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May 29, 2014
VIA EMAIL

Administrative Law Judge Janis Rovner
Office of Administrative Hearings
Los Angeles Regional Office
320 West Fourth Street, Suite 630
Los Angeles, CA 90013

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

Dear Judge Rovner:

Pursuant to the *Amended Status and Trial Setting Conference Order* dated April 17, 2014, Respondent Bruce Malkenhorst hereby provides the Court and counsel for the other parties with the following motions in limine and other motions.

A. Motions in limine with respect to specific offers of evidence or testimony:

1. Motion in Limine to Exclude All Evidence that Would Support a Reduction in Malkenhorst's Pension;
2. Motion in Limine to Exclude All Irrelevant Testimony and Evidence That Does Not Relate to the Issues CalPERS Is Proceeding On;
3. Motion in Limine to Restrict the Testimony of CalPERS Witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall;
4. Motion in Limine to Restrict the Testimony of CalPERS Witness Joaquin Leon;
5. Motion in Limine to Exclude Evidence of Prior Felony Conviction;
6. Motion in Limine to Exclude CalPERS' Proposed Exhibit 66, 9/3/04 "Report on City Administrator's Misappropriation of Public Funds Through the Misuse of the City Petty Cash and the Credit Card Processes";
7. Motion in Limine re Discovery Violations and Barring Use of ADP Payroll Reports;
8. Motion for Leave to Take Records Deposition of ADP, aka Automatic Data Processing, Inc.;
9. Motion in Limine to Admit Court Pleadings and Records;

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10. Motion in Limine to Exclude All Evidence and Testimony that Violates the Parol Evidence Rule;

11. Motion in Limine to Exclude All Evidence and Testimony Subject to Judicial Estoppel by Prior Filings in the 2005-2006 Administrative Process;

B. Substantive Motions

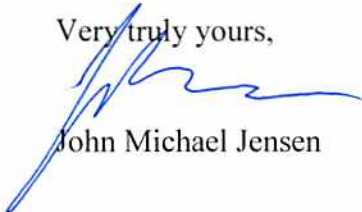
12. Motion re CalPERS' Alleged Right to Recoup Past "Pension Overpayments from Respondent, and if so, the Time Period for Which Such "Overpayments" May Be Sought; and

C. Motions in Limine Reiterating Objections, General Motion to Exclude

13. Motion in Limine to Exclude All Testimony and Evidence that Lacks Foundation, Constitutes Hearsay, Is Irrelevant, or Contains Inappropriate Opinion or Conclusion.

I understand that these motions will be heard and argued at the Prehearing Conference scheduled for June 13, 2014, at 9:00 am.

Very truly yours,



John Michael Jensen

JMJ:gm

Enclosures

cc: Renee Salazar, staff counsel for CalPERS
Ed Gregory, Jason Levin and Lisa Petrovsky, counsel for CalPERS
Joung Yim, counsel for the City of Vernon
Bruce V. Malkenhorst, Sr.

Motion #1

**Notice and Motion in Limine to Exclude all Evidence
that Would Support a Reduction in Malkenhorst's
Pension**

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,) **NOTICE AND MOTION IN LIMINE TO**
) **EXCLUDE ALL EVIDENCE THAT**
Respondents.) **WOULD SUPPORT A REDUCTION IN**
) **MALKENHORST'S PENSION;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; [PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby moves this Court for a motion *in limine* and an order excluding any and all evidence, in that as the *Statement of Issues* filed by CalPERS fails to state a cause of action, act or omission on which CalPERS may proceed, so no evidence should be admitted that would support a reduction in Malkenhorst's pension. (*Clemens v. American Warrant Co* (1987) 193 CA3d 444, 451.)

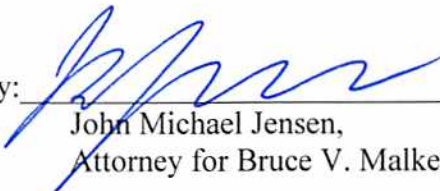
This motion is made under the provisions of Government Code Section 11511(b)(12) and 11513(b) and Evidence Code Sections 402, 352 and 350, and is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

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Respectfully submitted,

Dated: May 29, 2014

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 Respondent has filed a separate *Motion to Force CalPERS to Proceed by Accusation,*
4 *Bear Burden of Proof* herein on October 11, 2013, arguing that CalPERS must proceed by
5 *Accusation* pursuant to *Government Code* section 11503, rather than by *Statement of Issues*
6 pursuant to Section 11504.

7 At the heart is Respondent's contention that he obtained a fully vested property right in
8 the higher pension at the time of his retirement, or at the very latest when CalPERS ruled in his
9 favor on precisely that issue in August 2006 at the conclusion of a more than year-long quasi-
10 judicial administrative process. That process included the filing of two separate "Notices of
11 Appeal", the exchange of information and evidence, a determination that Malkenhorst was
12 entitled to the higher pension, and the payment to Malkenhorst of all pension monies that had
13 been withheld for more than a year while the dispute was litigated. Thus, CalPERS has already
14 determined that the higher pension was correct.

15 Since the pension is a vested property right, CalPERS must proceed by *Accusation*
16 pursuant to *Government Code* section 11503 to "revoke[], suspend[], limit[], or condition[]"
17 the pension. Further, CalPERS must provide "a written statement of charges that shall set forth in
18 ordinary and concise language the acts or omissions with which the respondent is charged, to the
19 end that the respondent will be able to prepare his or her defense. It shall specify the statutes and
20 rules that the respondent is alleged to have violated, but shall not consist merely of charges
21 phrased in the language of those statutes and rules." (*Government Code*, §11503.)

22 CalPERS' *Statement of Issues*, by contrast, contains little more than general statements of
23 law and quotations from the PERL that CalPERS contends justify a pension reduction, without
24 any explanation of the specific acts CalPERS asserts that Malkenhorst has done or failed to do in
25 violation of the PERL. Inasmuch as CalPERS *already determined* that Malkenhorst was entitled
26 to the higher pension in August 2006, CalPERS cannot proceed to try to reduce his pension a
27 second time without first stating the factual basis it now allegedly has that it did not have or
28 could not have obtained during the 2005-2006 process.

1 **II. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE IN ADVANCE OF**
2 **TRIAL BY WAY OF AN *IN LIMINE* MOTION**

3 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
4 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

5 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
6 has the power to promote the orderly and prompt conduct of a hearing. Malkenhost has a right to
7 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

8 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
9 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
10 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
11 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

12 *Evidence Code* section 352 allows the court to exclude evidence where there is a
13 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
14 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) If CalPERS were permitted to introduce
15 evidence that Malkenhorst's employment allegedly violated the PERL without first providing
16 Malkenhorst with allegations of the factual nature of such violations, it would deny Malkenhorst
17 his due process rights and thus subject Malkenhorst to undue prejudice.

18 **III. EVIDENCE EXPECTED TO BE OFFERED BY CALPERS IS IRRELEVANT**
19 **AND SHOULD BE EXCLUDED**

20 *Evidence Code* section 350 states that "(n)o evidence is admissible except relevant
21 evidence." Relevant evidence is defined by Evidence Code Section 210 as "having any tendency
22 in reason to prove or disprove any disputed fact that is of consequence to the determination of
23 the action." (See *People v. Kelly* (1992) 1 Cal.4th 495, 523.) However, absent any statement of
24 the factual basis for CalPERS' contentions that Malkenhorst's employment somehow violated the
25 PERL, no evidence offered by CalPERS could possibly "prove or disprove any disputed fact that
26 is of consequence to the determination of the action" because there CalPERS has put no facts in
27 dispute.

28 The court has no discretion to admit irrelevant evidence. (*People v. Keating* (1981) 118

1 Cal.App.3d 172, 179-80.)

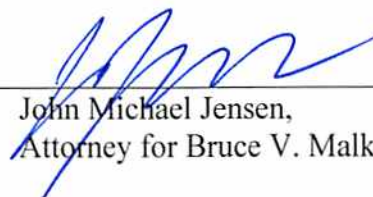
2 **IV. CONCLUSION**

3 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
4 exclude any testimony or documentary evidence, or mention of any evidence, that would support
5 a reduction in his pension because CalPERS has failed to state any cause of action, act or
6 omission on which CalPERS may proceed.

7 Respectfully submitted,

8

9 Dated: May 29, 2014

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

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that CalPERS be barred from introducing any and all evidence supporting a reduction in Respondent Malkenhorst's pension allowance.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

1. Not to mention, refer to, or attempt to convey in any manner, either directly or indirectly, any facts that would support or tend to support the reduction of Malkenhorst's pension allowance without first obtaining permission of the Court;
2. Not to make any reference to the fact that this motion has been filed; and
3. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 2

**Notice and Motion in Limine to Exclude all Irrelevant
Testimony and Evidence that does not relate to the issues
CalPERS is Proceeding on**

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,) **NOTICE AND MOTION IN LIMINE TO**
) **EXCLUDE ALL IRRELEVANT**
Respondents.) **TESTIMONY AND EVIDENCE THAT**
) **DOES NOT RELATE TO THE ISSUES**
) **CALPERS IS PROCEEDING ON;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; [PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby
moves this Court for a motion *in limine* and an order excluding any and all testimony and
evidence that does not relate to the narrow issues CalPERS has indicated it is proceeding on in
this administrative matter, on the grounds that such testimony and evidence is irrelevant.

This motion is made under the provisions of *Government Code* sections 11511(b)(12) and
11513(b) and *Evidence Code* sections 402, 352 and 350, and is based on the supporting
Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon
such of the argument and evidence as may be presented prior to or at the hearing of this matter.

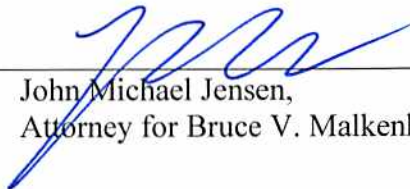
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Respectfully submitted,

Dated: May 29, 2014

By: _____


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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS has submitted its Issue Statement as part of the Joint Prehearing Conference
4 Statement filed on May 19, 2014, setting forth the two specific issues CalPERS intends to
5 proceed on in this administrative matter: (1) Malkenhorst's lawful payrate, excluding overtime;
6 and (2) Malkenhorst's lawful longevity pay.

7 Because CalPERS is the agency convening this administrative proceeding, it should be
8 limited to soliciting testimony and introducing evidence that address the narrow issues it has
9 determined must be decided by the Court.

10 **II. THIS COURT MAY EXCLUDE PREJUDICIAL AND IRRELEVANT EVIDENCE**
11 **IN ADVANCE OF TRIAL BY WAY OF AN *IN LIMINE* MOTION**

12 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
13 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

14 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
15 has the power to promote the orderly and prompt conduct of a hearing. Malkenhost has a right to
16 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

17 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
18 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
19 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
20 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

21 *Evidence Code* section 352 allows the court to exclude evidence where there is a
22 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
23 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.)

24 Any evidence or testimony which goes beyond the bounds of the two narrow issues
25 identified by CalPERS in its Issues Statement are irrelevant and prejudicial and would require
26 Malkenhorst to defend himself against charges which CalPERS has failed to identify.

27 *Evidence Code* section 350 states that "(n)o evidence is admissible except relevant
28 evidence." Relevant evidence is defined by Evidence Code Section 210 as "having any tendency

1 in reason to prove or disprove any disputed fact that is of consequence to the determination of
2 the action." (See *People v. Kelly* (1992) 1 Cal.4th 495, 523.)

3 The court has no discretion to admit irrelevant evidence. (*People v. Keating* (1981) 118
4 Cal.App.3d 172, 179-80.)

5 **III. DOCUMENTS MALKENHORST SEEKS TO EXCLUDE**

6 CalPERS is expected to offer into evidence at hearing its proposed Exhibits 1, 3-4, 6-83,
7 and 85-88 to prove CalPERS' allegations of "multiple positions", "overtime" and/or "longevity
8 pay". Such exhibits are inadmissible as a matter of law to the extent they relate or refer to any
9 matter beyond the limited scope of issues CalPERS is proceeding on in this administrative
10 process pursuant to its Issues Statement.

11 Malkenhorst therefore respectfully requests an order excluding the introduction of any of
12 the above-identified CalPERS exhibits or any portion of said exhibits to the extent the document
13 or portion of the document relates or refers to any matter beyond the limited scope of the issues
14 CalPERS is proceeding on in this administrative process pursuant to its Issues Statement.

15 **IV. TESTIMONY MALKENHORST SEEKS TO EXCLUDE**

16 CalPERS is expected to offer into evidence at hearing its proposed Exhibits 1, 3-4, 6-83,
17 and 85-88 to prove its allegations of "multiple positions", "overtime" and/or "longevity pay", and
18 expected to offer at hearing the testimony of CalPERS employees Tomi Jimenez, Lolita Lueras,
19 Margaret Junker and Chris Wall regarding those documents. Testimony about such exhibits is
20 inadmissible as a matter of law to the extent that testimony relates or refers to any matter beyond
21 the limited scope of issues CalPERS is proceeding on in this administrative process pursuant to
22 its Issues Statement.

23 Malkenhorst therefore respectfully requests an order excluding the introduction of any of
24 testimony by CalPERS employees Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris
25 Wall, whether such testimony addresses the above-described CalPERS exhibits or not, to the
26 extent that testimony relates or refers to any matter beyond the limited scope of the issues
27 CalPERS is proceeding on in this administrative process pursuant to its Issues Statement.

28 CalPERS is also expected to offer into evidence at hearing its proposed Exhibits 1, 3-4,

1 6-83, and 85-88 to prove its allegations of "multiple positions", "overtime" and/or "longevity
2 pay", and expected to offer at hearing the testimony of City of Vernon employee Joaquin Leon
3 regarding those documents. Testimony about such exhibits is inadmissible as a matter of law to
4 the extent that testimony relates or refers to any matter beyond the limited scope of issues
5 CalPERS is proceeding on in this administrative process pursuant to its Issues Statement.

6 Malkenhorst therefore respectfully requests an order excluding the introduction of any of
7 testimony by City of Vernon employee Joaquin Leon, whether such testimony addresses the
8 above-described CalPERS exhibits or not, to the extent that testimony relates or refers to any
9 matter beyond the limited scope of the issues CalPERS is proceeding on in this administrative
10 process pursuant to its Issues Statement.

11 **V. CONCLUSION**

12 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
13 limit the testimony and evidence offered by CalPERS to that which addresses the matters
14 identified by CalPERS in its Issues Statement, and to allow no other testimony or evidence by
15 CalPERS.

16 Respectfully submitted,

17
18 Dated: May 29, 2014

19 By: 

20 John Michael Jensen,
21 Attorney for Bruce V. Malkenhorst, Sr.
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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that CalPERS is barred from introducing any and all testimony and evidence that does not relate to the narrow issues CalPERS has identified in its Issues Statement as those it is proceeding on in this administrative matter.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

1. Not to mention, refer to, or attempt to convey in any manner, either directly or indirectly, any facts that go beyond the two issues identified by CalPERS in its Issues Statement without first obtaining permission of the Court;
2. Not to seek to move into evidence any document or any portion of any document that goes beyond the two issues identified by CalPERS in its Issues Statement without first obtaining permission of the Court;
3. Not to seek to elicit testimony of any witness about any subject that goes beyond the two issues identified by CalPERS in its Issues Statement without first obtaining permission of the Court;
4. Not to make any reference to the fact that this motion has been filed; and
5. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 3

**Notice and Motion in Limine to Restrict the Testimony of
CalPERS Witnesses Tomi Jimenez, Lolita Lueras,
Margaret Junker and Chris Wall**

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,)
Respondents.) NOTICE AND MOTION IN LIMINE TO
) RESTRICT THE TESTIMONY OF
) CALPERS WITNESSES TOMI JIMENEZ,
) LOLITA LUERAS, MARGARET
) JUNKER AND CHRIS WALL;
) MEMORANDUM OF POINTS AND
) AUTHORITIES; [PROPOSED] ORDER
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:
PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby
moves this Court for a motion *in limine* and an order restricting the testimony of CalPERS'
proposed witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall and barring
them from testifying on (i) matters on which they lack personal knowledge, (ii) the legal
meaning and interpretation of PERL statutes and *C.C.R.* regulations; (iii) the application of those
statutes and regulations to the facts concerning Malkenhorst's employment and compensation at
the City of Vernon; (iv) providing any expert opinion and (v) testifying or opining about
CalPERS' determinations about Malkenhorst's pension rights and benefits comply with
applicable law.

1 The witness lack personal knowledge. CalPERS has failed to establish the preliminary
2 facts to allow their testimony.

3 Bruce Malkenhorst hereby moves this Court for an order excluding any and all testimony,
4 references to testimony or argument based upon the testimony of Tomi Jimenez, Lolita Lueras,
5 Margaret Junker and Chris Wall relating to Vernon's policies or procedures, as the witness are
6 neither offered nor qualified to testify as experts in the structure of local government, job duties,
7 overtime, multiple duties, or job responsibilities. The motion is based upon the ground that the
8 subject matter of the witness' opinion testimony is improper and is therefore inadmissible.
9 *Evidence Code Section 803* .

10 CalPERS seeks for the witness to offer expert opinion without offering them or
11 qualifying them as experts. The CalPERS witness are not expert in Vernon's policies or
12 procedures, nor qualified nor offered as experts in the structure of local government, job duties,
13 overtime, multiple duties, or job responsibilities.

14 The testimony is incompetent. CalPERS seeks to allow them to offer legal opinions
15 contrary to the Evidence Code. The conclusions and determinations for which CalPERS is
16 offering the witnesses can only be reached by applying CalPERS' governing statutes and
17 regulations to factual matters. None of their witness are allowed to offer legal opinions or
18 determinations.

19 Based on their percipient experience, the CalPERS witnesses may be allowed to testify
20 about what actions they took. Testimony should be limited to identification of the documents
21 they used. Testimony should be limited to the policies and procedures they consulted. Testimony
22 may include the CalPERS policies and procedures upon which the witness relied. Testimony
23 may include steps the witnesses took when following CalPERS' policies and procedures.

24 Testimony of the CalPERS witness beyond their personal experience is irrelevant,
25 prejudicial, lacking foundation, not based on personal knowledge, incomplete, and incompetent.

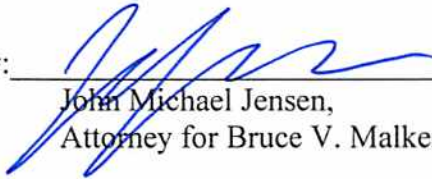
26 The motion is based upon the ground that the testimony lacks a necessary foundation for
27 admission and therefore should be excluded pursuant to *Evidence Code* section 400, 403 and
28 405.

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This motion is made under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and *Evidence Code* sections 402, 352 and 350, and is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

Respectfully submitted,

Dated: May 29, 2014

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

CalPERS seeks to take the testimony of four CalPERS employees concerning CalPERS' audit of the City of Vernon and Malkenhorst's employment there, and CalPERS' determinations about what pension allowance Malkenhorst is entitled to.

The witness lack personal knowledge. CalPERS has failed to establish the preliminary facts to allow their testimony.

None of the identified witnesses were employed or present at the City of Vernon during Malkenhorst's tenure, or otherwise personally familiar with Malkenhorst's employment at the City of Vernon prior to his retirement. They are therefore not "percipient witnesses" as claimed by CalPERS, and did not have any firsthand knowledge about occurrences or matters which happened or did not happen during the time Malkenhorst was employed by the City of Vernon.

CalPERS seeks for the witness to offer expert opinion without offering them or qualifying them as experts. The CalPERS witness are not expert in Vernon's policies or procedures, nor offered as experts in the structure of local government, job duties, overtime, multiple duties, or job responsibilities. CalPERS fails to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion. *Kotla v. Regents of University of California*, 115 Cal. App. 4th 283, 8 Cal. Rptr. 3d 898 (1st Dist. 2004)

The testimony is incompetent. CalPERS seeks to allow them to offer legal opinions contrary to the *Evidence Code 310(a)*: All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court.... (Emphasis added.) None of their witness are allowed to offer legal opinions or determinations.

The conclusions and determinations for which CalPERS is offering the witnesses can only be reached by applying CalPERS' governing statutes and regulations to factual matters. None of the CalPERS witnesses identified above are being offered or qualified as expert witnesses.

1 Further, Tomi Jimenez and Lolita Lueras are employees in CalPERS' Customer Account
2 Services Division. CalPERS seeks to elicit testimony concerning CalPERS' 2012 determination
3 to reduce Malkenhorst's retirement benefit, and specifically to discuss the statutes and
4 regulations relevant to Malkenhorst's final compensation; CalPERS' conclusion that the
5 reduction of Malkenhorst's final compensation was necessary under the law; and CalPERS'
6 determination of Malkenhorst's benefit.

7 Margaret Junker and Chris Wall are employees in CalPERS' Office of Audit Services.
8 CalPERS seeks to elicit testimony concerning CalPERS' 2010-2012 Public Agency Review of
9 the City of Vernon, particularly as it pertains to Malkenhorst, and specifically to address
10 CalPERS' efforts to obtain from the City of Vernon documents and information substantiating
11 the final compensation of Malkenhorst, including documents and information from which
12 CalPERS might derive Malkenhorst's payrate, overtime, and available longevity pay, and
13 whether the documents and information produced by the City of Vernon were sufficient to
14 support the final compensation figure initially reported for Malkenhorst.

15 Such conclusions and determinations can only be reached by applying Vernon's charter,
16 ordinances, minutes, resolution, pay schedules or other documents and/or CalPERS' statutes and
17 regulations to factual matters of which they have no personal knowledge.

18 The witnesses are not qualified to testify about Vernon's charter, ordinances, minutes,
19 resolution, pay schedules or other documents.

20 The witnesses may be qualified only to testify about the CalPERS policies and
21 procedures they relied upon in their work, to identify the documents containing such policies and
22 procedures, and to testify how they processed the documents according to CalPERS policies and
23 procedures. Malkenhorst objects to and seeks to bar any testimony which exceeds those
24 parameters as hearsay, lacking in foundation, and inadmissible.

25 **II. OBJECTIONS TO SPECIFIC TESTIMONY BY CALPERS' WITNESSES**

26 Malkenhorst objects to any proposed testimony by the four CalPERS witnesses identified
27 above on the following grounds:

- 28 • CalPERS seeks to admit improper opinion evidence by seeking to have the lay witnesses

1 testify about inferences or conclusions the witnesses draws from their observations.

- 2 • CalPERS offers the witnesses for improper purposes of giving an expert opinion. Expert
3 opinions must be based upon reliable matter (whether or not admissible) that may be
4 reasonably used in forming an opinion on the subject matter of the witnesses' testimony.
5 In addition, the witnesses' opinions appear to be based in significant part on matters that
6 are not proper basis for the opinions offered. Expert witness opinion may be based solely
7 on the witness' special knowledge, skill, experience, training and education. The opinion
8 must be based on reliable matter. (*Evidence Code*, 801.) Experts may not rely
9 *on speculation or conjecture.* (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516.)
- 10 • CalPERS offers the witnesses for improper lay opinion. Lay witnesses may not give
11 opinions going beyond the matters personally observed. (See *Evidence Code*, §800(a).)
12 CalPERS is not offering the witnesses for opinions that are *rationaly based on the*
13 *perception* of the witnesses. "Perception" is the process by which *knowledge* is
14 acquired through one's *senses* (i.e., matters seen, heard, smelled, etc.). Lay opinion is
15 admissible only if based on matters *personally observed* by the witness. Where a witness
16 *can* adequately describe his or her observations, opinions are not allowed. Similarly, lay
17 witnesses may not express opinions on matters not within common knowledge or
18 experience.
- 19 • Lay witnesses may not give conjectural lay opinion.
- 20 • CalPERS offers the witnesses for improper purposes of offering a legal conclusion.
- 21 • The proper interpretation of a deed, contract, statute, etc. is an *issue of law* for the court
22 to determine. Expert testimony is therefore inadmissible. (*Summers v. A.L. Gilbert Co.*
23 (1999) 69 Cal.App.4th 1155, 1178.) The court may "receive expert factual opinion to
24 inform its decision on these issues . . . but in no event may it receive expert evidence on
25 the ultimate legal issues." (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472–473.)
- 26 • CalPERS' witnesses are basing their opinions on matters not reasonably relied on by
27 other experts in the field, including improper methodology. "The court may, and upon
28 objection *shall*, exclude ... an opinion ... based in whole or in significant part on *matter*

1 *that is not a proper basis* for such an opinion." (*Evidence Code*, §803.)

- 2 • Request for the Court to determine the reasonableness of matters relied on by CalPERS'
3 witnesses, require offer of proof. Malkenhorst requests that the Court order CalPERS to
4 provide an offer of proof identifying with greater specificity the sources of information
5 reasonably relied on by the expert. What is "reasonable" for an expert to rely upon in
6 forming an opinion is a foundational issue determined by the court. (See *Mosesian v.*
7 *Pennwalt Corp.* (1987) 191 Cal.App.3d 851.)
- 8 • CalPERS' witnesses seek to offer hearsay or reiterate out of court statements for the truth
9 of the matter asserted. The witnesses are relying on inadmissible hearsay.
- 10 • The conclusions and determinations for which CalPERS is offering the witnesses can
11 only be reached by applying CalPERS' governing statutes and regulations to factual
12 matters. Testimony should be limited to identification of the documents containing such
13 policies and procedures upon which the witness relied and what steps the witness took
14 when following CalPERS' policies and procedures.
- 15 • CalPERS is offering its witness to testify about matters not personally known to them.
16 Evidence Code Section 801(b) limits expert opinion testimony on matters not "perceived
17 by or personally known to the witness or made known to him at or before the hearing."

18 **III. THIS COURT MAY EXCLUDE PREJUDICIAL OR UNSUPPORTED**
19 **EVIDENCE IN ADVANCE OF TRIAL BY WAY OF AN IN LIMINE MOTION**

20 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
21 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

22 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
23 has the power to promote the orderly and prompt conduct of a hearing. Malkenhost has a right to
24 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

25 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
26 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
27 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
28 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

1 The Court also has the power to grant a motion *in limine* which seeks to bar testimony
2 that lacks a necessary foundation for admission and therefore should be excluded. (*Evidence*
3 *Code*, 403.)

4 **IV. THE COURT MAY EXCLUDE IRRELEVANT EVIDENCE**

5 *Evidence Code* section 350 states that "(n)o evidence is admissible except relevant
6 evidence." Relevant evidence is defined by *Evidence Code* section 210 as "having any tendency
7 in reason to prove or disprove any disputed fact that is of consequence to the determination of
8 the action." (See *People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Haston* (1968) 69 Cal.2d
9 233, 245.)

10 When the relevance of evidence depends on the existence of a preliminary fact, the
11 proffered evidence is inadmissible unless the trial court finds there is sufficient evidence to
12 sustain a finding of the existence of the preliminary fact; the trial court must determine whether
13 the evidence is sufficient for a trier of fact to reasonably find the existence of the preliminary fact
14 by a preponderance of the evidence, and the court should exclude the proffered evidence only if
15 the showing of preliminary facts is too weak to support a favorable determination by the jury.
16 See *People v. Guerra*, 37 Cal. 4th 1067, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006), cert.
17 denied, 127 S. Ct. 1149, 166 L. Ed. 2d 998 (U.S. 2007)

18 **V. CALPERS FAILURE TO OFFER OR QUALIFY CALPERS WITNESSES AS**
19 **EXPERTS IN JOB DUTIES, OVERTIME, STRUCTURE OF LOCAL**
20 **GOVERNMENT, MULTIPLE JOBS, INCOMPETENCE TO TESTIFY ON**
21 **THESE MATTERS**

22 *Evidence Code Section 803* provides that an opinion may be excluded if it is based wholly or in
23 significant part upon improper matter. *People ex rel. Department of Public Works v. Lipari*, 213
24 Cal. App. 2d 485, 490–91, 28 Cal. Rptr. 808 (4th Dist. 1963). *Evidence Code Section 803* states
as follows:

25 The court may, and upon objection shall, exclude testimony in the form of
26 an opinion that is based in whole or in significant part on matter that is not
27 a proper basis for such an opinion. In such case, the witness may, if there
28 remains a proper basis for his opinion, then state his opinion after

1 excluding from consideration the matter determined to be improper.
2 (Emphasis added.)

3 ***Evidence Code Section 801(a)*** limits an expert opinion to those subjects that are beyond the
4 competence of persons of common experience, training, and education. See *People v. Cole*, 47
5 Cal. 2d 99, 103, 301 P.2d 854, 56 A.L.R.2d 1435 (1956).

6 ***Evidence Code Section 801*** states as follows:

7 If a witness is testifying as an expert, his testimony in the form of an
8 opinion is limited to such an opinion as is:

9 (a) Related to a subject that is sufficiently beyond common experience that
10 the opinion of an expert would assist the trier of fact; and

11 (b) Based on matter (including his special knowledge, skill, experience,
12 training, and education) perceived by or personally known to the witness
13 or made known to him at or before the hearing, whether or not admissible,
14 that is of a type that reasonably may be relied upon by an expert in
15 forming an opinion upon the subject to which his testimony relates, unless
16 an expert is precluded by law from using such matter as a basis for his
17 opinion.

18 Under ***Section 801(b)*** the matter upon which an expert's opinion is based must meet each of
19 three tests: 1) the matter must be perceived by or personally known to the witness, to ensure the
20 expert's acquaintance with the facts of a particular case; 2) the matter must be of a type that is
21 reasonably relied upon by experts in forming an opinion, to assure the reliability and
22 trustworthiness of the information used; and 3) an expert may not base his opinion upon any
23 matter that is declared by the constitutional, statutory, or decisional law of this State to be an
improper basis for an opinion.

24 ***Evidence Code Section 720(a)*** states as follows:

25 A person is qualified to testify as an expert if he has special knowledge, skill,
26 experience, training, or education sufficient to qualify him as an expert on
27 the subject to which his testimony relates. Against the objection of a party,
28 such special knowledge, skill, experience, training, or education must be
shown before the witness may testify as an expert. (Emphasis added.)

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CalPERS has failed to show that CalPERS witnesses are qualified as experts, especially with respect to overtime, multiple jobs, structure of local government, and related testimony. Before witness may testify as an expert, there must be a preliminary showing that witness is qualified as an expert on the expected testimony. *People v. King*, 266 Cal. App. 2d 437, 444, 72 Cal. Rptr. 478 (2d Dist. 1968)

Courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion. *Kotla v. Regents of University of California*, 115 Cal. App. 4th 283, 8 Cal. Rptr. 3d 898 (1st Dist. 2004)

CalPERS witness testimony is speculative. The court may properly exclude evidence and testimony where the expected testimony lacked proper foundation; merely speculative. *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 337–39, 145 Cal. Rptr. 47 (1st Dist. 1978)

Courts have the obligation to require adequate foundation for expert's opinion. *Kotla v. Regents of University of California*, 115 Cal. App. 4th 283, 8 Cal. Rptr. 3d 898 (1st Dist. 2004)

VI. THE COURT MAY EXCLUDE EVIDENCE THAT LACKS FOUNDATION

The motion is based on the grounds that the report lacks foundation is incomplete, and unsupported. The motion is based upon the ground that the evidence lacks a necessary foundation for admission and therefore should be excluded pursuant to *Evidence Code Section 403*.

The motion is based upon Evidence Code Section 403(a), which gives the court the discretion to exclude evidence lacking a necessary preliminary fact.

Evidence Code Section 403(a) states as follows:

The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

- (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

1 (2) The preliminary fact is the personal knowledge of a witness
2 concerning the subject matter of his testimony;

3 (3) The preliminary fact is the authenticity of a writing; or

4 (4) The proffered evidence is of a statement or other conduct of a
5 particular person and the preliminary fact is whether that person made the
6 statement or so conducted himself. (Emphasis added.)

7 CalPERS has the burden to prove the preliminary facts.

8
9 **VII. CalPERS Failure to Establish PRELIMINARY FACT**

10 *Evidence Code Section 400* defines a "preliminary fact" as a fact upon the existence or
11 nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the
12 admissibility or inadmissibility of evidence" includes the qualification or disqualification of a
13 person to be a witness and the existence or nonexistence of a privilege.

14 *Evidence Code Section 405* requires: "When the existence of a preliminary fact is disputed,
15 the court shall indicate which party has the burden of producing evidence and the burden of
16 proof on the issue as implied by the rule of law under which the question arises. The court shall
17 determine the existence or nonexistence of the preliminary fact and shall admit or exclude the
18 proffered evidence as required by the rule of law under which the question arises. (Emphasis
added.)

19 It is error to allow testimony of expert witness based on practices of others, where matter was
20 outside expert's area of expertise. *Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1522, 3 Cal.
21 Rptr. 2d 833 (4th Dist. 1992)

22 **VIII. THE COURT MAY EXCLUDE EVIDENCE THAT IS HEARSAY**

23 A writing by a person who lacked personal knowledge of the items contained therein,
24 was properly excluded as hearsay, because there was insufficient foundation to allow the
25 evidence to fall under a hearsay exception. *Prato-Morrison v. Doe*, 103 Cal. App. 4th 222, 229-
26 30, 126 Cal. Rptr. 2d 509 (2d Dist. 2002)

27 Evidence Code Section 1200 states as follows:
28

1 (a) "Hearsay evidence" is evidence of a statement that was made other
2 than by a witness, while testifying at the hearing and that is offered to
3 prove the truth of the matter stated.

4 (b) Except as provided by law, hearsay evidence is inadmissible.

5
6 (c) this section shall be known and cited as the hearsay rule.

7
8 Subject to recognized exceptions, the hearsay rule bars out-of-court declarations of
9 nonparties which are offered to prove the truth of the matter stated. *People v. Sundlee*, 70 Cal.
10 App. 3d 477, 482, 138 Cal. Rptr. 834 (3d Dist. 1977).

11 The hearsay rule applies to written instruments as well as to oral statements. *Lusardi v.*
12 *Prukop*, 116 Cal. App. 506, 509, 2 P.2d 870 (1st Dist. 1931).

13 For example, office of the Inspector General (OIG) report was not admissible evidence
14 under the official record exception to the hearsay rule; insufficient evidence to indicate the
15 trustworthiness of the report, inasmuch as the report contained information that was not directly
16 observable by the investigator who prepared the report, and the investigator identified no
17 independent sources. *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 55 Cal. Rptr.
18 3d 600 (4th Dist. 2007)

19 Hearsay statement cannot be offered by expert to prove truth of matter asserted. *Korsak*
20 *v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1525–27, 3 Cal. Rptr. 2d 833 (4th Dist. 1992)

21 Witness cannot put forth incompetent hearsay evidence under guise of stating reasons for
22 opinion. *People v. Price*, 1 Cal. 4th 324, 416, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991)

23 **IX. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE**

24 *Evidence Code* section 352 states that Court may "exclude evidence if its probative value
25 is substantially outweighed by the probability that its admission will (a) necessitate undue
26 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,
27 or of misleading the jury." (See *People v. Cardenas, supra*, at 904 [prejudicial evidence]; *People*
28 *v. Sanders* (1995) 11 Cal.4th 475, 514, as modified on denial of reh'g, (Jan. 30, 1996) [undue

1 consumption of time]; *People v. Wagner* (1982) 138 Cal.App.3d 473, 481 [jury confusion].)

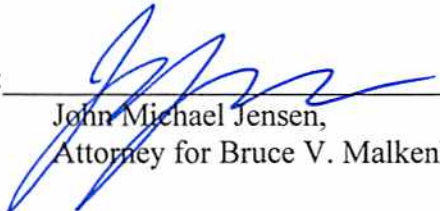
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4 **X. CONCLUSION**

5 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
6 restrict the testimony of CalPERS' witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker and
7 Chris Wall to lay opinions on what actions they took , to identification of the documents
8 containing such CalPERS policies and procedures , and to what steps the witnesses took when
9 following CalPERS' policies and procedures.

10 Malkenhorst specifically requests that the Court bar said witnesses from testifying on
11 matters of which they have no personal experience, on matters that are the subject of expert
12 testimony, the legal meaning and interpretation of PERL statutes and C.C.R. regulations; the
13 application of those statutes and regulations to the facts concerning Malkenhorst's employment
14 and compensation at the City of Vernon; and whether CalPERS' determinations about
15 Malkenhorst's pension rights and benefits comply with applicable law.

16
17
18 Respectfully submitted,

19
20 Dated: May 29, 2014

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

1 **[PROPOSED] ORDER**

2
3 **GOOD CAUSE APPEARING, IT IS HEREBY ORDERED** that

4 1. CalPERS must restrict the testimony of CalPERS' proposed witnesses Tomi
5 Jimenez, Lolita Lueras, Margaret Junker and Chris Wall and bar them from testifying on (i)
6 matters on which they lack personal knowledge, (ii) the legal meaning and interpretation of
7 PERL statutes and C.C.R. regulations; (iii) the application of those statutes and regulations to the
8 facts concerning Malkenhorst's employment and compensation at the City of Vernon; (iv)
9 providing any expert opinion and (v) testifying or opining about CalPERS' determinations about
10 Malkenhorst's pension rights and benefits comply with applicable law.

11 2. CalPERS is barred from introducing and eliciting testimony from its declared
12 witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall on the legal meaning
13 and interpretation of PERL statutes and C.C.R. regulations; the application of those statutes and
14 regulations to the facts concerning Malkenhorst's employment and compensation at the City of
15 Vernon; and whether CalPERS' determinations about Malkenhorst's pension rights and benefits
16 comply with applicable law.

17 3. CalPERS may only introduce and elicit testimony from declared witnesses Tomi
18 Jimenez, Lolita Lueras, Margaret Junker and Chris Wall on what actions they took, the
19 identification of the documents containing such CalPERS policies and procedures ; and what
20 steps the witnesses took .

21 **IT IS HEREBY FURTHER ORDERED** that CalPERS, CalPERS' counsel and
22 CalPERS' witnesses shall:

23 4. Not to make any reference to the fact that this motion has been filed; and

24 5. Shall warn and caution each of CalPERS' witnesses to strictly follow the same
25 instructions.

26
27 Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 4

Notice and Motion in Limine to Restrict the Testimony of CalPERS Witness Joaquin Leon

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8 Attorneys for Respondent Bruce Malkenhorst

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11 **BEFORE THE BOARD OF ADMINISTRATION**

12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

13 In Re the Matter of) CALPERS CASE NO.: 2012-0671
14) OAH CASE NO.: 2013080917
15 BRUCE V. MALKENHORST, SR and)
16 CITY OF VERNON,) **NOTICE AND MOTION IN LIMINE TO**
17) **RESTRICT THE TESTIMONY OF**
18 Respondents.) **CALPERS WITNESS JOAQUIN LEON;**
19) **MEMORANDUM OF POINTS AND**
20) **AUTHORITIES; [PROPOSED] ORDER**
21)
22) Prehearing Conf: June 13, 2014, 9:00am
23) Location: Los Angeles OAH

24 **TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

25 **PLEASE TAKE NOTICE THAT** Respondent Bruce V. Malkenhorst, Sr., hereby
26 moves this Court for a motion *in limine* and an order restricting the testimony of CalPERS'
27 proposed witness Joaquin Leon and barring him from testifying on matters for which he has no
28 personal knowledge and is instead relying on hearsay or unqualified opinion, and from testifying
on matters for which he lacks foundation and/or expertise to render opinions.

The motion is based upon the ground that the testimony CalPERS seeks to elicit lacks a
necessary foundation for admission and therefore should be excluded pursuant to *Evidence Code*
section 403.

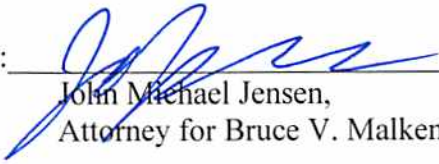
This motion is made under the provisions of *Government Code* sections 11511(b)(12) and
11513(b) and *Evidence Code* sections 402, 352 and 350, and is based on the supporting

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Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

Respectfully submitted,

Dated: May 29, 2014

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS seeks to take the testimony of Joaquin Leon, an employee of the City of
4 Vernon, concerning the information and documents sought by CalPERS from the City of Vernon
5 in connection with CalPERS' 2010-2012 Public Agency Review.

6 Leons was neither employed by nor present at the City of Vernon during the vast
7 majority of Malkenhorst's tenure, nor is he otherwise personally familiar with Malkenhorst's
8 employment at Vernon prior to Malkenhorst's retirement. Leon is therefore not a "percipient
9 witness" as claimed by CalPERS, and does not have any firsthand knowledge about occurrences
10 or matters which happened or did not happen during the time Malkenhorst was employed by the
11 City of Vernon.

12 Further, Leon is not being offered as an expert qualified to reach legal conclusions and
13 therefore is not qualified to offer opinions about whether documents he provided or did not
14 provide to CalPERS prove or fail to prove whether Malkenhorst's employment and compensation
15 were in compliance with the PERL.

16 Further, CalPERS apparently intends to offer Leon to testify about documents contained
17 in CalPERS' proposed Exhibits 80, 81, 82 and 83 which CalPERS indicates will be introduced to
18 support CalPERS' contentions about Malkenhorst's alleged multiple positions, overtime and
19 longevity pay. To the extent CalPERS seeks to elicit testimony from Leon about these matters
20 which contradict evidence in Vernon's duly enacted and authorized resolutions, ordinances, City
21 Charter and City Code, Leon is unqualified to offer opinions about such resolutions, ordinances,
22 City Charter and City Code and any such testimony should be barred as lacking in foundation.

23 **II. THIS COURT MAY EXCLUDE PREJUDICIAL OR UNSUPPORTED**
24 **EVIDENCE IN ADVANCE OF TRIAL BY WAY OF AN IN LIMINE MOTION**

25 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
26 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

27 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
28 has the power to promote the orderly and prompt conduct of a hearing. Malkenhost has a right to

1 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

2 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
3 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
4 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
5 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

6 The Court also has the power to grant a motion *in limine* which seeks to bar testimony
7 that lacks a necessary foundation for admission and therefore should be excluded. (*Evidence*
8 *Code*, 403.)

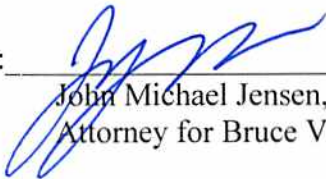
9 **III. CONCLUSION**

10 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
11 restrict the testimony of CalPERS' witness Joaquin Leon and bar him from (a) testifying about
12 occurrences or matters which happened or did not happen during the time Malkenhorst was
13 employed by the City of Vernon and for which Leon lacks firsthand knowledge; (b) testifying
14 about whether documents he provided or did not provide to CalPERS prove or fail to prove
15 whether Malkenhorst's employment and compensation were in compliance with the PERL
16 inasmuch as Leon lacks legal expertise to make such determinations; and (c) testifying to
17 opinions which contradict evidence in Vernon's duly enacted and authorized resolutions,
18 ordinances, City Charter and City Code

19 Respectfully submitted,

20
21 Dated: May 29, 2014

By: _____


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

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that

1. CalPERS is barred from introducing and eliciting testimony from its declared witness Joaquin Leon about occurrences or matters which happened or did not happen during the time Malkenhorst was employed by the City of Vernon and for which Leon lacks firsthand knowledge;

2. CalPERS is barred from introducing or eliciting testimony from Leon about whether documents he provided or did not provide to CalPERS prove or fail to prove whether Malkenhorst's employment and compensation were in compliance with the PERL; and

3. CalPERS is barred from introducing or eliciting testimony from Leon which contradict evidence in Vernon's duly enacted and authorized resolutions, ordinances, City Charter and City Code.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

4. Not to make any reference to the fact that this motion has been filed; and

5. Shall warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 5

Notice and Motion in Limine to Exclude Evidence of Prior Felony Conviction

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8 Attorneys for Respondent Bruce Malkenhorst

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,)
) **NOTICE AND MOTION IN LIMINE TO**
) **EXCLUDE EVIDENCE OF PRIOR**
) **FELONY CONVICTION;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; [PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby

moves this Court for a motion *in limine* and an order excluding any and all evidence, references to evidence, testimony or argument in this case pertaining to a prior felony conviction of Respondent Malkenhorst.

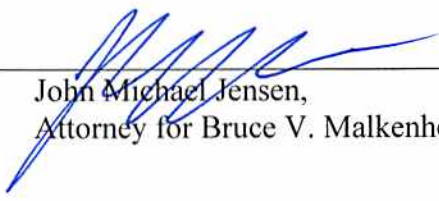
This motion is based upon the grounds that such evidence is irrelevant, prejudicial and improper character evidence.

This motion is made under the provisions of *Evidence Code* sections 787, 788, 352 and 350 and is based upon the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

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Respectfully submitted,

Dated: May 29, 2014

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS has indicated it intends to introduce a Minute Order dated May 26, 2011
4 concerning an agreement by Malkenhorst to plead guilty to a felony as CalPERS' proposed
5 Exhibit 84. The document, and indeed the entire issue it relates to, is irrelevant to the issues
6 CalPERS is proceeding on in this administrative process. CalPERS' only reason for introducing
7 it is to prejudice Respondent.

8 The document relates to a plea bargain made by Malkenhorst in 2011 concerning charges
9 by the Los Angeles District Attorney's office that Malkenhorst received petty cash disbursements
10 and was given use of a City of Vernon credit card during his employment at Vernon, and that
11 said compensation violated statutes governing receipt of public funds. Malkenhorst pled guilty to
12 a single count of misappropriation of public funds, made restitution ordered by the court, and
13 served a period of probation.

14 The monies which Malkenhorst allegedly received were admittedly completely separate
15 from and irrelevant to the calculation of his pension benefit. Indeed, the Los Angeles District
16 Attorney filed a request to submit an *Amicus Curiae* brief in an appeal of the dismissal of an
17 Orange County Superior Court case filed by Malkenhorst (Fourth District Court of Appeal Case
18 No. G047959) that discussed the plea agreement and explicitly acknowledged that "the criminal
19 gains which were the basis for Appellant's prosecution did not actually factor into the
20 calculations of his pension benefits...."

21 Further, CalPERS itself indicates that it seeks to introduce the document into evidence
22 solely for impeachment purposes. It never identifies the document as relevant to the issues that
23 CalPERS seeks to prove in this administrative proceeding. CalPERS has said in its Issue
24 Statement included in the Joint Prehearing Conference Statement filed on May 19, 2014 that
25 there are only two matters for consideration by the Court: (a) the calculation of Malkenhorst's
26 payrate and (b) the amount of his longevity pay. Those monies had nothing to do with the
27 District Attorney's investigation and charges.

28 Accordingly, the plea agreement can have no bearing on the matters to be decided in this

1 administrative process, and can serve no purpose other than to prejudice the rights of
2 Malkenhorst.

3 **II. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE IN ADVANCE OF TRIAL**
4 **BY WAY OF AN *IN LIMINE* MOTION**

5 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
6 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

7 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
8 has the power to promote the orderly and prompt conduct of a hearing. Malkenhorst has a right to
9 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

10 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
11 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
12 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
13 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

14 *Evidence Code* section 352 allows the court to exclude evidence where there is a
15 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
16 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) If CalPERS were permitted to introduce
17 evidence about Malkenhorst's felony plea agreement concerning monies that admittedly have no
18 relationship to the calculation of his pension allowance, and therefore are irrelevant to the
19 matters to be decided, it would subject Malkenhorst to undue prejudice.

20 **III. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE**

21 *Evidence Code* section 352 states that Court may "exclude evidence if its probative value
22 is substantially outweighed by the probability that its admission will (a) necessitate undue
23 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,
24 or of misleading the jury." (See *People v. Cardenas*, *supra*, at 904 [prejudicial evidence]; *People*
25 *v. Sanders* (1995) 11 Cal.4th 475, 514, as modified on denial of reh'g, (Jan. 30, 1996) [undue
26 consumption of time]; *People v. Wagner* (1982) 138 Cal.App.3d 473, 481 [jury confusion].)

27 **IV. THE COURT MAY EXCLUDE IRRELEVANT EVIDENCE**

28

1 *Evidence Code* section 350 states that "(n)o evidence is admissible except relevant
2 evidence." Relevant evidence is defined by *Evidence Code* section 210 as "having any tendency
3 in reason to prove or disprove any disputed fact that is of consequence to the determination of
4 the action." (See *People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Haston* (1968) 69 Cal.2d
5 233, 245.)

6 **V. THIS COURT MAY EXCLUDE IMPROPER EVIDENCE OF A PRIOR FELONY**
7 **CONVICTION**

8 *Evidence Code* section 787 states: "Subject to Section 788 [use of felony convictions],
9 evidence of specific instances of his conduct relevant only as tending to prove a trait of his
10 character is inadmissible to attack or support the credibility of a witness." (See *People v. Matlock*
11 (1970) 11 Cal.App.3d 453 ["A witness may not be impeached by evidence of particular wrongful
12 acts"].)

13 While *Evidence Code* section 788 expressly allows the use of felony convictions to
14 impeach the credibility of a witness, this section must be read in conjunction with *Evidence Code*
15 section 352, which gives the court the discretion to exclude such evidence if the probative value
16 is substantially outweighed by the risk of undue prejudice. (See *People v. Beagle* (1972) 6 Cal.3d
17 441, 452-53.)

18 Further, in civil cases, upon a proper objection to the admissibility of prior felony
19 conviction evidence under Section 788, the trial court is bound to perform the weighing function
20 prescribed by Section 352. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.)

21 The following cases are in line with the above authorities: *Clemmer v. Hartford*
22 *Insurance Co.* (1978) 22 Cal.3d 865, 879 [exclusion of criminal conviction for second degree
23 murder proper when court found significant danger of undue prejudice, misleading the jury, and
24 confusing the issues]; *People v. Castro* (1985) 38 Cal.3d 301, 312 [the admissibility of felony
25 conviction evidence is subject to a balancing under Section 352]; *People v. Kent* (1981) 125
26 Cal.App.3d 207, 215 [error to allow evidence where obvious purpose was to put before the jury
27 highly prejudicial evidence concerning defendant's past convictions].)

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In the present case, the evidence of Respondent's conviction is in no way relevant to any issues raised by the CALPERS relating to compensation earnable or the pension. The only possible reason for addressing this issue would be to place Respondent in a bad light.

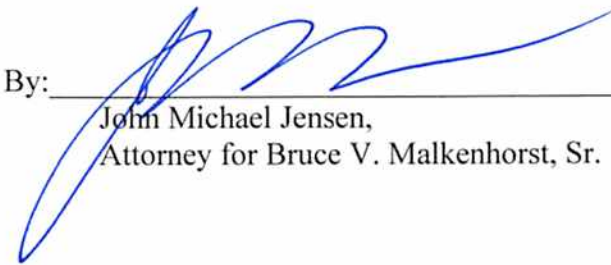
To allow this evidence to be tossed about by the defense, absent any arguable relevancy, certainly will meet even the strictest standard for exclusion under *Evidence Code* section 352 and the cases cited above.

VI. CONCLUSION

Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court bar CalPERS from introducing and eliciting testimony about the plea bargain CalPERS has included as its proposed Exhibit 84.

Respectfully submitted,

Dated: May 29, 2014

By: 

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

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that

1. CalPERS is barred from introducing and eliciting testimony about Malkenhorst's prior felony conviction documented in CalPERS' proposed Exhibit 84.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

2. Not to mention, refer to, or attempt to convey in any manner, either directly or indirectly, any facts that would refer or related to the felony plea bargain and/or the document contained in CalPERS' proposed Exhibit 84 without first obtaining permission of the Court;

3. Not to make any reference to the fact that this motion has been filed; and

4. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 6

**Notice and Motion in Limine to Exclude CalPERS'
Proposed Exhibit 66, 9/3/04 "Report on City
Administrator's Misappropriation of Public Funds
Through the Misuse of The City Petty Cash and the Credit
Card Processes"**

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,)
Respondents.) **NOTICE AND MOTION IN LIMINE TO**
) **EXCLUDE CALPERS' PROPOSED**
) **EXHIBIT 66, 9/3/04 "REPORT ON CITY**
) **ADMINISTRATOR'S**
) **MISAPPROPRIATION OF PUBLIC**
) **FUNDS THROUGH THE MISUSE OF**
) **THE CITY PETTY CASH AND THE**
) **CREDIT CARD PROCESSES";**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; [PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:
PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby
moves this Court for a motion *in limine* and an order excluding any and all evidence, references
to evidence, testimony or argument in this case pertaining to the document which CalPERS has
offered as its proposed Exhibit 66, a 9/3/04 "Report on City Administrator's Misappropriation of
Public Funds Through the Misuse of the City Petty Cash and the Credit Card Processes".

This motion is based upon the grounds that such evidence is irrelevant, prejudicial and
improper character evidence. The report contains hearsay without an exception for admissibility.

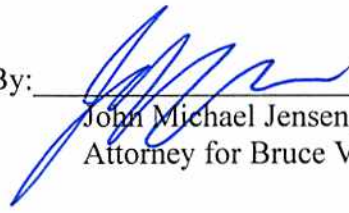
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It is irrelevant and conclusory. The motion is based on the grounds that the report lacks foundation, is incomplete, and unsupported. The motion is based upon the ground that the evidence lacks a necessary foundation for admission and therefore should be excluded pursuant to Evidence Code Section 403. Evidence Code Section 1401(a) states that: "Authentication of a writing is required before it may be received in evidence."

This motion is made under the provisions of *Evidence Code* sections 787, 788, 352 and 350 and is based upon the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

Respectfully submitted,

Dated: May 29, 2014

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS has indicated it intends a document dated 9/3/04 entitled, "Report on City
4 Administrator's Misappropriation of Public Funds Through the Misuse of the City Petty Cash
5 and the Credit Card Processes" as CalPERS' proposed Exhibit 66. The document, and indeed the
6 entire issue it relates to, is irrelevant to the issues CalPERS is proceeding on in this
7 administrative process.

8 The document is irrelevant, contains inadmissible hearsay, is highly prejudicial and
9 improper character evidence.

10 The report lacks foundation, is incomplete, and unsupported.

11 CalPERS' only reason for introducing it is to prejudice Respondent.

12 The report is conclusory and not based on personal knowledge. The report is incomplete
13 as it does not contain any supporting documentation. The report lacks foundation as well.

14 The document is a report purportedly prepared by Edward Olivo, an attorney who
15 formerly worked for the City of Vernon, relating to the alleged misuse of Vernon's petty cash
16 funds and City credit cards by Respondent. This matter was investigated by the Los Angeles
17 District Attorney's office concerning charges that such compensation violated statutes governing
18 receipt of public funds.

19 The monies which Malkenhorst allegedly received were admittedly completely separate
20 from and irrelevant to the calculation of his pension benefit. Indeed, the Los Angeles District
21 Attorney filed a request to submit an *Amicus Curiae* brief in an appeal of the dismissal of an
22 Orange County Superior Court case filed by Malkenhorst (Fourth District Court of Appeal Case
23 No. G047959) that discussed the plea agreement and explicitly acknowledged that "the criminal
24 gains which were the basis for Appellant's prosecution did not actually factor into the
25 calculations of his pension benefits...."

26 Further, CalPERS has said in its Issue Statement included in the Joint Prehearing
27 Conference Statement filed on May 19, 2014 that there are only two matters for consideration by
28 the Court: (a) the calculation of Malkenhorst's payrate and (b) the amount of his longevity pay.

1 Neither issue is related to the substance of the Report. Any peripheral allegations are
2 unsupported opinions.

3 The substance of payrate and the longevity pay are unrelated to the issues addressed in
4 the Report. The report, the subsequent District Attorney's investigation and charges, and the
5 petty cash and credit card funds have nothing to do with Malkenhorst's pension calculation. The
6 subject monies in the report are not related to the issues in the administrative process, were never
7 reported to CalPERS and were never claimed as part of Malkenhorst's "compensation earnable"
8 used to calculate his pension.

9 Accordingly, the document in proposed Exhibit 66 can have no bearing on the matters to
10 be decided in this administrative process, and can serve no purpose other than to prejudice the
11 rights of Malkenhorst.

12 **II. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE IN ADVANCE OF**
13 **TRIAL BY WAY OF AN *IN LIMINE* MOTION**

14 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
15 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

16 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
17 has the power to promote the orderly and prompt conduct of a hearing. Malkenhorst has a right
18 to have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

19 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
20 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
21 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
22 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

23 *Evidence Code* section 352 allows the court to exclude evidence where there is a
24 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
25 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) If CalPERS were permitted to introduce
26 evidence about Malkenhorst's alleged misappropriation of funds that admittedly have no
27 relationship to the calculation of his pension allowance, and therefore are irrelevant to the
28 matters to be decided, it would subject Malkenhorst to undue prejudice.

1 **III. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE**

2 *Evidence Code* section 352 states that Court may "exclude evidence if its probative value
3 is substantially outweighed by the probability that its admission will (a) necessitate undue
4 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,
5 or of misleading the jury." (See *People v. Cardenas, supra*, at 904 [prejudicial evidence]; *People*
6 *v. Sanders* (1995) 11 Cal.4th 475, 514, as modified on denial of reh'g, (Jan. 30, 1996) [undue
7 consumption of time]; *People v. Wagner* (1982) 138 Cal.App.3d 473, 481 [jury confusion].)

8 **IV. THE COURT MAY EXCLUDE IRRELEVANT EVIDENCE**

9 *Evidence Code* section 350 states that "(n)o evidence is admissible except relevant
10 evidence." Relevant evidence is defined by *Evidence Code* section 210 as "having any tendency
11 in reason to prove or disprove any disputed fact that is of consequence to the determination of
12 the action." (See *People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Haston* (1968) 69 Cal.2d
13 233, 245.)

14 When the relevance of evidence depends on the existence of a preliminary fact, the
15 proffered evidence is inadmissible unless the trial court finds there is sufficient evidence to
16 sustain a finding of the existence of the preliminary fact; the trial court must determine whether
17 the evidence is sufficient for a trier of fact to reasonably find the existence of the preliminary fact
18 by a preponderance of the evidence, and the court should exclude the proffered evidence only if
19 the showing of preliminary facts is too weak to support a favorable determination by the jury.
20 See *People v. Guerra*, 37 Cal. 4th 1067, 40 Cal. Rptr. 3d 118, 129 P.3d 321 (2006), cert.
21 denied, 127 S. Ct. 1149, 166 L. Ed. 2d 998 (U.S. 2007)

22 **V. THE COURT MAY EXCLUDE EVIDENCE THAT LACKS FOUNDATION**

23 The motion is based on the grounds that the report lacks foundation is incomplete, and
24 unsupported. The motion is based upon the ground that the evidence lacks a
25 necessary foundation for admission and therefore should be excluded pursuant to *Evidence*
26 *Code Section 403*.

27 *Evidence Code Section 1401(a)* states that: "Authentication of a writing is required
28 before it may be received in evidence."

1 The motion is based upon Evidence Code Section 403(a), which gives the court the
2 discretion to exclude evidence lacking a necessary preliminary fact.

3 *Evidence Code Section 403(a)* states as follows:

4 The proponent of the proffered evidence has the burden of producing
5 evidence as to the existence of the preliminary fact, and the proffered
6 evidence is inadmissible unless the court finds that there is evidence
7 sufficient to sustain a finding of the existence of the preliminary fact,
8 when:

9 (1) The relevance of the proffered evidence depends on the existence of
10 the preliminary fact;

11 (2) The preliminary fact is the personal knowledge of a witness
12 concerning the subject matter of his testimony;

13 (3) The preliminary fact is the authenticity of a writing; or

14 (4) The proffered evidence is of a statement or other conduct of a
15 particular person and the preliminary fact is whether that person made the
16 statement or so conducted himself. (Emphasis added.)

17 CalPERS has the burden to prove the preliminary facts.

18 **VI. CalPERS Failure to Establish PRELIMINARY FACT**

19 *Evidence Code Section 400* defines a "preliminary fact" as a fact upon the existence or
20 nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the
21 admissibility or inadmissibility of evidence" includes the qualification or disqualification of a
22 person to be a witness and the existence or nonexistence of a privilege.

23 *Evidence Code Section 405* requires: "When the existence of a preliminary fact is disputed,
24 the court shall indicate which party has the burden of producing evidence and the burden of
25 proof on the issue as implied by the rule of law under which the question arises. The court shall
26 determine the existence or nonexistence of the preliminary fact and shall admit or exclude the
27 proffered evidence as required by the rule of law under which the question arises. (Emphasis
28 added.)

VII. THE COURT MAY EXCLUDE EVIDENCE THAT IS HEARSAY

1 A writing by a person who lacked personal knowledge of the items contained therein,
2 was properly excluded as hearsay, because there was insufficient foundation to allow the
3 evidence to fall under a hearsay exception. *Prato-Morrison v. Doe*, 103 Cal. App. 4th 222, 229–
4 30, 126 Cal. Rptr. 2d 509 (2d Dist. 2002)

5 Evidence Code Section 1200 states as follows:

6 (a) "Hearsay evidence" is evidence of a statement that was made other
7 than by a witness, while testifying at the hearing and that is offered to
8 prove the truth of the matter stated.

9 (b) Except as provided by law, hearsay evidence is inadmissible.

10 (c) this section shall be known and cited as the hearsay rule.

11
12 Subject to recognized exceptions, the hearsay rule bars out-of-court declarations of
13 nonparties which are offered to prove the truth of the matter stated. *People v. Sundlee*, 70 Cal.
14 App. 3d 477, 482, 138 Cal. Rptr. 834 (3d Dist. 1977).

15 The hearsay rule applies to written instruments as well as to oral statements. *Lusardi v.*
16 *Prukop*, 116 Cal. App. 506, 509, 2 P.2d 870 (1st Dist. 1931).

17 For example, office of the Inspector General (OIG) report was not admissible evidence
18 under the official record exception to the hearsay rule; insufficient evidence to indicate the
19 trustworthiness of the report, inasmuch as the report contained information that was not directly
20 observable by the investigator who prepared the report, and the investigator identified no
21 independent sources. *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 55 Cal. Rptr.
22 3d 600 (4th Dist. 2007)

23
24 **VIII. CONCLUSION**

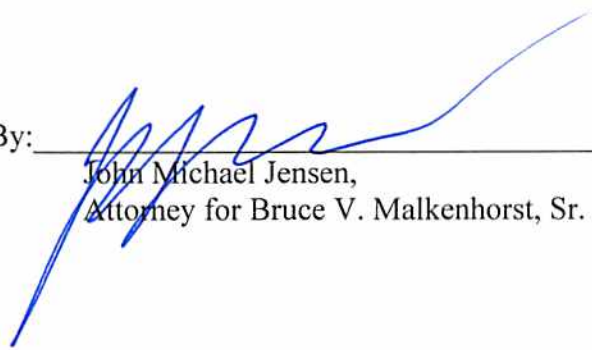
25 Based on the foregoing, Respondent Malckenhorst respectfully requests that this Court bar
26 CalPERS from introducing the document in Exhibit 66 and eliciting testimony about the
27 document that CalPERS proposes to submit as its Exhibit 66.

28 Respectfully submitted,

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Dated: May 29, 2014

By: _____



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

[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that

1. CalPERS is barred from introducing the document in Exhibit 66 and eliciting testimony about CalPERS' proposed Exhibit 66.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

2. Not to mention, refer to, or attempt to convey in any manner, either directly or indirectly, any facts that would refer or related to the document contained in CalPERS' proposed Exhibit 66 without first obtaining permission of the Court;

3. Not to make any reference to the fact that this motion has been filed; and

4. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 7

Notice and Motion in Limine RE Discovery Violations and Barring Use of ADP Payroll Reports

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8 Attorneys for Respondent Bruce Malkenhorst

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,)
Respondents.) NOTICE AN MOTION IN LIMINE RE
) DISCOVERY VIOLATIONS AND
) BARRING USE OF ADP PAYROLL
) REPORTS; MEMORANDUM OF
) POINTS AND AUTHORITIES;
) DECLARATION OF GRISELDA
) MONTES DE OCA; [PROPOSED]
) ORDER
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:
PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby
moves this Court for a motion *in limine* and an order precluding CalPERS from introducing or
mentioning evidence relating to ADP payroll reports.

The reports are hearsay without an exception and inadmissible. The reports lack
foundation. They reports are based on persons who lack personal knowledge.

Additionally, the motion is based upon the grounds that CaLPERS misused the discovery
process by *selectively omitting certain pages of the ADP payroll reports related to Bruce
Malkenhorst* from the documents it intends to introduce as Exhibits 67 and 68 and therefore an
evidence sanction, pursuant to *Code of Civil Procedure* section 2023.030(c), is an appropriate

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS has indicated it intends to introduce nine (9) pages of ADP Payroll Registers
4 for the year 2004 concerning the salary received by Respondent Malkenhorst from the City of
5 Vernon as its Exhibit 67, and another fifteen (15) pages of ADP Payroll Registers for the year
6 2005 concerning Respondent Malkenhorst as its Exhibit 68.

7 The reports are inadmissible hearsay that also lack foundation.

8 Malkenhorst and other Vernon employees were paid every two (2) weeks. The ADP
9 Payroll Register entries for Malkenhorst for 2005 (Exhibit 68) appear to be complete and to
10 cover all of the weeks Malkenhorst was employed by Vernon in 2005. However, there are
11 numerous missing entries for Malkenhorst during the 2004 period (Exhibit 67). Based on an
12 analysis performed by staff for Respondent's attorney, it appears CalPERS has excluded a
13 number of relevant records for Malkenhorst from the exhibits and is offering only a select sub-
14 set of the ADP Payroll Register entries.

15 Moreover, CalPERS has not simply excluded those records from its proposed Exhibit 67,
16 but has failed to produce the missing records to counsel for Malkenhorst and thus denied
17 Malkenhorst the opportunity to introduce a complete set of records for 2004 as his own proposed
18 exhibit.

19 Specifically, Malkenhorst served CalPERS with Public Records Act ("PRA") requests in
20 June 2012. CalPERS has provided approximately 150,000 pages of documents in electronic form
21 in response to those PRA requests. Those documents include ADP Payroll Register sheets
22 covering portions of the years 2004 and 2005. However, while the ADP Payroll Register entries
23 appear complete for most if not all of the other persons working for Vernon, the documents are
24 missing the very same entries for Malkenhorst in 2004 that are missing from the documents
25 included in Exhibit 67. (See Declaration of Griselda Montes de Oca, attached hereto.)

26 CalPERS has provided no explanation for why it is introducing an incomplete set of ADP
27 payroll registers for Malkenhorst for 2004, or for why it produced a similar incomplete set to
28 counsel for Respondent. In any event, CalPERS should not be permitted to offer an incomplete

1 and potentially skewed history of Malkenhorst's compensation history by relying on incomplete
2 payroll registers, while simultaneously denying Malkenhorst the opportunity to present a
3 complete picture.

4 Malkenhorst therefore requests that the Court either (a) bar CalPERS from introducing
5 and eliciting testimony about any of the ADP payroll registers in the administrative proceeding,
6 or (b) compel CalPERS to supplement its Exhibit 67 to include all of the missing payroll
7 registers concerning Malkenhorst and (c) provide copies of those additional records to counsel
8 for Respondent.

9 In the alternative, Malkenhorst is concurrently requesting Court permission to take the
10 records deposition of ADP, aka Automatic Data Processing, Inc., to obtain complete copies of
11 the subject records prior to the hearing in this administrative proceeding and then be permitted to
12 introduce those documents into evidence in the administrative proceeding.

13 **II. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE IN ADVANCE OF**
14 **TRIAL BY WAY OF AN *IN LIMINE* MOTION**

15 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
16 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

17 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
18 has the power to promote the orderly and prompt conduct of a hearing. Malkenhost has a right to
19 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

20 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
21 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
22 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
23 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

24 *Evidence Code* section 352 allows the court to exclude evidence where there is a
25 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
26 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) If CalPERS were permitted to introduce
27 evidence about Malkenhorst's compensation history that is incomplete and may present an
28 inaccurate picture of that history, and further permitted to withhold copies of the missing

1 documents from Malkenhorst so that he cannot introduce them into evidence himself, it would
2 subject Malkenhorst to undue prejudice.

3 **III. THE COURT MAY EXCLUDE EVIDENCE THAT LACKS FOUNDATION**

4 The motion is based on the grounds that the report lacks foundation is incomplete, and
5 unsupported. The motion is based upon the ground that the evidence lacks a
6 necessary foundation for admission and therefore should be excluded pursuant to *Evidence*
7 *Code Section 403*.

8 The motion is based upon Evidence Code Section 403(a), which gives the court the
9 discretion to exclude evidence lacking a necessary preliminary fact.

10
11 *Evidence Code Section 403(a)* states as follows:

12 The proponent of the proffered evidence has the burden of producing
13 evidence as to the existence of the preliminary fact, and the proffered
14 evidence is inadmissible unless the court finds that there is evidence
15 sufficient to sustain a finding of the existence of the preliminary fact,
16 when:

- 17 (1) The relevance of the proffered evidence depends on the existence of
18 the preliminary fact;
- 19 (2) The preliminary fact is the personal knowledge of a witness
20 concerning the subject matter of his testimony;
- 21 (3) The preliminary fact is the authenticity of a writing; or
- 22 (4) The proffered evidence is of a statement or other conduct of a
23 particular person and the preliminary fact is whether that person made the
24 statement or so conducted himself. (Emphasis added.)

25 CalPERS has the burden to prove the preliminary facts.

26 **IV. CalPERS Failure to Establish PRELIMINARY FACT**

27 *Evidence Code Section 400* defines a "preliminary fact" as a fact upon the existence or
28 nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the
admissibility or inadmissibility of evidence" includes the qualification or disqualification of a
person to be a witness and the existence or nonexistence of a privilege.

1 *Evidence Code Section 405* requires: "When the existence of a preliminary fact is disputed,
2 the court shall indicate which party has the burden of producing evidence and the burden of
3 proof on the issue as implied by the rule of law under which the question arises. The court shall
4 determine the existence or nonexistence of the preliminary fact and shall admit or exclude the
5 proffered evidence as required by the rule of law under which the question arises. (Emphasis
6 added.)

7 It is error to allow testimony of expert witness based on practices of others, where matter was
8 outside expert's area of expertise. *Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1522, 3 Cal.
9 Rptr. 2d 833 (4th Dist. 1992)

10 **V. THE COURT MAY EXCLUDE EVIDENCE THAT IS HEARSAY**

11 A writing by a person who lacked personal knowledge of the items contained therein,
12 was properly excluded as hearsay, because there was insufficient foundation to allow the
13 evidence to fall under a hearsay exception. *Prato-Morrison v. Doe*, 103 Cal. App. 4th 222, 229–
14 30, 126 Cal. Rptr. 2d 509 (2d Dist. 2002)

15 Evidence Code Section 1200 states as follows:

16 (a) "Hearsay evidence" is evidence of a statement that was made other
17 than by a witness, while testifying at the hearing and that is offered to
18 prove the truth of the matter stated.

19 (b) Except as provided by law, hearsay evidence is inadmissible.

20 (c) this section shall be known and cited as the hearsay rule.

21
22 Subject to recognized exceptions, the hearsay rule bars out-of-court declarations of
23 nonparties which are offered to prove the truth of the matter stated. *People v. Sundlee*, 70 Cal.
24 App. 3d 477, 482, 138 Cal. Rptr. 834 (3d Dist. 1977).

25 The hearsay rule applies to written instruments as well as to oral statements. *Lusardi v.*
26 *Prukop*, 116 Cal. App. 506, 509, 2 P.2d 870 (1st Dist. 1931).

27 For example, office of the Inspector General (OIG) report was not admissible evidence
28 under the official record exception to the hearsay rule; insufficient evidence to indicate the

1 trustworthiness of the report, inasmuch as the report contained information that was not directly
2 observable by the investigator who prepared the report, and the investigator identified no
3 independent sources. *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 55 Cal. Rptr.
4 3d 600 (4th Dist. 2007)

5 Hearsay statement cannot be offered by expert to prove truth of matter asserted. *Korsak*
6 *v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1525–27, 3 Cal. Rptr. 2d 833 (4th Dist. 1992)

7 Witness cannot put forth incompetent hearsay evidence under guise of stating reasons for
8 opinion. *People v. Price*, 1 Cal. 4th 324, 416, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (1991)

9 **VI. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE**

10 *Evidence Code* section 352 states that Court may "exclude evidence if its probative value
11 is substantially outweighed by the probability that its admission will (a) necessitate undue
12 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,
13 or of misleading the jury." (See *People v. Cardenas, supra*, at 904 [prejudicial evidence]; *People*
14 *v. Sanders* (1995) 11 Cal.4th 475, 514, as modified on denial of reh'g, (Jan. 30, 1996) [undue
15 consumption of time]; *People v. Wagner* (1982) 138 Cal.App.3d 473, 481 [jury confusion].)

16 **VII.**

17 **VIII. THE COURT MAY DENY INTRODUCTION OF EVIDENCE BY CALPERS**
18 **WHEN IT HAS WITHHELD RELATED AND POTENTIALLY EXPLANATORY**
19 **EVIDENCE FROM MALKENHORST**

20 The court is within its power to preclude a party from introducing documents not
21 discovered by the opposing party, where relevant evidence is not disclosed during discovery.
22 (See *Code of Civil Procedure*, 2023.030; *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th
23 1447, 1454; *Caryl Richards, Inc. v. Superior Court In and For Los Angeles County* (1961) 188
24 Cal.App.2d 300, 306.)

25 In *Caryl Richards, Inc. v. Superior Court, supra*, the court held that a party who had
26 suppressed evidence waived its opportunity to try the issue and was forbidden from offering
27 evidence to overcome any presumptions arising from the suppression. (*Id.* at 306.)

28 **IX. CONCLUSION**

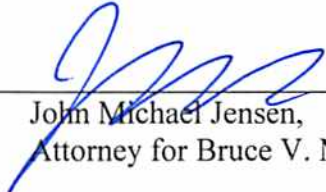
1 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
2 either (a) bar CalPERS from introducing and eliciting testimony about any of the ADP payroll
3 registers in the administrative proceeding, or (b) compel CalPERS to supplement its Exhibit 67
4 to include all of the missing payroll registers concerning Malkenhorst and (c) provide copies of
5 those additional records to counsel for Respondent.

6 In the alternative, Malkenhorst is concurrently requesting Court permission to take the
7 records deposition of ADP, aka Automatic Data Processing, Inc., to obtain complete copies of
8 the subject records prior to the hearing in this administrative proceeding and then be permitted to
9 introduce those documents into evidence in the administrative proceeding.

10 Respectfully submitted,

11
12 Dated: May 29, 2014

By: _____


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

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2 LAW OFFICES OF JOHN MICHAEL JENSEN
3 11500 West Olympic Blvd., Suite 550
4 Los Angeles, CA 90064
5 (310) 312-1100
6 (310) 312-1109 Facsimile
7 johnjensen@johnmjensen.com

8 Attorneys for Respondent Bruce Malkenhorst

9
10 BEFORE THE BOARD OF ADMINISTRATION
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
12

13 In Re the Matter of

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

16 Respondents.

17) CALPERS Case No.: 2012-0671
18) OAH Case No.: 2013080917

19) **DECLARATION OF GRISELDA**
20) **MONTES DE OCA RE MISSING ADP**
21) **PAYROLL REGISTER RECORDS**

22) Prehearing Date: June 13, 2014, 9:00am
23) Location: Los Angeles OAH

24 I, GRISELDA MONTES DE OCA, declare as follows:

25 1. The statements herein are based upon my personal knowledge and if called to
26 testify under oath in court I could and would so testify.

27 2. I am over 18 years old.

28 3. I am employed as a secretary by the Law Offices of John Michael Jensen, the
attorneys for Respondent in this matter.

4. On or about May 1, 2014, I was directed by Mr. Jensen to review the responses
we had previously received from Petitioner CalPERS to Public Records Act requests filed by our
office. Those responses contain approximately 150,000 pages of documents in electronic form.

5. Mr. Jensen instructed me to look for documents bearing a similarity to the "ADP
Payroll Register" entries offered by CalPERS in its proposed Exhibits 67 and 68. Specifically,

1 Mr. Jensen directed me to locate all such payroll registers referring to compensation received by
2 Bruce V. Malckenhorst, Sr., in the years 2004 and 2005.

3 6. Mr. Jensen informed me that the documents contained in CalPERS' proposed
4 Exhibit 67 had gaps in time and did not cover all of the pay periods in 2004. He instructed me to
5 look through the Public Records Act responses to see if I could locate the missing records there.

6 7. I located several thousand electronic pages of documents constituting ADP
7 Payroll Register documents for 2004 and 2005. The Bates numbers are in chronological order,
8 and the ADP pages are individually numbered.

9 8. While the ADP pages seemed complete for City of Vernon employees other than
10 Mr. Malckenhorst, there were numerous missing entries for Mr. Malckenhorst during the 2004
11 period.

12 9. For example, for the entries in Week 16, covering the period of April 3-15, 2004,
13 page 2 of the ADP registers which should document the compensation for Mr. Malckenhorst is
14 missing, but ADP pages 1 and 3 are included and bear chronological Bates numbers 144225-
15 144226.

16 10. For the entries in Week 20, covering the period of May 1-13, 2004, page 3 of the
17 ADP registers which should document the compensation for Mr. Malckenhorst is missing, but
18 ADP pages 2 and 4 are included and bear chronological Bates numbers 144361-144362.

19 11. For the entries in Week 22, covering the period of May 15-27, 2004, page 4 of the
20 ADP registers which should document the compensation for Mr. Malckenhorst is missing, but
21 ADP pages 3 and 5 are included and bear chronological Bates numbers 144427-144428.

22 12. For the entries in Week 24, covering the period of May 29-June 10, 2004, page 3
23 of the ADP registers which should document the compensation for Mr. Malckenhorst is missing,
24 but ADP pages 2 and 4 are included and bear chronological Bates numbers 144494-144495.

25 13. For the entries in Week 26, covering the period of June 12-24, 2004, page 4 of the
26 ADP registers which should document the compensation for Mr. Malckenhorst is missing, but
27 ADP pages 3 and 5 are included and bear chronological Bates numbers 144559-144560.

28 14. For the entries in Week 28, covering the period of June 26-July 8, 2004, pages 4

1 and 5 of the ADP registers which should document the compensation for Mr. Malkenhorst are
2 missing, but ADP pages 3 and 6 are included and bear chronological Bates numbers 144648-
3 144649.

4 15. For the entries in Week 30, covering the period of July 10-22, 2004, page 4 of the
5 ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
6 ADP pages 3 and 5 are included and bear chronological Bates numbers 144756-144757.

7 16. For the entries in Week 32, covering the period of July 24-August 5, 2004, page 4
8 of the ADP registers which should document the compensation for Mr. Malkenhorst is missing,
9 but ADP pages 3 and 5 are included and bear chronological Bates numbers 144906-144907.

10 17. For the entries in Week 34, covering the period of August 7-19, 2004, page 4 of
11 the ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
12 ADP pages 3 and 5 are included and bear chronological Bates numbers 145035-145036.

13 18. For the entries in Week 36, covering the period of August 21-September 2, 2004,
14 page 4 of the ADP registers which should document the compensation for Mr. Malkenhorst is
15 missing, but ADP pages 3 and 5 are included and bear chronological Bates numbers 145159-
16 145160.

17 Under penalty of perjury, I hereby declare that all statements made herein of my own
18 knowledge are true and that all statements made on information and belief are believed to be
19 true.

20
21 DATED: May 29, 2014


22 Griselda Montes De Oca

[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that

1. CalPERS is barred from introducing and eliciting testimony about any of the ADP payroll registers in the administrative proceeding;

2. In the alternative, CalPERS is compelled to (a) supplement its Exhibit 67 to include all of the missing payroll registers concerning Malkenhorst and (b) provide copies of those additional records to counsel for Respondent.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

3. Not to mention, refer to, or attempt to convey in any manner, either directly or indirectly, any facts that would refer or related to any ADP payroll registers concerning Malkenhorst in the years 2004 and 2005 without first obtaining permission of the Court;

4. Not to make any reference to the fact that this motion has been filed; and

5. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 8

Notice and Motion for Leave to Take Records Deposition of ADP, AKA Automatic Data Processing, Inc.

1 John Jensen, Esq., State Bar No. 176813
2 Law Offices of John Michael Jensen
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4 Los Angeles CA 90064
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6 (310) 312-1109 Facsimile
7 johnjensen@johnmjensen.com
8 Attorneys for Respondent Bruce Malkenhorst

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,)
) **NOTICE AND MOTION FOR LEAVE TO**
) **TAKE RECORDS DEPOSITION OF ADP,**
Respondents.) **AKA AUTOMATIC DATA PROCESSING,**
) **INC.; MEMORANDUM OF POINTS AND**
) **AUTHORITIES; DECLARATION OF**
) **GRISELDA MONTES DE OCA;**
) **[PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby moves this Court for leave to take the records deposition of ADP, aka Automatic Data Processing, Inc., to obtain complete copies of payroll register records concerning Malkenhorst for the years 2004 and 2005 because CalPERS has failed to provide such records to Respondent and seeks to introduce incomplete sets of such documents as CalPERS' Exhibits 67 and 68.

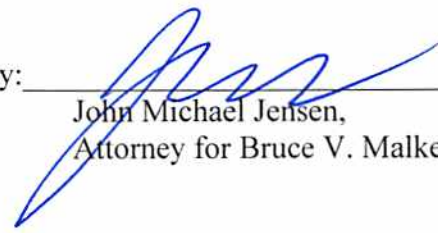
This motion is made under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and *Evidence Code* sections 402, 352 and 350, and is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

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Respectfully submitted,

Dated: May 29, 2014

By: _____



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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS has indicated it intends to introduce nine (9) pages of ADP Payroll Registers
4 for the year 2004 concerning the salary received by Respondent Malkenhorst from the City of
5 Vernon as its Exhibit 67, and another fifteen (15) pages of ADP Payroll Registers for the year
6 2005 concerning Respondent Malkenhorst as its Exhibit 68.

7 Malkenhorst and other Vernon employees were paid every two (2) weeks. The ADP
8 Payroll Register entries for Malkenhorst for 2005 (Exhibit 68) appear to be complete and to
9 cover all of the weeks Malkenhorst was employed by Vernon in 2005. However, there are
10 numerous missing entries for Malkenhorst during the 2004 period (Exhibit 67). Based on an
11 analysis performed by staff for Respondent's attorney, it appears CalPERS has excluded a
12 number of relevant records for Malkenhorst from the exhibits and is offering only a select sub-
13 set of the ADP Payroll Register entries.

14 Moreover, CalPERS has not simply excluded those records from its proposed Exhibit 67,
15 but has failed to produce the missing records to counsel for Malkenhorst and thus denied
16 Malkenhorst the opportunity to introduce a complete set of records for 2004 as his own proposed
17 exhibit.

18 Specifically, Malkenhorst served CalPERS with Public Records Act ("PRA") requests in
19 June 2012. CalPERS has provided approximately 150,000 pages of documents in electronic form
20 in response to those PRA requests. Those documents include ADP Payroll Register sheets
21 covering portions of the years 2004 and 2005. However, while the ADP Payroll Register entries
22 appear complete for most if not all of the other persons working for Vernon, the documents are
23 missing the very same entries for Malkenhorst in 2004 that are missing from the documents
24 included in Exhibit 67. (See Declaration of Griselda Montes de Oca, attached hereto.)

25 CalPERS has provided no explanation for why it is introducing an incomplete set of ADP
26 payroll registers for Malkenhorst for 2004, or for why it produced a similar incomplete set to
27 counsel for Respondent. In any event, CalPERS should not be permitted to offer an incomplete
28 and potentially skewed history of Malkenhorst's compensation history by relying on incomplete

1 payroll registers, while simultaneously denying Malkenhorst the opportunity to present a
2 complete picture.

3 Malkenhorst therefore requests that the Court grant him permission to take the records
4 deposition of ADP, aka Automatic Data Processing, Inc., to obtain complete copies of the subject
5 records prior to the hearing in this administrative proceeding and then be permitted to introduce
6 those documents into evidence in the administrative proceeding.

7 **II. THIS COURT HAS AUTHORITY TO ALLOW THE SUBJECT DISCOVERY TO**
8 **TAKE PLACE**

9 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
10 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

11 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
12 has the power to promote the orderly and prompt conduct of a hearing. Malkenhorst has a right to
13 have the Court rule on this motion under *Government Code* section 11513(b).

14 The Court previously set a discovery cut-off of March 25, 2014. However, CalPERS did
15 not for the first time disclose its intentions to produce the ADP records contained in its proposed
16 Exhibits 67 and 68 until after the discovery cut-off period. Further, CalPERS provided counsel
17 for Malkenhorst with approximately 150,000 pages of electronic documents, the vast majority of
18 which are irrelevant to this matter. Despite diligent efforts to review as many of those documents
19 as could be done, it was not to locate the ADP records and determine that they were incomplete
20 prior to the discovery cut-off, nor was it possible to anticipate that CalPERS would seek to
21 introduce an incomplete set of documents as evidence in this proceeding.

22 There would be no prejudice to any party if Malkenhorst's request to take a records
23 deposition of ADP is granted, and in fact it would enable to Court to consider all relevant
24 evidence, rather than the selective sampling of evidence proposed by CalPERS.

25 **III. CONCLUSION**

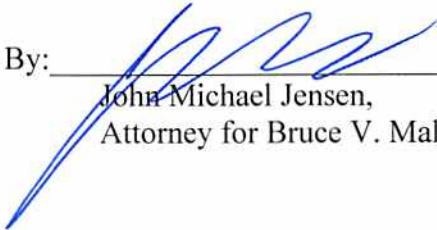
26 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
27 grant him leave to take the records deposition of ADP, aka Automatic Data Processing, Inc., to
28 obtain complete copies of the subject records prior to the hearing in this administrative

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proceeding and then be permitted to introduce those documents into evidence in the administrative proceeding.

Respectfully submitted,

Dated: May 29, 2014

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

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8 Attorneys for Respondent Bruce Malkenhorst

9
10 BEFORE THE BOARD OF ADMINISTRATION
11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
12

<p>13 In Re the Matter of</p> <p>14 BRUCE V. MALKENHORST, SR and CITY OF VERNON,</p> <p>15 Respondents.</p>	}	<p>16 CALPERS Case No.: 2012-0671</p> <p>17 OAH Case No.: 2013080917</p> <p>18 DECLARATION OF GRISELDA MONTES DE OCA RE MISSING ADP PAYROLL REGISTER RECORDS</p> <p>19 Prehearing Date: June 13, 2014, 9:00am</p> <p>20 Location: Los Angeles OAH</p>
---	---	--

21 I, GRISELDA MONTES DE OCA, declare as follows:

22 1. The statements herein are based upon my personal knowledge and if called to
23 testify under oath in court I could and would so testify.

24 2. I am over 18 years old.

25 3. I am employed as a secretary by the Law Offices of John Michael Jensen, the
26 attorneys for Respondent in this matter.

27 4. On or about May 1, 2014, I was directed by Mr. Jensen to review the responses
28 we had previously received from Petitioner CalPERS to Public Records Act requests filed by our
office. Those responses contain approximately 150,000 pages of documents in electronic form.

5. Mr. Jensen instructed me to look for documents bearing a similarity to the "ADP
Payroll Register" entries offered by CalPERS in its proposed Exhibits 67 and 68. Specifically,

1 Mr. Jensen directed me to locate all such payroll registers referring to compensation received by
2 Bruce V. Malkenhorst, Sr., in the years 2004 and 2005.

3 6. Mr. Jensen informed me that the documents contained in CalPERS' proposed
4 Exhibit 67 had gaps in time and did not cover all of the pay periods in 2004. He instructed me to
5 look through the Public Records Act responses to see if I could locate the missing records there.

6 7. I located several thousand electronic pages of documents constituting ADP
7 Payroll Register documents for 2004 and 2005. The Bates numbers are in chronological order,
8 and the ADP pages are individually numbered.

9 8. While the ADP pages seemed complete for City of Vernon employees other than
10 Mr. Malkenhorst, there were numerous missing entries for Mr. Malkenhorst during the 2004
11 period.

12 9. For example, for the entries in Week 16, covering the period of April 3-15, 2004,
13 page 2 of the ADP registers which should document the compensation for Mr. Malkenhorst is
14 missing, but ADP pages 1 and 3 are included and bear chronological Bates numbers 144225-
15 144226.

16 10. For the entries in Week 20, covering the period of May 1-13, 2004, page 3 of the
17 ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
18 ADP pages 2 and 4 are included and bear chronological Bates numbers 144361-144362.

19 11. For the entries in Week 22, covering the period of May 15-27, 2004, page 4 of the
20 ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
21 ADP pages 3 and 5 are included and bear chronological Bates numbers 144427-144428.

22 12. For the entries in Week 24, covering the period of May 29-June 10, 2004, page 3
23 of the ADP registers which should document the compensation for Mr. Malkenhorst is missing,
24 but ADP pages 2 and 4 are included and bear chronological Bates numbers 144494-144495.

25 13. For the entries in Week 26, covering the period of June 12-24, 2004, page 4 of the
26 ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
27 ADP pages 3 and 5 are included and bear chronological Bates numbers 144559-144560.

28 14. For the entries in Week 28, covering the period of June 26-July 8, 2004, pages 4

1 and 5 of the ADP registers which should document the compensation for Mr. Malkenhorst are
2 missing, but ADP pages 3 and 6 are included and bear chronological Bates numbers 144648-
3 144649.

4 15. For the entries in Week 30, covering the period of July 10-22, 2004, page 4 of the
5 ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
6 ADP pages 3 and 5 are included and bear chronological Bates numbers 144756-144757.

7 16. For the entries in Week 32, covering the period of July 24-August 5, 2004, page 4
8 of the ADP registers which should document the compensation for Mr. Malkenhorst is missing,
9 but ADP pages 3 and 5 are included and bear chronological Bates numbers 144906-144907.

10 17. For the entries in Week 34, covering the period of August 7-19, 2004, page 4 of
11 the ADP registers which should document the compensation for Mr. Malkenhorst is missing, but
12 ADP pages 3 and 5 are included and bear chronological Bates numbers 145035-145036.

13 18. For the entries in Week 36, covering the period of August 21-September 2, 2004,
14 page 4 of the ADP registers which should document the compensation for Mr. Malkenhorst is
15 missing, but ADP pages 3 and 5 are included and bear chronological Bates numbers 145159-
16 145160.

17 Under penalty of perjury, I hereby declare that all statements made herein of my own
18 knowledge are true and that all statements made on information and belief are believed to be
19 true.

20
21 DATED: May 29, 2014


22 _____
Griselda Montes De Oca

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that

1. Malkenhorst is granted leave to take the records deposition of ADP, aka Automatic Data Processing, Inc., to obtain complete copies of the ADP Payroll Register records for Bruce Malkenhorst concerning his employment at the City of Vernon in 2004; and

2. Malkenhorst is permitted to introduce those documents into evidence in the administrative proceeding should he so wish.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 9

Notice and Motion In Limine to Admit Court Pleadings and Records

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

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11 **BEFORE THE BOARD OF ADMINISTRATION**

12 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

13 In Re the Matter of) CALPERS CASE NO.: 2012-0671
14) OAH CASE NO.: 2013080917
15 BRUCE V. MALKENHORST, SR and)
16 CITY OF VERNON,)
17 Respondents.) **NOTICE AND MOTION IN LIMINE TO**
18) **ADMIT COURT PLEADINGS AND**
19) **RECORDS; MEMORANDUM OF**
20) **POINTS AND AUTHORITIES;**
21) **[PROPOSED] ORDER**
22)
23) Prehearing Conf: June 13, 2014, 9:00am
24) Location: Los Angeles OAH

25 **TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

26 **PLEASE TAKE NOTICE THAT** Respondent Bruce V. Malkenhorst, Sr., hereby
27 moves this Court in limine for an order admitting pleadings, exhibits, briefs, and other court
28 records filed in the superior or appellate courts related to (1) Malkenhorst's charter cities
complaint/petition and appeal; and (2) Malkenhorst's collateral estoppel/*res judicata*
complaint/petition and appeal.

Malkenhorst challenges whether these issues should have to be exhausted in the
administrative process. However, one or more of the superior or appellate courts has ordered
(pursuant to CalPERS' demurrer motions) that these issues be exhausted in the administrative
process. Since CalPERS moved on demurrer that these issues must be exhausted, the pleadings,
exhibits, briefs, and other court records from the superior and appellate courts hearing those

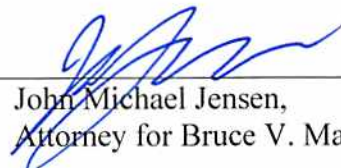
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matters should be admitted into the administrative record in order to present and to preserve these issues before the OAH and within the administrative record.

This motion is made under the provisions of Government Code Section 11511(b)(12) and 11513(b) and Evidence Code Sections 402, 352 and 350, and is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

Respectfully submitted,

Dated: May 29, 2014

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 By this motion, Bruce Malkenhorst seek to admit the pleadings, exhibits, briefs, and other
4 court records filed in the superior or appellate court related to (1) Malkenhorst's charter cities
5 complaint/petition filed in the Orange County Superior Court, case no. 30-2012-00588466, and
6 the appeal of the Superior Court's dismissal of the case after sustaining CalPERS' demurrer filed
7 in the Fourth District Court of Appeal, case no. G047959; and (2) Malkenhorst's collateral
8 estoppel/*res judicata* complaint/petition filed in the Los Angeles County Superior Court, case no.
9 BS141275, and the appeal of the Superior Court's dismissal of the case after sustaining CalPERS'
10 demurrer filed in the Second District Court of Appeal, case no. B247676.

11 Both superior court cases were dismissed after the respective courts sustained CalPERS'
12 demurrers contending that the matters must be first exhausted in CalPERS' administrative
13 process. Malkenhorst seeks to admit the pleadings, exhibits, briefs, and other court records to
14 present these issues for resolution by the OAH, to preserve these issues if they cannot be
15 resolved by the OAH, and to admit these pleadings and their contents for purposes of exhausting
16 their consideration in the administrative process.

17 The charter cities complaint/petition and appeal pleadings, exhibits, briefs, and other
18 court records are contained in Malkenhorst's proposed Exhibits QQQQQ-ZZZZZ and CCCCC-
19 EEEEE.

20 The collateral estoppel/*res judicata* complaint/petition and appeal pleadings, exhibits,
21 briefs, and other court records are contained in Malkenhorst's proposed Exhibits GGGGG-
22 JJJJJ and TTTTT-VVVVV.

23 Malkenhorst challenges whether these issues should have to be exhausted in the
24 administrative process. However, one or more of the superior or appellate courts has ordered
25 (pursuant to CalPERS' demurrer motions) that these issues be exhausted in the administrative
26 process. Since CalPERS moved on demurrer that these issues must be exhausted, the pleadings,
27 exhibits, briefs, and other court records should be admitted into the administrative record in order
28 to present and to preserve these issues before the OAH and within the administrative record.

1 **II. THIS COURT MAY ADMIT OR EXCLUDE EVIDENCE IN ADVANCE OF**
2 **TRIAL BY WAY OF AN *IN LIMINE* MOTION**

3 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
4 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

5 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
6 has the power to promote the orderly and prompt conduct of a hearing. Malkenhorst has a right
7 to have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

8 **III. EVIDENCE OF ISSUES THAT NEED TO BE PRESENTED, TO BE**
9 **PRESERVED, AND TO BE EXHAUSTED IN ADMINISTRATIVE PROCESS**

10 Since CalPERS moved on demurrers that these issues must be exhausted in the
11 administrative process, these pleadings, exhibits, briefs, and other court records should be
12 admitted into the administrative record in order to present and to preserve these issues before the
13 OAH and within the administrative record.

14 Malkenhorst seeks the OAH to admit these pleadings, exhibits, briefs, and other court
15 records as issues that are to be presented to the OAH within the administrative process, to be
16 resolved by the OAH within the administrative process, and to be ruled on by the OAH in the
17 administrative process.

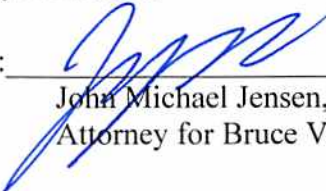
18 Malkenhorst reserves all rights to challenge whether these issues should have to be
19 exhausted in the administrative process, however, one or more of the superior or appellate courts
20 has ordered (pursuant to CalPERS' demurrer motions) that these issues be exhausted in the
21 administrative process.

22 **IV. CONCLUSION**

23 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
24 admit the pleadings, exhibits, briefs, and other court records identified above.

25 Respectfully submitted,

26 Dated: May 29, 2014

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

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the Court admits the pleadings, exhibits, briefs, and other court records contained in Malkehhorst's proposed Exhibits QQQQQ-ZZZZZ, CCCCC-EEEEEE, GGGGGG-JJJJJ, and TTTTTT-VVVVVV as issues that are presented to the OAH within the administrative process, that are to be resolved by the OAH within the administrative process, and that are to be ruled on by the OAH or ALJ in the administrative process.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 10

**Notice and Motion In Limine to Exclude all Evidence and
Testimony that Violates the Parol Evidence Rule**

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6 (310) 312-1109 Facsimile
7 johnjensen@johnmjensen.com
8 Attorneys for Respondent Bruce Malkenhorst

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

13 In Re the Matter of) CALPERS CASE NO.: 2012-0671
14) OAH CASE NO.: 2013080917
15 BRUCE V. MALKENHORST, SR and)
16 CITY OF VERNON,)
17 Respondents.) **NOTICE AND MOTION IN LIMINE TO**
18) **EXCLUDE ALL EVIDENCE AND**
19) **TESTIMONY THAT VIOLATES THE**
20) **PAROL EVIDENCE RULE;**
21) **MEMORANDUM OF POINTS AND**
22) **AUTHORITIES; [PROPOSED] ORDER**
23)
24) Prehearing Conf: June 13, 2014, 9:00am
25) Location: Los Angeles OAH

26 **TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**
27 **PLEASE TAKE NOTICE THAT** Respondent Bruce V. Malkenhorst, Sr., hereby
28 moves this Court for a motion *in limine* and an order excluding any and all evidence that violates
the parol evidence rule by varying or contradicting the terms in the City of Vernon's written
charter, resolutions, minutes, pay schedules, or other official documents.

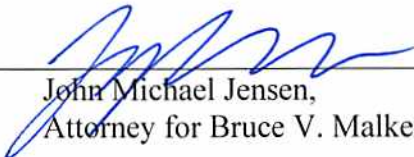
This motion is made under the provisions of Government Code Section 11511(b)(12) and
11513(b) and Evidence Code Sections 402, 352 and 350, and civil Code Section 1625, Code of
Civil Procedure Section 1856 and is based on the supporting Memorandum of Points and
Authorities, the pleadings and papers on file in this action, and upon such of the argument and
evidence as may be presented prior to or at the hearing of this matter.

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Respectfully submitted,

Dated: May 29, 2014

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

By this motion, Respondent Malckenhorst seeks to exclude certain testimony and evidence that he believe will be proffered by CalPERS at hearing.

CalPERS is expected to offer at hearing the testimony of CalPERS employees Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall. The testimony of Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall would allegedly show an "understanding", "intent", "agreement", arrangement or term that that is related to "multiple positions", "overtime", additional compensation or other compensation which is directly contrary to the clear and unambiguous terms of the City of Vernon's charter, resolutions, minutes, pay schedules, or other official documents or acts. Such testimony is therefore inadmissible as a matter of law under the parol evidence rule.

Malckenhorst therefore respectfully requests an order excluding any testimony of testimony of Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall at the hearing of this matter regarding "understanding", "intent", "agreement", arrangement or term that that is related to "multiple positions", "overtime", additional compensation or other compensation and which is directly contrary to the clear and unambiguous terms of the City of Vernon's charter, resolutions, minutes, pay schedules, or other official documents or acts.

CalPERS is also expected to offer at hearing the testimony of Vernon employee Joaquin Leon. The testimony of Vernon employee Joaquin Leon would allegedly show an "understanding", "intent", "agreement", arrangement or term that is related to "multiple positions", "overtime", additional compensation or other compensation which is directly contrary to the clear and unambiguous terms of the City of Vernon's charter, resolutions, minutes, pay schedules, or official documents or acts. Such testimony is therefore inadmissible as a matter of law under the parol evidence rule.

Malckenhorst therefore respectfully requests an order excluding any testimony of Vernon employee Joaquin Leon at the hearing of this matter regarding "understanding", "intent", "agreement", arrangement or term that is related to "multiple positions", "overtime", additional

1 compensation or other compensation and which is directly contrary to the clear and unambiguous
2 terms of the City of Vernon's charter, resolutions, minutes, pay schedules, or other official
3 documents or acts.

4 CalPERS is expected to offer at hearing one or more documents would allegedly show an
5 "understanding", "intent", "agreement", arrangement or term related to "multiple positions",
6 "overtime", additional compensation or other compensation which is directly contrary to the
7 clear and unambiguous terms of the City of Vernon's charter, resolutions, minutes, pay
8 schedules, or other official documents or acts. For example, CalPERS seeks to offer Exhibits 3-
9 4, 6-69, 71-76, 78-83, and 85- 88 for purpose of showing "multiple positions" or "overtime".
10 Those documents are therefore inadmissible as a matter of law under the parole evidence rule for
11 the purposes of contradicting the clear and unambiguous terms of the City of Vernon's charter,
12 resolutions, minutes, pay schedules, or other official documents or acts.

13 Malkenhorst therefore respectfully requests an order excluding any such documents from
14 being admitted for those purposes.

15 **II. THIS COURT MAY EXCLUDE EVIDENCE IN ADVANCE OF TRIAL BY WAY**
16 **OF AN *IN LIMINE* MOTION**

17 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
18 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

19 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
20 has the power to promote the orderly and prompt conduct of a hearing. Malkenhorst has a right
21 to have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

22 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
23 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
24 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
25 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

26 *Evidence Code* section 352 allows the court to exclude evidence where there is a
27 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
28 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) If CalPERS were permitted to introduce

1 evidence that Malkenhorst's employment allegedly violated the PERL which is directly contrary
2 to the clear and unambiguous terms of the City of Vernon's charter, resolutions, minutes, pay
3 schedules, or other official documents or acts, it would deny Malkenhorst his due process rights
4 and thus subject Malkenhorst to undue prejudice.

5 **III. EVIDENCE EXPECTED TO BE OFFERED BY CALPERS IS BARRED BY THE**
6 **PAROLE EVIDENCE RULE**

7 The parole evidence rule prohibits the introduction of extrinsic evidence to vary or
8 contradict the terms of an integrated written instrument. (*Tahoe Nat'l Bank v. Phillips* (1971) 4
9 Cal.3d 11, 22-23.)

10 The parole evidence rule is codified in *Civil Code*, §1625 and *Code of Civil Procedure*,
11 §1856. The parole evidence rule applies to "writings intended by the parties as a final expression
12 of their *agreement*." (*Code of Civil Procedure*, §1856(a).)

13 In applying the parole evidence rule, first the court must determine whether the writing
14 was intended to be an integration—that is, a complete and final expression of the parties'
15 agreement. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.)

16 In the present action, Vernon's charter, resolutions, minutes, pay schedules, or other
17 official documents or acts are clearly intended to be integrated. Specifically, the pay schedules
18 and other documents are clearly intended to be integrated. Each annual pay schedule contained
19 an integration clause to the effect that any previous negotiations, contracts or representations
20 concerning the subject matter described herein, and not contained in the agreement, are hereby
21 withdrawn and annulled. The presence of this integration clause is conclusive on the issue of
22 integration. (See *Salyer Grain & Milling Co. v. Hensen* (1970) 13 Cal.App.3d 493, 501.)
23 Therefore the pay schedules are an integrated instrument.

24 The second part of the parole evidence analysis requires the court to consider whether
25 Vernon's charter, resolutions, minutes, pay schedules, or other official documents or acts are
26 susceptible of the meaning urged by the party offering the evidence. Extrinsic evidence is not
27 admissible to give the language used in a written instrument a meaning to which it is not
28 reasonably susceptible. (*People ex rel Dept. of Parks & Recreation v. West-A-Rama, Inc.*

1 (1973) 35 Cal.App.3d 786.)

2 Vernon's charter, resolutions, minutes, pay schedules, or other official documents or acts
3 are clear and unambiguous that no additional pay or compensation was to be provided to the City
4 Administrator for performing any additional duties and that Vernon would compensate
5 Malkenhorst solely in the position of City Administrator. There is nothing ambiguous about
6 Vernon's charter, resolutions, minutes, pay schedules, or other official documents or acts on
7 these issues. There is nothing ambiguous about Vernon's documents and the written pay
8 schedules or other written instruments.

9 As a result, the court must exclude any extrinsic evidence that CalPERS seeks to
10 introduce regarding "multiple positions" "overtime", or compensation for performing duties or
11 "multiple positions".

12 The parol evidence rule applies in litigation involving *third parties* in the same manner it
13 applies in actions between the parties to the instrument. (*Kern County Water Agency v. Belridge*
14 *Water Storage Dist.* (1993) 18 Cal.App.4th 77, 86; *Neverkovec v. Fredericks* (1999) 74
15 Cal.App.4th 337, 349-350, fn. 8 [third party claimed to be beneficiary of release of "all parties"];
16 but see *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 608 (citing text) [assuming California
17 law permits third parties to invoke rule in proper context].)

18 In addition, Vernon intended to form a fully integrated contract with Malkenhorst when it
19 annually enacted the duties, responsibilities, and compensation that was reduced to writing in
20 Vernon's annual pay schedules and other related documents.

21 "Writings" thus clearly covers written contracts between parties (including commercial
22 instruments). (*Code of Civil Procedure*, §1856(h).)

23 The fundamental rules of contract interpretation are set forth in *Civil Code* sections 1635,
24 *et seq.* which provide that the expressed intent of contract under an objective standard. (*Mission*
25 *Valley East Inc v. County of Kern* (1981) 120 Cal.App.3d 89, 97.) When a contract is reduced to
26 writing, the intention of the parties is to be ascertained form the writing alone if possible. (*Civil*
27 *Code*, §§1638-1639.)

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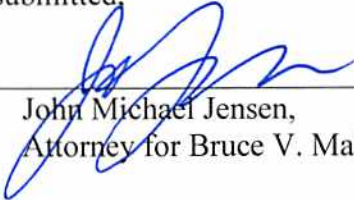
1 **IV. CONCLUSION**

2 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
3 exclude any testimony or documentary evidence, or mention of any evidence, that would vary or
4 contradict the terms in Vernon's written charter, resolutions, minutes, pay schedules, or other
5 official documents.

6 Respectfully submitted,

7 Dated: May 29, 2014

8 By: _____

9 
10 John Michael Jensen,
11 Attorney for Bruce V. Malkenhorst, Sr.

PROPOSED ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that CalPERS be barred from introducing any and all evidence that varies or contradicts the terms in Vernon's written charter, resolutions, minutes, pay schedules, or other official documents.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

1. Not to mention, refer to, or attempt to convey by testimony or by evidence in any manner, either directly or indirectly, any facts that would vary or contradict the terms in Vernon's written charter, resolutions, minutes, pay schedules, or official documents;
2. Not to make any reference to the fact that this motion has been filed; and
3. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

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Motion # 11

**Notice and Motion In Limine to Exclude all Evidence and
Testimony Subject to Judicial Estoppel By Prior Filings in
the 2005-2006 Administrative Process**

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7 johnjensen@johnmjensen.com
8 Attorneys for Respondent Bruce Malkenhorst

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,)
Respondents.) **NOTICE AND MOTION IN LIMINE TO**
) **EXCLUDE ALL EVIDENCE AND**
) **TESTIMONY SUBJECT TO JUDICIAL**
) **ESTOPPEL BY PRIOR FILINGS IN THE**
) **2005-2006 ADMINISTRATIVE PROCESS;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; [PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby

moves this Court for a motion *in limine* and an order excluding any and all evidence (1) offered by CalPERS that is inconsistent with its position and resolution of the matters by CalPERS in the 2005-2006 CalPERS administrative proceeding concerning the calculation of Respondent's pension allowance; and (2) offered by the City of Vernon that is inconsistent with the position taken by Vernon and resolution of the matters in the 2005-2006 CalPERS administrative proceeding. These matters are preclude by judicial estoppel.

This motion is made under the provisions of Government Code Section 11511(b)(12) and 11513(b) and Evidence Code Sections 402, 352 and 350, and is based on the supporting

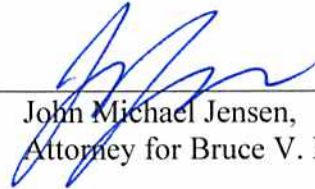
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Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

Respectfully submitted,

Dated: May 29, 2014

By: _____



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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 By this motion, Respondent Malkenhorst seek to exclude certain testimony and evidence
4 that he believe will be proffered by CalPERS at hearing in 2014 that is inconsistent with the
5 position taken by CalPERS in the 2005-2006 administrative process concerning the calculation
6 of the pension allowance of Respondent or CalPERS' resolution of that process.

7 Malkenhorst also seek to exclude certain testimony and evidence that he believes will be
8 proffered by the City of Vernon at hearing in 2014 that is inconsistent with the position taken by
9 Vernon in the 2005-2006 CalPERS administrative process or its resolution.

10 CalPERS' position in 2005 and 2006 is described in the documents found in
11 Malkenhorst's proposed Exhibits PPPP, QQQQ and SSSS. Vernon's position in 2005 and 2006 is
12 described in the "Notices of Appeal" filed in the 2005-2006 administrative process found in
13 Malkenhorst's proposed Exhibits RRRR and TTTT. CalPERS final position in the 2005-2006
14 administrative process is described in two "determination" letters in August and November 2006
15 found in Malkenhorst's proposed Exhibits WWWW and VVVV.

16 In 2005, CalPERS originally took a position contrary to Malkenhorst. However, Vernon
17 took a position in support of Malkenhorst. During the litigation, CalPERS changed its position to
18 be consistent with Vernon. CalPERS finally resolved these issues in Malkenhorst's favor.

19 In 2014, both Vernon and CalPERS are expected to take positions that are inconsistent
20 with the positions they originally took and/or with the resolution of the matters in 2006.

21 In 2014, CalPERS is expected to offer at hearing the testimony of CalPERS employees
22 Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall to allege that Malkenhorst held
23 "multiple positions", was paid or entitled to "overtime", received additional compensation or was
24 entitled to other compensation in addition to his monthly pay as City Administrator.

25 The expected testimony of CalPERS employees Tomi Jimenez, Lolita Lueras, Margaret
26 Junker and Chris Wall is inconsistent with CalPERS' positions and the resolution of these issues
27 in 2006. Such testimony is subject to judicial estoppel and therefore inadmissible as a matter of
28 law. Malkenhorst therefore respectfully requests an order excluding any testimony of testimony

1 of Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall at the hearing of this matter
2 related to "multiple positions", "overtime", additional compensation or other compensation and
3 which is inconsistent with the resolution of the 2005-2006 administrative process and a finding
4 that such testimony is inadmissible.

5 CalPERS is expected to offer at hearing the testimony of Vernon employee Joaquin Leon
6 on issues where Vernon previously took a position in the 2005-2006 administrative process.

7 Although the testimony is purported to be offered by CalPERS (and/or Vernon), both CalPERS
8 and Vernon are judicially estopped from taking inconsistent positions in 2014 from the positions
9 that CalPERS and/or Vernon took in the 2005-2006 administrative process.

10 Such testimony is subject to judicial estoppel and is therefore inadmissible as a matter of
11 law. Malckenhorst therefore respectfully requests an order excluding any testimony of Vernon
12 employee Joaquin Leon that is inconsistent with the positions taken by Vernon in the 2005-2006
13 administrative process and a finding that such testimony is inadmissible.

14 CalPERS is expected to offer at hearing one or more documents in support of testimony
15 that is inconsistent with the positions taken by CalPERS and Vernon in the 2005-2006
16 administrative process.

17 For example, CalPERS seeks to offer its proposed Exhibits 3-4, 6-69, 71-76, 78-83, and
18 85-88 for purpose of showing "multiple positions" or "overtime". Those documents are therefore
19 inadmissible as a matter of law under the judicial estoppel doctrine as inconsistent with the
20 position taken by CalPERS and/or Vernon in 2005-2006.

21 Malckenhorst therefore respectfully requests an order excluding any such documents from
22 being admitted for those purposes.

23 **II. THIS COURT MAY EXCLUDE EVIDENCE IN ADVANCE OF TRIAL BY WAY**
24 **OF AN *IN LIMINE* MOTION**

25 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
26 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

27 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
28 has the power to promote the orderly and prompt conduct of a hearing. Malckenhorst has a right

1 to have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

2 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
3 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
4 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
5 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

6 *Evidence Code* section 352 allows the court to exclude evidence where there is a
7 substantial danger that the probative value will be outweighed by the danger of undue prejudice.
8 (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.) If CalPERS were permitted to introduce
9 evidence that Malckenhorst's employment allegedly violated the PERL in contradiction to the
10 position CalPERS took at the end of the 2005-2006 administrative process, it would violate the
11 judicial estoppel doctrine, deny Malckenhorst his due process rights, and thus subject Malckenhorst
12 to undue prejudice.

13 **III. EVIDENCE EXPECTED TO BE OFFERED BY CALPERS IS BARRED BY**
14 **JUDICIAL ESTOPPEL**

15 Inconsistent positions taken in administrative proceedings may also support a finding
16 of judicial estoppel. (*People v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181,
17 189; *Chaveriat v. Williams Pipe Line Co.* (7th Cir. 1993) 11 F.3d 1420.)

18 Judicial estoppel comes into play when "(1) the same party has taken two positions; (2)
19 the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party
20 was successful in asserting the first position; (4) the two positions are completely inconsistent;
21 and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*County of*
22 *Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 34.)

23 Vernon took a position in Malckenhorst's favor in the 2005-2006 administrative process
24 on the job duties, single job, and single compensation issues, which also incorporate the
25 "multiple positions" and "overtime" allegations made by CalPERS.

26 CalPERS originally took a contrary position but then adopted the position of Malckenhorst
27 and Vernon in 2006.

28 This doctrine of judicial estoppel rests on the principle that litigation is not a war game

1 unmoored from conceptions of ethics, truth, and justice. It is quite the reverse. Our adversarial
2 system limits the affirmative duties owed by an advocate to his adversary, but that does not mean
3 it frees him to deceive courts, argue out of both sides of his mouth, fabricate facts and rules of
4 law, or seek affirmatively to obscure the relevant issues and considerations behind a
5 smokescreen of self-contradictions and opportunistic flip-flops. (*Ferraro v. Camarlinghi* (2008)
6 161 Cal.App.4th 509, 558.)

7 The elements of judicial estoppel are:

8 (1) the same party has taken two positions; (2) the two positions were taken in judicial or
9 quasi-judicial administrative proceedings; (3) the party was successful in asserting the first
10 position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are
11 totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or
12 mistake. (*Drain v. Betz Laboratories, Inc.* (1998) 69 Cal.App.4th 950, 956.)

13 Judicial estoppel does not require a final judgment. (*Swahn Group, Inc. v. Segal* (2010)
14 183 Cal.App.4th 831, 841.) Judicial estoppel is designed to protect the integrity of the judicial
15 process rather than to protect a particular litigant. (*Gordon v. Nissan Motor Co.* (2009) 170
16 Cal.App.4th 1103, 1113, fn.4.)

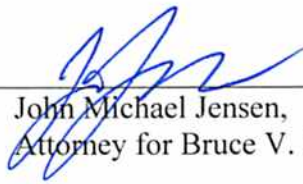
17 **IV. CONCLUSION**

18 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
19 exclude any testimony or documentary evidence, or mention of any evidence, that would be or is
20 inconsistent with the positions that CalPERS and/or the City of Vernon took in the 2005-2006
21 CalPERS administrative process under judicial estoppel.

22 Respectfully submitted,

23
24 Dated: May 29, 2014

By: _____


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

[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that CalPERS be barred from introducing any and all evidence that is inconsistent with positions that CalPERS took in 2006.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

1. Not to mention, refer to, or attempt to convey by testimony or by evidence in any manner, either directly or indirectly, any facts that are inconsistent with the position that CalPERS took in 2006;
2. Not to make any reference to the fact that this motion has been filed; and
3. To warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the City of Vernon be barred from introducing any and all evidence that is inconsistent with positions that Vernon took in 2005-2006.

IT IS HEREBY FURTHER ORDERED that the City of Vernon, Vernon's counsel and Vernon's witnesses shall:

4. Not to mention, refer to, or attempt to convey by testimony or by evidence in any manner, either directly or indirectly, any facts that are inconsistent with the position that Vernon took in 2005-2006;
5. Not to make any reference to the fact that this motion has been filed; and
6. To warn and caution each of Vernon's witnesses to strictly follow the same instructions.

7.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 12

**Notice and Motion RE CalPERS' Alleged Right to
Recoup Past "Pension Overpayments" From Respondent,
and if so, the time period for which such "Overpayments"
may be Sought**

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

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,) **NOTICE AND MOTION RE CALPERS'**
) **ALLEGED RIGHT TO RECOUP PAST**
Respondents.) **"PENSION OVERPAYMENTS" FROM**
) **RESPONDENT, AND IF SO, THE TIME**
) **PERIOD FOR WHICH SUCH**
) **"OVERPAYMENTS" MAY BE SOUGHT;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES; [PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby

moves this Court for a determination in its *Proposed Decision* of (a) whether CalPERS has the right to seek recoupment of alleged "pension overpayments" made to Respondent, and (b) if so, the time period for which such "overpayments" may be sought.

This motion is based upon the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

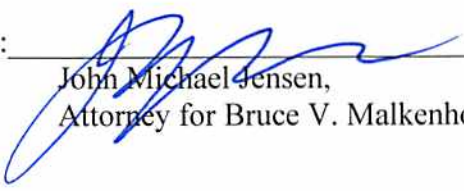
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Respectfully submitted,

Dated: May 29, 2014

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

CalPERS contends that Malkenhorst is not entitled to the higher pension that he has been receiving since retirement, and has drastically reduced the pension allowance. CalPERS further contends that as a result of this reduction, Malkenhorst has allegedly received "overpayments" in his pension allowance. CalPERS claims it has authority to recoup or collect all such "pension overpayments" allegedly made to Malkenhorst.

Malkenhorst disagrees that CalPERS has such authority and respectfully requests that this Court rule on the matter. Further, even if the Court rules that CalPERS has authority to seek such recoupment or repayment, Malkenhorst requests that this Court determine when CalPERS' right to do so commences, and for what period of time.

II. CALPERS HAS ALREADY DETERMINED MALKENHORST IS ENTITLED TO THE HIGHER PENSION SO THERE CAN BE NO "OVERPAYMENTS"

Malkenhorst's right to the higher pension allowance vested at the time of his retirement, or at the latest at the time of CalPERS' determination at the end of CalPERS' 2005-2006 administrative process that he was entitled to that amount.

CalPERS has no right to seek "overpayments" because there have not been any overpayments. CalPERS previously determined the amount of the higher benefit. When CalPERS litigated the issue of the appropriate amount of Malkenhorst's pension allowance in 2005-2006, it resolved the issue in his favor such that it established the correct benefit up until the time of a different final decision. As such, the correct benefit has been paid.

CalPERS may prospectively seek to reduce the benefit, but CalPERS cannot seek to recollect an overpayment of the pension that it has already determined is correct. As such, CalPERS cannot assert that there have been any overpayments. Only after CalPERS makes a different determination on the amount of the benefit may it then prospectively reduce the benefit. The Court should bar CalPERS from attempting to recoup or collect any alleged "overpayments" which have occurred prior to such a finding.

/ / /

1 **III. A PROSPECTIVE REDUCTION IN MALKENHORST'S ENTITLEMENT**
2 **CANNOT TAKE EFFECT UNTIL A BOARD DECISION OR DECISION OF A**
3 **COURT OF LAW**

4 In the newly certified opinion in *City of Oakland v. Oakland Police and Fire Retirement*
5 *System* (2014) 224 Cal.App.4th 210, the appellate court discussed the case of *Crumpler v. Board*
6 *of Administration* (1973) 32 Cal.App.3d 567. As part of that discussion, the *City of Oakland*
7 court ruled that that CalPERS has no authority or right to reduce or change a benefit until a final
8 determination has been made by either the CalPERS Board or by the appropriate court of law.
9 (*City of Oakland v. Oakland Police and Fire Retirement System, supra*, at fn. 18.)

10 No Board approval has taken place concerning CalPERS' current attempts to reduce
11 Malkenhorst's pension allowance, nor has any court of law ruled on the matter. Any right to
12 collect alleged "overpayments", if such a right even exists (a matter Malkenhorst challenges),
13 would only start to run on the date of the final determination.

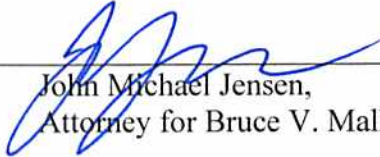
14 **IV. CONCLUSION**

15 Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court
16 rule in its *Proposed Decision* that CalPERS cannot collect "overpayments", especially after
17 considering the matter in 2005-2006 and after reaching a final decision in Malkenhorst's favor in
18 the earlier 2005-2006 administrative process. In the alternative, should the Court decide that
19 CalPERS does have authority to collect "overpayments", Malkenhorst requests that the Court
20 rule in its *Proposed Decision* that CalPERS' right to do so does not commence until there has
21 been a decision adopted by the CalPERS Board or a determination by a court of law.

22 Respectfully submitted,

23
24 Dated: May 29, 2014

By: _____


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

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that

1. The Court shall prepare a *Proposed Decision* ruling that CalPERS cannot collect alleged "overpayments" of pension benefits paid to Malkenhorst.

2. In the alternative, the Court shall prepare a *Proposed Decision* ruling that CalPERS has authority to collect "overpayments", but CalPERS' right to do so does not commence until there has been a decision adopted by the CalPERS Board or a determination by a court of law.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

Motion # 13

**Notice and Motion In Limine to Exclude all Testimony
and Evidence that Lacks Foundation, Constitutes Hearsay,
Is Irrelevant, or Contains Inappropriate Opinion or
Conclusion**

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

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In Re the Matter of) CALPERS CASE NO.: 2012-0671
) OAH CASE NO.: 2013080917
BRUCE V. MALKENHORST, SR and)
CITY OF VERNON,) **NOTICE AND MOTION IN LIMINE TO**
) **EXCLUDE ALL TESTIMONY AND**
Respondents.) **EVIDENCE THAT LACKS**
) **FOUNDATION, CONSTITUTES**
) **HEARSAY, IS IRRELEVANT, OR**
) **CONTAINS INAPPROPRIATE OPINION**
) **OR CONCLUSION; MEMORANDUM OF**
) **POINTS AND AUTHORITIES;**
) **[PROPOSED] ORDER**
)
) Prehearing Conf: June 13, 2014, 9:00am
) Location: Los Angeles OAH

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Respondent Bruce V. Malkenhorst, Sr., hereby
moves this Court for a motion *in limine* and an order excluding any and all testimony and
evidence that lacks foundation, constitutes hearsay, is irrelevant, or contains inappropriate
opinion or conclusion. Malkenhorst specifically incorporates by reference all of his objections to
CalPERS' proposed Exhibits and the testimony of its proposed Witnesses re lack of foundation,
lack of relevance, hearsay, and containing inappropriate opinion or conclusion.

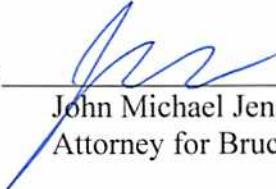
This motion is made under the provisions of *Government Code* sections 11511(b)(12) and
11513(b) and *Evidence Code* sections 402, 352 and 350, and is based on the supporting

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Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing of this matter.

Respectfully submitted,

Dated: May 29, 2014

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 CalPERS has submitted a list of Exhibits 1 through 88 that it seeks to offer into evidence,
4 and the names of witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker, Chris Wall, and
5 Joaquin Leon that it seeks to have testify in this matter. Malkenhorst has interposed objections to
6 all of said exhibits and witnesses, as detailed in his written objections in the Joint Prehearing
7 Conference Statement filed herein on May 19, 2014.

8 True and correct copies of CalPERS proposed Exhibit and Witness lists containing
9 Malkenhorst's specific objections are attached hereto as Exhibits 1 and 2. Malkenhorst hereby
10 incorporates all of those objections by reference and seeks a ruling by the Court on those
11 objections prior to any such exhibit being offered into evidence or any testimony being taken.

12 **II. THIS COURT MAY EXCLUDE EVIDENCE THAT LACKS FOUNDATION,**
13 **LACKS RELEVANCE, CONSTITUTES HEARSAY, OR CONTAINS IMPROPER**
14 **OPINION OR CONCLUSION IN ADVANCE OF TRIAL BY WAY OF AN *IN***
15 **LIMINE MOTION**

16 Under the provisions of *Government Code* sections 11511(b)(12) and 11513(b) and
17 *Evidence Code* sections 402, 352 and 350, the ALJ has the power to admit or exclude evidence.

18 Under the provisions of *Government Code* section 11511(b)(12) and 11513(b), the ALJ
19 has the power to promote the orderly and prompt conduct of a hearing. Malkenhost has a right to
20 have the Court rule on a motion *in limine* under *Government Code* section 11513(b).

21 The Court has the inherent power to grant a motion *in limine* to exclude "any kind of
22 evidence which could be objected to at trial, either as irrelevant or subject to discretionary
23 exclusion as unduly prejudicial." (*Clemens v. American Warranty Corp.*, *supra*, at 451; *Peat,*
24 *Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.)

25 *Evidence Code* section 350 states that "(n)o evidence is admissible except relevant
26 evidence." Relevant evidence is defined by Evidence Code Section 210 as "having any tendency
27 in reason to prove or disprove any disputed fact that is of consequence to the determination of
28 the action." (See *People v. Kelly* (1992) 1 Cal.4th 495, 523.)

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The court has no discretion to admit irrelevant evidence. (*People v. Keating* (1981) 118 Cal.App.3d 172, 179-80.)

III. CONCLUSION

Based on the foregoing, Respondent Malkenhorst respectfully requests that this Court bar the use of CalPERS Exhibits 1 through 88, and CalPERS' witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker, Chris Wall, and Joaquin Leon, to the extent those documents or that testimony lacks foundation, lacks relevance, constitutes hearsay, or contains improper opinion or conclusion.

Respectfully submitted,

Dated: May 29, 2014

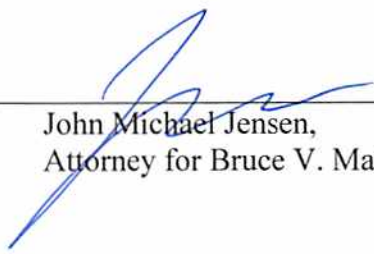
By: 
John Michael Jensen,
Attorney for Bruce V. Malkenhorst, Sr.

EXHIBIT 1

In re Final Compensation of Bruce Malkenhorst, Sr.
 Case No. 2012-0671; OAH No. 2013080917

CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
1	Statement of Issues	13	CalPERS' Statement of Issues dated 9/26/13 signed by Karen DeFrank, Chief, Customer Account Services Division	Jurisdictional	CalPERS should be proceeding by <i>Accusation</i> , not <i>Statement of Issues</i> . The <i>Statement of Issues</i> is mainly limited to quotes from allegedly applicable law and fails to adequately disclose the facts CalPERS intends to prove to justify application of that law.	
2	Notice of Hearing	4	CalPERS' Notice of Hearing dated 4/21/14	Jurisdictional	No objection other than that Malkenhorst reserves his right to a full hearing and does not agree to be bound to the five days currently scheduled.	
3	5/25/12 CalPERS' Preliminary Determination Letter to Mr. Malkenhorst	8	5/25/12 Letter from Tomi Jimenez, Manager in Compensation and Employer Review at CalPERS, to Bruce V. Malkenhorst, informing him of CalPERS' decision to make a downward adjustment to his retirement allowance	Jurisdictional Multiple positions Overtime Longevity pay	Objection to the extent the document is relied on to prove "multiple positions, overtime, longevity pay". The document fails to adequately disclose the facts CalPERS intends to prove to justify the application of the PERL to the facts of Malkenhorst's employment.	

In re Final Compensation of Bruce Malkenhorst, Sr.
 Case No. 2012-0671; OAH No. 2013080917

CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
4	10/22/12 CalPERS' Final Determination Letter to Mr. Jensen	9	10/22/12 Letter from Tomi Jimenez, Manager in Compensation and Employer Review at CalPERS, to John Jensen, informing him of CalPERS' final decision to make a downward adjustment to Mr. Malkenhorst's retirement allowance	Jurisdictional Multiple positions Overtime Longevity pay	Objection to the extent the document is relied on to prove "multiple positions, overtime, longevity pay". The document fails to adequately disclose the facts CalPERS intends to prove to justify the application of the PERL to the facts of Malkenhorst's employment.	
5	Bruce Malkenhorst's Appeal	60	Bruce V. Malkenhorst Sr.'s Appeal of CalPERS' Denial of Benefits dated 12/21/12	Jurisdictional	Objection to the extent Malkenhorst does not consent or submit to the administrative process, including as argued in his motion to dismiss and supporting papers.	
6	Contract between City of Vernon and CalPERS and related amendments	106	10/23/48 Contract between the City Council of the City of Vernon and the Board of Administration of CalPERS and amendments thereto	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

In re Final Compensation of Bruce Malkenhorst, Sr.
 Case No. 2012-0671; OAH No. 2013080917

CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
7	7/1/77 Finance Committee Meeting Minutes		7/1/77 Finance Committee Meeting Minutes appointing Mr. Malkenhorst to City Clerk/Finance Director	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
8	7/24/78 City Council Meeting Minutes	2	7/24/78 City Council meeting minutes appointing Mr. Malkenhorst to City Treasurer	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
9	Ordinance 883	15	City Council Ordinance adopted on 8/1/78 creating the City Administrator position and appointing Mr. Malkenhorst as City Administrator	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

In re Final Compensation of Bruce Malkenhorst, Sr.
 Case No. 2012-0671; OAH No. 2013080917

CaPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
10	Vernon City Code Sections 2.7-2.19	9	Vernon City Code Article II City Administrator and Article IV Purchasing System	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
11	Resolution 4633	13	Resolution effective 3/1/79 fixing the compensation of certain employees of Vernon and listing the Step 2 salary of the City Administrator/ City Clerk at \$3,680 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
12	Resolution 4669	24	Resolution effective 8/26/79 fixing the compensation of certain employees and listing the Step 2 salary of the City Administrator/ City Clerk at \$3,937 per	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple	

In re Final Compensation of Bruce Malkenhorst, Sr.
Case No. 2012-0671; OAH No. 2013080917

CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also Obj. # 1 and # 2 in footnote)	<u>Vernon Objections</u>
13	Resolution 4742	26	month Resolution effective 7/1/80 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator/City Clerk as \$4,547 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
14	Resolution 4803	6	Resolution adopted by the City Council of the City of Vernon on 5/5/81 creating the position of CEO of the Light & Power Department and appointing the City Administrator/ City Clerk to serve in that role	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
15	Resolution 4810	3	Resolution adopted by the City Council on 6/2/81 reaffirming Mr. Malkenhorst's appointment as City Treasurer	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the	

In re Final Compensation of Bruce Malkenhorst, Sr.
 Case No. 2012-0671; OAH No. 2013080917

CaPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections (See also Obj #1 and #2 in footnote)</u>	<u>Vernon Objections</u>
16	Resolution 4817	37	Resolution effective 7/1/81 fixing the compensation of certain employees, listing the Step 1 salary of the City Administrator/City Clerk at \$5,373 per month and recognizing the position of CEO of the Light & Power Department	Multiple positions Overtime	document to "prove" issues of "multiple positions, overtime, longevity pay". No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
17	Resolution 4918	37	Resolution effective 7/1/82 fixing the compensation of certain employees and listing the salary of the City Administrator/City Clerk at \$6,235 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
18	Resolution 4853	20	Resolution of City Council effective 1/5/82 approving	Multiple positions Overtime	No objection to the introduction of the document, but	

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
19	Resolution 5018	33	Employment Agreement of Malkenhorst		Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
			Resolution effective 7/1/83 fixing the compensation of certain employees and listing the salary of the City Administrator/ City Clerk as \$7,105 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
20	Resolution 5120	41	Resolution effective 7/1/84 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$7,333 per month and appointing the City Administrator/City Clerk as the Purchasing	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also Obj. # 1 and # 2 in footnote)	<u>Vernon Objections</u>
21	Resolution 5147	3	Agent Resolution effective 10/28/84 providing a merit increase for the salary of City Administrator/ City Clerk to \$7,773 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
22	Resolution 5197	39	Resolution effective 7/1/85 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$8,239 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
23	Resolution 5226	3	Resolution effective 10/27/85 providing a merit increase for the salary of City Administrator/ City Clerk to \$8,733 per month	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple	

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CalPERS' Final Exhibit List

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24	Resolution 5294	43	Resolution effective 7/1/86 fixing the compensation of certain employees and listing the salary of the City Administrator/ City Clerk at \$9,606 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
25	Resolution 5337	4	Resolution effective 10/12/86 providing a merit increase for the salary of City Administrator/ City Clerk to \$10,374 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
26	Resolution 5405	44	Resolution effective 7/1/87 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove"	

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CaPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
27	Resolution 5439	5	Clerk as \$11,204 per month Resolution effective 10/13/87 providing a merit increase for the salary of City Administrator/ City Clerk to \$12,333 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
28	Resolution 5531	47	Resolution effective 7/1/87 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$12,950 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
29	Vernon City Charter	33	City Charter instituted on 3/22/88 that sets forth the duties of officers of the City of Vernon	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the	

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30	Resolution 5564	5	Resolution effective 10/24/88 providing a merit increase for the salary of City Administrator/ City Clerk to \$14,213 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
31	Resolution RA-9		12/13/88 Resolution of the Redevelopment Agency of the City of Vernon appointing Mr. Malkenhorst as the Executive Director and Secretary of the Redevelopment Agency	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
32	Resolution IDA-1	3	12/7/93 Resolution of the Industrial Development Authority appointing Mr. Malkenhorst as the	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to	

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CalPERS' Final Exhibit List

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33	Resolution 5641	46	Executive Director, Secretary and Treasurer of the Industrial Development Authority Resolution effective 7/1/89 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$15,066 per month	Multiple positions Overtime Longevity pay	CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay". No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
34	Resolution 5682	7	Resolution effective 10/17/89 providing a merit increase for the salary of City Administrator/ City Clerk to \$15,819 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
35	Resolution 5780	47	Resolution effective 7/1/90 fixing the compensation of certain employees and	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the	

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CaIPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also Obj. # 1 and # 2 in footnote)	<u>Vernon Objections</u>
36	Resolution 5834	6	listing the Step 1 salary of the City Administrator /City Clerk as \$16,926 per month Resolution effective 10/1/90 providing a merit increase for the salary of City Administrator/ City Clerk to \$17,603 per month	Multiple positions Overtime Longevity pay	right to object to CaIPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay". No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaIPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
37	Resolution 5944	44	Resolution effective 7/1/91 fixing the compensation of certain employees and appointing the City Administrator/City Clerk as the CEO of the Gas Municipal Utility Department	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaIPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
38	Resolution 6010	5	Resolution effective 10/6/91 providing a merit increase for the	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but	

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CaPERS' Final Exhibit List

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39	Resolution 6123	67	salary of City Administrator/ City Clerk to \$19,405 per month Resolution effective 7/1/92 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$20,181 per month	Multiple positions Overtime Longevity pay	Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay". No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
40	Resolution 6184	8	Resolution effective 11/1/92 providing a merit increase for the salary of City Administrator/ City Clerk to \$22,537 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
41	Resolution 6346	5	Resolution effective 10/17/93 providing a	Multiple positions Overtime	No objection to the introduction of the	

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42	Resolution 6467	50	merit increase for the salary of City Administrator/ City Clerk to \$23,037 per month	Longevity pay	document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
43	Resolution 6571	5	Resolution effective 7/1/94 fixing the compensation of certain employees	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
44	1/12/95 Letter from	1	Letter from Rebecca	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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	CalPERS to the City of Vernon		Bolin, Compensation Review Section of CalPERS, to Joan Francone, Personnel Manager of the City of Vernon, requesting documentation related to Mr. Malkenhorst	Overtime	introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
45	2/3/95 Follow-up Letter from CalPERS to the City of Vernon	2	Letter from Rebecca Bolin, Compensation Review Section of CalPERS to Joan Francone, Personnel Manager of the City of Vernon, regarding request for documentation related to Mr. Malkenhorst	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
46	5/24/95 Letter from the City of Vernon to CalPERS	44	Letter from Gloria Orosco, Chief Deputy Clerk of the City of Vernon, to Merlanya Yee, Compensation Review Section of CalPERS, identifying the positions in which Mr. Malkenhorst served and attaching	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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47	6/2/95 Letter from CalPERS to the City of Vernon	1	documentation related to Mr. Malkenhorst Letter from Merlayna Yee, Compensation Review Section of CalPERS, to Gloria Orosco, Chief Deputy Clerk of the City of Vernon, indicating other positions as overtime and requesting a duty statement for City Administrator/City Clerk, pay schedules for other positions and a notation of the percentage of time spent on each position	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
48	3/13/96 Letter from CalPERS to the City of Vernon	1	Follow-up letter from Merlayna Yee, Compensation Review Section of CalPERS to Gloria Orosco, Chief Deputy Clerk of the City of Vernon, requesting a duty statement for City Administrator/City	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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49	Resolution 6651	71	Clerk, pay scales/schedules for other positions and notation of the percentage of time spent on each position Resolution effective 7/1/95 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$25,928 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
50	Resolution 6704	5	Resolution effective 10/15/95 providing a merit increase for the salary of City Administrator/ City Clerk to \$26,228 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
51	Resolution 6811	75	Resolution effective 7/1/96 fixing the compensation of	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but	

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52	Resolution 6887	4	certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$26,228 per month Resolution effective 11/10/96 providing a merit increase for the salary of City Administrator/ City Clerk to \$27,399 per month	Multiple positions Overtime Longevity pay	Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay". No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
53	Resolution 6976	75	Resolution effective 7/1/97 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$28,084 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
54	Resolution 7165	78	Resolution effective 7/1/98 fixing the	Multiple positions Overtime	No objection to the introduction of the	

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			compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$28,716 per month	Longevity pay	document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
55	Resolution 7359	76	Resolution effective 7/1/99 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$29,577 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
56	Resolution 7534	4	Resolution effective 11/21/99 providing a merit increase for the salary of City Administrator/ City Clerk to \$30,077 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
57	Resolution 7562	76	Resolution effective	Multiple positions	No objection to the	No objection to the

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			7/1/00 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$31,055 per month	Overtime Longevity pay	introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
58	Resolution 7796	75	Resolution effective 7/1/01 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$31,987 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
59	Resolution 7869	5	Resolution effective 10/1/01 providing a merit increase for the salary of City Administrator/ City Clerk to \$32,307 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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60	Resolution 8007	111	Resolution effective 7/1/02 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$33,276 per month	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
61	7/23/02 Fax from CalPERS to the City of Vernon	1	Facsimile from Alinda Heringer, Actuarial & Employer Services of CalPERS, to Payroll at the City of Vernon requesting salary schedule and other documentation to substantiate Mr. Malkenhorst's salary	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
62	7/25/02 Memo from the City of Vernon to CalPERS	1	7/25/02 Memorandum from Eric Fresch of the City of Vernon to Alinda Heringer at CalPERS attaching salary information	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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63	Resolution 8228	83	Resolution effective 7/1/03 fixing the compensation of certain employees and listing the Step 1 salary of the City Administrator /City Clerk as \$34,274 per month	Multiple positions Overtime Longevity pay	longevity pay". Also object in that CaPERS has not identified the documents	
64	Resolution 001	3	12/17/03 Resolution of the Board of Directors of the Vernon Historic Preservation Society appointing Mr. Malkenhorst as the Executive Director of the Vernon Historic Preservation Society	Multiple positions Overtime	No objection to the introduction of the document, but Malkenhorst reserves the right to object to CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
65	Resolution 8473	84	Resolution effective 7/1/04 fixing the compensation of certain employees and listing the Step 1 salary	Multiple positions Overtime Longevity pay	No objection to the introduction of the document, but Malkenhorst reserves the right to object to	

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66	9/3/04 Report from the City of Vernon Legal Counsel's Office	87	of the City Administrator /City Clerk as \$35,302 per month 9/3/04 Report on City Administrator's Misappropriation of Public Funds Through the Misuse of the City Petty Cash and the Credit Card Processes	Multiple positions Overtime	CaPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay". Objection, irrelevant, immaterial, lacks foundation, lacks authentication, hearsay, incompetent, not "original", incomplete, more prejudicial than probative.	
67	2004 Payroll Registers	9	City of Vernon ADP Payroll Registers dated 2004 for Mr. Malkenhorst	Multiple positions Overtime Longevity	Objection, lacks foundation, lacks authentication, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, not best evidence, "genuine dispute" exists concerning the material terms of the writing, confusing or misleading opinion or conclusion of the witness, no affidavit.	
68	2005 Payroll Registers	15	City of Vernon ADP Payroll Registers dated	Multiple positions Overtime	Objection, lacks foundation, lacks	

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69	6/16/05 Fax from CalPERS to the City of Vernon	2	Facsimile from Alinda Heringer, Actuarial & Employer Services at CalPERS, to Payroll at the City of Vernon requesting salary schedule for Mr. Malkenhorst and identification of base pay and longevity pay	Longevity	authentication, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, best evidence, "genuine dispute" exists concerning the material terms of the writing, confusing or misleading opinion or conclusion of the witness, no affidavit.	
70	6/21/05 Fax from CalPERS to the City of Vernon	1	Facsimile from Alinda Heringer, Actuarial & Employer Services at CalPERS, to Martha V. at the City of Vernon requesting 2003 and 2004 salary schedule	Multiple positions Overtime	Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
71	6/21/05 Fax from the City of Vernon to CalPERS	18	for Mr. Malkenhorst, a job duties statement for City Administrator, a MOU for longevity and an organization chart 6/21/05 Facsimile from Martha Valenzuela, Finance Office Manager at the City of Vernon, to Alinda Heringer at CalPERS attaching partial resolutions and salary schedules and organization chart	Multiple positions Overtime	Objection, inadmissible opinion of lay witness, confusing or misleading. Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
72	6/21/05 Organization Chart	1	Organization Chart for the City of Vernon created on 3/9/04 and updated on 6/21/05	Multiple positions Overtime	Objection, lacks foundation, lacks authentication, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, "genuine dispute" exists. Concerning the material terms of the writing, confusing or misleading opinion or conclusion of the witness, no affidavit.	
73	Resolution 8789	3	Resolution approved on	Multiple positions	Objection, irrelevant,	

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
			6/29/05 signed by Mr. Malkenhorst as Acting City Clerk	Overtime	immaterial, the signature on the document is not that of Malkenhorst. but that of his son.	
74	CalPERS' Spreadsheet reporting payrate	17	CalPERS' spreadsheet listing payroll and payrate information for Mr. Malkenhorst from 7/10/82 to 7/31/05	Multiple positions Overtime Longevity pay	Objection, lacks foundation, is a summary, lacks authentication, is not documentary evidence, demonstrative, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, opinion or conclusion of the witness, inadmissible opinion of lay witness,	
75	Resolution 8780	29	Resolution effective 7/1/05 fixing the compensation for certain employees listing the Step 1 salary of Acting City Clerk as \$7,875 per month	Multiple positions Overtime	Objection, irrelevant, immaterial, document applies to time period after Malkenhorst's retirement and is irrelevant to the issues herein.	
76	Resolution 9089	80	Resolution effective 7/1/06 fixing the compensation of certain employees	Multiple positions Overtime	Objection, irrelevant, immaterial, document applies to time period after Malkenhorst's retirement and is irrelevant to the issues	

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CaPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote)</i> herein.	<u>Vernon Objections</u>
77	Resolution 9129	7	Resolution approved on 9/20/06 amending the longevity provisions in Resolution 9089 for City Administrator and department heads	Longevity pay	Objection, irrelevant, immaterial	
78	Resolution 9342	71	Resolution effective 7/8/07 fixing the compensation of certain employees	Multiple positions Overtime Longevity pay	Objection, irrelevant, immaterial, document applies to time period after Malkenhorst's retirement and is irrelevant to the issues herein.	
79	Notice of Proposed Regulatory Action	5	Title 2. CaPERS' Notice of Proposed Regulatory Action related to the addition of section 570.5 and amendment to 571(b)	Multiple positions Overtime Longevity pay	Objection, irrelevant, immaterial, objection to the extent CaPERS seeks authority to apply regulations that did not take effect until after Malkenhorst's retirement; irrelevant to the issues herein.	
80	Correspondence between the City of Vernon and CaPERS	9	Correspondence between Chris Wall, auditor from CaPERS, and Joaquin Leon, City Treasurer of the City of Vernon, during the	Payroll register Multiple positions Overtime Longevity	Objection, lacks foundation, lacks authentication, not documentary evidence, demonstrative, prepared in anticipation of litigation,	

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
81	City of Vernon's List of Department Codes	1	2011 Public Agency Review Process	Multiple positions Overtime	hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, opinion or conclusion of the witness. No objection to the introduction of the document, but Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
82	City of Vernon Spreadsheet - Multiple Positions Held Concurrently	2	Schedule dated 2/15/11 submitted by the City of Vernon to CalPERS listing all then-current and past employees that held multiple concurrent positions	Multiple positions Overtime	Objection, lacks foundation, lacks authentication, not documentary evidence, demonstrative, prepared in anticipation of litigation, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, opinion or conclusion of the witness, inadmissible opinion of lay witness,	
83	3/14/11 Letter from City	13	Letter from Joaquin	Multiple positions	Objection, lacks	

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
	of Vernon to CalPERS with attached charts		Leon, Deputy City Treasurer of the City of Vernon, to Chris Wall, Field Auditor at CalPERS, attaching charts indicating what percentage of time current employees spent performing each of their respective positions	Overtime	foundation, lacks authentication, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, opinion or conclusion of the witness, "genuine dispute" exists concerning the material terms of the writing.	
84	5/26/11 Minute Order	4	5/26/11 Minute Order from The People of the State of California v. Bruce Malkenhorst (BA312388) in which Malkenhorst pleads to felony	Impeachment	Objection, irrelevant, incomplete, <i>Evidence Code</i> section 352, more prejudicial than probative, not certified.	
85	Spreadsheet prepared by Chris Wall	1	Spreadsheet listing Mr. Malkenhorst's various pay increases and related resolutions	Multiple positions Overtime Longevity pay	Objection, lacks foundation, lacks authentication, hearsay, incompetent, not documentary evidence, demonstrative, summary prepared in anticipation of litigation, not "original", incomplete, fails <i>Evidence Code</i> section 1552, opinion or conclusion of	

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CalPERS' Final Exhibit List

<u>Exhibit No.</u>	<u>Description</u>	<u>Pg. No.</u>	<u>Synopsis</u>	<u>Offered to Prove</u>	<u>Malkenhorst Objections*</u> (See also <i>Obj. # 1 and # 2 in footnote</i>)	<u>Vernon Objections</u>
86	4/27/12 Public Agency Review Report	99	CalPERS' Office of Audit Services Final Public Agency Review Report including appendices	Multiple positions Overtime Longevity pay	the witness. Objection, lacks foundation, summary, lacks authentication, hearsay, incompetent, not "original", incomplete, fails <i>Evidence Code</i> section 1552, opinion or conclusion of the witness.	
87	5/25/12 CalPERS' Preliminary Determination letter to Vernon	2	5/25/12 Letter from Tomi Jimenez, Manager in Compensation and Employer Review at CalPERS, to Joaquin Leon at the City of Vernon informing them of CalPERS' Public Agency Review and adjustment to Mr. Malkenhorst's retirement allowance	Multiple positions Overtime Longevity pay	Objection, hearsay, opinion or conclusion of the witness, Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	
88	Ordinance 1035	9	Ordinance dated 11/21/95 amending the Code of the City of Vernon relating to City administration	Multiple positions Overtime Longevity pay	Malkenhorst reserves the right to object to CalPERS' use of the document to "prove" issues of "multiple positions, overtime, longevity pay".	

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CalPERS' Final Exhibit List

- **FOOTNOTE:** In addition, Malкенhorst asserts the following two objections.
- **Objection 1.** Malкенhorst asserts continuing objections to the CalPERS-authored documents and the documents authored after July 1, 2005 (i) on the grounds they are hearsay and offered for the truth of the matters asserted in statements, facts, or conclusions, and (2) on grounds of (i) relevance, (ii) incompetence; (iii) lack of foundation; and (iv) inappropriate opinion or conclusion. As an illustration and not limitation, Malкенhorst objects to the admission of CalPERS' documents to "prove" issues of "multiple positions, overtime, longevity pay".
- **Objection 2.** Malкенhorst asserts a continuing objection to the admission of part of a document, and requires the whole of that document to be put into evidence. (*Evidence Code* section 356.) Malкенhorst objects to the incompleteness of a series of documents being offered without other documents in the series being offered and admitted. (*Evidence Code* section 356.)

EXHIBIT 2

In re Final Compensation of Bruce Malkenhorst, Sr.
 Case No. 2012-0671; OAH No. 2013080917

CalPERS' Final Witness List

<u>Witness</u>	<u>Percipient/ Expert</u>	<u>Synopsis of expected testimony</u>	<u>Malkenhorst Objections</u>	<u>Vernon Objections</u>
Tomi Jimenez	Percipient	The witness, who works in CalPERS' Customer Account Services Division, will address CalPERS' 2012 determination to reduce Mr. Malkenhorst's retirement benefit. The witness will discuss: the statutes and regulations relevant to Mr. Malkenhorst's final compensation; CalPERS' conclusion that the reduction of Mr. Malkenhorst's final compensation was necessary under the law; and CalPERS' determination of Mr. Malkenhorst's benefit.	See Objections Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 below.	
Lolita Lueras	Percipient	The witness, who works in CalPERS' Customer Account Services Division, will address CalPERS' 2012 determination to reduce Mr. Malkenhorst's retirement benefit. The witness will discuss: the statutes and regulations relevant to Mr. Malkenhorst's final compensation; CalPERS' conclusion that the reduction of Mr. Malkenhorst's final compensation was necessary under the law; and CalPERS' determination of Mr. Malkenhorst's benefit.	See Objections Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 below.	
Chris Wall	Percipient	The witness, who works in CalPERS' Office of Audit Services, will testify concerning the 2010-2012 Public Agency Review of the City of Vernon, particularly as it pertains to Mr. Malkenhorst. The witness will address CalPERS' efforts to obtain from the City of Vernon documents and information substantiating the final compensation of Mr. Malkenhorst, including documents and information from which CalPERS might derive Mr. Malkenhorst's payrate, overtime, and available longevity pay. The witness will testify that the documents and information produced by the City of Vernon were insufficient to support the final compensation figure initially reported for Mr. Malkenhorst.	See Objections Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 below.	

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CaPERS' Final Witness List

Margaret Junker	Percipient	<p>The witness, who works in CaPERS' Office of Audit Services, will testify concerning the 2010-2012 Public Agency Review of the City of Vernon, particularly as it pertains to Mr. Malkenhorst. The witness will address CaPERS' efforts to obtain from the City of Vernon documents and information substantiating the final compensation of Mr. Malkenhorst, including documents and information from which CaPERS might derive Mr. Malkenhorst's payrate, overtime, and available longevity pay. The witness will testify that the documents and information produced by the City of Vernon were insufficient to support the final compensation figure initially reported for Mr. Malkenhorst.</p>	<p>See Objections Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 below.</p>
City of Vernon Employee - Joaquin Leon	Percipient	<p>The witness will discuss the efforts made by the City of Vernon to provide the information and documents sought in connection with the 2010-2012 Public Agency Review, specifically including the available and unavailable documents and information relative to Mr. Malkenhorst's employment with the City of Vernon and final compensation.</p>	<p>See Objections Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 below. Malkenhorst also objects to the extent the witness is being offered to testify about occurrences or matters which happened or did not happen during the time Malkenhorst was employed by the City of Vernon when the witness was not himself present at Vernon, or to offer testimony about his interpretation of what is stated in resolutions, ordinances, pay schedules or other official documents of the City of Vernon.</p>

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CalPERS' Final Witness List

Objection #1: Objection, witness is not a "percipient witness". The witness was neither employed by nor present at the City of Vernon during Malckenhorst's employment. The witness did not have firsthand knowledge about occurrences or matters which happened or did not happen during the time Malckenhorst was employed by the City of Vernon.

Objection #2: CalPERS seeks to admit improper opinion evidence by seeking to have the lay witness testify about inferences or conclusions the witness draws from his or her observations.

Objection #3: CalPERS offers the witness for improper purposes of giving an expert opinion. Expert opinions must be based upon reliable matter (whether or not admissible) that may be reasonably used in forming an opinion on the subject matter of the witness' testimony. In addition, the witness' opinions appear to be based in significant part on matters that are not proper basis for the opinions offered. Expert witness opinion may be based solely on the witness' special knowledge, skill, experience, training and education. The opinion must be based on reliable matter. (*Evidence Code* section 801.) Experts may not rely on *speculation or conjecture*. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516.)

Objection #4: CalPERS offers the witness for improper lay opinion. Lay witnesses may not give opinions going beyond the matters personally observed. (See *Evidence Code*, §800(a).) CalPERS is not offering the witness for opinions that are *rationaly based on the perception* of the witness. "Perception" is the process by which *knowledge* is acquired *through one's senses* (i.e., matters seen, heard, smelled, etc.). Lay opinion is admissible only if based on matters *personally observed* by the witness. Where a witness *can* adequately describe his or her observations, opinions are not allowed. Similarly, lay witnesses may not express opinions on matters not within common knowledge or experience.

Objection #5: Improper Speculative Opinion. Lay witnesses may not give conjectural lay opinion.

Objection #6: CalPERS offers the witness for improper purposes of offering a legal conclusion.

Objection #7: Improper Expert Opinion About the Law. The proper interpretation of a deed, contract, statute, etc. is an *issue of law* for the court to determine. Expert testimony is therefore inadmissible. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) The court may "receive expert factual opinion to inform its decision on these issues . . . but in no event may it receive expert evidence on the ultimate legal issues." (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472-473.)

In re Final Compensation of Bruce Malckenhorst, Sr.
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CalPERS' Final Witness List

Objection #8: Improper Basis for Opinion. CalPERS witness or expert is basing his or her opinion on matters not reasonably relied on by other experts in the field, including improper methodology. "The court may, and upon objection shall, exclude ... an opinion ... based in whole or in significant part on matter that is not a proper basis for such an opinion." (*Evidence Code*, §803.)

Objection #9: Request for Court to Determine Reasonableness of Matters Relied On By CalPERS' Witness, Offer of Proof. We request that the court order CalPERS to provide an offer of proof identifying with greater specificity the sources of information reasonably relied on by the expert. What is "reasonable" for an expert to rely upon in forming an opinion is a foundational issue determined by the court. (See *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851.)

Objection #10: Hearsay. The witness seeks to offer hearsay or reiterate out of court statements for the truth of the matter asserted. The witness or expert witness is relying on inadmissible hearsay.

Objection #11: Improper Interpretation of Policies, and Procedures. The conclusions and determinations for which CalPERS is offering the witness can only be reached by applying CalPERS' governing statutes and regulations to factual matters. Testimony should be limited to identification of the documents containing such policies and procedures upon which the witness relied and what steps the witness took when following CalPERS' policies and procedures.

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[PROPOSED] ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that CalPERS is barred from introducing any and all of its proposed Exhibits 1 through 88, and the testimony of its proposed witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker, Chris Wall, and Joaquin Leon, to the extent those documents or that testimony lacks foundation, lacks relevance, constitutes hearsay, or contains improper opinion or conclusion.

IT IS HEREBY FURTHER ORDERED that CalPERS, CalPERS' counsel and CalPERS' witnesses shall:

1. Not make any reference to the fact that this motion has been filed; and
2. Warn and caution each of CalPERS' witnesses to strictly follow the same instructions.

Dated: _____

Administrative Law Judge of the
Office of Administrative Hearings

PROOF OF SERVICE

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 May 29, 2014, I served the following document(s) by the method indicated below:

- 1) Notice and Motion In Limine to Exclude All Evidence and Testimony Subject to Judicial Estoppel by Prior Filings In the 2005-2006 Administrative Process; Memorandum of Points and Authorities; [Proposed] Order
- 2) Notice and Motion In Limine to Exclude All Evidence of Prior Felony Conviction; Memorandum of Points and Authorities; [Proposed] Order
- 3) Notice and Motion for Leave to Take Records Deposition of ADP, Aka Automatic Data Processing, Inc.; Memorandum of Points and Authorities; [Proposed] Order
- 4) Notice and Motion RE CalPERS' Alleged Right to Recoup Past "Pension Overpayments" from Respondent, and if So, the time period for which such "Overpayments" may be sought; Memorandum of Points and Authorities; [Proposed] Order
- 5) Notice and Motion in Limine to Exclude that would Support a Reduction in Malkenhorst's Pension; Memorandum of Points and Authorities; [Proposed] Order
- 6) Notice and Motion In Limine to Exclude All Evidence and Testimony that Violates the Parol Evidence Rule; Memorandum of Points and Authorities; [Proposed] Order
- 7) Notice and Motion in Limine to Restrict the Testimony of CalPERS Witnesses Tomi Jimenez, Lolita Lueras, Margaret Junker and Chris Wall; Memorandum of Points and Authorities; [Proposed] Order
- 8) Notice and Motion in Limine to Restrict the Testimony of CalPERS Witness Joaquin Leon; Memorandum of Points and Authorities; [Proposed] Order
- 9) Notice and Motion in Limine to Admit Court Pleadings and Records; Memorandum of Points and Authorities; [Proposed] Order
- 10) Notice and Motion in Limine to Exclude CalPERS' Proposed Exhibit 66, 9/3/04 "Report On City Administrator's Misappropriation of Public Funds Through the Misuse of the

