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9 Attorneys for  
10 California Public Employees'  
11 Retirement System (CalPERS)

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

15 In the Matter of the Calculation of Final ) **CASE NO. 2012-0671**  
16 Compensation of: )  
17 ) **OAH NO. 2013080917**  
18 BRUCE MALKENHORST, SR., )  
19 Respondent, ) **CALPERS OPPOSITION TO**  
20 and. ) **MALKENHORST'S MOTION IN**  
21 CITY OF VERNON, ) **LIMINE NO. 12**  
22 ) **Hearing: June 13, 2014, 9:00 a.m.**  
23 Respondent. )  
24 )  
25 )  
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27 )  
28 )

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2 **MOTION IN LIMINE NO. 12 SHOULD BE DENIED**

3 This administrative proceeding concerns the determination of Malkenhorst's retirement  
4 allowance under the Public Employees' Retirement Law (Government Code section 20000, et  
5 seq.). CalPERS recently recalculated Malkenhorst's retirement allowance to correct an error,  
6 and CalPERS will prove that the recalculation is consistent with the PERL.

7 Malkenhorst argues that even if the recalculation is proper, CalPERS does not have the  
8 authority to recoup past overpayments. This same argument was the subject of CalPERS'  
9 "OPPOSITION TO MALKENHORST'S MOTION ON STATUTE OF LIMITATIONS AND  
10 LACHES," filed May 16, 2014. CalPERS adopts here the argument made in that Opposition,  
11 which is summarized below.

12 The PERL itself describes two methods by which CalPERS may recoup overpayments  
13 from members like Malkenhorst. First, CalPERS may elect to file a civil lawsuit to recover  
14 overpayments, subject to a three-year limitations period. (Gov. Code § 20164(b) ["For the  
15 purposes of payments into or out of the retirement fund for adjustment of errors or omissions  
16 ... the period of limitation of actions shall be three years..."].) Second, CalPERS may recover  
17 overpayments through the process of administrative adjustment, modifying a member's  
18 allowance "so that the retired person ... will receive the actuarial equivalent of the allowance to  
19 which the member is entitled." (Gov. Code § 20163(a).) CalPERS is directed to make  
20 adjustments so that "the status, rights, and obligations of all parties ... are adjusted to be the  
21 same that they would have been if the act that would have been taken, but for the error or  
22 omission, was taken at the proper time." (Gov. Code § 20160(e).)

23  
24 Malkenhorst argues that CalPERS does not have the authority to recoup past  
25 overpayments without even addressing the PERL statutes that indicate otherwise. Instead,  
26 Malkenhorst cites *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224  
27 Cal.App.4th 210, claiming the court there, "ruled that [ ] CalPERS has no authority or right to  
28 reduce or change a benefit until a final determination has been made be either the CalPERS  
Board or by the appropriate court of law." (Motion, p. 4.) Malkenhorst misdescribes *Oakland*

1 *Police*, a decision that has nothing to do with CalPERS or the PERL – it analyzes retirement  
2 benefits under the Oakland City Charter. And even under the City Charter, recoupment of  
3 certain overpayments was permissible. The Court held that the retirement board was not,  
4 “barred by theories of equitable estoppel or laches from recouping benefits improperly paid to  
5 PFRS retirees....” (*City of Oakland v. Oakland Police and Fire Retirement System, supra*, 224  
6 Cal.App.4th at p. 249.)  
7

8 In separate briefing, the parties address Malkenhorst’s estoppel and laches arguments.  
9 Independent of those arguments, and in light of the PERL, Malkenhorst has no authority for his  
10 contention that CalPERS cannot recoup overpayments. Motion No. 12 should be denied.  
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12 DATED: June 9, 2014

STEPTOE & JOHNSON LLP

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15 By: \_\_\_\_\_  
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Jason Levin

17 Attorneys for Complainant CalPERS  
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