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

<p>9</p> <p>10</p> <p>11 In the Matter of the Appeal of CalPERS'</p> <p>12 Denial of Pension Benefits to Richard Lewis</p> <p>13 RICHARD LEWIS and CITY OF SAN</p> <p>14 BERNARDINO,</p> <p>15 Appellants.</p>	}	<p>11 CALPERS CASE NO.: 2014 0256</p> <p>12 OAH CASE NO.: 2014040945</p> <p>13 RICHARD LEWIS' NOTICE OF</p> <p>14 DEFENSE, AFFIRMATIVE DEFENSES,</p> <p>15 AND NEW MATTER; EXHIBITS 1-3</p> <p>16 JURISDICTIONAL CHALLENGE FILED</p> <p>17 CONCURRENTLY</p>
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18 Richard Lewis hereby timely submits this *Notice of Defense, Affirmative Defenses and*
19 *New Matter* (hereinafter "*Notice of Defense*") in response to the California Public Employees'
20 Retirement System's ("CalPERS") *Statement of Issues* dated April 22, 2014, although the
21 *Statement of Issues* was not mailed until April 24, 2014 and not received by counsel for Mr.
22 Lewis until April 30, 2014.

23 This *Notice of Defense* specifically denies each part of the *Statement of Issues* that is not
24 expressly admitted. The *Notice of Defense* also sets forth special defenses and objections to the
25 *Statement of Issues*.

26 Subject to the "Jurisdictional Challenge" filed concurrently herewith and with a
27 reservation of all rights of any kind or nature, Lewis conditionally files his *Notice of Defense*
28 under protest regarding CalPERS' attempted denial of pension rights and benefits concerning his

EXHIBIT
32
PENGAD 800-831-6889

1 employment with the City of San Bernardino Fire Department ("SBFD"). CalPERS has no
2 authority outside that granted to it by the Public Employees' Retirement Law ("PERL",
3 *Government Code*, §§20000, *et seq.*) As a foundational matter, CalPERS has no legal right to
4 initiate or conduct an administrative process concerning the calculation of Mr. Lewis' pension
5 benefits because such action will violate the constitutional charter city autonomy of the City of
6 San Bernardino ("City" or "San Bernardino"), including its authority to determine the job,
7 position, duties and responsibilities, and compensation of its employees, including Mr. Lewis.

8 The jurisdictional challenge provides that foundational matters must be first resolved if
9 CalPERS seeks to proceed in a manner that does not accept the Battalion Chief pay as the basis
10 for Mr. Lewis' pension. Mr. Lewis does not otherwise waive any defenses or rights to provide a
11 defense.

12 Although Mr. Lewis is not submitting and not consenting to jurisdiction, he is timely
13 filing this *Notice of Defense* in response to CalPERS' *Statement of Issues* under protest with a
14 full reservation of rights. Mr. Lewis reserves the right to amend, augment, and add to this *Notice*
15 *of Defense*, including as additional information is obtained from CalPERS.

16 Respondent has appealed (i) CalPERS' rejection of the use of Mr. Lewis' highest year of
17 compensation received for the position of Battalion Chief in the calculation of his pension
18 allowance, (ii) CalPERS' rejection of the inclusion of Mr. Lewis' Employer Paid Member
19 Contributions ("EPMC") as part of the final compensation used to calculate his pension
20 allowance; and (iii) CalPERS' threat to collect what CalPERS incorrectly deems "overpayments"
21 of Mr. Lewis' pension allowance based on the correct final compensation and EPMC.

22 The City of San Bernardino has also appealed CalPERS' determination, in a letter dated
23 June 5, 2014. A true and correct copy of that appeal is attached hereto as **Exhibit 1**.

24 INTRODUCTION

25 CalPERS has incorrectly and unjustly denied Mr. Lewis the right to have his pension
26 allowance calculated based on his highest year of compensation with the SBFD, including
27 EMPC. Instead, CalPERS has drastically reduced Mr. Lewis' allowance by nearly thirty percent.

28 Further, CalPERS has done so in violation of Mr. Lewis' due process rights by

1 unilaterally reducing the pension allowance without first affording him the right to a fully
2 litigated hearing that comports with due process, an opportunity to refute CalPERS' contentions,
3 and a final resolution of the dispute in the administrative process or a court of law before any
4 pension reduction. Counsel for Mr. Lewis sent a letter to CalPERS on April 18, 2014, three days
5 after receiving notice from CalPERS that it would unilaterally reduce the pension effective May
6 1, 2014, and requested that CalPERS refrain from any reduction until a hearing was held.

7 CalPERS has never responded to that request.

8 Mr. Lewis' employer, the City, has affirmatively recognized that Lewis was entitled to
9 the Battalion Chief position. The City filed an appeal of CalPERS' "final determination" to
10 reduce Mr. Lewis' pension allowance, a true and correct copy of which is attached hereto as
11 Exhibit 1.

12 The City duly and faithfully reported the Battalion Chief compensation and EPMC to
13 CalPERS as "Temporary Upgrade Pay" as instructed and directed by CalPERS. CalPERS issued
14 such direction after the City explicitly contacted CalPERS to determine how to report the
15 compensation so that Mr. Lewis would receive an eventual pension allowance calculated based
16 on his highest one-year earnings at the Battalion Chief level.

17 Mr. Lewis asserts all his equitable defenses and rights. CalPERS is equitably estopped
18 from unjustly denying Mr. Lewis the pension allowance based on his highest one year of regular
19 and special compensation pursuant to the City's retention of CalPERS to administer the City's
20 pension promises. Laches bars this proceeding. The statute of limitations bars CalPERS from
21 now acting to cut the pension allowance.

22 **SPECIAL DEFENSES AND RESPONSE TO STATEMENT OF ISSUES**

23 Mr. Lewis specifically denies each part of the *Statement of Issues* that is not expressly
24 admitted. Mr. Lewis hereby presents the following special defenses, specific denials, and
25 responses to the *Statement of Issues* pursuant to *Government Code* section 11506.

26 1. Mr. Lewis recognizes that Petitioner CalPERS makes and files the *Statement of*
27 *Issues* in its Official capacity.

28 2. Mr Lewis timely filed an appeal and requested a hearing.

1 existing practice of the City's promotion process. The local rules, including those made pursuant
2 to the City's charter powers, were established and in many instances became mandatory and
3 binding.

4 7. Neither the Civil Service Commission, nor the City, nor the Sbfd involved has
5 the power to dispense with the essentials prescribed. Moreover, a city council or its department
6 heads cannot evade the established provisions by enacting contrary ordinances or practices
7 without notice of a change in practice. The City made no changes to established practices in this
8 case.

9 8. Eligibility lists were established as a result of position and competitive
10 examinations. The exams were open to persons who lawfully may be appointed to any position
11 within the class for which these examinations are held. The persons must meet the minimum
12 qualifications requisite to the performance of the duties of that position.

13 9. When an examination for a managerial position is conducted on an open and
14 promotional basis, the names of eligible persons must be placed on one list, ranked in relative
15 order of the examination score received, and for purposes of preference in certifying eligible
16 persons the list must be considered an eligible list. The names of the applicants who pass the
17 examination with a passing score must be placed on one list and ranked in the relative order of
18 the examination score received.

19 10. Promotions are supposed to be made in order from the list. Under the City's
20 charter practices and powers, the City established a formal and historic practice where
21 certification of the person next highest on the eligible list for appointment is mandatory.
22 Seniority and score must be respected in making appointments. Mr. Lewis was employed at the
23 time that the City established these practices, which created an expectancy and right in Mr.
24 Lewis.

25 **Promotional Test to Become Battalion Chief:**

26 11. Beginning in or about November 2002 and finishing in or about February 2003,
27 while holding the position of Fire Captain, Mr. Lewis took the test to be promoted to the position
28 of Battalion Chief. He had on occasion previously performed the duties normally assigned to

1 Battalion Chiefs, including in taking command responsibility at large fire events and directing
2 the activities and responses of the other firefighter personnel on scene.

3 12. The first step in the Battalion Chief promotional test was a written examination.
4 As is currently understood, Mr. Lewis, Lester Kulikoff, and Dennis Moon were the only three
5 Fire Captains to pass.

6 13. The next step was a series of simulations where the examinees assumed command
7 of a structure fire, a wild land fire and a hazardous materials incident. It was announced prior to
8 the examination that simulated injury or death of any personnel under an examinee's command in
9 any of the scenarios would be considered automatic failure of the test, and such an individual
10 would be disqualified for promotion to Battalion Chief until they later retook the simulator
11 portion and passed.

12 14. Years later, it is understood that both Kulikoff and Moon had failed the simulator
13 portion; only Mr. Lewis passed. Nevertheless, both Kulikoff and Moon were kept in the pool of
14 Fire Captains eligible for promotion to Battalion Chief.

15 15. The remainder of the examination included a writing exercise, a Fire Chief's oral
16 examination and an outside Chief's oral board. The scores from the entire examination process
17 were added up by Fire Chief Larry Pitzer. Chief Pitzer then sent the list to the City's Civil
18 Service Board with the three individuals listed in order as to their ranked eligibility to be
19 promoted at the opportunity when a Battalion Chief position opened up in the SBFDD.

20 16. Mr. Lewis, along with two other Fire Captains (Kulikoff and Moon) were all
21 deemed eligible to serve as Battalion Chief should an opening for that position develop. Chief
22 Pitzer placed Mr. Kulikoff first on the promotion list, Mr. Lewis was placed second on the list,
23 and Mr. Moon was placed last on the list.

24 17. Civil service rules and past practice in the City and the SBFDD established that
25 once an opening for Battalion Chief occurred, the SBFDD would be required to first offer the
26 position to the individual holding position number one on the list, i.e. Kulikoff. If Kulikoff
27 declined the position or was no longer available to accept the promotion (e.g., because he had
28 retired or left SBFDD), the SBFDD was required to offer the position to the next person on the

1 ranking list, i.e. to Mr. Lewis. Only if both Kulikoff and Mr. Lewis either declined the Battalion
2 Chief position or were no longer available to accept the promotion could Sbfd offer the position
3 to Moon.

4 18. If another Battalion Chief position later opened up, the Sbfd would be required
5 to follow the same procedures, i.e. to first offer the promotion to the individual who was then at
6 the top of the list, and only move to a lower-ranked individual if the higher-ranked individual
7 declined or was unable to accept the promotion.

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

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

14 20. Because of violations of Sbfd policies governing employment and professional
15 conduct, Mr. Kulikoff was placed on administrative leave at the end of 2003. He remained 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 21. Mr. Lewis had earned the position as Battalion Chief, as well as the associated
19 pay rate and related deferred compensation in the form of a pension, prior to October 2004. Mr.
20 Lewis had a vested earned right to the position, compensation and deferred compensation, and
21 other benefits of a Battalion Chief.

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

23 22. Although City and Sbfd policy and practice required that promotion to the new
24 Battalion Chief position be offered first to Mr. Lewis because he was now number one on the
25 promotion list, the City and Sbfd violated existing procedure, bypassed Mr. Lewis for the
26 promotion, and instead awarded the Battalion Chief position to Mr. Moon in October 2004.

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

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

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

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

13 26. The City ultimately came to a resolution of the dispute with Mr. Lewis, agreeing,
14 *inter alia*, (i) to award Mr. Lewis back pay from the date of Moon's promotion (consisting of the
15 difference between Mr. Lewis' existing pay as Fire Captain and the pay associated with a
16 promotion to Battalion Chief), (ii) to increase Mr. Lewis' compensation from the date of the
17 City's agreement forward to the Battalion Chief salary paid pursuant to the City's publicly
18 available pay schedules, and (iii) to ensure that Mr. Lewis would receive deferred compensation
19 he was entitled to, including a pension calculated at his highest earnings at the Battalion Chief
20 pay scale.

21 27. The City acted to remedy its failure to timely promote Mr. Lewis to the Battalion
22 Chief position, including by granting Mr. Lewis the compensation and benefits to which
23 Battalion Chiefs were entitled. Further, the City, did so in its capacity as a charter city with
24 constitutional autonomous rights to determine its own governance structure, hire and promote
25 employees of its own choosing, designate those employees' job duties and responsibilities, and
26 compensate those employees as the City deemed appropriate.

27 28. The City later memorialized this in a March 2007 Settlement Agreement. A true
28 and correct copy of the Settlement Agreement is attached hereto as **Exhibit 2**. However, the

1 City's acknowledgement of its obligations and of Mr. Lewis' rights to all benefits accruing from a
2 promotion to Battalion Chief were already in existence prior to the Settlement Agreement.

3 29. Fire Chief Pitzer was a signatory on and party to the Settlement Agreement. Chief
4 Pitzer agreed that Lewis was entitled to receive all of the rights and benefits of any other
5 individual promoted to the position of Battalion Chief. However, Chief Pitzer, as the head of the
6 SBFD and ultimate authority in SBFD, directed that Lewis would remain assigned to duties
7 similar to those performed by Lewis prior to the enactment of the Settlement Agreement.

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

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

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

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

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

22 34. After evaluating the request and applying its administrative experience and
23 knowledge, CalPERS directed the City to calculate the difference between the pay Mr.
24 Lewis received as Fire Captain and the new pay the City was awarding him pursuant to the
25 Battalion Chief pay scale, and then to report that difference as "temporary upgrade pay".
26 CalPERS also directed the City to pay employer and employee contributions calculated on
27 the basis of the Battalion Chief compensation rate paid to Mr. Lewis. Pursuant to the
28 PERL and Regulations, and CalPERS' policies and procedures, "temporary upgrade pay"

1 **is PERSible compensation.**

2 35. CalPERS instructed the City to do so for the approximately three years of
3 additional back pay (the difference between what Mr. Lewis had received as Fire Captain and
4 what he should have received as Battalion Chief), as well as do so for Mr. Lewis' pay going
5 forward.

6 36. CalPERS never advised that there was any "time limit" or duration on how long
7 such pay should be reported as "temporary upgrade pay", nor did it ever inform the City that the
8 City needed to take any other actions to be in compliance with CalPERS' policies and procedures
9 concerning CalPERS' interpretation of the PERL. The City and Mr. Lewis relied on CalPERS'
10 advice.

11 37. As the pension administrator for the City and purportedly the agency most
12 qualified to determine the applicability of the PERL to effect the pension promises of the City,
13 CalPERS could have chosen to direct the City to characterize and report Lewis' Battalion Chief
14 compensation in some other manner qualifying as PERSible special compensation, or if
15 necessary it could have directed the City to take some other action to ensure that Lewis'
16 compensation qualified as PERSible compensation.

17 38. The City and Lewis were entitled to rely on CalPERS' expertise that the Battalion
18 Chief compensation had been properly reported and characterized to provide Lewis with the
19 benefits attributable to that compensation, including deferred income in the form of an eventual
20 pension allowance payable by CalPERS.

21 **Performed Duties of Battalion Chief:**

22 39. By virtue of his experience and knowledge, and his exemplary performance on
23 the Battalion Chief promotional tests, Mr. Lewis had qualified to serve as Battalion Chief.

24 40. Mr. Lewis had served as Battalion Chief on an acting basis at various times prior
25 to the time of the Settlement Agreement (Exhibit 2). He continued to perform duties of a
26 Battalion Chief after the Settlement Agreement, such as taking command of fire suppression
27 incidents.

28 41. Mr. Lewis shared the same work location as other individuals who had served as

1 Battalion Chief (i.e., at the SBFD). Mr. Lewis also was in the same bargaining unit as those other
2 individuals who had served as Battalion Chief. For example, he was required to and did take
3 wage and benefit reductions when the City required that of all managerial personnel between
4 March 2007 and Mr. Lewis' retirement from the SBFD on October 31, 2012.

5 **Disability Leave:**

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

10 43. Throughout approximately 16 months that Mr. Lewis was on disability leave, he
11 continued to receive compensation as Battalion Chief pursuant to SBFD's and the City's publicly
12 available pay schedules pursuant to *Labor Code* section 4850.

13 44. During his disability leave, Mr. Lewis did not perform the duties of any active
14 SBFD employee, regardless of title held, because he was on medical leave and unable to work as
15 a firefighter. However, like any CalPERS Member who takes disability leave, he was entitled to
16 receive the PERSible rights and benefits of the compensation reported to CalPERS, regardless of
17 the fact that he was disabled and therefore unable to perform the duties of any active SBFD
18 employee. CalPERS, in fact, does not inquire into what, if any, duties a Member is performing
19 while on disability leave and instead ministerially calculates the Member's accrual of pension
20 benefits based on the compensation reported to CalPERS on behalf of that individual.

21 45. Throughout the period of his disability, the City continued to report Mr. Lewis'
22 Battalion Chief compensation and EPMC to CalPERS throughout the time he was on disability
23 leave and to make the required employer and employee contributions attributable to those
24 earnings. CalPERS continued to accept the reports of compensation and the contributions.

25 **Retirement:**

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

28 47. The contract between the SBFD and CalPERS mandates that a retiree's "final

1 compensation" from the Sbfd shall be calculated based upon his or her highest single year of
2 earnings, together with total years of service credit earned from CalPERS-covered employment
3 and the specific retirement formula based upon the employee's age at retirement.

4 48. Once Mr. Lewis retired effective November 1, 2012, he began receiving a
5 retirement pension that was correctly calculated by using his highest one-year earnings, which
6 was at the Battalion Chief rate of compensation during his final year of employment with the
7 Sbfd.

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

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

13 50. CalPERS also disallowed the Employer Paid Member Contributions ("EPMC") in
14 which the City paid Mr. Lewis' nine percent (9%) Member contributions to CalPERS and
15 included the value of those contributions in his total reported compensation.

16 51. All employees of Sbfd are entitled to have EPMC included in their final
17 compensation, regardless of whether they hold jobs as part of the "rank and file" or as part of the
18 management and confidential employees of the Sbfd.

19 52. CalPERS provided Mr. Lewis with appeal rights should he wish to challenge this
20 determination.

21 53. Lewis timely appealed CalPERS' determination.

22 **LAW AND ARGUMENT**

23 **I. Law of Jurisdiction**

24 **A. No Jurisdiction, Charter City Authority, No Preemption**

25 CalPERS and the OAH have no jurisdiction to hear or to decide any issue that is relevant
26 to Mr. Lewis' employment which ignore or attempt to circumvent the "home rule" authority of
27 the City as a "charter city" under the California Constituion. The City made decisions pursuant to
28 its protected charter city autonomy to establish rates of compensation and deferred

1 compensation, or to make decisions concerning the positions held by any of its employees or the
2 duties undertaken in those positions.

3 **B. Challenge to Jurisdiction**

4 Mr. Lewis reserves all rights to challenge CalPERS' and the OAH's jurisdiction in this
5 regard and this matter at all times. Mr. Lewis does not consent to jurisdiction. Specifically, Mr.
6 Lewis expressly reserves and maintains his rights to challenge CalPERS' or the OAH's
7 jurisdiction and challenge that CalPERS or the OAH is operating in excess of its jurisdiction in
8 this matter. Mr. Lewis expressly reserves and maintains his rights to pursue his rights in the
9 Superior or higher courts.

10 **No Implied or Express Consent.** Mr. Lewis' filing of this *Notice of Defense* is not
11 implied or express consent to (1) the jurisdiction of the OAH, (2) CalPERS' administrative
12 authority; or (3) other authority of CalPERS or OAH.

13 **No Subject Matter Jurisdiction.** CalPERS and the OAH lack subject matter jurisdiction
14 over all matters arising from the City's actions awarding Mr. Lewis the compensation of a
15 Battalion Chief and the attendant deferred compensation and pension promises related to that
16 compensation in that the City, as a charter city organized under the California Constitution, acted
17 in accordance with its constitutional authority. The question of subject matter jurisdiction of an
18 administrative agency over the subject matter generally may be raised at any time during the
19 pendency of an adjudicative proceeding before the agency, or at any stage of an appeal
20 thereafter. (*Stuck v. Board of Medical Examiners of State* (1949) 94 Cal.App.2d 751.)

21 **No Waiver of Jurisdiction, No Consent.** Mr. Lewis does not waive or consent to
22 jurisdiction. Although jurisdiction can be 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 **C. Limited Agency Authority**

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

16 The powers of public agencies are derived from the statutes which create them and define
17 their functions (*Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018) and
18 an administrative agency cannot enlarge or exceed the scope of authority that has been statutorily
19 delegated to it (*Western States Petroleum Ass'n v. Department of Health Services* (2002) 99
20 Cal.App.4th 999). Accordingly, an agency's adjudicative jurisdiction must be pursuant to
21 legislative authorization (*Dominguez Land Corp. v. Daugherty* (1925) 196 Cal.453; *Hardin*
22 *Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, as modified on denial of reh'g,
23 (Feb. 28, 1997); *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44
24 Cal.App.4th 194), which must be conveyed expressly and unequivocally (*Campos v. Anderson*
25 (1997) 57 Cal.App.4th 784).

26 An agency cannot validly act in excess of the limits of jurisdiction that have been
27 conferred on it. (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d
28 245; *Hamilton v. Gourley* (2002) 103 Cal.App.4th 351; *Hardin Oldsmobile v. New Motor Vehicle*

1 *Bd. (1997) 52 Cal.App.4th 585, as modified on denial of reh'g, (Feb. 28, 1997).*

2 **D. No Voluntary Appearance, No Waiver, No Consent, Notice of Defense Under**
3 **Protest**

4 Mr. Lewis files this *Notice of Defense* under protest. Mr. Lewis is not volunteering, not
5 consenting, and not waiving his rights. He appears involuntarily, under compulsion.

6 **II. Property Right Vested, Right to a Full Due Process Adjudicative Hearing in**
7 **Superior Court Before Any Reduction in Pension, Reduction is Inappropriate**

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

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

15 Nevertheless, CalPERS advised Mr. Lewis by letter dated April 9, 2014, that it was
16 unilaterally reducing the pension by nearly thirty percent (30%) effective May 1, 2014, before
17 any hearing on the matter had taken place or any ruling on CalPERS' authority to make the
18 reduction had been issued. Counsel for Mr. Lewis objected to the planned reduction by letter
19 dated April 18, 2014, and demanded that CalPERS refrain from any reduction unless and until it
20 received a final determination in the administrative process or in a court of law that CalPERS
21 was entitled to make the reduction, but CalPERS has never responded to that letter demand and
22 has moved forward with the unilateral pension reduction.

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

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

6 **III. Employment with a Contracting Agency**

7 The City has contracted with CalPERS to provide pension rights and benefits to its
8 employees. Said contract was entered into some years prior to Mr. Lewis' employment at the
9 City with the SBFD. The City-CalPERS contract does not preempt the City's charter city powers
10 and authority.

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

14 **IV. Mr. Lewis Satisfies the Public Employees' Retirement Law**

15 The PERL sets forth the conditions for CalPERS membership, accrual of service credit,
16 and the calculation of retirement benefits to which such an individual might be entitled. Mr.
17 Lewis meets all such terms and is entitled to a retirement pension calculated on the basis of his
18 highest earnings, i.e., the highest year of Battalion Chief compensation he received as well as the
19 associated EPMC.

20 **A. 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.

1 **B. Group or Class:**

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

7 **C. "Regular Rate of Pay":**

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

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

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

18 **D. Labor Code Requirements Re "Average Weekly Earnings":**

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

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

1 **V. CalPERS Must Accept Mr. Lewis' Battalion Chief Compensation as "Compensation**
2 **Earnable"**

3 **A. Prior Advice:**

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

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

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

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

17 **C. Mr. Lewis' Battalion Chief Compensation Qualifies as "Temporary Upgrade**
18 **Pay"**

19 CalPERS determined that Mr. Lewis' Battalion Chief compensation qualified as
20 "temporary upgrade pay". *California Code of Regulations* section 571(a)(3), Premium Pay,
21 states:

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

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

27 Further, if CalPERS insists that Mr. Lewis' receipt of the Battalion Chief compensation
28 was not of limited duration, but was permanent in nature, then CalPERS should either correct the

1 prior reporting and include all of the Battalion Chief compensation in Mr. Lewis' base salary or
2 instruct the City to make such corrections.

3 There is also no definition in the PERL or the Regulations which further defines what it
4 means to "work in an upgraded position/classification". As a charter city and employer of Mr.
5 Lewis, the City had constitutional autonomy and authority to determine what duties he
6 performed or did not perform. CalPERS has no authority under the PERL to evaluate the specific
7 duties performed by any employee.

8 Instead, CalPERS has the ministerial duty as applied to the instant case to (i) accept the
9 City's determination that Mr. Lewis was eligible to and would receive compensation pursuant to
10 a publicly approved pay schedule at the rate paid to Battalion Chiefs, and (ii) accept the City's
11 determination of whatever duties Mr. Lewis would then perform in exchange for that
12 compensation.

13 **D. CalPERS Must Either Accept the Disputed Portion of Mr. Lewis' Battalion**
14 **Chief Compensation As "Temporary Upgrade Pay" Or Must Now**
15 **Appropriately Redesignate It**

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

21 For example, C.C.R. §571(a)(1) – Incentive Pay, includes the following:

22 **Bonus** – Compensation to employees for superior performance such as "annual
23 performance bonus" and "merit pay"... A program or system must be in place to
24 plan and identify performance goals and objectives.

25 The fact that Mr. Lewis performed as Battalion Chief on an acting basis before he took
26 the Battalion Chief promotional tests, then achieved exemplary scores in those tests, and then
27 continued to be called on to periodically perform Battalion Chief duties such as taking command
28 of fire suppression events under the Incident Command System constituted "superior

1 performance." Moreover, Mr. Lewis did so pursuant to his high scores in the Battalion Chief
2 promotional test which meets the definition of "a program or system ... in place to plan and
3 identify performance goals and objectives."

4 As another example, C.C.R. §571(a)(4) – Special Assignment Pay, includes the
5 following:

6 **Confidential Premium** – Compensation to rank and file employees who are
7 routinely and consistently assigned to sensitive positions requiring trust and
8 discretion.

9 Pursuant to the Settlement Agreement (**Exhibit 2**) and the City's decision to award Mr.
10 Lewis the benefits and rights of Battalion Chief, he became a member of the confidential
11 management staff of the SBFDF and was mandated to carry out his duties with trust and
12 discretion. If CalPERS maintains that he did so while remaining a member of the SBFDF rank and
13 file holding the position of Fire Captain, then the additional compensation he received would
14 constitute "compensation to rank and file employees who are routinely and consistently assigned
15 to sensitive positions requiring trust and discretion."

16 **VI. Mr. Lewis Qualifies for Inclusion of EPMC in His Pension Calculation**

17 All safety employees at the SBFDF at the time of Mr. Lewis' retirement were entitled to
18 inclusion of EPMC in their "compensation earnable", whether a member of the "rank and file"
19 employees covered by Local 891 of the San Bernardino Professional Firefighters Union or a
20 member of the management/confidential employees' bargaining unit. (See resolutions of the City
21 granting EPMC to all safety employees of the SBFDF, true and correct copies of which are
22 attached hereto as **Exhibit 3**.)

23 Accordingly, CalPERS must include EPMC in Mr. Lewis' pension calculation, regardless
24 of the outcome of the dispute concerning his base salary.

25 **AFFIRMATIVE DEFENSES**

26 **VII. CalPERS' Duty to Correctly Inform**

27 CalPERS was fully informed in or about June 2007 of the City's decision to compensate
28 Mr. Lewis in accordance with the Battalion Chief pay scale listed on the City's publicly available
pay schedule. It was fully informed of the City's intent to provide Mr. Lewis with deferred

1 compensation in the form of a pension, including one administered by CalPERS, based upon the
2 Battalion Chief compensation that the City paid to Mr. Lewis. It was also fully informed of the
3 fact that the City requested advice from CalPERS about how to properly report Mr. Lewis'
4 Battalion Chief compensation so that he would qualify for an eventual pension based upon that
5 compensation.

6 CalPERS then explicitly instructed the City how to report Mr. Lewis' Battalion Chief
7 compensation in a manner that would meet CalPERS' requirements and provide him with the
8 promised pension based upon that compensation. The City had no reason or basis to dispute
9 CalPERS' explicit reporting instructions. The City duly followed CalPERS' reporting instructions
10 from June 2007 through Mr. Lewis' retirement effective on November 1, 2012. The City also
11 made all employer and employee contributions to CalPERS that were attributable to the reported
12 compensation, and CalPERS accepted all such contributions.

13 CalPERS has contracted with the City to administer the City's pension promises.
14 CalPERS holds itself out as the agency with the expertise and experience necessary to correctly
15 administer the pension system of the City and all other CalPERS contracting entities. The City
16 had the legal right to rely on CalPERS to provide it with accurate advice concerning the
17 implementation of the City's pension promises.

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

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

28 **Pension is Consideration for Work.** " 'A pension plan offered by the employer and

1 impliedly accepted by the employee by remaining in employment constitutes a contract between
2 them, whether the plan is a public or private one, and whether or not the employee is to
3 contribute funds to the pension. [Citations.] The continued employment constitutes consideration
4 for the promise to pay the pension, which is deemed deferred compensation. [Citations.]
5 (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425, 179 Cal.Rptr. 78.) As a
6 result, '[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees
7 of pension funds who administer retirement benefits ... and the trustees must exercise their
8 *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries. [Citations
9 omitted.]' (*Ibid.*; emphasis in originals.)" (*Hittle v. Santa Barbara County Employees Retirement*
10 *Assn.* (1985) 39 Cal.3d 374, 392.)

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

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

21 As this court has previously noted, "[i]n the vast development of pensions in
22 today's complex society, the numbers of pension funds and pensioners have
23 multiplied, and most employees, upon retirement, now become entitled to
24 pensions earned by years of service. We believe that courts must be vigilant in
25 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."

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

27 This fiduciary relationship is judicially guarded by the application of *Civil Code*
28 section 2235, which provides that "[a]ll transactions between a trustee and his
beneficiary during the existence of the trust, or while the influence acquired by

1 the trustee remains, by which he obtains any advantage from his beneficiary, are
2 presumed to be entered into by the latter without sufficient consideration, and
under undue influence."

3 (*Hittle v. Santa Barbara County Employees Retirement Assn., supra*, at 393-394.)

4 **Equitable Estoppel.** CalPERS takes the position is that estoppel can never apply to it as
5 a matter of law. CalPERS essentially says it cannot be held accountable when it repeatedly and
6 consistently provides Members and/or contracting agencies with incorrect advice over a long
7 period of time and those Members and agencies rely on and act upon that advice to their
8 significant harm. In short, CalPERS grants itself absolute immunity from any prior mistakes, no
9 matter how egregious.

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

22 (30 Cal.Jur.3d, *Estoppel and Waiver*, §1.)

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

In the words of our state Supreme Court, Mr. Lewis' long term detrimental reliance on a
seemingly reasonable representation by CalPERS creates one of those " 'exceptional cases' where
'justice and right require' that the government be bound by an equitable estoppel." (*City of Long*

1 *Beach v. Mansell* (1970) 3 Cal.3d 462, 501 ("*Mansell*".)

2 **VIII. CalPERS is Estopped from Denying the Use of Mr. Lewis' Battalion Chief Salary**

3 Mr. Lewis is not seeking to impose strict liability on CalPERS for every representation
4 that it makes to its 1.5 million Members. However, he is also entitled to estop CalPERS from
5 denying its representation of a reasonable benefit. Rather than immunize CalPERS, the estoppel
6 promotes the Constitution and qualifies as an "exceptional case" where "justice and right require"
7 such estoppel in the words of *Mansell*.

8 **A. Elements of Equitable Estoppel**

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

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

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

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

1 City.

2 Further, if CalPERS now contends that the City's reporting of Mr. Lewis' Battalion Chief
3 compensation was improper, Mr. Lewis will prove that he "did not have actual knowledge of the
4 true facts [and] did not have notice of facts sufficient to put a reasonably prudent man upon
5 inquiry, the pursuit of which would have led to actual knowledge." (*Banco Mercantil v. Sauls,*
6 *Inc.* (1956) 140 Cal.App.2d 316.)

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

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

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

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

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

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

26 CalPERS has "plenary authority and fiduciary responsibility for ... administration of the
27 system", subject among other things to the mandate that "[a] retirement board's duty to its
28 participants and their beneficiaries shall take precedence over any other duty." (Cal. Const., art.

1 XVI, §17.) If CalPERS is permitted to seriously and repeatedly misinform a Member in ways
2 that cause the Member permanent, irreparable and substantial harm, this would eviscerate the
3 mandate to put the interest of Members above all other duties. The constitutionally mandated
4 fiduciary duties certainly give CalPERS the authority to now award Mr. Lewis a pension based
5 on his Battalion Chief compensation at the City, even if that compensation does not meet all of
6 the technical requirements that CalPERS (wrongly) asserts.

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

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

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

14 **C. CalPERS Is Estopped From Now Disallowing Mr. Lewis' Battalion Chief**
15 **Compensation**

16 The doctrine of equitable estoppel is based on the theory that the party estopped has
17 misled the other party to its prejudice, and may be applied against a governmental body where
18 justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School*
19 *District* (2004) 114 Cal.App.4th 1018.) Whenever a party has, by his own statement or conduct,
20 intentionally and deliberately led another to believe a particular thing to be true and to act upon
21 such belief, he is not, in any litigation arising out of such statement or conduct, permitted to
22 contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4th 394; *California Evidence Code*
23 §623.)

24 The requisite elements for equitable estoppel are met in this case: (1) The party to be
25 estopped (CalPERS) was apprised of the facts; (2) the party to be estopped (CalPERS) intended
26 by its conduct to induce reliance by the other party (Mr. Lewis) on the explicit and implicit
27 promises that Mr. Lewis could utilize his Battalion Chief compensation at the City in the
28 calculation of his eventual pension (and acting in such a way as to cause Mr. Lewis reasonably to

1 believe reliance was intended); (3) the party asserting estoppel (Mr. Lewis) was ignorant of the
2 facts, if indeed any facts exist which would otherwise support CalPERS' recent refusal to provide
3 a pension based upon the Battalion Chief compensation; and (4) the party asserting estoppel (Mr.
4 Lewis) suffered injury in reliance on CalPERS' conduct, to wit: he accepted continued
5 employment at the City, made his retirement plans and left City employment believing that his
6 Battalion Chief compensation was PERSible. Mr. Lewis retired from CalPERS with this
7 understanding and thereby ended his career, only to find that he would be receiving a far smaller
8 pension allowance from CalPERS than he had been promised.

9 If those estoppel elements are established against the government, the court must then
10 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the
11 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,
12 400-401.)

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

16 **IX. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Mr. Lewis**

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

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

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

1 (a) The retirement board of a public pension or retirement system shall have the
2 sole and exclusive fiduciary responsibility over the assets of the public pension or
3 retirement system. The retirement board shall also have sole and exclusive
4 responsibility to administer the system in a manner that will assure prompt
5 delivery of benefits and related services to the participants and their beneficiaries.
6 The assets of a public pension or retirement system are trust funds and shall be
7 held for the exclusive purposes of providing benefits to participants in the pension
8 or retirement system and their beneficiaries and defraying reasonable expenses of
9 administering the system.

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

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

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

27 As the California Court of Appeals ruled in *City of Oakland v. Public Employees'*
28 *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*.)

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

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

6 CalPERS' unjust disallowance of the use of Mr. Lewis' Battalion Chief compensation in
7 the calculation of his pension allowance meets each of the elements to bring a breach of fiduciary
8 claim against CalPERS.

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

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

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

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

23 CalPERS' also has other fiduciary duties as provided by statute.

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

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

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

5 **X. CalPERS' Actions Provide Unjust Enrichment to CalPERS**

6 CalPERS freely and knowingly accepted employee and employer contributions
7 associated with Mr. Lewis' Battalion Chief compensation earned at the City. Contribution
8 amounts are established on the basis of actuarial estimates of the pension allowances CalPERS
9 will eventually be required to pay to individuals based on the salaries they earned.

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

17 **XI. CalPERS Is Barred By Laches**

18 Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render
19 the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304; 30
20 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of
21 the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco*
22 (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The
23 defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act
24 about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v.*
25 *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical*
26 *Center* (1980) 27 Cal.3d 614.)

27 **A. Laches in Administrative Hearings**

28 The elements of unreasonable delay and resulting prejudice, which must be established in

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

8 **B. Acquiescence By CalPERS**

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

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

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

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

25 Mr. Lewis suffered prejudice because he relied on CalPERS' representations about how
26 his Battalion Chief compensation should be reported to make it PERSible in planning his
27 retirement and in his job selection and generally planning his life. The large and small, conscious
28 and unconscious, decision matrix that an individual uses to plan his life, his retirement, his

1 activities are founded on the accepted facts of one's life. Material changes of condition, including
2 retirement, have taken place between the parties during that period of CalPERS' neglect.
3 CalPERS should not now be able to unsettle Mr. Lewis' expectations by belatedly and
4 prejudicially asserting that it has a right to change its mind.

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

6 Mr. Lewis suffered prejudice in that he continued employment at the SBFD and retired
7 based on CalPERS' representations that is Battalion Chief compensation was being properly
8 reported to CalPERS and associated contributions were being properly made such that he would
9 be entitled to a pension based upon that compensation. CalPERS' delay would, were the claim
10 upheld, permit the imposition of an unwarranted injustice. Mr. Lewis could not now easily begin
11 to look for other work, make alternative jobs choices, or seek other benefits.

12 **E. Laches is Appropriate**

13 Mr. Lewis may assert laches against CalPERS to prevent relief of a strictly legal nature
14 because of CalPERS' failure to make the correction, or to prosecute it with diligence. In some
15 cases of delay, equity may bar an administrative proceeding, and the courts will apply notions of
16 laches borrowed from the civil law. (30 Cal.Jur.3d, *Equity*, §36.)
17 The doctrine of laches and statutes of limitations are both designed to promote justice by
18 preventing surprises through the revival of claims that have been allowed to slumber until
19 evidence has been lost, memories have faded, and witnesses have disappeared. These policies
20 also guard against other injuries caused by a change of position during a delay. While a statute of
21 limitations bars proceedings without proof of prejudice, laches requires proof of delay that
22 results in prejudice or change of position.

23 Respectfully submitted.

24
25 Dated: May 14, 2014

26 By: _____

27 John Michael Jensen,
28 Attorney for Appellant Richard Lewis