorandum of Points and Authorities (Case No. BS141275)	X - Hearsay; Relevance		27	Collateral estoppel/res judicata lawsuit	
IIIII	Petitioner's Opposition to CalPERS' Demurrer to Verified Petition for Writ of Mandate; Declaration of John M. Jensen; (BS141275)	X - Hearsay; Relevance		35	Collateral estoppel/res judicata lawsuit	
JJJJJ	Respondent's Reply to Petitioner's Opposition to Demurrer to Verified Petition for Writ of Mandate; Memorandum of Points and Authorities; Respondents Objections to and Request to Strike Same (Case No. BS141275)	X - Hearsay; Relevance		9	Collateral estoppel/res judicata lawsuit	
KKKKK	Malkenhorst Subpoena Privilege Log	X - Hearsay; Relevance		7	Privilege log from Loeb & Loeb	
LLLLL	CalPERS' Touch Point entry	X - Vague; Relevance			CalPERS' 2005-2006 administrative process and current administrative process re Malkenhorst's job, position, duties and compensation	

**Proposed Exhibit List
 (subject to revision)**

Respondent's Exhibits	Description	CalPERS' Objections	City of Vernon's Objections	# of Pages	Brief Synopsis	What the exhibit is being offered to prove
MMMM MM	C V of Joseph Tanner	X - Hearsay; Relevance			Curriculum Vitae of Expert Witness	
NNNNN	C V of Robert "Bob" Adams	X - X - Hearsay; Relevance		3	Curriculum Vitae of Expert Witness	
OOOOO	C V of Jim Niehaus	X - Hearsay; Relevance		3	Curriculum Vitae of Expert Witness	
PPPPP	Annual Report of City of Vernon General-Purpose Financial Statements and Supplemental Combining Statements with Independent Auditor's Reports Fiscal Year 1999-2008	X - Relevance; Vague			Vernon's financial reports	
QQQQQ	Financial, reporting, or contributions Reports by CalPERS about Vernon; for period of 1990 to 2014	X - Relevance; Vague	X		Vernon's reports and contributions to CalPERS	
RRRRR	Financial, reporting, or contributions Reports by Vernon; for period of 1990 to 2014	X - Relevance; Vague	X		Vernon's reports and contributions to CalPERS	
SSSSS	CalPERS Audit of Vernon, annually for years 1990 to 2014	X - Relevance; Vague	X		CalPERS' audits of Vernon	
TTTTT	Appellant's Opening Brief, Case No. B247676	X - Relevance; Hearsay		91	Collateral estoppel/res judicata lawsuit	
UUUUU	CalPERS Opposition, Case No. B247676.	X - Relevance; Hearsay		49	Collateral estoppel/res judicata lawsuit	
VVVVV	CalPERS Request for Judicial Notice, Case No. B247676.	X - Relevance; Hearsay		25	Collateral estoppel/res judicata lawsuit	

EXHIBIT “2”

Law Offices of John Michael Jensen
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johnjensen@johnmjensen.com tel. 310.312.1100

May 12, 2014
By Email and U.S. Mail

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Los Angeles, CA 90071

Joung Yim
Liebert Cassidy and Whitmore
6033 West Century Blvd., 5th Floor
Los Angeles, CA 90045

Re: Bruce Malkenhorst/Vernon v. California Public Employees' Retirement System
Nominally CalPERS Case No. 2012-0671, OAH Case No. 2013080917

Dear counsel:

During last Friday's meet and confer conference call, Jason objected to my seeking to admit into the administrative record various pleadings from the Superior Court and Appellate Court about the collateral estoppel/*res judicata* and charter cities autonomy litigation and appeals.

As you know, I am seeking to bar the administrative proceeding at the threshold, including on one or both of these legal claims.

Preservation of Issues for Possible Appeal:

I will seek to admit the pleadings from those other lawsuits (including in my list of exhibits to be introduced in the administrative proceeding) because the Superior or Appellate Court sustained CalPERS' demurrers in both cases principally on grounds that Mr. Malkenhorst was required to exhaust his administrative remedies before seeking intervention on these issues from a court of law.

The pleadings in question contain a more extensive discussion of those claims and the factual and legal arguments underlying them than I have thus far been able to bring forward in the administrative process. For example, the ALJ has limited us to a 10 page Reply Brief on the Motion to dismiss. Although we quickly filed under great time pressure the original motions, points and authorities, and other pleadings, the limitation of a 10 page Reply Brief to the Motion to dismiss does not allow for a full description of the many issues that have been brought in this matter but which the Superior or Appellate court has found are required to be exhausted in the administrative process. One way (that we have) to try to preserve them is to introduce and admit the pleadings in the other actions.

Jason Levin, counsel for CalPERS
Lisa Petrovsky, counsel for CalPERS
Joung Yim, counsel for City of Vernon
May 12, 2014
Page 2

I have sought to bring forward all of these claims and preserve all of these claims in the administrative process.

In any event, I intend to fully assert all of my client's rights on these claims in the administrative process and bring forward all of my claims on those issues, and if necessary he will seek court review of any adverse administrative finding by way of a *Writ of Administrative Mandamus* or other appropriate remedy.

I have included the pleadings as exhibits to ensure they are included in the administrative record.

CalPERS' Staff Had Authority to Make a Final Decision:

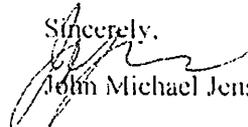
While I tried to include as many of my arguments and legal analyses as I could in the motions I filed with the OAH in response to CalPERS' *Statement of Issues*, those pleadings were prepared under an extremely short time deadline and may not have fully covered all of the relevant issues.

One particular argument I want to make sure you are fully aware of so that you may address it if you wish in your opposition briefs to my Motion to Dismiss is the argument that CalPERS' executive officer or staff members acting on the executive officer's direction have the authority to make final determinations of entitlement to benefits on behalf of the CalPERS Board, without seeking explicit Board approval. (See, for example, *Government Code*, §§20099, 20123 and 20134, and *C.C.R.* §555.)

This argument is included in the points and authorities I submitted on the issue of collateral estoppel/*res judicata*, but is developed more fully in the *Appellant's Opening Brief* filed in the collateral estoppel/*res judicata* appeal proceedings.

If you wish to further discuss these matters, please do not hesitate to contact me. Otherwise I will include these and other arguments in my briefing on the subject motion and argue my position in front of the OAH.

Sincerely,



John Michael Jensen

JMJ:gm
cc: Bruce V. Malkenhorst, Sr.



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PROOF OF SERVICE
F.R.C.P. 5 / C.C.P. 1013a(3)/ Rules of Court, Rule 2060

I am a resident of, or employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Steptoe & Johnson LLP, 633 West Fifth Street, Suite 700, Los Angeles, California 90071.

On **May 29, 2014**, I served the following listed document(s), by method indicated below, on the parties in this action: **CALPERS' MOTION IN LIMINE TO EXCLUDE FROM EVIDENCE PLEADINGS IN OTHER LITIGATION.**

SEE ATTACHED SERVICE LIST

XX BY U.S. MAIL

By placing the original / a true copy thereof enclosed in a sealed envelope(s), with postage fully prepaid, addressed as per the attached service list, for collection and mailing at Steptoe & Johnson in Los Angeles, California following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of document for mailing. Under that practice, the document is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that upon motion of any party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after date of deposit for mailing contained in this affidavit.

BY OVERNIGHT DELIVERY

By delivering the document(s) listed above in a sealed envelope(s) or package(s) designated by the express service carrier, with delivery fees paid or provided for, addressed as per the attached service list, to a facility regularly maintained by the express service carrier or to an authorized courier or driver authorized by the express service carrier to receive documents.

BY PERSONAL SERVICE

By personally delivering the document(s) listed above to the offices at the addressee(s) as shown on the attached service list.
 By placing the document(s) listed above in a sealed envelope(s) and instructing a registered process server to personally deliver the envelope(s) to the offices at the address(es) set forth on the attached service list. The signed proof of service by the registered process server is attached.

XX STATE

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

ELENA HERNANDEZ
Type or Print Name

Signature

BY ELECTRONIC SERVICE

(via electronic filing service provider)

By electronically transmitting the document(s) listed above to LexisNexis File and Serve, an electronic filing service provider, at www.fileandserve.lexisnexis.com pursuant to the Court's _____ Order mandating electronic service. See Cal. R. Ct. R. 2053, 2055, 2060. The transmission was reported as complete and without error.

XX BY ELECTRONIC SERVICE

(to individual persons)

By electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. The transmission was reported as complete and without error. See Rules of Court, rule 2060.

BY FACSIMILE

By transmitting the document(s) listed above from Steptoe & Johnson in Los Angeles, California to the facsimile machine telephone number(s) set forth on the attached service list. Service by facsimile transmission was made pursuant to agreement of the parties, confirmed in writing.



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