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**MOTION IN LIMINE NO. 11 SHOULD BE DENIED**

This administrative proceeding concerns the determination of Malkenhorst's retirement allowance under the Public Employees' Retirement Law ("the PERL," Government Code section 20000, et seq.). CalPERS initially determined Malkenhorst's retirement allowance in 2006, but subsequently discovered in 2012 that its initial determination failed to meet statutory requirements. CalPERS then corrected its mistake as required by the PERL. (Govt. Code § 20160(b) ["[T]he board shall correct all actions taken as a result of errors or omissions of ... this system."]; see also, *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, 27 [statutory history of Section 20160 indicates that "shall" means that CalPERS has a mandatory duty to act.]

In his Motion in Limine No. 11, Malkenhorst argues that CalPERS should be judicially estopped from introducing evidence "inconsistent" with its initial determination in 2006. Judicial estoppel is a discretionary, equitable doctrine that "prohibits a party from asserting a position in a legal proceeding that is contrary to a position he or she successfully asserted in the same or some earlier proceeding." (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121.) Judicial estoppel cannot apply unless there was an earlier legal proceeding in which the party to be estopped "was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." (*Id.*) Judicial estoppel also does not apply when the first position was asserted by mistake. (*Id.*)

There are several reasons that judicial estoppel does not apply to CalPERS' recalculation of Malkenhorst's retirement allowance. Many of those reasons are described in CalPERS' "OPPOSITION TO MALKENHORST'S MOTION REGARDING COLLATERAL ESTOPPEL, RES JUDICATA, ISSUE PRECLUSION, AND CLAIM PRECLUSION," (filed May 16, 2014), and CalPERS adopts here its prior Opposition. In summary, judicial estoppel cannot apply here because there has never been a legal proceeding where Malkenhorst's retirement allowance has been litigated. In 2005 and 2006, CalPERS decided not to litigate the issue and refrained from filing a Statement of Issues. (Tit. 2, Cal. Code Regs. §§ 555.2, 555.4.)

1 And because there was no Statement of Issues, there was no judge, no evidence, no motions, no  
2 argument, no hearing, and no judicial adoption of CalPERS' initial determination.

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4 Judicial estoppel does not apply for a second reason: CalPERS' initial determination  
5 was the result of a mistake that, by law, must be corrected. There is no authority for applying  
6 an equitable doctrine to prevent a public entity from carrying out its legal, statutory obligations.

7 For the reasons set forth above, the Motion should be denied.

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9 DATED: June 9, 2014

STEPTOE & JOHNSON LLP

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12 By: \_\_\_\_\_

Jason Levin

13 Attorneys for Complainant CalPERS  
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