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

11 In the Matter of the Appeal of CalPERS'
12 Denial of Pension Benefits to Richard Lewis

13 RICHARD LEWIS and CITY OF SAN
14 BERNARDINO,

15 Appellants.

CALPERS CASE NO.: TBD

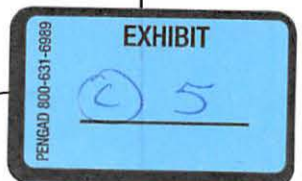
RICHARD LEWIS' APPEAL OF
CALPERS' DENIAL OF PENSION
BENEFITS

JURISDICTIONAL CHALLENGE FILED
CONCURRENTLY

17 Subject to the "Jurisdictional Challenge" filed prior to his appeal and with a reservation
18 of all rights of any kind or nature, Richard Lewis hereby conditionally submits this Appeal under
19 protest regarding the California Public Employees' Retirement System's ("CalPERS") attempted
20 denial of pension rights and benefits concerning his employment with the City of San Bernardino
21 Fire Department ("SBFD").

22 The jurisdictional challenge provides that foundational matters that must be first resolved
23 in order for CalPERS to proceed in a manner that does not accept the Battalion Chief pay as the
24 basis for Mr. Lewis' pension, but Mr. Lewis does not otherwise waive any right to provide a
25 defense.

26 CalPERS formally denied certain pension rights and benefits to Mr. Lewis pursuant to its
27 May 8, 2013 letter from Tomi Jimenez, Manager of the Compensation and Employer Review
28 section of CalPERS' Customer Account Services Division, addressed to Mr. Lewis and copied to



1 Georgia Chamberlain of the City of San Bernardino ("the City").

2 Although Mr. Lewis is not submitting and not consenting to jurisdiction, CalPERS' May
3 8, 2013 letter instructed Mr. Lewis to submit any Appeal of the denial within 30 days of the date
4 of the letter pursuant to *Government Code* section 20134 and *California Code of Regulations*
5 sections 555-555.4. Mr. Lewis then spoke with Nicole Horning of CalPERS' Compensation and
6 Employer Review section to request an extension of time to respond (including to file an appeal)
7 and was verbally granted an additional 30 days by Ms. Horning, making these responses and his
8 Appeal due on or before July 8, 2013. Expressly reserving all of his rights, Mr. Lewis timely
9 supplies these responses, the Jurisdictional Challenge¹ and this Appeal, by the July 8, 2013
10 deadline set by CalPERS.

11 Mr. Lewis reserves the right to amend, augment, and add to this appeal. He is currently
12 seeking additional information, including from CalPERS.

13 Mr. Lewis appeals all factual and legal bases for CalPERS' decision in this matter,
14 including but not limited to:

- 15 (i) Mr. Lewis' rights and entitlements establish his right to the higher pension;
- 16 (ii) CalPERS' refusal to accept the rights that accrued and benefited Mr. Lewis at
17 SBFD for purposes of calculating his pension benefit is without merit or legal
18 foundation;
- 19 (iii) CalPERS has no jurisdiction or authority to intervene in a manner that would not
20 provide Mr. Lewis the higher pension based on the Battalion Chief pay rate, as
21 CalPERS invades the City's charter autonomy, violates the Parol Evidence Rule,
22 and collaterally attacks the resolution of the civil service and discrimination
23 cases (see attached jurisdictional challenge);
- 24 (iv) CalPERS is applying statutes and regulations to this matter that do not apply
25 and/or interposes its own unsupported and unilateral definitions of terms in
26 those statutes and regulations which are contrary to their plain meaning and
27

28 ¹ See prior filed Jurisdictional Challenge.

- 1 intended to deny Mr. Lewis the benefit of the statutory and regulatory language;
- 2 (v) CalPERS is construing nomenclature in a narrow, inappropriate manner in
- 3 opposition to its intention and substance; CalPERS applies it contrary to
- 4 CalPERS' obligations to construe language in the favor of the Member;
- 5 (vi) CalPERS violates Mr. Lewis' due process, equal protection and other
- 6 constitutional rights;
- 7 (vii) CalPERS inappropriately denies Mr. Lewis a monthly pension calculated based
- 8 upon the \$14,687.68 monthly salary and special compensation earned by Mr.
- 9 Lewis during his highest year of employment at SBFD;
- 10 (viii) CalPERS correctly instructed the City six (6) years ago to report a portion of
- 11 Mr. Lewis' compensation at SBFD as "special compensation" and specifically as
- 12 "temporary upgrade pay" ;
- 13 (ix) CalPERS now, without additional facts or law, has changed its decision and
- 14 decided that the compensation does not qualify as "temporary upgrade pay", but
- 15 CalPERS is barred from renegeing on its prior representations by collateral
- 16 estoppel, *res judicata*, promissory estoppel, and equitable estoppel;
- 17 (x) If CalPERS incorrectly instructed the City six (6) years ago to report a portion of
- 18 Mr. Lewis' compensation at SBFD as "special compensation" and specifically as
- 19 "temporary upgrade pay", CalPERS is barred by equitable estoppel and
- 20 promissory estoppel;
- 21 (xi) In its denial letter, CalPERS wrongly interprets the term "work in an upgraded
- 22 position/classification" in *California Code of Regulations*, §571(a)(3) –
- 23 **PREMIUM PAY, Temporary Upgrade Pay** as it applies to Mr. Lewis'
- 24 compensation from SBFD;
- 25 (xii) In its denial letter, CalPERS wrongly interprets the term "limited duration" in
- 26 *California Code of Regulations*, §571(a)(3) – **PREMIUM PAY, Temporary**
- 27 **Upgrade Pay** as it applies to Mr. Lewis' compensation from SBFD;
- 28 (xiii) CalPERS' reasoning in reaching its conclusions lacks merit and legal foundation;

- 1 (xiv) CalPERS wrongly finds or utilizes various matters or facts underlying CalPERS'
2 determination that are taken out of context, wrongly applied, or without bases;
3 and
4 (xv) Mr. Lewis challenges all other legal issues involving CalPERS' determinations,
5 Mr. Lewis' employment with and compensation from SBF, the legal rights and
6 statutory scheme involved, and all matters associated with Mr. Lewis' CalPERS
7 pension rights and benefits.

8 In addition, Mr. Lewis asserts all affirmative defenses, including:

- 9 (xvi) CalPERS acts in excess of its jurisdiction when seeking to apply meanings to
10 applicable statutes and regulations that are not contained in those statutes and
11 regulations, and thus are void and without effect;
- 12 (xvii) Mr. Lewis asserts that CalPERS is equitably estopped from denying its prior
13 advice to the City and to Mr. Lewis that a portion of his compensation at SBF
14 should be reported as "special compensation" and specifically as "temporary
15 upgrade pay", and CalPERS must now credit that reported compensation and
16 utilize it as part of his pension calculation;
- 17 (xviii) Mr. Lewis asserts that CalPERS is equitably estopped from denying its prior
18 representations to the City and to Mr. Lewis that CalPERS would utilize the
19 highest salary earned in CalPERS contracting employment (and CalPERS'
20 representations that it would utilize Mr. Lewis' highest single year of earnings at
21 SBF) in calculating Mr. Lewis' CalPERS pension;
- 22 (xix) Mr. Lewis asserts *res judicata*, collateral estoppel, equitable estoppel, and
23 promissory estoppel claims against CalPERS, including as a result of CalPERS'
24 acceptance of the agreement, its advice to the City, its acceptance of the
25 compensation reported to CalPERS and its acceptance of the contributions paid
26 by the City concerning Mr. Lewis' employment at SBF;
- 27 (xx) Mr. Lewis asserts claims for unjust enrichment against CalPERS based on the
28 fact that it accepted contributions from the City on Mr. Lewis' behalf and would

1 accrue a windfall if the pension benefits paid to Mr. Lewis are reduced as
2 CalPERS threatens to do;
3 (xxi) Laches; and
4 (xxii) All other affirmative defenses.

5
6 Mr. Lewis broadly reserves all rights of any kind and nature to assert legal or factual
7 bases in this matter.

8 **Mr. Lewis has a vested right to the higher pension amount. CalPERS cannot move**
9 **to reduce the pension amount unless it litigates the matter in Superior Court under the**
10 **rules relevant to the Civil Code, Parol Evidence Rule, and charter city rights, and receives**
11 **a formal judgment in its favor. Mr. Lewis has been receiving the proper pension allowance**
12 **since his retirement on November 1, 2012. He asserts his due process right to a full hearing**
13 **before a neutral judge in the Superior Court to judgment. Before Judgment, CalPERS**
14 **cannot reduce the vested pension (including in the interim pending resolution).**

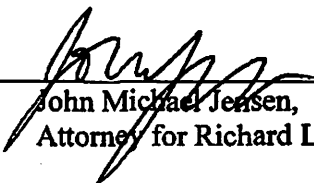
15 At this time, Mr. Lewis has not been supplied with sufficient information to determine
16 the full nature of the dispute. Mr. Lewis has made Public Records Act document requests on
17 CalPERS and on the City. Neither has yet fully responded.

18 Mr. Lewis asserts all rights to amend, correct, supplement or otherwise file new and
19 additional pleadings and assert additional defenses, facts and new matter once the nature of the
20 dispute has been determined.

21 We reserve the right to amend, correct and augment this Appeal and to provide Exhibits
22 at any time.

23
24 Dated: July 8, 2013

By: _____


John Michael Jensen,
Attorney for Richard Lewis

INTRODUCTION

1
2 CalPERS has wrongly denied the correct pension benefits to Richard Lewis. Mr. Lewis is
3 fully entitled to have his pension based on the pay rate of a Battalion Chief. Mr. Lewis' rights to
4 the Battalion Chief position vested upon his right to hold the Battalion Chief position. The
5 employer SBFD recognized that Mr. Lewis was entitled to the Battalion Chief position.

6 Mr. Lewis worked for nearly three decades as a firefighter for the City of San Bernardino
7 ("the City") in the San Bernardino Fire Department ("SBFD"). He was a member of CalPERS
8 throughout the entire time and earned service credit and other pension rights and benefits
9 associated with that employment. All of Mr. Lewis' CalPERS Member time occurred while he
10 was employed with the SBFD.

11 The timing of Mr. Lewis' rights to the Battalion Chief position informs the matters related
12 to his pension.

13 The City had established a formal and historic civil service and promotion process and
14 structure. As a matter of practice and law, the City's employees became entitled to the existing
15 practice of the City's promotion process. The local rules, including those made pursuant to the
16 City's charter powers, are established and in many instances became mandatory and binding.
17 Neither the Civil Service Commission, nor the City, nor the SBFD involved has the power to
18 dispense with the essentials prescribed. Moreover, a city council or its department heads cannot
19 evade the established provisions by enacting contrary ordinances or practices without notice of a
20 change in practice. The City made no changes to established practices in this case.

21 Eligibility lists were established as a result of position and competitive examinations. The
22 exams were open to persons who lawfully may be appointed to any position within the class for
23 which these examinations are held. The persons must meet the minimum qualifications requisite
24 to the performance of the duties of that position. When an examination for a managerial position
25 is conducted on an open and promotional basis, the names of eligible persons must be placed on
26 one list, ranked in relative order of the examination score received, and for purposes of
27 preference in certifying eligible persons the list must be considered an eligible list. The names of
28 the applicants who pass the examination with a passing score must be placed on one list and

1 ranked in the relative order of the examination score received. Promotions were supposed to be
2 made in order from the list. Under the City's charter practices and powers, the City established a
3 formal and historic practice where certification of the person next highest on the eligible list for
4 appointment is mandatory. Seniority and score must be respected in making appointments. Mr.
5 Lewis was employed at the time that the City established these practices, which created an
6 expectancy and right in Mr. Lewis.

7 During the final decade of his firefighting career, Mr. Lewis and several other Fire
8 Captains took the examination to be promoted to Battalion Chief. The first step was a written
9 examination. As is currently understood, Mr. Lewis, Lester Kulikoff, and Dennis Moon were the
10 only three Fire Captains to pass.

11 The next step was a series of simulations where the examinees assumed command of a
12 structure fire, a wild land fire and a hazardous materials incident. It was announced prior to the
13 examination that simulated injury or death of any personnel under an examinee's command in
14 any of the scenarios would be considered automatic failure of the test, and such an individual
15 would be disqualified for promotion to Battalion Chief until they retook the simulator portion
16 and passed. Years later, it is understood that Mr. Lewis learned that both Kulikoff and Moon
17 failed the simulator portion; only Mr. Lewis passed. Nevertheless, it is believed that both
18 Kulikoff and Moon were kept in the pool of Fire Captains eligible for promotion to Battalion
19 Chief.

20 The remainder of the examination included a writing exercise, a Fire Chief's oral
21 examination and an outside Chief's oral board. The scores from the entire examination process
22 were added up by Fire Chief Larry Pitzer and sent the list to the City's Civil Service Board with
23 the three individuals listed in order as to their ranked eligibility to be promoted at the opportunity
24 when a Battalion Chief position opened up in the SBFD. Chief Pitzer ranked Kulikoff at number
25 one on the list, Mr. Lewis at number two, and Moon at number three.

26 Civil service rules and past practice in the City and the SBFD established that once an
27 opening for Battalion Chief occurred, the SBFD would be required to first offer the position to
28 the individual holding position number one on the list, i.e. Kulikoff. If Kulikoff declined the

1 position or was no longer available to accept the promotion (e.g., because he had retired or left
2 SBFD), the SBFD was required to offer the position to the next person on the ranking list, i.e. to
3 Mr. Lewis. Only if both Kulikoff and Mr. Lewis either declined the Battalion Chief position or
4 were no longer available to accept the promotion could SBFD offer the position to Moon. If
5 another Battalion Chief position later opened up, the SBFD would be required to follow the same
6 procedures, i.e. to first offer the promotion to the individual who was then at the top of the list,
7 and only move to a lower-ranked individual if the higher-ranked individual declined or was
8 unable to accept the promotion.

9 In or about early 2003, a position for Battalion Chief in the SBFD opened up. Pursuant to
10 the procedures set forth above, SBFD first offered the position to Kulikoff. He accepted the
11 promotion in March 2003 and thereafter served as Battalion Chief. Mr. Lewis then moved up to
12 number one on the ranking list in the event another opening for Battalion Chief occurred and
13 Moon moved up to number two.

14 Because of violations of SBFD policies governing employment and professional conduct,
15 Kulikoff was placed on administrative leave at the end of 2003. Kulikoff continued on
16 administrative leave until September 2004 when he was granted industrial disability retirement
17 and left the SBFD. This created a new Battalion Chief opening.

18 Mr. Lewis earned his position as Battalion Chief, as well as the associated pay rate and
19 related deferred compensation in the form of a pension, prior to October 2004. Mr. Lewis had a
20 vested earned right to the position, compensation and deferred compensation, and other benefits
21 of a Battalion Chief.

22 Pursuant to existing policy and procedure, the City and SBFD were required to first offer
23 the promotion to Mr. Lewis because he had moved to number one on the promotion list after
24 Kulikoff was promoted. Instead, the City and SBFD violated existing procedure, bypassed Mr.
25 Lewis for the promotion, and instead awarded the Battalion Chief position to Moon in October
26 2004.

27 The City and SBFD promoted Moon over Mr. Lewis without justification or legal cause
28 in violation of Mr. Lewis' vested employment rights. The City and SBFD promoted Moon even

1 though Moon had scored much lower than Mr. Lewis on the Battalion Chief test (and had failed
2 the simulator test which pursuant to announced testing and scoring procedures, should have
3 disqualified him for the promotion list altogether. Under law, Moon was not entitled to take the
4 new Battalion Chief position unless it was first offered to and declined by Mr. Lewis. However,
5 the City and SBFD did not offer the Battalion Chief position to Mr. Lewis (and he did not
6 decline it), and promoted Moon contrary to law.

7 Mr. Lewis challenged the City's and SBFD's actions, contending that they were illegal.
8 Mr. Lewis instituted legal action, and filed a *Complaint*.

9 Three years passed between the time when Mr. Lewis vested in the Battalion Chief
10 employment rights and the time when the underlying dispute was resolved. During that time, Mr.
11 Lewis performed the job duties that were required of him by his employer. The City paid Mr.
12 Lewis and made associated employer and employee contributions to CalPERS.

13 Eventually in early 2007, the City agreed that Mr. Lewis had been wrongly denied the
14 promotion to Battalion Chief. The City awarded Mr. Lewis back pay from the date of Mr. Lewis'
15 entitlement to the promotion. The back pay consisted of the difference between Mr. Lewis' pay
16 as Fire Captain and the pay associated with a promotion to Battalion Chief. The City thereafter
17 paid Mr. Lewis at the Battalion Chief pay rate and made employer and employee contributions to
18 CalPERS associated with Mr. Lewis at the Battalion Chief pay rate.

19 In recognition of his right to the Battalion Chief position, the City increased Mr. Lewis'
20 compensation from the date of the City's agreement forward, paying him the compensation
21 earned as a Battalion Chief pursuant to the City's publicly available pay schedule.

22 Importantly for purposes of this dispute, the City also recognized its obligation to ensure
23 that Mr. Lewis would receive the deferred compensation he was entitled to, including an
24 eventual CalPERS pension calculated based upon his highest earnings at the Battalion Chief pay
25 scale.

26 For its purposes, and pursuant to its procedures and its authority as a charter city under
27 the provisions of the California Constitution, the City then memorialized a March 2007
28 document entitled Settlement and General Release Agreement ("Settlement Agreement"). The

1 Settlement Agreement was an official affirmation by the City that it intended Mr. Lewis to obtain
2 all the compensation and other benefits associated with the Battalion Chief promotion that the
3 City had initially wrongly denied him. The City explicitly affirmed its intent, promise, and
4 agreement to ensure that Lewis received the deferred compensation in the form of a pension
5 administered by CalPERS based on the Battalion Chief position.

6 Mr. Lewis's rights to all benefits arising from the Battalion Chief position vested when
7 the Battalion Chief position opened in October 2004. Mr. Lewis' rights did not arise from the
8 Settlement Agreement.

9 The City contacted CalPERS, as administrator of the City's pension obligations, to find
10 out how to ensure that Mr. Lewis would receive the full benefit of the City's agreement. The City
11 made clear to CalPERS that it intended the compensation it was paying to Mr. Lewis to be fully
12 "PERSible" such that he would be entitled to receive a pension calculated based on his highest
13 earnings at the Battalion Chief pay scale. The City sought specific informed advice from
14 CalPERS, as its contracted administrator of the City's pension benefits, as to how to handle
15 matters so as to ensure the City's wishes as Mr. Lewis' employer were carried out.

16 CalPERS was fully informed of the City's intentions and wishes. As its pension
17 administrator, the City was entitled to rely upon CalPERS' expertise and advice to ensure that the
18 City's wishes were carried out.

19 **After reviewing and considering the situation, CalPERS recognized and specifically**
20 **advised the City and Lewis that Mr. Lewis was entitled to a pension based on the higher**
21 **pay rate of the Battalion Chief.**

22 As a matter of form (not substance), CalPERS explicitly directed the City to report the
23 increased pay rate for purposes of increasing Mr. Lewis' pension. CalPERS' "Compensation
24 Review Unit" explicitly advised and directed the City to report to CalPERS difference between
25 the pay Mr. Lewis received as Fire Captain and the new pay the City was awarding him pursuant
26 to the Battalion Chief pay scale as "temporary upgrade pay". CalPERS directed the City to pay
27 contributions based on this higher amount. The City complied with CalPERS' chosen
28 nomenclature in order to fulfill its obligation to provide Mr. Lewis with the employment rights

1 that he had earned. The City continued to make contributions to CalPERS for Mr. Lewis based
2 on the Battalion Chief pay rate until his retirement.

3 Eight (8) years passed since Mr. Lewis vested in the Battalion Chief rights.

4 Five (5) years passed since CalPERS recognized Mr. Lewis' rights to a pension based on
5 the Battalion Chief pay rate. The City paid Lewis at the Battalion Chief payrate. The City
6 contributed to CalPERS based on part on Lewis' Battalion Chief pay rate. CalPERS accepted the
7 higher contributions. All parties believed the issue had been resolved.

8 Mr. Lewis continued receiving compensation based on the City's publicly available pay
9 schedule for the Battalion Chief position until his retirement from the SBFD on October 31,
10 2012. The City continued to report his compensation as temporary upgrade pay pursuant to
11 CalPERS' instructions and to make employee and employer contributions to CalPERS based on
12 the Battalion Chief pay. CalPERS accepted such reports and contributions without raising any
13 questions or concerns.

14 Once Mr. Lewis retired, he began receiving a retirement pension that was correctly
15 calculated by using his highest one-year earnings, which was at the Battalion Chief rate of
16 compensation. Six (6) months after his retirement, and nearly six (6) years after CalPERS
17 explicitly instructed the City to report Mr. Lewis' compensation as temporary upgrade pay,
18 CalPERS suddenly reversed its long-stated position and instructions. CalPERS recognized and
19 admitted that CalPERS had previously advised the City and Mr. Lewis that Mr. Lewis was
20 entitled to receive a pension based on the Battalion Chief pay rate and that the City should report
21 a portion of his Battalion Chief compensation as temporary upgrade pay. However, in its March
22 8, 2013 letter, CalPERS for the first time indicated that the pay rate did not qualify as "temporary
23 upgrade pay" and therefore disallowed it. CalPERS also disallowed the Employer Paid Member
24 Contributions ("EPMC") in which the City paid Mr. Lewis' nine percent (9%) Member
25 contributions to CalPERS and included the value of those contributions in his total reported
26 compensation.

27 As a result of these disallowances, CalPERS advised that it would be cutting Mr. Lewis'
28 retirement pension. If the threatened reductions go through, it would mean Mr. Lewis would

1 suffer a reduction of approximately twenty-eight percent (28%) of his pension allowance.

2 CalPERS did not consider the underlying substantive issues that Mr. Lewis was entitled
3 to the pay rate and position of Battalion Chief, and that the City had actually paid Mr. Lewis the
4 pay rate for Mr. Lewis' full time work.

5 CalPERS argues that Mr. Lewis did not perform the duties of the Battalion Chief, so
6 therefore Mr. Lewis is not entitled to the pay rate of the Battalion Chief. When CalPERS seeks to
7 intervene in the City's decisions regarding the job duties of the City's employee, CalPERS
8 oversteps and seeks to invade the City's autonomy. The City as employer can determine the job
9 duties, positions and responsibilities of its employees. The City is not challenging that Lewis is
10 entitled to the pay and pension of a Battalion Chief. The City has paid or will pay all
11 contributions to fund Mr. Lewis' pension, such that the City bears the costs of its decisions.

12 At the time of giving its advice, CalPERS was well aware of the City's intentions and
13 fully understood that the City intended to provide Mr. Lewis with the PERSible benefits of his
14 compensation. Pursuant to its contract with the City to administer the City's pension benefits,
15 CalPERS had and continues to have contractual and fiduciary duties to the City, including to
16 provide the City with correct advice on how to implement the City's decision to provide Mr.
17 Lewis with all the benefits associated with the Battalion Chief compensation. CalPERS also has
18 ministerial duties to implement the decisions of the City, as a charter city, concerning
19 compensation, deferred compensation, decisions on promotions, and other "home rule" matters
20 reserved to the City as a charter city.

21 CalPERS cannot override the City's determinations about pay rate or positions, in direct
22 opposition to the City's long vested decisions, and void the employee-employer agreement.

23 If the City took any actions based upon CalPERS' advice which CalPERS now deems to
24 have been incorrect, CalPERS is obligated to effect the substance of the City's actions and
25 intentions. CalPERS should not be permitted to interrupt the settled expectations of the parties,
26 and void the substance of a core employee-employer arrangement, especially as it focuses on
27 language that in retrospect may be inartful or reformable. Minor or banal inexactitudes or
28 procedural errors are not grounds to void substantial property rights.

1 In sum, CalPERS should not deny Mr. Lewis the benefit of the employment rights that he
2 was entitled to and vested in. CalPERS should not punish Mr. Lewis because of procedural
3 measures or decisions taken by CalPERS, or by the City based on CalPERS' advice. CalPERS
4 has distorted the meaning and purpose of the statutes and regulations concerning regular and
5 special compensation, apparently in order to reach a desired result (denying Mr. Lewis the
6 appropriate pension) rather than neutrally and correctly applying the law. CalPERS has rejected
7 and refused to give effect to the clearly stated intent and agreement of the City to afford Mr.
8 Lewis all of the benefits of the Battalion Chief position during his final years at SBFD, including
9 the right to deferred compensation and to a pension calculated based on his highest one year of
10 earnings at SBFD.

11 In doing all of this, CalPERS has violated its constitutional, statutory and fiduciary duties
12 to Mr. Lewis and refused to carry out its ministerial duties to provide Mr. Lewis with a pension
13 based on the highest earnings awarded to him by the City, which is what the City desired.

14 Further, if CalPERS now contends that its advice to the City was incorrect, CalPERS is
15 obligated under *Government Code* sections 20160, *et seq.*, to correct CalPERS' errors or
16 omissions and/or to direct the City to correct its own errors and omissions.

17 In any event, Mr. Lewis is clearly entitled to a pension allowance calculated on the basis
18 of his highest single year of compensation at SBFD, namely his last year receiving the
19 compensation awarded to Battalion Chiefs.

20 Mr. Lewis also asserts that CalPERS is equitably estopped from denying him pension
21 benefits based upon the Battalion Chief compensation and related EPMC that he received, and
22 that it is equitably estopped from denying the use of this compensation to calculate his pension,
23 when it is CalPERS itself that explicitly instructed the City to report portions of Mr. Lewis'
24 compensation as "temporary upgrade pay" special compensation and now seeks to disavow its
25 instructions in order to punish Mr. Lewis.

26 FACTUAL BACKGROUND

27 CalPERS Membership:

- 28 1. Richard Lewis was first employed by the SBFD on or about March 31, 1981.

1 2. Throughout his employment, the SBFD contracted with CalPERS to provide
2 pension benefits to all of SBFD's firefighters. Mr. Lewis was enrolled in CalPERS at the start of
3 his SBFD employment and remained a CalPERS member throughout his SBFD career.

4 **SBFD Career:**

5 3. Mr. Lewis held a number of positions with the SBFD during the course of his
6 career, working his way up through the ranks with promotions and associated increases in salary
7 along the way.

8 4. In or about May 1991 Mr. Lewis was promoted to the position of Fire Captain.
9 This is the highest ranking position a firefighter can hold in the SBFD while still being a member
10 of the "rank and file" and not a part of the management and confidential employees of SBFD.

11 **Entitlement to Battalion Chief Promotion:**

12 5. Beginning in or about November 2002 and finishing in or about February 2003, ,
13 while holding the position of Fire Captain, Mr. Lewis took the test to be promoted to the position
14 of Battalion Chief.

15 6. Mr. Lewis, along with two other Fire Captains (Lester Kulikoff and Dennis
16 Moon) were all deemed eligible to serve as Battalion Chief should an opening for that position
17 develop. Mr. Kulikoff was placed first on the promotion list, Mr. Lewis was placed second on
18 the list, and Mr. Moon was placed last on the list.

19 7. Pursuant to City and SBFD policy and practice, once an opening for Battalion
20 Chief occurred, the SBFD would be required to first offer the position to the individual holding
21 position number one on the list, i.e. Kulikoff. If Kulikoff declined the position or was no longer
22 available to accept the promotion, the position was to be offered to the next person on the
23 ranking list, i.e. to Mr. Lewis. Only if both Mr. Kulikoff and Mr. Lewis either declined the
24 Battalion Chief position or were no longer available to accept the promotion could SBFD offer
25 the position to Mr. Moon. If another Battalion Chief position later opened up, the SBFD would
26 be required to follow the same procedures, i.e. to first offer the promotion to the individual who
27 was then at the top of the list, and only move to a lower-ranked individual if the higher-ranked
28 individual declined or was unable to accept the promotion.

1 **Mr. Kulikoff's Promotion to Battalion Chief and Later Retirement:**

2 8. In or about early 2003, a position for Battalion Chief in the SBFD opened up.
3 Pursuant to the procedures set forth above, SBFD offered the position to Mr. Kulikoff, who
4 accepted the promotion in March 2003 and thereafter served as Battalion Chief. Mr. Lewis then
5 moved up to number one on the ranking list in the event another opening for Battalion Chief
6 occurred and Mr. Moon moved up to number two.

7 9. Because of violations of SBFD policies governing employment and professional
8 conduct, Mr. Kulikoff was placed on administrative leave at the end of 2003. He remained on
9 administrative leave until September 2004 when he was granted industrial disability retirement
10 and left the SBFD. This created a new Battalion Chief opening.

11 10. Mr. Lewis earned his position as Battalion Chief, as well as the associated pay
12 rate and related deferred compensation in the form of a pension, prior to October 2004. Mr.
13 Lewis had a vested earned right to the position, compensation and deferred compensation, and
14 other benefits of a Battalion Chief.

15 **Denial of Promotion, Challenge, and Settlement:**

16 11. Although City and SBFD policy and practice required that promotion to the new
17 Battalion Chief position be offered first to Mr. Lewis because he was now number one on the
18 promotion list, the City and SBFD violated existing procedure, bypassed Mr. Lewis for the
19 promotion, and instead awarded the Battalion Chief position to Mr. Moon in October 2004.

20 12. Mr. Lewis challenged the City's and SBFD's actions, contending that they were
21 illegal. Mr. Lewis instituted legal action, and filed a *Complaint*.

22 13. Three years passed between the time when Mr. Lewis vested in the Battalion
23 Chief employment rights and the time when the underlying dispute was resolved. During that
24 time, Mr. Lewis performed the job duties that were required of him by his employer. The City
25 paid Mr. Lewis and made associated employer and employee contributions to CalPERS.

26 14. The City ultimately came to an agreement with Mr. Lewis to resolve the dispute,
27 agreeing, *inter alia*, (i) to award Mr. Lewis back pay from the date of Moon's promotion
28 (consisting of the difference between Mr. Lewis' existing pay as Fire Captain and the pay

1 associated with a promotion to Battalion Chief), (ii) to increase Mr. Lewis' compensation from
2 the date of the City's agreement forward to the Battalion Chief salary paid pursuant to the City's
3 publicly available pay schedules, and (iii) to ensure that Mr. Lewis would receive deferred
4 compensation he was entitled to, including a pension calculated at his highest earnings at the
5 Battalion Chief pay scale.

6 15. The City later memorialized this in the March 2007 Settlement Agreement. However, the
7 City's acknowledgement of its obligations and of Mr. Lewis' rights to all benefits accruing from a
8 promotion to Battalion Chief were already in existence prior to the Settlement Agreement.

9 **City's Reliance on CalPERS for Instructions on Implementation:**

10 16. In or about June 2007, the City contacted CalPERS for advice on how to
11 implement its decisions concerning compensation and other PERSible benefits the City was now
12 providing to Mr. Lewis.

13 17. As administrator of the City's pension obligations, CalPERS had fiduciary and
14 contractual duties to provide the City with proper advice on how to implement its agreement and
15 intent, and the City had the right to rely on CalPERS' performance of those duties.

16 18. After evaluating the request and applying its administrative experience and
17 knowledge, CalPERS directed the City to calculate the difference between the pay Mr. Lewis
18 received as Fire Captain and the new pay the City was awarding him pursuant to the Battalion
19 Chief pay scale, and then to report that difference as "temporary up-grade pay". CalPERS also
20 directed the City to pay employer and employee contributions calculated on the basis of the
21 Battalion Chief compensation rate paid to Mr. Lewis.

22 **Disability Leave:**

23 19. Beginning in or about July 19, 2011 Mr. Lewis went on disability leave from his
24 SBFJ job due to injuries suffered on the job, including a diagnosis of lymphoma. Firefighters
25 who are diagnosed with lymphoma are presumptively assumed to have contracted the illness due
26 to the hazards of firefighting duties and resulting exposures to toxic and carcinogenic substances.

27 20. Throughout approximately 16 months that Mr. Lewis was on disability leave, he
28 continued to receive compensation as Battalion Chief pursuant to SBFJ's publicly available pay

1 schedules pursuant to *Labor Code* section 4850.

2 21. During his disability leave, Mr. Lewis did not perform the duties of any active
3 SBFD employee, regardless of title held, because he was on medical leave and unable to work as
4 a firefighter. However, like any CalPERS Member who takes disability leave, he was entitled to
5 receive the PERSible rights and benefits of the compensation reported to CalPERS, regardless of
6 the fact that he was disabled and therefore unable to perform the duties of any active SBFD
7 employee.

8 22. Throughout that period, SBFD continued to report Mr. Lewis' Battalion Chief
9 compensation and EPMC to CalPERS throughout the time he was on disability leave and to
10 make the required employer and employee contributions attributable to those earnings. CalPERS
11 continued to accept the reports of compensation and the contributions.

12 **Retirement:**

13 23. On October 10, 2012, while still on disability leave, Mr. Lewis filed a retirement
14 application for industrial disability retirement because of injuries he suffered on the job.

15 24. The contract between the SBFD and CalPERS mandates that a retiree's "final
16 compensation" from the SBFD shall be calculated based upon his or her highest single year of
17 earnings, together with total years of service credit earned from CalPERS-covered employment
18 and the specific retirement formula based upon the employee's age at retirement.

19 25. Once Mr. Lewis retired effective November 1, 2012, he began receiving a
20 retirement pension that was correctly calculated by using his highest one-year earnings, which
21 was at the Battalion Chief rate of compensation.

22 **CalPERS' Disallowance of Mr. Lewis' Highest Compensation and EPMC:**

23 26. Six (6) months after Mr. Lewis' retirement, and nearly six (6) years after CalPERS
24 explicitly instructed the City to report his compensation as temporary upgrade pay, CalPERS
25 suddenly reversed its long-stated position and instructions. CalPERS issued its March 8, 2013
26 letter to Mr. Lewis which for the first time disallowed the temporary upgrade pay.

27 27. CalPERS also disallowed the Employer Paid Member Contributions ("EPMC") in
28 which the City paid Mr. Lewis' nine percent (9%) Member contributions to CalPERS and

1 included the value of those contributions in his total reported compensation.

2 28. CalPERS provided Mr. Lewis with appeal rights should he wish to challenge this
3 determination.

4 29. This Appeal is timely filed in response.

6 LAW AND ARGUMENT

7 I. Law of Jurisdiction

8 A. No Jurisdiction

9 CalPERS and the OAH have no jurisdiction to hear or to decide any issue that is relevant
10 to Mr. Lewis' employment which ignore or attempt to circumvent the "home rule" authority of
11 the City to establish rates of compensation and deferred compensation, or to make decisions
12 concerning the positions held by any of its employees or the duties undertaken in those positions.

13 Mr. Lewis reserves all rights to challenge CalPERS' and the OAH's jurisdiction in this
14 regard and this matter at all times. Mr. Lewis does not consent to jurisdiction. Specifically, Mr.
15 Lewis expressly reserves and maintains his rights to challenge CalPERS' or the OAH's
16 jurisdiction and challenge that CalPERS or the OAH is operating in excess of its jurisdiction in
17 this matter. Mr. Lewis expressly reserves and maintains his rights to pursue his rights in the
18 Superior or higher courts.

19 Mr. Lewis' filing of this Appeal is not implied or express consent to (1) the jurisdiction of
20 the OAH, (2) CalPERS' administrative authority; or (3) other authority of CalPERS or OAH.

21 It is fundamental that an administrative agency has only such power as has been
22 conferred upon it by the constitution or by statute and an act in excess of the power conferred
23 upon the agency is void." (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162
24 Cal.App.3d 980, 994.)

25 The powers of public agencies are derived from the statutes which create them and define
26 their functions (*Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018) and
27 an administrative agency cannot enlarge or exceed the scope of authority that has been statutorily
28 delegated to it (*Western States Petroleum Ass'n v. Department of Health Services* (2002) 99

1 Cal.App.4th 999). Accordingly, an agency's adjudicative jurisdiction must be pursuant to
2 legislative authorization (*Dominguez Land Corp. v. Daugherty* (1925) 196 Cal.453; *Hardin*
3 *Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, as modified on denial of reh'g,
4 (Feb. 28, 1997); *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44
5 Cal.App.4th 194), which must be conveyed expressly and unequivocally (*Campos v. Anderson*
6 (1997) 57 Cal.App.4th 784).

7 An agency cannot validly act in excess of the limits of jurisdiction that have been
8 conferred on it. (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d
9 245; *Hamilton v. Gourley* (2002) 103 Cal.App.4th 351; *Hardin Oldsmobile v. New Motor Vehicle*
10 *Bd.* (1997) 52 Cal.App.4th 585, as modified on denial of reh'g, (Feb. 28, 1997).

11 **B. Subject Matter Jurisdiction**

12 CalPERS and the OAH lacks subject matter jurisdiction over all matters arising from the
13 City's actions awarding Mr. Lewis the compensation of a Battalion Chief and the attendant
14 deferred compensation and pension promises related to that compensation in that the City, as a
15 charter city organized under the California Constitution, acted in accordance with its
16 constitutional authority. The question of subject matter jurisdiction of an administrative agency
17 over the subject matter generally may be raised at any time during the pendency of an
18 adjudicative proceeding before the agency, or at any stage of an appeal thereafter. (*Stuck v.*
19 *Board of Medical Examiners of State* (1949) 94 Cal.App.2d 751.)

20 **C. No Waiver of Jurisdiction, No Consent**

21 Mr. Lewis does not waive or consent to jurisdiction. Although jurisdiction can be
22 conferred by consent, Mr. Lewis does not consent.

23 While reserving all rights to challenge jurisdiction at every stage, Mr. Lewis recognizes
24 the law often indicates that where questions concerning the agency's jurisdiction are presented,
25 the doctrine of exhaustion of administrative remedies often requires a final decision in the
26 administrative forum. (See generally, *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d
27 787.) Mr. Lewis reserves all rights to later seek a court order in an appropriate proceeding to
28 grant relief, including that an agency decision is unconstitutional or contrary to or in violation of

1 a constitutional right, privilege, immunity, or constitutional power, as where the agency action is
2 beyond the powers that could constitutionally be vested in or exercised by an administrative
3 agency or are in excess of the agency's statutory jurisdiction. (2A Cal. Jur. 3d Administrative
4 Law § 627.)

5 Unless and until CalPERS successfully moves a court with appropriate jurisdiction for a
6 ruling that CalPERS can invade the City's "home rule" charter city authority to set compensation
7 and make decisions concerning employment, CalPERS has a ministerial duty to accept the
8 Battalion Chief salary paid to Mr. Lewis by the City and also accept the EPMC benefit given to
9 Mr. Lewis in connection with the Battalion Chief salary as "compensation earnable" and to use
10 that as Mr. Lewis' "final compensation" when calculating his pension allowance.

11 **D. No Voluntary Appearance, No Waiver, No Consent, Notice of Defense Under**
12 **Protest**

13 Mr. Lewis files this Appeal under protest. Mr. Lewis is not volunteering, not consenting,
14 and not waiving his rights. He appears involuntarily, under compulsion.

15 **II. Property Right Vested, Right to a Full Due Process Adjudicative Hearing in**
16 **Superior Court Before Any Reduction in Pension**

17 Mr. Lewis asserts that CalPERS has no authority proceed to reduce his pension without
18 first affording him the right to a full hearing on the matter.

19 Mr. Lewis has been receiving the proper pension for more than eight months since his
20 retirement on November 1, 2012. His right to said pension fully vested upon his retirement. He
21 has neither waived his vested rights nor consented to any amendment to or revision of those
22 rights. CalPERS does not possess the right or authority to reduce his pension after it has fully
23 vested.

24 CalPERS' threat to reduce Mr. Lewis' pension allowance constitutes an attempt to take
25 away a vested property right. CalPERS' threatened action would constitute a taking or a seizure
26 of vested benefits. CalPERS cannot take such action, or in any other way imperil Mr. Lewis'
27 vested rights, especially without first affording him the right to a full hearing before a neutral
28 judge in a court of law and permitting him to challenge the grounds for any reduction. Any

1 attempt to do so would constitute a denial of due process rights to Mr. Lewis.

2 If CalPERS seeks to reduce the benefits, a predeprivation hearing in Superior Court is
3 required "as a matter of constitutional right" because full relief cannot be obtained at a
4 predeprivation or postdeprivation administrative hearing where CalPERS is also barred from
5 declaring a statute unenforceable, or to refuse to enforce a statute. (*Cal. Const.*, art. III, §3.5;
6 *Matthews v. Eldridge* (1976) 424 U.S. 319, 331, 96 S.Ct. 893, 900.)

7 **III. Mr. Lewis Satisfies the Public Employees' Retirement Law**

8 The Public Employees' Retirement Law ("PERL", *Government Code*, §20000, *et seq.*)
9 sets forth the conditions for CalPERS membership, accrual of service credit, and the calculation
10 of retirement benefits to which such an individual might be entitled. Mr. Lewis meets all such
11 terms and is entitled to a retirement pension calculated on the basis of his highest earnings, i.e.,
12 the highest year of Battalion Chief compensation he received and associated EPMC.

13 **A. Employment with a Contracting Agency**

14 The City has contracted with CalPERS to provide pension rights and benefits to its
15 employees. Said contract was entered into some years prior to Mr. Lewis' employment at the
16 City with the SBFD.

17 Pursuant to those contractual arrangements, Mr. Lewis entered and continued in
18 CalPERS membership throughout his employment with the SBFD. He is a vested Member of
19 CalPERS entitled to the rights and benefits associated with such membership.

20 **B. Mr. Lewis' Compensation as Battalion Chief Meets CalPERS' Requirements**

21 Mr. Lewis was legally entitled to hold the position of Battalion Chief at the SBFD and to
22 receive the compensation, deferred compensation and pension rights and benefits flowing
23 therefrom. He received the Battalion Chief compensation for full-time work.

24 Mr. Lewis' Battalion Chief salary thus qualifies as "compensation earnable" pursuant to
25 *Government Code* section 20636 – he received a monthly rate of pay and was paid for
26 performing services on a full-time basis during normal working hours based on a publicly
27 available pay schedule duly adopted by the City.

28 **C. Group or Class:**

1 Section 20636(b) of the PERL says payrate is the rate of pay "paid ... to similarly
2 situated members of the same group or class of employment". Section 20636(e)(1) defines
3 "group or class of employment" as "a number of employees considered together because they
4 share similarities in job duties, work location, collective bargaining unit, or other logical work-
5 related grouping."

6 Mr. Lewis had qualified to serve as Battalion Chief and had actually served as Battalion
7 Chief on an acting basis at various times. Mr. Lewis shared the same work location as other
8 individuals who had served as Battalion Chief (i.e., at the SBFD). Mr. Lewis also was in the
9 same bargaining unit as those other individuals who had served as Battalion Chief. For example,
10 he was required to and did take wage and benefit reductions when the City required that of all
11 managerial personnel between March 2007 and Mr. Lewis' retirement from the SBFD on
12 October 31, 2012.

13 **D. "Regular Rate of Pay":**

14 "An employee's 'regular rate' of pay is 'the hourly rate actually paid the employee for the
15 normal, non-overtime workweek for which he is employed.'" (*Parth v. Pomona Valley Hosp.*
16 *Med. Ctr.* (9th Cir. 2010) 630 F.3d 794, 802, quoting *Walling v. Youngerman-Reynolds*
17 *Hardwood Co.* (1945) 325 U.S. 419, 424.)

18 The regular rate by its very nature must reflect all payments which the parties
19 have agreed shall be received regularly during the workweek, exclusive of
20 overtime payments. It is not an arbitrary label chosen by the parties; it is an actual
21 fact. Once the parties have decided upon the amount of wages and the mode of
22 payment the determination of the regular rate becomes a matter of mathematical
23 computation, the result of which is unaffected by any designation of a contrary
24 'regular rate' in the wage contracts.

25 (*Walling v. Youngerman-Reynolds, supra*, at 424-425.)

26 **E. Labor Code Requirements Re "Average Weekly Earnings":**

27 When Mr. Lewis went on paid disability leave in July 2011 because of injuries and illness
28 incurred in connection with his work at the SBFD, his Battalion Chief wages were used to
calculate his disability pay. He received disability compensation based on the monthly earnings
he received based on the publicly available Battalion Chief pay scale

1 This is an implicit determination that his wages were what he received as Battalion Chief,
2 irrespective of what duties he performed. For example, *Labor Code* section 4453 sets disability
3 payments based on "average weekly earnings".

4 / / /

5 / / /

6 **IV. CalPERS Must Accept Mr. Lewis' Battalion Chief Compensation as "Compensation**
7 **Earnable"**

8 **A. Correction of Errors and Omissions:**

9 After considering all of the facts relevant to the situation, CalPERS explicitly instructed
10 the City to report a portion of Mr. Lewis' Battalion Chief compensation as "temporary upgrade
11 pay". CalPERS has now apparently decided its instructions were in error. CalPERS must correct
12 those errors, and cannot punish the City or Mr. Lewis for its incorrect advice.

13 *Government Code* sections 20160, *et seq.*, state that CalPERS and contracting agencies
14 (such as the City) have a mandatory duty to correct their errors and omissions which negatively
15 impact Members, and that this duty continues throughout the lifetime of the Member and his/her
16 beneficiaries.

17 CalPERS argues or implies that Mr. Lewis or the City were in some manner responsible
18 for incorrectly reporting a portion of his Battalion Chief compensation as "temporary upgrade
19 pay", despite the fact that the City submitted such reports after being explicitly directed to do so
20 by CalPERS.

21 **B. CalPERS Must Either Accept the Disputed Portion of Mr. Lewis' Battalion**
22 **Chief Compensation As "Temporary Upgrade Pay" Or Must Now**
23 **Appropriately Designate It**

24 If CalPERS, despite explicitly advising the City to report a portion of Mr. Lewis'
25 compensation as "temporary upgrade pay", now believes that compensation must be reported to
26 CalPERS in some other fashion or designation, CalPERS is obligated to establish the correct
27 designation such that Mr. Lewis receives the full PERSible benefit of all of his Battalion Chief
28 compensation.

1 *California Code of Regulations* section 571(a)(3), Premium Pay, states:

2 **Temporary Upgrade Pay** – Compensation to employees who are required by
3 their employer or governing board or body to work in an upgraded
4 position/classification of limited duration."

5 There is no definition in the PERL or the Regulations which further defines what
6 constitutes "limited duration".

7 Further, if CalPERS insists that Mr. Lewis' receipt of the Battalion Chief compensation
8 was not of limited duration, but was permanent in nature, then CalPERS should either correct the
9 prior reporting and include all of the Battalion Chief compensation in Mr. Lewis' base salary or
10 instruct the City to make such corrections.

11 **V. Mr. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation**

12 All safety employees at the SBFD at the time of Mr. Lewis' retirement were entitled to
13 inclusion of EPMC in their "compensation earnable", whether a member of the "rank and file"
14 employees covered by Local 891 of the San Bernardino Professional Firefighters Union or a
15 member of the management/confidential employees' bargaining unit. CalPERS must include
16 EPMC in Mr. Lewis' pension calculation, regardless of the outcome of the dispute concerning his
17 base salary.

18 **AFFIRMATIVE DEFENSES**

19 **VI. CalPERS' Duty to Correctly Inform**

20 CalPERS was fully informed in or about June 2007 of the City's decision to compensate
21 Mr. Lewis in accordance with the Battalion Chief pay scale listed on the City's publicly available
22 pay schedule. It was fully informed of the City's intent to provide Mr. Lewis with deferred
23 compensation in the form of a pension, including one administered by CalPERS, based upon the
24 Battalion Chief compensation that the City paid to Mr. Lewis. It was also fully informed of the
25 fact that the City requested advice from CalPERS about how to properly report Mr. Lewis'
26 Battalion Chief compensation so that he would qualify for an eventual pension based upon that
27 compensation.

28 CalPERS then explicitly instructed the City how to report Mr. Lewis' Battalion Chief

1 compensation in a manner that would meet CalPERS' requirements and provide him with the
2 promised pension based upon that compensation. The City had no reason or basis to dispute
3 CalPERS' explicit reporting instructions. The City duly followed CalPERS' reporting instructions
4 from June 2007 through Mr. Lewis' retirement effective on November 1, 2012. The City also
5 made all employer and employee contributions to CalPERS that were attributable to the reported
6 compensation, and CalPERS accepted all such contributions.

7 CalPERS has contracted with the City to administer the City's pension promises.
8 CalPERS holds itself out as the agency with the expertise and experience necessary to correctly
9 administer the pension system of the City and all other CalPERS contracting entities. The City
10 had the legal right to reply on CalPERS to provide it with accurate advice concerning the
11 implementation of the City's pension promises.

12 CalPERS has obtained no new information about Mr. Lewis' compensation since it first
13 instructed the City how to report Mr. Lewis' compensation in June 2007. There have been no
14 material changes in the situation or CalPERS' knowledge of the situation from that period to the
15 present.

16 If CalPERS now asserts that Mr. Lewis' compensation was incorrectly reported, this is
17 entirely the fault and responsibility of CalPERS. CalPERS had an affirmative duty to inform the
18 City and Mr. Lewis of any reporting issues. CalPERS' failure to do so until now constitutes
19 either the failure to form a valid contract with the City for the provision of pension rights and
20 benefits, including the rights and benefits of Mr. Lewis, and/or a breach of the CalPERS-City
21 contract.

22 **Pension is Consideration for Work.** " 'A pension plan offered by the employer and
23 impliedly accepted by the employee by remaining in employment constitutes a contract between
24 them, whether the plan is a public or private one, and whether or not the employee is to
25 contribute funds to the pension. [Citations.] The continued employment constitutes consideration
26 for the promise to pay the pension, which is deemed deferred compensation. [Citations.]'
27 (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425, 179 Cal.Rptr. 78.) As a
28 result, '[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees

1 of pension funds who administer retirement benefits ... and the trustees must exercise their
2 *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries. [Citations
3 omitted.]' (*Ibid.*; emphasis in originals.)" (*Hittle v. Santa Barbara County Employees Retirement*
4 *Assn.* (1985) 39 Cal.3d 374, 392.)

5 **Duty to Inform.** CalPERS has a fiduciary duty to provide timely and *accurate*
6 information to its members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec.
7 No. 99-01 ["The duty to inform and deal fairly with members also requires that the information
8 conveyed be complete and unambiguous"]; see also *City of Oakland v. Public Employees'*
9 *Retirement System* (2002) 95 Cal.App.4th 29, 40.)

10 **Misinformation.** CalPERS and its officers are charged with the fiduciary relationship
11 described in *Civil Code* section 2228: "In all matters connected with his trust, a trustee is bound
12 to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein
13 over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any
14 kind."

15 As this court has previously noted, "[i]n the vast development of pensions in
16 today's complex society, the numbers of pension funds and pensioners have
17 multiplied, and most employees, upon retirement, now become entitled to
18 pensions earned by years of service. We believe that courts must be vigilant in
19 protecting the rights of the pensioner against powerful and distant administrators;
the relationship should be one in which the administrator exercises toward the
pensioner a fiduciary duty of good faith and fair dealing."

20 (*Symington v. City of Albany* (1971) 5 Cal.3d 23, 33, 95.)

21 This fiduciary relationship is judicially guarded by the application of *Civil Code* section
22 2235, which provides that "[a]ll transactions between a trustee and his beneficiary during the
23 existence of the trust, or while the influence acquired by the trustee remains, by which he obtains
24 any advantage from his beneficiary, are presumed to be entered into by the latter without
25 sufficient consideration, and under undue influence. (*Hittle v. Santa Barbara County Employees*
26 *Retirement Assn.*, *supra*, at 393-394.)

27 **Equitable Estoppel.** CalPERS takes the position is that estoppel can never apply to it as
28 a matter of law. CalPERS essentially says it cannot be held accountable when it repeatedly and

1 consistently provides Members and/or contracting agencies with incorrect advice over a long
2 period of time and those Members and agencies rely on and act upon that advice to their
3 significant harm. In short, CalPERS grants itself absolute immunity from any prior mistakes, no
4 matter how egregious.

5 Thus, the doctrine of equitable estoppel is a rule of fundamental fairness, founded
6 on concepts of equity and fair dealing, that prevents a party from profiting from
7 the detriment he or she induced another to suffer. It is based on the theory that a
8 party who by declarations or conduct misleads another to the latter's prejudice
9 should be estopped to prevent the former from obtaining the benefit of his or her
10 misconduct; provides that a person may not deny the existence of a state of facts
11 if he or she intentionally led another to believe a particular circumstance to be true
12 and to rely upon that belief to his or her detriment; and applies to prevent a person
13 from asserting a right where his or her conduct or silence makes it unconscionable
14 for him or her to assert it. Thus, equitable estoppel precludes a party from
15 asserting rights he or she otherwise would have had against another when his or
16 her own conduct renders assertion of those rights contrary to equity.

17 (30 Cal.Jur.3d, *Estoppel and Waiver*, §1.)

18 If CalPERS' *current* position is correct that Mr. Lewis' Battalion Chief compensation was
19 improperly reported to CalPERS or that any other element of Mr. Lewis' employment with the
20 SBFD disqualified him from receiving the pension benefits associated with his Battalion Chief
21 compensation, then CalPERS utterly failed to notify the City and Mr. Lewis of this fact. The
22 harm caused by this failure to notify is no minor matter. Mr. Lewis maintained employment at
23 the City with the full understanding that his Battalion Chief compensation earned at the City
24 would be PERSible income and would be eligible for use in calculating his eventual pension.

25 In the words of our state Supreme Court, Mr. Lewis' long term detrimental reliance on a
26 seemingly reasonable representation by CalPERS creates one of those " 'exceptional cases' where
27 'justice and right require' that the government be bound by an equitable estoppel." (*City of Long
28 Beach v. Mansell* (1970) 3 Cal.3d 462, 501 ("*Mansell*").)

VII. CalPERS is Estopped from Denying the Use of Mr. Lewis' Battalion Chief Salary

Mr. Lewis is not seeking to impose strict liability on CalPERS for every representation
that it makes to its 1.5 million Members. However, he is also entitled to estop CalPERS from
denying its representation of a reasonable benefit. Rather than immunize CalPERS, the estoppel

1 promotes the Constitution and qualifies as an "exceptional case" where "justice and right require"
2 such estoppel in the words of *Mansell*.

3 **A. Elements of Equitable Estoppel**

4 It is well-established that the doctrine of estoppel may be applied against a government
5 body where justice and right require it. (*Mansell, supra; Piazza Properties, Ltd. v. Department of*
6 *Motor Vehicles* (1977) 71 Cal.App.3d 622, 631.)

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

13 **Equitable Estoppel Against CalPERS.** All four elements of estoppel are satisfied here:
14 (1) CalPERS knew or should have known that it promised pension benefits to Mr. Lewis based
15 upon the Battalion Chief compensation he received from the City, even though CalPERS would
16 later claim it was unauthorized to provide those benefits; (2) CalPERS either intended this
17 representation of pension benefits to be relied upon, or Mr. Lewis had the right to believe it was
18 so intended; (3) Mr. Lewis was unaware of the fact that CalPERS would later disavow such
19 representations; and (4) Mr. Lewis relied upon the conduct of CalPERS in making his career
20 plans to his injury. (See *Driscoll v. City of Los Angeles, supra*.)

21 **Mr. Lewis Can Prove All Elements.** Mr. Lewis can establish that he meets all essential
22 elements of estoppel. CalPERS explicitly or implicitly represented to Mr. Lewis that it would
23 grant him the pension rights and benefits flowing from his Battalion Chief compensation at the
24 City.

25 Further, if CalPERS now contends that the City's reporting of Mr. Lewis' Battalion Chief
26 compensation was improper, Mr. Lewis will prove that he "did not have actual knowledge of the
27 true facts [and] did not have notice of facts sufficient to put a reasonably prudent man upon
28 inquiry, the pursuit of which would have led to actual knowledge." (*Banco Mercantil v. Sauls*,

1 *Inc.* (1956) 140 Cal.App.2d 316.)

2 Nothing from CalPERS put Mr. Lewis on notice that CalPERS would disallow the use of
3 his Battalion Chief compensation and associated EPMC in the calculation of his pension benefits
4 before he retired.

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

8 **B. CalPERS' Authority to Effect What Estoppel Would Accomplish**

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

13 This completely ignores the central holding in the *Mansell* case where the Supreme Court
14 found that imposition of estoppel would require the government to not only exceed what it was
15 statutorily allowed to do, but in fact would contravene constitutional limitations (the
16 constitutional bar on the alienation of tidal lands. The Supreme Court made clear that estoppel
17 may be a rare or highly unusual remedy, but it is authorized and mandated "where justice and
18 right" require such estoppel.

19 Moreover, CalPERS *does* have authority to allow the use of Mr. Lewis' Battalion Chief
20 compensation in calculating his pension.

21 CalPERS has "plenary authority and fiduciary responsibility for ... administration of the
22 system", subject among other things to the mandate that "[a] retirement board's duty to its
23 participants and their beneficiaries shall take precedence over any other duty." (Cal. Const., art.
24 XVI, §17.) If CalPERS is permitted to seriously and repeatedly misinform a Member in ways
25 that cause the Member permanent, irreparable and substantial harm, this would eviscerate the
26 mandate to put the interest of Members above all other duties. The constitutionally mandated
27 fiduciary duties certainly give CalPERS the authority to now award Mr. Lewis a pension based
28 on his Battalion Chief compensation at the City, even if that compensation does not meet all of

1 the technical requirements that CalPERS (wrongly) asserts.

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

4 CalPERS also has statutory authority under the so-called "correction statutes" to permit
5 Mr. Lewis the use of his Battalion Chief compensation in calculating his pension benefits as a
6 correctable error, if indeed the reporting of that compensation was incorrect.

7 Nothing in the PERL precludes CalPERS from determining that an award of pension
8 benefits utilizing Mr. Lewis' Battalion Chief compensation is appropriate.

9 **C. CalPERS Is Estopped From Now Disallowing Mr. Lewis' Battalion Chief**
10 **Compensation**

11 The doctrine of equitable estoppel is based on the theory that the party estopped has
12 misled the other party to its prejudice, and may be applied against a governmental body where
13 justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School*
14 *District* (2004) 114 Cal.App.4th 1018.) Whenever a party has, by his own statement or conduct,
15 intentionally and deliberately led another to believe a particular thing to be true and to act upon
16 such belief, he is not, in any litigation arising out of such statement or conduct, permitted to
17 contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4th 394; *California Evidence Code*
18 §623.)

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

1 Battalion Chief compensation was PERSible. Mr. Lewis retired from CalPERS with this
2 understanding and thereby ended his career, only to find that he would be receiving a far smaller
3 pension allowance from CalPERS than he had been promised.

4 If those estoppel elements are established against the government, the court must then
5 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the
6 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,
7 400-401.)

8 As the doctrine of equitable estoppel states, justice and right require that CalPERS be
9 estopped from now disallowing use of Mr. Lewis' Battalion Chief compensation and associated
10 EPMC in the calculation of Mr. Lewis' retirement pension.

11 **VIII. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Mr. Lewis**

12 CalPERS has been a trust arrangement since its inception, with the Board of
13 Administration acting as trustee for the Members as beneficiaries. The Board owes fiduciary
14 duties to each Member individually and to the membership collectively. Standard trust duties
15 apply. (*Hannon Engineering, Inc. v. Reim, supra*, at 425 [pension plans create a trust relationship
16 between pensioner-beneficiaries and the trustees of pension funds who administer retirement
17 benefits; trustees must exercise their fiduciary trust in good faith and deal fairly with the
18 pensioners-beneficiaries].)

19 When adopted in 1992, however, Proposition 162 strengthened and extended these
20 fiduciary duties. The amended California Constitution now reads in relevant part:

21 Notwithstanding any other provisions of law or this Constitution to the contrary,
22 the retirement board of a public pension or retirement system shall have plenary
23 authority and fiduciary responsibility for investment of moneys and
24 administration of the system, subject to all of the following:

25 (a) The retirement board of a public pension or retirement system shall have the
26 sole and exclusive fiduciary responsibility over the assets of the public pension or
27 retirement system. The retirement board shall also have sole and exclusive
28 responsibility to administer the system in a manner that will assure prompt
delivery of benefits and related services to the participants and their beneficiaries.
The assets of a public pension or retirement system are trust funds and shall be
held for the exclusive purposes of providing benefits to participants in the pension
or retirement system and their beneficiaries and defraying reasonable expenses of

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administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty. (*Cal. Const.*, art. XVI, §17.)

In addition to CalPERS' pre-existing trust and fiduciary duties, Proposition 162 mandates that a retirement board shall have *fiduciary responsibility to its members and beneficiaries above all other duties*. In other words, the constitutional changes were not simply aimed at blocking "outside forces" (i.e., the government) from exerting control over the disposition and management of pension funds, but were also directed at ensuring that *the pension systems themselves* fulfilled their fiduciary responsibilities to their respective memberships.

The constitutional duties are not simply general statements of responsibility. Rather, they must actually guide CalPERS' day-to-day communications with its Members, such as Mr. Lewis, including imposing a specific duty of care on CalPERS to ensure the accuracy of its communications with its Members.

As the California Court of Appeals ruled in *City of Oakland v. Public Employees' Retirement System, supra*, "[CalPERS] owes a fiduciary duty to provide timely and *accurate* information to its members". (*City of Oakland, supra*, at 40, italics in original.) CalPERS itself has recognized this same duty to accurately inform in its precedential decision *In Re Application of Smith*, where CalPERS adopted the *Proposed Decision* of the ALJ stating, "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous." (*In Re Application of Smith, supra*.)

A. CalPERS Breached Its Fiduciary Duties Owed to Mr. Lewis

Under California law, a breach of fiduciary duty includes (1) the existence of fiduciary relationship giving rise to fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach. (*Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.* (C.D. Cal. 2006) 436 F.Supp.2d 1095.)

CalPERS' unjust disallowance of the use of Mr. Lewis' Battalion Chief compensation in

1 the calculation of his pension allowance meets each of the elements to bring a breach of fiduciary
2 claim against CalPERS.

3 **B. The Existence of A Fiduciary Relationship Giving Rise to Fiduciary Duty**

4 CalPERS and Mr. Lewis were engaged in a fiduciary relationship giving rise to a
5 fiduciary duty. It has been held that the administrator of a pension is a fiduciary in its
6 relationship with its pensioner. In *Hittle v. Santa Barbara County Employees Retirement Assn.*,
7 *supra*, at 392-393, the Supreme Court concluded that trustees who administer pension plan
8 retirement funds owe fiduciary duties of good faith and fair dealing towards the pensioner-
9 beneficiaries.

10 Similarly, in *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32
11 Cal.App.4th 30, 43-45, the court acknowledged the existence of fiduciary duties owed by a
12 retirement plan and its administrator to a pension plan beneficiary. Pensions and retirement
13 systems have fiduciary obligations to deal fairly and have a duty to inform employees.

14 CalPERS is an administrator of pensions and is in a fiduciary relationship with its
15 Members, specifically Mr. Lewis. CalPERS also has fiduciary duties to its Member-beneficiaries
16 which have a Constitutional basis in Article XVI, Section 17, of the California Constitution.

17 CalPERS' other fiduciary duties as provided by statute.

18 As seen by both case law and statute, CalPERS had a duty to deal with Mr. Lewis fairly
19 and in good faith. Included within the fiduciary obligation is the duty to fully inform its
20 Members of their options in obtaining retirement benefits, as stated in CalPERS' own
21 Precedential Board decision, *In re William R. Smith, supra*.

22 **C. CalPERS' Breach of Fiduciary Duty**

23 CalPERS has breached this duty by failing to fully and timely inform and/or correctly
24 inform Mr. Lewis of how its interpretation of the PERL would apply to Mr. Lewis' Battalion
25 Chief compensation and its use in calculating his pension allowance.

26 **IX. CalPERS' Actions Provide Unjust Enrichment to CalPERS**

27 CalPERS freely and knowingly accepted employee and employer contributions
28 associated with Mr. Lewis' Battalion Chief compensation earned at the City. Contribution

1 amounts are established on the basis of actuarial estimates of the pension allowances CalPERS
2 will eventually be required to pay to individuals based on the salaries they earned.

3 CalPERS' refusal to calculate Mr. Lewis' pension allowance on the basis of his Battalion
4 Chief compensation, even though that compensation meets all requirements of the PERL
5 concerning what constitutes "final compensation", means CalPERS has collected and is retaining
6 funds in excess of the pension allowance the contributions were expected to pay for. CalPERS
7 thus would accrue a windfall if the pension benefits paid to Mr. Lewis are reduced as CalPERS
8 has done, resulting in an unjust enrichment to CalPERS' benefit and to the detriment of Mr.
9 Lewis and the City.

10 **X. CalPERS Is Barred By Laches**

11 Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render
12 the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304; 30
13 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of
14 the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco*
15 (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The
16 defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act
17 about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v.*
18 *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical*
19 *Center* (1980) 27 Cal.3d 614.)

20 **A. Laches in Administrative Hearings**

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

1 **B. Acquiescence By CalPERS**

2 As described above, CalPERS has known since at least June 2007 of the City's
3 determination to provide Mr. Lewis with compensation paid pursuant to the Battalion Chief
4 salary scale. CalPERS had sufficient information in its possession from the outset to determine
5 how that compensation should be reported to CalPERS so as to make it PERSible for use in the
6 calculation of Mr. Lewis' eventual pension allowance. CalPERS gave the City explicit advice on
7 how to report the compensation based upon that knowledge.

8 **C. Undue Prejudice and Injury To Mr. Lewis**

9 Mr. Lewis was injured by CalPERS' delay in waiting to raise its disallowance of his
10 Battalion Chief compensation and/or CalPERS' failure to properly advise the City on how to
11 report that compensation so that it would be utilized in calculating Mr. Lewis' pension.

12 Based on CalPERS' representations that he would earn an eventual pension that could be
13 calculated based upon his PERSible Battalion Chief compensation, Mr. Lewis made career and
14 life choices – including, *inter alia*, continuing employment at the SBFDD and later retiring from
15 CalPERS when he did – to his detriment. Mr. Lewis would have made different job, career, or
16 work choices had he known that CalPERS would deny him a pension based on his Battalion
17 Chief compensation.

18 Mr. Lewis suffered prejudice because he relied on CalPERS' representations about how
19 his Battalion Chief compensation should be reported to make it PERSible in planning his
20 retirement and in his job selection and generally planning his life. The large and small, conscious
21 and unconscious, decision matrix that an individual uses to plan his life, his retirement, his
22 activities are founded on the accepted facts of one's life. Material changes of condition, including
23 retirement, have taken place between the parties during that period of CalPERS' neglect.
24 CalPERS should not now be able to unsettle Mr. Lewis' expectations by belatedly and
25 prejudicially asserting that it has a right to change its mind.

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

27 Mr. Lewis suffered prejudice in that he continued employment at the SBFDD and retired
28 based on CalPERS' representations that is Battalion Chief compensation was being properly

1 reported to CalPERS and associated contributions were being properly made such that he would
2 be entitled to a pension based upon that compensation. CalPERS' delay would, were the claim
3 upheld, permit the imposition of an unwarranted injustice. Mr. Lewis could not now easily begin
4 to look for other work, make alternative jobs choices, or seek other benefits.

5

6 **E. Laches is Appropriate**

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

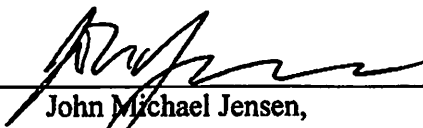
11 The doctrine of laches and statutes of limitations are both designed to promote justice by
12 preventing surprises through the revival of claims that have been allowed to slumber until
13 evidence has been lost, memories have faded, and witnesses have disappeared. These policies
14 also guard against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

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Respectfully submitted.

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19 Dated: July 8, 2013

By: 

John Michael Jensen,
Attorney for Appellant Richard Lewis

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