ATTACHMENT C

RESPONDENT KING'S ARGUMENT

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Via Facsimile & U.S. Mail

Board Secretary
Board of Administration
California Public Employees' Retirement System
P.O. Box 942701
Sacramento, CA 94229-2701

Re: RESPONDENT KING'S ARGUMENT

In The Matter of The Appeal Regarding Membership Exclusion of Foundation Employees By SANTA CLARA COUNTY HEALTH AUTHORITY, Respondent and KATHLEEN KING, Respondent; Reference No. 2014-1087

To: Members of The Board of Administration of the California Public Employees' Retirement System:

This law firm represents Respondent Kathleen King in the above-referenced matter. We are submitting this argument to the Board of Administration pursuant to the notice and other materials dated March 8, 2016 regarding this matter.

The Case Before the Administrative Law Judge

This case came about as a result of an audit performed by CalPERS on Respondent Santa Clara County Health Authority. The audit concluded that even though Respondent Kathleen King was duly reported and timely contributions were consistently paid by the Authority to CalPERS, Ms. King (and others) should not have been a participant because she was not employed by the Authority, but instead was employed by the Santa Clara County Health Foundation, an allegedly separate entity.

There was a wealth of evidence presented at the hearing on this matter. There were close to 500 pages of exhibits, and the transcript over 250 pages. Respondent King's position was that, despite the formal structure of the two entities at issue (Respondent Authority and the Santa Clara County Health Foundation), she was either a common law employee of the Authority or the Authority and the Foundation together were a joint employer. King argued that, as an innocent participant, the facts here cry out for a finding that these two entities were joint

employers, and that on that basis, she should be considered an employee of the Authority for purposes of CalPERS participation.

The record in this matter[1] made it clear that for all matters concerning the employment relationship, employees of the Foundation were treated as employees of the Authority. Hiring was done through the Authority, personnel policies were set by the Authority, compensation levels were set by the Authority, Foundation employees received their paychecks from the Authority, employee relations matters were governed by and handled by the Authority, and the Authority provided the office space and equipment to the Foundation employees. That the Foundation employees would also be participants in CalPERS, just like all of the Authority employees, was not a surprising or questionable proposition.

Nevertheless, the CalPERS auditors relied exclusively on the formal documentation indicating that the Foundation was a separate, non-public entity. Based on that, the audit concluded that King was an employee of the Foundation only, and the reality of the actual employment relationship was irrelevant.

The administrative law judge agreed with this approach. She too elevated form over substance, ignoring all factors pointing to joint employment, and relied exclusively on the formal documents to support her conclusion that only the Foundation was King's employer.

Argument

It must be emphasized that Respondent King - and her fellow Foundation employees - were innocent parties in their participation. They were regularly reported to CalPERS, the Authority made the required contributions, they were treated as employees of the Authority for all aspects of the employment relationship, including all employee benefits. Unlike the converse situation of an employer attempting to avoid obligations to CalPERS, their expected participation in CalPERS was completely above board, and did not involve some type of subterfuge in order to gain for employees of a private employer benefits to which they should not be entitled. This is in contrast to the Board's case of *City of Galt* (2008) CalPERS Precedential Decision 08-01, where a separate entity was created expressly for the purpose of obtaining CalPERS coverage.

Unless there is evidence of a contrivance in order to gain coverage to which participants otherwise would not be entitled, Respondent King urges that, under these peculiar circumstances, King should be considered an employee of the Authority by applying the doctrine of "joint employer". Under the PERL, determining who is an "employee" of a contracting agency is to be determined by interpreting common law principals of employment. *See, Metropolitan Water District of Southern California v. Superior Court (Cargill)* (2004) 32 Cal. 4th 491. Even the administrative law judge in this case agreed that the definition of common law employment includes "co-employment". Nevertheless, somewhat inexplicably, and notwithstanding the overwhelming evidence to the contrary, the ALJ found that King was not jointly employed by both the Authority and the Foundation. What the ALJ ignored was that that, although the "right

[1] In the interest of brevity, Respondent King will not present repeated citations to the administrative Record. However, co-Respondent Santa Clara County Health Authority is simultaneously presenting an argument to the Board which does contain numerous citations to the record and upon which Respondent King hereby relies.

of control" over the employee is an important test under the common law to determine who is the employer, that test precisely means that the analysis should look not just to who has the right according to the documents, but who **actually** exercises control. The evidence here was that Respondent King was denied a raise by the Authority, that the Authority controlled Ms. King's hours of work and handled approval of her vacation requests, that it controlled who Ms. King could hire and fire, that it controlled how her performance evaluations read, and that it controlled all other significant aspects of her employment relationship. In fact, the ALJ demonstrated blind adherence to the words of the charter documents of the two organizations, rather than weighing the actuality of the relationship. This is the same error that the *Cargill* court cautioned against: that just because the Water District and the private labor supplier had a document that said that the labor supplier was the employer, not the public agency, that should not end the inquiry; instead, the emphasis should be on how the parties actually treat the relationship as between the two entities and the employee.

It must be emphasized that the position that the Board's legal counsel has taken thus far in this case is not claimed by Respondent King to be clearly in error. We are unaware of any case – whether in a civil court, or before this Board – which explicitly holds that the concept of joint employment is included in the PERL's definition of "employee" of the contracting agency. Without express approval of that concept by this Board, it makes complete sense that the position of CalPERS' counsel and staff thus far has been to adopt a more narrow reading of the PERL. Nevertheless, as pointed out above, even the ALJ in this case agreed that the concept of joint employment was consistent with the PERL's definition of employee. Respondent King urges that this Board would be functioning well within its authority to interpret the PERL by embracing the concept of joint employment under these limited and rather peculiar circumstances.

It may be argued that to include joint employment under the PERL would open up the CalPERS to a number of new claims of coverage relying upon a joint employer theory. Respondent King believes that the number of situations that might be even remotely similar to this case would be extremely limited, if existent at all. This is a situation where the larger organization – the Authority – developed a fundraising arm – the Foundation – but the Authority outnumbered the Foundation by a factor of approximately forty-to-one in terms of staffing. The Foundation, as the fundraising arm, did in fact incorporate as a non-profit charitable institution. However, throughout the life of this relationship, the parties treated this configuration as if the Foundation were merely another division of the Authority. With control of all aspects of the employment relationship and of the office and administrative functions placed in the hands of the Authority over the Foundation, the existence of this offshoot of the contracting agency is as rare a phenomenon as one could imagine. Consequently, it submitted that considering Ms. King as an employee of the Authority under the joint employer doctrine sets little if no precedent and is a situation which is not likely to recur.

Respondent King devoted her labor to the Foundation for over a five-year period while innocently believing that she was earning a pension in CalPERS. Contributions were duly made by her employer, and additional contributions were duly deducted from her paychecks. To find out years later that CalPERS wants to bar her from receiving the benefit of those contributions, through circumstances completely beyond her control, in the face of a completely logical and

legally supportable rationale for why she *should* receive the benefit of those contributions, smacks of inequity. The tens of thousands of hours of labor, for which she thought she was earning a pension, cannot be recouped. More significantly, there is no reasonable prospect of any substitute benefit or replacement plan precisely because the hours have already been worked. This matter also involves more than simply the permanent loss of retirement benefits for Ms. King. CalPERS' staff has already contacted the agency regarding other employees of the Foundation that were in fact subjects of the original audit in this matter. Thus, there are several other Foundation employees whose benefits may be taken away years after the fact. Perhaps most significantly, as far as we are aware, this cancellation of benefits of these innocent participants will even extend to two former Foundation employees who are already retired and one of whom has been drawing benefits for several years.

The Board must faithfully adhere to the requirements of the PERL and its regulations. The joint employer doctrine provides an avenue for the Board to continue to do that in this instance while also administering the plan in a manner that is in the best interests of the plan participants. For that reason, Respondent King urges that the Board find that she is an eligible participant based on the circumstances of this case.

Very truly yours,

WYLIE, McBRIDE,
PLATTEN & RENNER

MARK S. RENNER

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PROOF OF SERVICE

I declare:

That I am now and at all times herein mentioned a citizen of the United States and a resident of Santa Clara County, California. I am over the age of eighteen years and not a party to the within action. My business address is 2125 Canoas Garden Avenue Suite 120, San Jose, CA 95125. On this date I served the following:

RESPONDENT KATHLEEN KING'S ARGUMENT

X By Mail: by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at San Jose, Santa Clara County, California, addressed as set forth below. I am readily familiar with my firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

X By e-mail: I personally sent to the addressee's e-mail address a true copy of the above-described document(s).

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 7, 2016, at San Jose, California.

Linda M Busch

LINDA M. BUSCH