ATTACHMENT B

RESPONDENT'S ARGUMENT

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BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.	)	AGENCY CASE NO. 2010-0825 **RESPONDENT'S ARGUMENT** Hearing Date: February 15, 2017 Hearing Location: Robert F. Carlson Auditorium CalPERS Lincoln Plaza North 400 Q Street, Sacramento, CA

RESPONDENT'S ARGUMENT

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INTRODUCTION TO FACTS

I. Respondent Paul G. Mast entered into a Contract (The Settlement Agreement) (Exhibit A) with The Judges' Retirement System (JRS) on October 22, 1996. The Contract is still in full force and effect.

II. Petitioner seeks to have Respondent repay a part of the retirement benefits that he has received pursuant to the Contract between Petitioner and Respondent. This is not properly before the Board. In order for the Board to consider this, the Contract must first be rescinded. The sole method of rescinding the Contract is to bring an Accusation pursuant to Government Code (GC) §11503. This has never been done.

III. If the Contract had been rescinded, Petitioner still could not seek partial repayment of retirement benefits until an Accusation has been filed pursuant to GC §11503. No such Accusation has been filed. The matter before the Board at this time does not constitute an Accusation. Petitioner has not complied with the procedure set forth in the GC §11503 and following. An Accusation has never served on Respondent.

DISCUSSION OF FACTS AND LAW

THE CONTRACT (SETTLEMENT AGREEMENT) HAS NOT BEEN RESCINDED

Respondent Paul G. Mast entered into a Contract (The Settlement Agreement) (Exhibit A) with the Judges' Retirement System (JRS) on October 22, 1996. The Contract is still in full force and effect. The Contract can be canceled or avoided in only one manner, by an action for Rescission brought in a timely manner and for good cause (Civil Code §1691). See *GEDSTAD v.ELLICHMAN* et al. 124 Cal.App.2d 831, 269 P.2d 661, April 29, 1954:

> Section 1691, Civil Code, requires the party who wishes to rescind an agreement to use reasonable diligence to rescind promptly when

> aware of his right and free from undue influence or disability. In such a suit acting promptly is a condition of his right to rescind, Victor Oil Co. v. Drum. 184 Cal. 226. 243, 193 P. 243;Neff v. Engler. 205 Cal. 484, 488, 271 P. 744. and therefore diligence must be shown by the actor whereas in other actions laches is an affirmative defense to be alleged by the defending party. Absence of explanation of delay may even cause a complaint for rescission to be demurrable. Bancroft v. Woodward, 183 Cal. 99, 109, 190 P. 445. A delay of more than one month in serving notice of rescission requires explanation. *835Campbell v. Title Guarantee Etc. Co.. 121 Cal.App. 374, 377, 9 P.2d 264. The diligence is required throughout and it applies as well to the time a person will be held aware of his right to rescind11503 as to the time he will be held to have discovered the facts on which that right is based. Bancroft v. Woodward, supra. 183 Cal. 99. 108, 190 P. 445; First Nat. Bk. v. Thompson, 212 Cal. 388, 401, 298 P. 808.

To initiate a procedure to rescind a contract under the administrative procedures pursuant to the Government Code, and Accusation must be initiated pursuant to Government Code §11503:

> A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

This is true no matter what the underlying cause of the motivation or theory that causes the administrative agency to attempt to rescind a contract, whether it be undue influence, intimidation, or threats in the inception; a decision of a court 18 years after the contract was entered into; an allegation that the contract was against "public policy"; or any reason whatsoever. These "claimed causes" made by the attorney for Petitioner will be discussed below.

The result, despite such "claimed causes" is the same. The contract has not been rescinded; The Judges' Retirement System is bound by the contract and must fulfill its terms. A contract cannot be rescinded by Petitioner or its attorney because they are unhappy with the contract or they feel they made a mistake 18 years ago.

GENESIS OF CONTRACT

Prior to the time Respondent was to begin receiving retirement benefits from JRS, Respondent contacted JRS regarding the amount of his prospective benefits. Respondent was aware of his right to receive Cost of Living Adjusted (COLA) benefits (See the Declaration of Paul G. Mast, page ___). Respondent was surprised that JRS was not paying certain retirees benefits which included COLA. A discourse, ensued which culminated in a letter from Respondent to JRS dated May 1, 1995 and a subsequent memo from Jim Niehaus of JRS to "Mike" dated 5/09/95 (both attached as Exhibit B) wherein Mr. Niehaus says, ". . . I think he has merit to his case even though Sue does not. Still I will write the denial letter but this new letter from him can be used as an appeal we can send it to Legal as an appeal or a request for legal opinion."

Subsequently Respondent and representatives of JRS, including the JRS legal staff, discussed the issue for over a year. Nothing was resolved. Respondent briefed the issue by letter during that time.

Respondent received a Statement of Issues dated July 29, 1996 (Exhibit C) from Maureen Reilly, Senior Staff Counsel for JRS. Respondent spoke to Ms. Reilly several times, including just before and just after the receipt of the Statement of Issues (Declaration of Paul G. Mast, page-----). During one of the two conversations around the Statement of Issues, Ms. Reilly stated that she thought Respondent was correct on the issues but she and JRS could not settle the case because if JRS did so, they would have to pay other retired judges between 200 and 400 million dollars. Either during the same conversation or a later one, Respondent stated to Ms. Reilly that he had no intention of telling other retired judges about this and that Respondent would promise that in any agreement.

Then, Respondent wrote a letter dated August 5, 1996 to Ms. Reilly (Exhibit D). The Attorney for Petitioner in discussing said letter, ignored the dates and time frames of all the communications. These are important considerations. He refers only to the second-to-last sentence of the August 5th letter, ignores the rest of the letter, and alleges that Respondent was threatening or extorting JRS. This was not the case. The letter must be taken in its entirety from the beginning, "Pursuant to our recent telephone conversation, . . ." Respondent then discussed the Statement of Issues and what *Olson* held the law to be. Ms. Reilly's prior statement is referred to in the letter: as she very cogently pointed out in our telephone conversation, "the only way to resolve this matter is for CalPers to change their position on the claim."

The case was not settled at that time. Respondent filed his Response to Statement of Issues and Points and Authorities, dated August 16, 1996.

Further discussions occurred between Respondent and Ms. Reilly culminating in a letter from Ms. Reilly to Respondent dated September 20, 1996 (Exhibit F). This is one-and-a-half months after the date attorney for Petitioner claims Respondent had threatened and extorted Petitioner. The September 20, 1996 letter states that JRS had accepted the terms of the settlement offer in Respondent's August 5, 1996 letter. Presumably this meant (as stated in Ms. Reilly's former letter) that CalPERS was aware and also accepted the settlement. The September 20, 1996 letter was followed by a letter of October 4, 1996, which included an agreement (the Contract) to be signed (Exhibit G). This contract was prepared solely by JRS without input from Respondent. See the relevant portion of the Proposed Decision on Remand at page 14 ff. *infra*.

ISSUES BEFORE THE BOARD AT THIS HEARING

The issues that can be considered at this hearing and which are the proper subject of these proceedings are only those presented by the Claim (the letter of September 1, 2010 from Respondent Paul G. Mast to Pamela Montgomery – attached as Exhibit H), Petitioner's Denial of the Claim (Exhibit I), and Respondent's Appeal of the Denial of the Claim (Exhibit J).

The purpose of the Statement of Issues initiating the administrative process is to state those issues contained in the Claim, the Denial, and the Appeal. It is not proper to state additional issues in the Statement of Issues. The additional issues cannot be added to the matters before the Board except by the filing of an Accusation, which has not been done.

The only issue in the Claim, Denial, and Appeal is the proper calculation of the retirement benefits. Any and all other issues stated either in the Statement of Issues or randomly during the administrative proceedings are not at issue in these proceedings. Rescission of the Contract or the repayment of retirement benefits paid to Respondent can only be considered subsequent to filing of Accusations and pursuant to the Government Code sections 15301 ff. relating thereto.

The letter of September 1, 2010 from Paul G. Mast to Pamela Montgomery, Manager of the JRS (the Claim Letter-Exhibit H) states in part:

> In 2010 as in 2006 you proceeded on the wrong premise and therefore came up with a completely wrong conclusion. The current calculations are very much the same as the calculations you came up with in 2006.
>
> In 2006 I explained the errors in a letter to you. You have ignored the law and the facts as stated in that letter and as they exist. You have stalled for four additional years while making one excuse after another. During that time the underpayment and therefore the problem has increased exponentially. . . .
>
> When I became eligible to receive retirement benefits in May 1995, your office began the payments incorrectly. You applied the law as it applied to retirees in 1995. The law that should have been applied was the law that prevailed when I retired in January 1979. That law provided that the amount to be paid be adjusted annually from the date of my retirement, in accordance with the COLA for the respective time periods. When l objected to application of the incorrect law, and when discussion was to no avail, I filed for an Administrative Proceeding. . . .
>
> **During that proceeding, after the case was briefed on each side and before a hearing, it was determined by your office, with the advice of counsel, that I was correct, and that I was entitled to my benefits being adjusted for COLA from the date of my retirement,**

January 1979. This was pursuant to the three Olson v. Cory cases, particularly, Olson v. Cory, (1980) 27 Cal 3d. 532.

The administrative matter was fully resolved by the Settlement Agreement dated October 22, 1996 between JRS and me, a copy of which is attached. . . .

You have proceeded on the wrong premise when you completely ignored the Settlement Agreement. I direct your attention particularly to paragraphs 2 and 3. Using that formula, JRS will re-calculate Mast's allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975, the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to Olson v. Cory, (1980), 27 Cal. 3d 532.

Paragraph 3 of the Agreement states, in part: 'Said recalculated retirement allowance . . . . '

'Said recalculated retirement allowance' are the key words showing you are in error in attempting to recalculate the amount of the retirement allowance ab initio.

When the Settlement Agreement says 'Said recalculated retirement allowance' it is referring to Paragraph 2. It is not a qualified statement. It does not say, 'if that calculation is correct.' It does not say that the calculation made may be modified in the future by another calculation. It says that the calculation made by JRS at that time is that which will be used as the basis for the retirement allowance. It should also be noted that I took no part in the calculation. I was not contacted or consulted and had no input into it. I relied on JRS to do it correctly and they did. I was not privy to the worksheets. They were never furnished to me.

The computed amount corresponded to the amount I expected to receive. If there was any miscalculation, the amount of the error was not significant enough to put me on notice that an error was made. If there was any miscalculation, the amount of the error was not significant enough to put anyone in your office on notice that the computed amount was unreasonable and therefore incorrect. The calculated amount is the recalculated retirement allowance as called for in paragraph 3 of the Settlement Agreement.

The Settlement Agreement was drafted by JRS, either by staff or by counsel. I took no part in its drafting or preparation. Although I do not see any ambiguities, any such that there may be would be construed in my favor and against yours, according to law. [That settlement agreement formed a binding contract upon execution by all parties, as a matter of law.]

> The validity or finality of the Settlement Agreement is not affected by any subsequent dissatisfaction you may have with how it was drafted. The law favors settlements. The finality of a settlement must be honored. If there is any ambiguity in a settlement statement due to deficient drafting, the ambiguity must be resolved in favor of the non-drafting party. The best indicator of the meaning of the Settlement Agreement is the behavior of JRS immediately after entering into the Agreement. You are estopped from changing the Agreement. Further, laches applies. The original calculation was made by your office in 1996. Even if it could be changed, it is too late to do so now. . . .
>
> I now direct your attention to Paragraph 5 of the Agreement, which states:
>
> 'Each party will keep the terms of this agreement confidential.'
>
> I have not paid attention to the wording of Paragraph 5 until now, as I knew what the concerns of JRS were. . . .
>
> I asked during the final discussion of the settlement why JRS wanted a confidentiality agreement. I was told that no retired judge was paid in accordance with the dictates of Olson v. Cory; that some 1,000 to 1,500 retired judges had been receiving retirement pay in violation of the dictates of that case; and that if JRS had to adjust the amounts previously paid, JRS would be paying out about four hundred million dollars. This discussion was held in 1996. Since then these retirees have accrued additional amounts they are owed. In addition, 15 additional years of interest has also accrued.

Letter of May 4, 2011 from Montgomery to Mast (Denial – Exhibit I) states in part:

> The Settlement Agreement you signed on October 8, 1996, provided for the Judges' Retirement System (JRS) to calculate your allowance based on the definition in former Government Code (GC) section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to Olson v. Cory (1980), 27 Cal. 3d. 532. We have complied with the terms of the Settlement Agreement . . .

The Appeal of May 31, 2011 of Petitioner Paul G. Mast (Exhibit J) states in part:

> Prior to entering into the Settlement Agreement, JRS calculated the amount of retirement allowance to which Mast was entitled pursuant to Olson v. Cory, (1980), 27 Cal. 3d. 532.

The following were agreed upon between Mast and JRS before the parties entered into the Settlement:

1 . The amount of the retirement allowance then payable to Mast ('recalculated retirement allowance');

2. The amount of the accrued arrearages due to Mast ('accrued arrearages');

3. The fact that the retirement allowance then payable to Mast would be annually adjusted in accordance with the requisite Cost of Living Adjustment ('COLA') as stated in the Statute. . . .

JRS calculated the annual COLA according to the Settlement Agreement. Mast has never seen any actual worksheet. . . .

JRS had sole responsibility for calculation of the recalculated retirement allowance. Mast discusses this in the letter dated September 1, 2010 to JRS. Mast was not contacted or consulted. Mast did not offer input. The JRS worksheets were not provided to Mast.

When JRS computed the recalculated retirement allowance and accrued arrearages, JRS presented its conclusions to Mast prior to the Settlement. The JRS calculations were used as the basis for the Settlement. The amounts were acceptable to both JRS and Mast.

Counsel represented JRS at the time of the Settlement. The Settlement document was drafted either by JRS staff or by its counsel. Mast did not participate in the drafting. . . .

The language of the paragraph purports to present the gist of the Settlement. The Settlement best speaks tor itself and can be read in its entirety.

Any change in wording is a change in meaning. The above portion of the May 4, 2011 letter is a rewriting of paragraph 2 of the Settlement. The first critical difference is that the actual Settlement says that JRS will re-calculate; it does not say to calculate.

The second critical difference is that the actual Settlement Agreement uses paragraph 2 as a definition for paragraph 3: Said recalculated retirement allowance shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995. . . .

> The Settlement Agreement needs to be read in whole. There were settlement negotiations prior to the creation of the Settlement. Then there were actions of JRS based on the Settlement Agreement. These actions included payment of the recalculated retirement allowance, accrued arrearages, and annual COLA for years subsequent to the Settlement. Mast received the payments that he expected to receive pursuant to the Settlement Agreement. . . .
>
> Demand was made by JRS during the negotiations that Mast waive the arrearages. Mast declined to waive the arrearages, and the arrearages were paid at or about the time of the signing of the Settlement Agreement (Settlement).

JRS and/or its attorneys drafted the entire Settlement Agreement.

It should be noted that Mast did waive interest on the re-calculated arrearages for the time from May 1995 to the first payment under the Settlement Agreement, January 1996, by not claiming interest.

Thus, as stated above, any other issues brought forth by the attorney for Petitioner at any time during these proceedings are precluded for failure to bring an Accusation and abide by the procedures set forth by Government Code Sections 11503 and following.

AMOUNT DUE PURSUANT TO THE CONTRACT (SETTLEMENT AGREEMENT)

The Contract (Settlement Agreement) has been breached on numerous occasions since about the year 2000. On only one occasion was a partial amount of arrearages paid.

In the early years of the Contract, JRS was confused about the time of year the increases would be calculated and the dates when the increases were to go into effect. Respondent did not correct JRS and actually adopted the dates put forth by JRS. In the accounting attached hereto, the correct COLA calculation dates (December to December) are used and the correct dates of increase (September) are used. Therefore,

any errors in COLA calculation dates and dates of increase are automatically corrected by the accounting sheet.

Respondent has calculated the principal and interest due for unpaid retirement benefits and interest due. The accounting calculation is attached hereto as Exhibit K. The amount due to February 28, 2017 is $352,898. Future monthly retirement benefits until the next date of adjustment, September 1, 2017, is $9,593.69.

PETITIONER CANNOT CLAIM REPAYMENT OF ANY BENEFITS PAID AND MUST ABIDE BY THE TERMS OF THE CONTRACT

Prior to claiming repayment of benefits, an Accusation must be filed by JRS and/or CalPERS. The Administrative Law Judge stated in her Proposed Decision on Remand, at page 22, in Legal Conclusions:

> According to the Administrative Procedure Act (APA) (Gov. Code,* I 1340 et seq.). the burden of proof flows from the type of process initiated. If CalPERS (or in this case, the JRS administered by CalPERS) initiates the process to take away a person's right or benefit (e.g. involuntarily discontinuing disability retirement), **an Accusation should he filed**, and CalPERS has the burden of proving the propriety of eliminating that right or benefit. . . . [emphasis supplied]

Even though the issue cannot be brought because of the failure to file an Accusation, Respondent will respond to the assertion of the attorney for Petitioner that the benefits cannot be paid in that the Contract is a nullity because of a court decision some 18 years later.

Whenever litigation is settled by a Settlement Agreement or otherwise, the parties to the litigation have been disputing issues of fact, issues of law, or both. That was true here. If subsequent to the settlement it is established in any manner that one party was correct and the other was incorrect, that does not give grounds to vacate a settlement agreement. If so, settlement agreements, which are favored by law and the

courts, could never be relied upon and therefore would never occur. The fact that there was an opinion of a court many years later does not change that.

The attorney for Petitioner states that in view of a court opinion, 18 years after the date of the Settlement Agreement, continuing to pay benefits pursuant to the Contract (Settlement Agreement) is against "public policy," which is meaningless. There is no such public policy and Petitioner has produced no legal authority showing any such public policy. Public policy is not what an attorney or a litigant says it is. It must be grounded in the law either by a statute or by case law, based upon a statute or the Constitution.

In regard to Petitioner attempting to rescind the Settlement Agreement during these proceedings, the Administrative Law Judge stated in her Proposed Decision, at page 24, in Legal Conclusions:

> *Contractual Remedy of Rescission under Civil Code sec1ion 1689 is not Properly at Issue;*
>
> *Respondent did not Breach the Settlement Agreement*
>
> 5. In its Post-Hearing Brief, JRS asserts that 'JRS is entitled to rescind the Settlement Agreement and cites Civil Code section 1689. This assertion was not in the Statement of Issues, and it is questionable whether orders regarding such contractual remedies under the Civil Code, including the rescission of a settlement agreement, can be made in this proceeding. Consequently, a determination of whether the settlement agreement can be rescinded under Civil Code section 1689 will not be made in this Proposed Decision.
>
> 6. However, some or the assertions made by JRS in asserting the propriety of rescission, as well as its assertion that Respondent breached the agreement, are addressed below since they have some bearing on the equitable estoppel discussion (below):
>
> (a). Contrary to JRS's assertion, the settlement agreement was not given by mistake or obtained through duress. menace, fraud or undue influence. (Exhibit 33. p. 8, lines 22-24.) JRS's attempts to now characterize Respondent as threating JRS to settle the prior OAH case is overreaching. JRS knew that Respondent's interpretation of Olson was

wrong, but affirmatively chose to draft and execute the settlement agreement to avoid litigation. The agreement was not formed through duress, menace or undue influence by Respondent, but was negotiated by Respondent zealously advocating his position and by JRS (with its decision-making resources including legal counsel at its disposal) determining that it could and would enter into the settlement agreement.

(b). Respondent did not fail to provide lawful consideration. Respondent agreed to keep the terms of the settlement agreement confidential and agreed to forego the OAH hearing scheduled in 1996. Although JRS asserts that Respondent's confidentiality promise was illusory, because the settlement agreement was a public record by law (Exhibit 33. p.10. lines 5-6), JRS provided no authority to support its assertion JRS cited to the Public Records Act (Govt. Code. §6250 et seq.), but that Act docs not specify that a settlement agreement regarding an individual's retirement allowance is subject to disclosure. However, it also does not exempt such agreements from disclosure. Even if the settlement agreement was subject to disclosure under the Public Records Act the JRS, not Respondent, was the entity to whom any Public Records Act request for disclosure would be directed, and Respondent was not prevented from maintaining confidentiality as he promised. Moreover, Respondent's silence was not the only consideration he provided. He also chose to forego his right to a hearing in the prior OAH matter; as set forth in the settlement agreement, the parties settled the prior OAH case 'solely to avoid the expense and uncertainty of litigation.' (Exhibit 1.) There was no evidence or authority presented that Respondent's consideration was invalid.

(c). Respondent correctly pointed out that, although he had agreed not to disclose the terms of the settlement agreement, he was not precluded under the settlement agreement from speaking to other judges about his in interpretation of *Olson*. Moreover given the JRS's delays in providing cost of living adjustments, and in some years determining not to provide any cost of living adjustment, the JRS breached the settlement agreement well prior to Respondent speaking to other judges about his *Olson* interpretation. The totality or the evidence demonstrated that Respondent did not breach the settlement agreement, and that any disclosure of his *Olson* theory occurred after JRS had breached the settlement agreement.

Government Code section 20164 subdivision (b)(1), provides that: "For adjustments of erroneous payments made to a member out of the retirement fund, the period of limitation of actions shall be three years and CalPERS' right to collect. . . . shall

expire three years from 1hc date of payment."

The Administrative Law Judge in the Proposed Decision on Remand, at page 29, quoted from *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29.):

> The statute or limitations contained in Government Code section 20164(b) applies to erroneous payments into or out or the re1ircmcnt fund, not to reclassifications (Id. at p. 45) . . . .
>
> However, as noted above, the court in City of Oakland expressly declined to extend its holding to include the 'consequences' of the reclassification/correction: i.e. to require someone to pay money. Consequently, while no statute of limitations bars JRS from correcting its erroneous calculation of Respondent's retirement allowance, there is a statutory limitation period for collection of any erroneous overpayment As set forth below, if recalculation of Respondent's allowance were to be applied retroactively, JRS's right to recoup overpayment would expire three years after the overpayment was made (Legal Conclusion 13). Nevertheless, recalculation of Respondent's allowance should be applied only prospectively from the date of 1his decision, and should not be applied retroactively (see Legal Conclusion 14 through 17 discussing estoppel). . . .
>
> Government Code section 20164 subdivision (b)(1), provides that. For adjustments of erroneous payments made to a member out of the retirement fund, the period of limitation of actions shall be three years and CalPERs right to collect .. shall expire three years from 1hc date of payment. (Sec Legal Conclusion 9.). . . .
>
> . . . . [T]he three-year limitation of actions under Government Code section 20164, subdivision (b), applies to administrative actions to make adjustments to correct erroneous overpayments to Respondent from the retirement fund. Any adjustments made under Government Code section 20163. subdivision (1). are limited to three years from the date of payment under Government Code section 20164, subdivision (b)(I). . . .
>
> In this case, JRS sent its supplemental denial letter on December 29. 2011, stating that it 'reserve[s] its rights to seek
> repayment of all amounts that it can lawfully recover from Respondent in the event that the Board of Administration and the courts find that JRS has paid [Respondent] amounts in excess of what is allowed' (Exhibit 27.), however unlike the May 4, 2011 denial letter from which Respondent appealed, the December 29, 2011 letter adding the issue of overpayment did not specify that Respondent had a right to appeal the 'determination' that he

> owed money, and the December 29, 2011 letter reserving the right to seek repayments at a later time cannot be construed as an action to collect erroneous repayments. Consequently, the action to collect erroneous payments occurred at the earliest on March 25, 2015, when JRS filed its Statement of Issues seeking an order to recover any overpayments. . . .
>
> JRS asserts that if the three-year limitations period applies, JRS should be allowed to recover overpayments made to Respondent after April 6. 2009. JRS contends that it did not file its Statement of Issues until March 25, 2015 because the April 6. 2012 emails constituted an agreement to stay this proceeding and should result in an equitable tolling of any applicable limitations period. These assertions are not persuasive. The April 6, 2012 emails contained Respondent's agreement to stay his administrative appeal (regarding his
> request for increases to his monthly allowance) pending resolution in *Staniforth*. The April 6, 2012 emails did not discuss JRS's asserted right to later recoup erroneous overpayments. Respondent did not agree to nor did the parties discuss staying any specific statute of limitations or any time deadline for JRS 's recoupment of overpayments. JRS notes that application of the doctrine of equitable tolling requires. among other things, lack of prejudice to the defendant (citing *.Addison v. State of California* (1978) 21 Cal.3d 313.319). In this case, if equitable tolling was applied in the manner JRS suggests, there will be considerable prejudice to Respondent in that he would be exposed to greater liability for several more years of overpayments and accumulated interest. JRS also notes that equitable tolling is designed to prevent unjust and technical forfeitures of the right to a trial on the merits ... " (citing *McDona!d v. Antelope Valley Community College Dist.* (2008) 45 Cal 4th 88, 99). In this case, without the application of equitable tolling, there has been no forfeiture of the right to trial on the merits. . . .
>
> Given the foregoing, JRS's action seeking to collect its overpayment commenced on March 25, 2015. JRS is barred by statute from obtaining overpayment of any retirement allowances made prior to March 25, 2012.

In addition to the above, the doctrine of collateral estoppel prevents the Petitioner from making any claim for recovering previously paid retirement benefits. In the Proposed Decision on Remand, in Legal Conclusions, at page 32, the Administrative Law Judge stated: the doctrine of equitable estoppel applies in this case (see Legal Conclusions 14 through 17), and JRS is estopped from recouping **any of the prior overpayments**:

> JRS asserts that equitable estoppel is not available to Respondent to avoid

repaying his overpaymcnts 'because the proper amount or [Respondent's] benefits is a matter that is plain and fully covered by statute' . . .

This assertion may be correct if applied to the correction of Respondent's prospective retirement allowances, which must comply with the mandatory formula set forth in Government Code section 75033.5 (sec Legal Conclusions 7 through 11, see also fn. 1). However, JRS's assertion and citation to *Pleasanton* is not persuasive as applied to CalPERS' discretionary adjustment of Respondent's future allowances under Government Code section 20163, subdivision (a). . .

In this case, JRS seeks to adjust Respondent's future retirement allowances to recover overpayment of benefits. JRS notes that CalPERS has 'broad discretion with respect to recovery of overpaid benefits' (Exhibit 33, p. 1 lines 22-23) and JRS correctly cites *City of Oakland vs. Oakland Police and Fire Retirement System* (2014) 224 Cal.App 41h 210. In Oakland Police. the court addressed CalPERS's discretionary ability to require employees to repay overpaid retirement benefits. The Oakland Police court held. 'Since the Board has discretion in this area, applying the doctrine of estoppel to prevent the Board from collecting certain specified overpayments would not result in a situation where the Board is required to act in excess of its statutory au1hori1y' (224 Cal.App.4th 210. 245.)

The *Pleasanton* case (cited by JRS) also acknowledged the potential in some cases for application of equitable estoppel where Cal PERS has discretionary power, citing *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567. In *Crumple*r, the city had misclassified animal control officers as police officers. and had made representations 10 those employees that they were in fact entitled to greater safety member benefits. When the misclassification came to CalPers' attention, it reclassified the officers retroactively as miscellaneous members with less pension benefits and the employees sued. The Crumpler Court found that CaPERS had broad authority to reclassify its members and was estopped from retroactively reclassifying petitioners as of the date of their initial membership in the system. The Crumpler Court recognized the rule that estoppel cannot enlarge a public agency's statutory or constitutional authority but found the rule was inapplicable because of a PERS provision ... stating PERS was the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system" *(Pleasanton* suprq, 211 Cal.App.4rh at 543. quoting *Crumple*r, supra.) The *Crumple*r court concluded that, 'In view of the statutory powers conferred upon the board. . . this is not a case where the governmental agency utterly lacks the power to effect that which an estoppel against it would accomplish.' . . . .

In this case, similar to *Oakland Police*, since CalPERS has broad discretion

regarding the recovery of overpaid benefits and the adjustment of Respondent's future allowances under Government Code section 20163, subdivision (a), application of estoppel in this matter is not precluded.

Moreover, even if CalPERS docs not have statutory authority to forgive the overpayment, equitable estoppel may still be applied. In *City of Long Beach v. Mansel*l (1970) 3 Cal.3d 462, the California Supreme Court held that equitable estoppel is available against a government entity, even if the requested relief is not within the government's legal authority, "when the elements requisite to such an estoppel against a private party are present and ... the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel' (Id. at pp. 496-497.) In this case, no effect on public policy would result from application or estoppel and justice dictates its application.

Almost 19 years ago JRS stood on solid legal ground and should have held its position and proceeded to hearing, which it would have won. However, JRS chose to avoid the battle of litigation, and it crafted a retreat which JRS knew or should have known had no legal support. Years later, JRS unilaterally took a condemnatory view of the settlement agreement and proceeded to initiate its destruction. The principles of fundamental fairness demand that JRS be estopped from recouping [retirement benefits] that it paid to Respondent based on a settlement agreement JRS drafted and executed, and which Respondent believed to be valid and relied on for 19 years. It is in the public interest and the interests of justice to mitigate this situation and to relieve Respondent from the potential harm that will result from having his retirement allowance further decreased to repay [portion of retirement benefits] over thc remainder of his life, in addition to the required decrease by way of recalculation to comply with Government Code section 75033.5. Based on the above,
estoppel is available against JRS in this case, because it would be an injustice to not allow respondent to pursue it, and application of estoppel against JRS will not undercut a public
policy or interest. It should be noted that, in this case, estoppel is applied retroactively, but not prospectively. . . .

In order to apply the doctrine of equitable estoppel four elements must he present: (I) the party being estopped must be apprised of the facts; (2) the party must intend or reasonably believe that its conduct will be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of facts, and (4) the party asserting the estoppel must actually rely upon the othcr party's conduct to their detriment. (City of Long Beach v. Mansell, supra, 3

Cal. 3rd at 489).

> In this case, Respondent has established the four elements of equitable estoppel. First, JRS was apprised of the facts. It knew prior to and after execution of the settlement agreement that Respondent's interpretation of *Olson* was incorrect and that the settlement agreement terms it had drafted were contrary to law. Second, JRS intended its conduct would be acted upon. Specifically, it intended for the settlement agreement it drafted to be executed by Respondent and for its terms to be followed. Third, Respondent was ignorant of the true state of facts. Respondent did not know that his interpretation of *Olson* was incorrect or that the settlement terms were contrary to law. In fact, Respondent continues to maintain his belief that his interpretation of *Olson* is correct and that the settlement agreement is enforceable. Additionally, Respondent was not apprised of JRS's assertion that the settlement agreement was unenforceable until 2011, 15 years after its execution. And JRS's assertion was not confirmed until the *Staniforth* decision in March 2015. And most significantly, Respondent actually relied upon JRS's conduct in entering into the settlement agreement and relying on it to his detriment, having unknowingly incurred . . . overpayments which JRS now seeks to recoup.
>
> Since all four elements have been proven, Respondent has met his burden of establishing by a preponderance of the evidence that estoppel applies in this case. JRS shall be estopped from adjusting Respondent's future allowances to recoup any of the [retirement benefits] overpaid to Respondent pursuant to the settlement.

CONFIDENTIALITY CLAUSE

If there is any problem with the confidentiality clause, it is one that does not effect the validity of the Contract (Settlement Agreement). The Judges' Retirement System and The California Public Employees Retirement System are fiduciaries to all the retirees (including Respondent), and if entering into a Settlement Agreement with a confidentiality clause violates the fiduciary relationship with other retirees, it does not in anyway void the Contract (Settlement Agreement) entered into with Respondent.

Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 384, 216 Cal.Rptr. 733 states:

> '[P]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits ... and the trustees must exercise their fiduciary trust in good faith and must deal fairly with the pensioners-beneficiaries. [Citations omitted.]' (Ibid., original italics.)
>
> The SBCERA officers, by the acceptance of their appointment, are voluntary trustees, within the meaning of Civil Code sections 2216 and 2222, fn. 11 of the retirement plans available to the beneficiary-members of the Association. [39 Cal.3d 393] (Cf. Hannon Engineering, Inc. v. Reim, supra, 126 Cal.App.3d at pp. 425-426.) As such, the SBCERA officers are charged with the fiduciary relationship described in Civil Code section 2228: 'In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.'
>
> As this court has previously noted, '[i]n the vast development of pensions in today's complex society, the numbers of pension funds and pensioners have multiplied, and most employees, upon retirement, now become entitled to pensions earned by years of service. We believe that courts must be vigilant in 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.' (Symington v. City of Albany (1971) 5 Cal.3d 23, 33 [95 Cal.Rptr. 206, 485 P.2d 270].)
> This fiduciary relationship is judicially guarded by the application of Civil Code section 2235, which provides that 'all transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.'
>
> [12b] With these considerations in mind, we conclude that SBCERA did not fulfill its fiduciary duty to Hittle to deal fairly and in good faith. fn. 12 The [39 Cal.3d 394] means by which SBCERA sought to inform Hittle of his options in disposing of his retirement contributions are tantamount to the misrepresentation and concealment, however 'slight,' prohibited by Civil Code section 2228.

Thus, per *Hittle,* JRS had a fiduciary duty to all retirees, and any duty that was violated in regard to other judicial retirees at the time of entering into the Contract (Settlement Agreement) was the responsibility of JRS not Respondent.

Respondent was not aware of such fiduciary duty of JRS and has no responsibility for its violation.

INTEREST

Interest is payable from the day each retirement benefit payment is due at 10 percent per annum compounded daily. Even though the authorities indicate that compounding should be daily, the Calculation prepared by Respondent of benefits and interest due calculates the compounding on a monthly basis.

Pursuant to *Olson v. Cory III*, (1983) 35 Cal.3d 390 [197 Cal.Rptr. 843, 673 P.2d 720], at p. 395 (*Olson III*), interest compounded on a daily basis should be added to the amount of accrued retirement benefits due to Respondent. Respondent is entitled to interest compounded on a daily basis on the unpaid benefits from the dates that the benefits should have been paid to him. The interest due is provided by Civil Code section 3287 (CC §3287) and the amount of the interest is proscribed by Civil Code §3289:

> (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.(b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.
> For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property.

The parties entered into the Contract (Settlement Agreement) in 1996. Pre-judgment interest is controlled by Civil Code §3289 and is set at 10 percent per annum. Such interest is compound interest. *Westbrook v. Fairchild*, 7 Cal.App.4th 889, 9 Cal.Rptr.2d 277, at pp. 894-895 discusses compound interest:

> The only exception to the rule that interest on interest (i.e. compound interest) [emphasis added] may not be recovered is in situations in which interest is included in a judgment which then bears interest at the legal rate. (45 Am.Jur 2d, Interest and Usury, § 78, p. 71.).

Interest is to be computed on a daily basis. In *Olson III*, the court states: "Interest is recoverable on each salary or pension payment from the date it fell due." *Olson III*,

supra, at p. 402.

The compounding of interest in the claims made herein follows the procedures and practices adopted by the California Franchise Tax Board. Revenue and Taxation Code sections 13550, 19104, and 19521 all specify that interest shall be compounded on a daily basis. In addition, four sections in the Administrative Code dealing with the Teachers' Retirement System call for compounding daily: see 5 Cal Admin Code §§ 27003(a) and (c), 27004 (a) and (c), 27007 and 27008. Also calling for compounding daily, although not dealing with retirement law, is 2 Cal Admin Code § 1138.72.

All specify that interest shall be compounded on a daily basis.

Nevertheless, the Calculation (Exhibit K) attached hereto compounds interest on a monthly basis.

RULE 555.5 DOES NOT APPLY

In mid 2016, the Board of the California Public Employees Retirement System passed Rule 555.5. This Rule is invalid for the following reasons:

1. The CalPERS Board is empowered to enact rules to govern the procedure of administrative matters within its jurisdiction. It is not empowered to enact rules (laws) of a substantive nature.
2. Interest laws are substantive in nature not procedural.
3. Although procedural rules may be retroactive in application, substantive laws may never be retroactive no matter who enacts the law.
4. CalPERS is not empowered to pass a law that seeks to change or override a law passed by the Legislature or by other means, i.e. by proposition. Rule 555.5 seeks to override Civil Code §3289.

Rule 555.5 is a substantive law, which is both beyond the authority of CalPERS to create and would be retroactive.

THE LAW AS STATED IN *OLSON V. CORY I* AND RELATED CASES UPHOLDS THE DECISION OF THE JUDGES' RETIREMENT SYSTEM TO ENTER INTO THE CONTRACT WITH RESPONDENT

Cost-of-living adjustment increased retirement benefits, whether earned during the protected period or before, were entirely vested and could not be impaired, unless accompanied by comparable new advantages, *Olson I* and other cases, *infra*. *Olson I* held that the 1976 Amendment to GC §68203 impaired vested rights to COLA increases for justices, judges, and judicial retirees stating:

> The 1976 amendment, in addition to impairing the vested rights of judges in office, also impairs those of judicial pensioners. A long line of this court's decisions has reiterated the principle that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment. (Betts v. Board of Administration, supra, 21 Cal.3d 859, 863; *541 Kern v. City of Long Beach, supra, 29 Cal.2d 848, 852853.) In Betts, this court held that a former state treasurer who had served in that office from 1959 to 1967 was entitled to a pension on the basis of the law in effect at the time of his termination rather than the modified law in effect at the time of his application for pension benefits in 1976. (Id., at pp. 867, 868.)
>
> The statute in effect in 1976 purported to withdraw benefits to which he had earned a vested contractual right while employed. Although an employee does not obtain any 'absolute right to fixed or specific benefits ... there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' (Betts v. Board of Administration, supra, 21 Cal.3d 859, 863, 864.) Such modifications must be reasonable and any 'changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' (Id., at p. 864.) Since no new comparable or offsetting benefit appeared in the modified plan, we held the 1976 statute unconstitutionally impaired the pensioner's vested rights.
>
> In the present case the state has purported to modify pension rights with the amendment of section 68203. Between 31 December 1969 and 1 January 1977, a judicial pensioner was entitled to receive benefits based on a specified percentage of the salary of a judge holding the judicial office to which the retired or deceased judge was last elected or appointed. (Gov. Code, § 75000 et seq.) The salary for such a judicial office if the retired or deceased judge served in office during the period 1970 to 1977 was covenanted to increase annually with the increase in the CPI. The

> 1976 limitation on increases in judicial salaries is, in turn, calculated to diminish benefits otherwise available to those judicial pensioners. Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit. Again, we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included and that section 68203 as amended is unconstitutional as to certain judicial pensioners. *Olson I* at 541, 542.

The *Olson I* decision uses the words "as to certain judicial pensioners." *Olson I* considered the rights of those pensioners who retired before January 1 1970, who had no vested COLA retirement rights, yet who did get the benefit of the COLA increases during the protected period, as their pension rights were a percentage of the prevailing salary of judicial officers holding their particular office. These pre-1970 retirees were not included in "certain judicial pensioners" in the quoted portion of the decision in O*lson I*.

THE CONTEXT OF *OLSON I* MUST BE CONSIDERED IN INTERPRETING THE DECISION

Petitioner's attorney has or will contend that other portions of Olson I state to the contrary, that a justice's or judge's retirement benefits are a portion of the sitting judge's actual salary or that a COLA vested justice or judge is entitled to no more retirement benefits than a COLA unvested justice or judge. These contentions are in error. These arguments are taken out of the context of the case. To properly understand *Olson I*, the context in which it was written must be understood as has been uniformly held.

Dyer v. Superior Court (Hasou) (1997), 56 Cal. App. 4th 61, 65 Cal. Rptr. 2d 85, states:

> However, 'language contained in a judicial opinion is 'to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered. [Citations.]' (People v. Banks (1993) 6 Cal. 4th 926, 945 [25 Cal. Rptr. 2d 524, 863 P.2d 769].) When questions about an opinion's import arise, the opinion 'should receive a reasonable interpretation [citation] and an interpretation which reflects the circumstances under which it was rendered [citation]' (Young v. Metropolitan Life Ins. Co. (1971) 20 Cal. App. 3d 777, 782 [98 Cal.Rptr. 77]), and its statements should be considered in context (see Pullman Co. v.

> Industrial Acc. Com. (1946) 28 Cal. 2d 379, 388 [170 P.2d 10]). Kirk v. First American Title Ins. Co., 183 Cal. App. 4th 776, 779, 108 Cal. Rptr. 3d 620, 634 (2010) states: 'When questions about an opinion's import arise, . . . its statements should be considered in context.' Stewart v. Norsigian, 64 Cal. App. 2d 540 [149 P.2d 46, 150 P.2d 554]; states: 'Isolated statements . . . may not be lifted from an opinion and be regarded as abstract and correct statements of law. They must be considered in connection with the factual setting the author of the opinion is discussing.'

People v. Jeffrey Allen Witmer Court of Appeal, Second District, Division 4 Case No. B231038 (later reversed by the Supreme Court on other grounds) states:

> [I]t is necessary to read the language of an opinion in the light of its facts and the issues raised, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. (Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1998) 65 Cal.App.4th 1279, 1301.) Furthermore, when questions about an opinion's import arise, the opinion 'should receive a reasonable interpretation [citation] and an interpretation which reflects the circumstances under which it was rendered [citation]' (Young v. Metropolitan Life Ins. Co. (1971) 20 Cal.App.3d 777, 782), and its statements should be considered in context (see Pullman Co. v. Industrial Acc. Com. (1946) 28 Cal.2d 379, 388).

The context of the opinion in *Olson I* is that the opinion was written before and issued on March 27, 1980, at a time during the protected period for some justices and judges. [The "protected period" is defined in *Olson I* as all judicial service of a judicial officer who served some time after the first Monday in 1970 up to and including his or her service to the end of any term that began before the first Monday in 1977.] The Supreme Court ruled that all pensioners, vested or not, were entitled to receive COLA adjusted pensions based on the COLA salaries of a justice or judge holding the particular judicial office. The Supreme Court did not differentiate between vested and unvested pensioners. This indicates first, that the Court did not consider what

particular seat in the courthouse the particular justice or judge occupied, as alleged by Petitioner. Second, it indicates that no judicial pensioner, even the non-vested, lost any rights on the first Monday in January 1977, as Petitioner alleges.

During the time after the first Monday in January 1977 until the date of the opinion, March 27, 1980 (and continuing thereafter) there were two levels of pay for each particular judicial office. Subsequent to the effective date of the 1981 Amendment to GC §68203, approximately June 1981, there were three levels of pay for each particular judicial office.

Olson I, supra, states the 1976 Amendment to GC §68203 impairs the **vested** rights of judicial pensioners.

Black's Law Dictionary defines "vested" as: "Accrued; fixed; settled; absolute; having the character or giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. See Scott v. West, 03 Wis. 529, 24 N. W. 161; McGillis v. McGillis, 11 App. Div. 359, 42 N. Y. Supp. 924; Smith v. Pros-key, 39 Misc. Rep. 385, 79 N. Y. Supp. 851."

Black's Law Dictionary further defines "vested right" as, "Right accrued to possessor with no conditions."

PETITIONER TAKES ONE PARAGRAPH OUT OF CONTEXT AND REVERSES IT'S MEANING TO ARRIVE AT AN ERRONEOUS CONCLUSION

Petitioner's attorney previously has claimed that the effect of the following paragraph from *Olson I* is that justices and judges with vested retirement benefit rights have no more rights to COLA than non-vested justices and judges. Non-vested justices and judges in the context of this paragraph are those justices and judges who retired before January 1, 1970. Petitioner's attorney has interpreted the meaning of this paragraph exactly in reverse of its true meaning. Taken in context, and with footnote 6 (from *Olson I*) confirming it, what this paragraph states is that for the purpose (the Court states "for our purposes") of determining the benefits due during the time period in which the opinion was written, prior to March 27, 1980, non-vested justices and judges were entitled to the same COLA retirement benefits as vested justices and judges.

> **Judicial pensioners whose benefits are based on judicial services terminating before the effective date of applicable law providing for unlimited cost of living increases,** have no vested right to benefits resulting therefrom. Legislation providing for unlimited cost of living increases was first enacted in 1964 to become effective on 1 January 1965, although the statute then provided for quadrennial increases based on a different index than the CPI. (Stats. 1964, First Ex.Sess., ch. 144, p. 518, § 4.) However, it is not necessary **for our purposes** to determine a judicial pensioner's right as being vested. Vested or not, a pensioner's right entitles him or her to benefits based on the prevailing salary for the judge or justice occupying the particular judicial office, regardless of the date of termination of judicial services giving rise to the pension. Finally, as in the case of judges or justices who enter upon a new or unexpired term of a predecessor judge after 31 December 1976, benefits of judicial pensioners based on the salaries of such judges will be governed by the 1976 amendment. *Olson* I at 543. [emphasis supplied].

The subject of this paragraph is stated in the first sentence [highlighted], those pensioners whose judicial service was before January 1, 1970.

When the Court states "for our purposes," the purpose of the Court is to determine what benefits are due up to the time of the decision. Up to the time of the decision the vested judicial pensioners were having their pension benefits adjusted in accordance with COLA. Unvested judges were not. Unvested judges, however were receiving there benefits based upon a sitting judges salary. At the time of the decision sitting judges were having their judicial salaries adjusted by COLA in the same manner as judicial pensioners. Thus, as stated by the Court non-vested judges were receiving the same benefit increases as vested judges.

JRS claims erroneously that when the Court says, "Vested or not, a pensioner's right entitles him or her to benefits based on the prevailing salary for the judge. . . .", it does not mean that "vested" judicial pensioners never will have benefits based on COLA. What it means is for "the purposes" of the Court at the time of the decision (March 1980), the non vested judges would get the same COLA adjusted benefits as the vested judges, which is also the same percentage adjustment as the sitting judges.

Footnote 6 of Olson I states in its entirety:

> Even pre 1965 pensioners are entitled to percentage participation in judicial salaries actually paid or to be paid under compulsion of law to judges or justices occupying the judicial office to which the retired or deceased judge or justice was last elected or appointed.

On one hand are the various statements in *Olson I*, referencing the prevailing salary for the judge or justice occupying the particular judicial office; and on another hand is the statement, *supra*, that the "1976 amendment, in addition to impairing the vested rights of judges in office, also impairs those of judicial pensioners."

If retirement benefits paid after the end of the protected period are only paid in accordance with the salaries of the sitting justice or judge in the particular judicial office, that would contradict the finding in *Olson I*, s*upra*, that "a public employee's pension rights are an integral element of compensation and a vested contractual right."

COLA retirement benefits were vested during the period before the end of the protected period.

The statement that retirement benefit payments were paid in accordance with the salary of sitting judges only applies in context, as the phrase in *Olson I* "for our purpose here" means for the time before the *Olson I* decision was handed down, March 27, 1980.

Every case, before and after *Olson I*, that considered the vesting of retirement rights uniformly held that judicial retirement benefits are irrevocably vested at the time the benefits were earned. Petitioner's attorney mislead the Staniforth Court in this regard by citing the one paragraph in *Olson I* out of context and reversing the meaning of "vested or not," as discussed above.

BETTS V. BOARD OF ADMINISTRATION **RULED THAT RETIREMENT BENEFITS ARE TOTALLY AND IRREVOCABLY VESTED**

Olson I was not a case of first impression on this issue. *Betts v. Board of Administration of the Public Employees Retirement System* 21 Cal.3d 859, 582 P.2d 614, 148 Cal.Rptr. 158 (*Betts*) stated:

> Petitioner, who served as Treasurer of the State of California from 1959 to 1967, . . .

At all times during petitioner's incumbency, the basic retirement benefit available to retired members of the Fund was governed by section 9359.1, subdivision (b), which then provided, in pertinent part: 'The retirement allowance for [a non-legislative member] ... is an annual amount equal to five percent (5%) of the compensation payable at the time payments of the allowance fall due, to the officer holding the office which the retired member last held prior to his retirement. . . '

Under this 'fluctuating' system, a retired member's monthly allowance would be adjusted periodically throughout the term of the pension to reflect changes in the salary payable to the current incumbent of the elective office the member had previously held. . . . In 1974, after petitioner had left office but before his retirement and application for benefits, the Legislature changed the method of benefit computation. Under amended section 9359.1, the basic benefit allowance became 'an annual amount equal to five percent (5%) of the highest compensation received by the officer while serving in such [non legislative elective] office,' multiplied by years of service credit. . . . A long line of California decisions has settled the principles applicable to the problems herein presented. (2) A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. (Kern v. City of Long Beach (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799].) . . .

However, there is a strict limitation on the conditions which may modify the pension system in effect during employment. We have described the applicable principles as follows: 'An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. [Citations.] ...' (Allen v. City of Long Beach (1955) 45 Cal.2d 128, 131 [287 P.2d 765], italics added.) We recently reaffirmed these principles in Miller v. State of California (1977) 18 Cal.3d 808, 816 [135 Cal.Rptr. 386, 557 P.2d 970].
The Board urges that 1963 amendments to the pension plan provide the necessary offsetting advantage in this case. In that year, the Legislature added section 9360.9, which requires automatic annual adjustment of

> pension benefits to reflect upward changes in the cost of living.
>
> [I]n the instant case, the 1963 enactment of section 9360.9 occurred during petitioner's term as Treasurer, which ran from 1959 to 1967; the 'fluctuating' system of benefit computation was also in effect during this entire period (4) An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure. . . .
>
> From application of the foregoing principles to the case before us we conclude that the prior version of section 9359.1 together with section 9360.9, enacted in 1963, form the basis by which petitioner's reasonable pension expectations must be measured. For four years, petitioner provided his services under a statutory scheme which simultaneously included both computation methods. . . .
>
> We fully recognize that the effect of our holding is that petitioner thereby receives the benefit of a double troubling result. We can only observe that the Legislature must have intended to provide such benefits to constitutional officers serving between 1963 and 1974 because it left in effect both of the formulae during that 11-year period.

Petitioner (in Staniforth *I*) quotes one sentence (RB 23) out of context from foonote 7, i*nfra*, in *Olson I*: "The net effect of our holding in the instant case is to allow a judicial pensioner but one increment of increase, that being the increment of prorate [COLA] increase." In quoting this one sentence, Petitioner suggests that applying COLA increases to retirement benefits of the Appellants in *Staniforth* I would somehow constitute a double increment of increase.

This was false and misleading. Judicial retirees would get only one increment of increase, that being a COLA increase to that part of the retirement benefits attributable to service and irrevocably vested during the "protected period" and before. For this period of judicial service the retiree would get no increase in retirement benefits based upon increases in active judges salaries. For that portion of judicial service after a judicial officer's "protected period," the unprotected portion of the retirees judicial service, the retirement benefits would be based on the active judicial officer's salary for the office the retiree last held.

The retirement benefits of judicial retirees would never have a double increment of increase as mentioned in *Betts*.

In the matter before the Board, it must be made clear that Respondent Paul G. Mast does not now nor has he ever demanded or requested a "double increment" of increases to his retirement benefits. In accordance with the Contract (Settlement Agreement) he is only entitled to and has only received or claimed COLA increases. He has never received increases based on the increases of salaries of sitting judges (including the increase when the courts were consolidated). The accounting discussed and attached below reflects only COLA increases; it does not include any increases in judicial salaries. Respondent's entire judicial service was during his protected period.

Olson I, footnote 7 is critical. The meaning of the footnote is that *Olson I* holds retirement beneficiaries ending judicial service during their protected period are entitled to vested COLA retirement benefits. footnote 7 does not address the retirement benefits attributable to service at the beginning of a new term after their protected period ends and thereafter. No COLA benefits accrue a judicial officers protected period. The retirement benefits for that period would be based on the justice or judges salary for that particular judicial office.

Respondent has inserted comments in brackets between the text of footnote 7, following:

> We note that in Betts this court held the pensioner was entitled to both the benefit of a basic retirement allowance calculated as a proportionate part of the fluctuating salary of the incumbent in the office occupied by the pensioner and, additionally, a cost of living adjustment of the basic allowance. We stated then that the effect of the holding 'is that petitioner thereby receives the benefit of a double increment of increase, a troubling result.' (Betts v. Board of Administration, supra, 21 Cal.3d 859, 867.) The net effect of our holding in the instant case is to allow a judicial pensioner but one increment of increase, that being the increment of prorate increase ["The increment of increase" means the COLA increase for the time of service in the protected period and before. The calculation of the yearly COLA increase is based on the salary of a

judge in the particular office as it was in January 1977. The calculations relevant to this case begin on the first day of January 1977 and thereafter for the length of the retirement. Prior to January 1977, the sitting judge's salary already included previously calculated COLA increases.] in the salary of the judge occupying the office formerly occupied by the retired or deceased judge. While that salary fluctuates with cost of living increases, [The Court is referring to cost of living increases or other increases to the sitting or justices or judges salary after the protected period for the jurist. The use of the word "cost of living increases" is confusing out of context, but in context is understandable in that it refers to cost of living increases with a 5 percent cap provided for by the 1976 Amendment (in effect until 1981). The increases pursuant to the 1976 Amendment are not material and are not in issue in this case.] the judicial pensioner's proportionate share is his basic retirement allowance and it is not increased by any cost of living factor.

[The Supreme Court contrasts its holding in *Olson I* with its holding in *Betts*. In *Betts* a non-legislative elected pensioner was entitled to both the "fluctuating salary of the . . . office" and " a cost of living adjustment" of the basic retirement allowance. In other words, if Betts' officeholder's salaries were rising, Betts would receive a proportionate share of the increased salary, which would then be increased by a cost of living adjustment. The Supreme Court referred to this as "a double increment of increase."]

Betts is distinguishable on the ground that, unlike the instant case, there was express legislative direction mandating the cost of living adjustment be applied to the fluctuating basic retirement allowance. (Id., at p. 865.) It was thus necessarily held that since statutes establishing both the fluctuating basic retirement allowance and the cost of living adjustment thereto were in effect during the pensioner's term in office, he had acquired vested contractual rights to the dual benefits. **In the instant case legislation exists directing increases cost of living or otherwise in the basic retirement allowance**, although that allowance itself may fluctuate depending on adjustments cost of living or otherwise in salaries of incumbent judges [emphasis supplied.]

[After the protected period, should there be increases to incumbent judges salaries, the retirement benefits of justices and judges receiving COLA would not be increased or affected for time periods of their judicial service in which they were receiving vested COLA benefits.]

The meaning of footnote 7 is that Olson I held that judicial retirees who had

earned vested cost-of-living adjusted retirement benefits during the protected period and before would receive COLA retirement benefits for that period of their service. For the period after their protected period, when they no longer were earning vested cost-of-living adjusted retirement benefits, their retirement benefits would be the requisite percentage of the sitting justices or judges salary. The jurists retirement benefits would be calculated under two formulas: first, COLA retirement benefits for the time earned during the protected period, but without any benefit derived from fluctuating judicial salaries after the protected period; second, for the requisite percentage of the sitting justice's or judge's salary for the percentage of judicial service which occurred after their protected period. All retirement benefits are vested during the first 20 years of judicial service.

MARRIAGE OF ALARCON RULES THAT RETIREMENT BENEFITS, ONCE VESTED, MAY NOT BE CHANGED BY LATER LAW

In Marriage of Alarcon, 149 Cal. App. 3d 544, 196 Cal. Rptr. 887 (1983), (Alarcon) Arthur Alarcon was serving on the superior court at a time that statutes concerning judicial pensions provided for deferred retirement. *Alarcon* stated:

> In 1973, the statute was amended to provide that a state court judge who accepted a federal judgeship was ineligible for deferred retirement. In 1978 Alarcon began a term on the California Court of Appeal, and in 1979 he was appointed judge of the U.S. Court of Appeals for the Ninth Circuit. Id. at 550-51, 196 Cal. Rptr. at 889-90.
>
> When Alarcon sought a deferred California pension as a retired justice from a California appellate court, JRS ruled him ineligible on the ground that when he began a term as an appellate justice in 1978, he became subject to the 1973 amendment barring deferred retirement for judges who had gone on the federal bench. JRS called this an 'unprotected term.' Id. at 552, 196 Cal. Rptr. at 891, the holding of Olson that a sitting judge who began a term of office after 1976 (when the protected period ended) became subject to the 5 % cap amendment, by which he or she had previously not been constitutionally governed. Id. at 552, 196 Cal. Rptr. at 891.
>
> The argument of the Judges Retirement System on applicability of Olson

v. Cory I equates pensions with salaries, a clear case of mistaken identity.

> . . . There is no promise express or implied the state will continue to pay an existing salary beyond the end of the term. . . . [¶] A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligations. [Id.]

Alarcon thus holds that different rules of constitutional law apply when the issue is validity of reduction in the salary of a sitting judge compared to reduction of pension benefits of a retiree, with the rule applicable to pensions providing more protection. *Alarcon* further holds that whereas the law may change in regard to salaries that are effective upon beginning a new term or assuming a new office, the law may not be changed so as to abrogate any vested pension rights. Thus, when Alarcon assumed his office as Justice of the Appellate Court, his salary and pension rights thereafter became subject to the 1973 law. When he retired, his pension rights were vested and he was entitled to a pension based upon his service before he assumed his office as an appellate court justice in 1978 (assuming he did not begin a new term in the trial court between 1973 and 1978, which apparently he did not). The pension rights he earned for his service on the appellate court after 1978 were subject to the law enacted in 1973.

His pension rights for a term he began after 1973 were subject to the 1973 amendment barring deferred retirement for judges who had gone on the federal bench.

He was entitled to pension rights after becoming a federal judge for his service to the end of any term that began before 1973, but not for any term that began after 1973.

The passage from *Alarcon* above was quoted with approval by the California Supreme Court in *Legislature v. Eu,* 54 Cal.3d 492, 532, 816 P.2d 1309, 1334 (1991). Thus it cannot be contended that the *Alarcon* opinion, written by an intermediate appellate court, misinterpreted what the Supreme Court intended to say in *Olson I.*

The relationship quote should be interpreted as the *Olson I* Court's determining that if a statute affecting remuneration of judges is unconstitutional as

applied to a sitting judge, that statute necessarily is also unconstitutional as applied to a judicial pensioner.

THE PETITIONER MISINTERPRETS THE CONCLUSION IN *OLSON I*

The Conclusion in *Olson I* clearly states that the rights of judicial pensioners are vested and cannot be changed or revoked.

Individual judges, justices and judicial pensioners have different rights based on the timing of the relevant judicial terms, as follows:

1. Judicial retirees who retired prior to January 1, 1970 have no vested COLA rights; their retirement benefits are based on a percentage of a sitting judge's salary for the level of office last held.

2. Judicial retirees who served all of their judicial service prior to or starting between January 1, 1970 and the end of any judicial term starting before January 1, 1977 (The Supreme Court entitled this "the protected period") have vested COLA rights; their retirement benefits, which includes COLA benefits earned during their judicial service, are entirely vested. "Vested COLA rights" are vested for the entire time that retirement benefits are paid. This is the category that Respondent falls within, as he retired prior to the end of his term that started on January 1, 1975.

3. Judicial retirees who served part of their judicial service prior to or starting between January 1, 1970 and the end of any judicial term starting before January 1, 1977 ("the protected period"), and who continued judicial service after the end of their "protected period" by commencing a new term (this would be a term that began on or after January 1, 1977). These judicial retirees would have a bifurcated retirement benefit calculation, i.e. for the service prior to and during the "protected

period" they would receive COLA benefits and retirement benefits for their judicial service after the "protected period" calculated as a percent of the salary of an active judicial officer for the level of office in which they last served.

4. Judicial retirees who first held judicial office after January 1, 1977 (after the "protected period") would not have any vested COLA benefits during their judicial service; their retirement benefits would be calculated as a percent of the salary of an active judicial officer for the level of office in which they served. They receive no COLA benefits. Although this category of judicial officers and judicial retirees is not explicitly discussed in *Olson I,* the meaning of the Court is clear in its discussion of those judicial officers and judicial retirees set forth in paragraph 3 above, which discusses no vested COLA benefits for terms after the "protected period."

The Conclusion of "*Olson I* states:

> We conclude that Government Code section 68203 as amended in 1976, insofar as it would limit cost of living salary increases as provided by section 68203 before the 1976 amendment, cannot be constitutionally applied to (1) a judge or justice during any term of office, or unexpired term of office of a predecessor, if the judge or justice served some portion thereof (a 'protected term') prior to 1 January 1977, and **(2) a judicial pensioner whose benefits are based on some proportionate amount of the salary of the judge or justice occupying that office.**
> The salaries of judges and justices as fixed on 1 September 1976 constituted equal compensation for all judges and justices in a particular peer group (the 'base salary'). (See Gov. Code, §§68200-68203.) Salaries for judges and justices never having served in a protected term are fixed by the legislative scheme to be at any time the 1976 base salaries increased annually by the percentage increase in the CPI not to exceed 5 percent, beginning on 1 July 1978 (the 'statutory salary'). However, salaries for judges and justices while serving a protected term will be increased above the 1976 base on 1 September each year beginning 1977, by the percentage increase in the CPI for the prior calendar year. There

> will thus be a disparity in salaries within a peer group of judges or justices while any judge or justice within that group continues to serve a protected term. Such disparity will continue, in the case of trial judges, no later than the first Monday in January 1981 and, in the case of appellate justices, no later than the first Monday in January 1987. (Cal. Const., art. VI, § 5, subd. (a), § 16, subd. (a);Gov. Code, § 71145.) A judge or justice who completes a protected term and voluntarily embarks upon a new term can no longer claim to serve in a protected term, and his or her compensation will thereafter be governed by the provisions of section 68203 as amended in 1976. While that section speaks of annual increases in the salaries of 'each justice or judge' by a percentage of the then current salary of 'such justice or judge,' we do not deem this to mean that the salary of a judge or justice at the end of a protected term will be the salary at which the judge or justice commences a new, unprotected term should he or she succeed himself or herself. As stated (ante, pp.544, 545), section 68203 becomes fully applicable upon expiration of a protected term and it follows that the benefits derived from constitutional protections during that term cannot be projected into an unprotected term. Thus the salary at which any unprotected term is commenced including the salary of a judge or justice leaving a protected and embarking upon an unprotected term is the statutory salary then paid to judges or justices of equal rank who never served during a protected term. Although a salary of a judge or justice serving a protected term will be decreased upon entering a new term, such a result is constitutionally permissible as such a judge or justice has voluntarily embarked or will voluntarily embark upon a new term for which there was or is a legislatively designated compensation.
> The judgment is affirmed as to any judge or justice who served any portion of his term or the unexpired term of a predecessor prior to 1 January 1977, and **as to judicial pensioners whose benefits are based on the salary of such a judge or justice.** In all other respects the judgment is reversed. All parties shall bear their own costs on appeal. [emphasis supplied]

In both the body of the opinion and its conclusion *Olson I* states, "Government Code section 68203 as amended in 1976, insofar as it would limit cost of living salary increases as provided by section 68203 before the 1976 amendment, cannot be constitutionally applied" to judicial pensioners.

This was confirmed in the passage from A*larcon*, supra, that states:

> The argument of the Judges Retirement System on applicability of Olson v. Cory I equates pensions with salaries, a clear case of mistaken identity.

> . . . There is no promise express or implied the state will continue to pay an existing salary beyond the end of the term . . . [¶] A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligations. *Alarcon,* 891.

In the *Olson I* Conclusion the "judgment affirmed as to judicial pensioners" is the judgment of the Superior Court. In conformity with the Court Rules at the time of that appeal, the decision of the Appellate Court was vacated; the appeal was an appeal from the trial court, which had entered a judgment declaring that the 1976 Amendment was unconstitutional as to all retirees (not only those who had service during the protected period). This judgment affirmed the judgment of the trial court that the 1976 Amendment was unconstitutional as to any retiree who had some judicial service during the protected period, and that those judicial retirees had vested constitutionally protected COLA benefits for their service during the protected period and before. O*lson I* reversed the trial court judgment insofar as it held the application of the law unconstitutional as it applied to those retirees who had no service during the protected period (those who retired before the January 1, 1970). *Olson I* also held that those who started judicial service after the protected period would not have any vested COLA benefits.

Alarcon agrees with and follows the decision in *Olson I*: "A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligations." *Alarco*n, *supra*.

Legisature v. Eu, 54 Cal.3d 492, 816 P.2d 1309, 286 Cal.Rptr. 283, concerns Proposition 140, passed by the voters in 1990. The Court stated:

> . . .the measure imposes limitations on legislators' pension rights. New section 4.5 is added to article IV of the Constitution to provide that the state will contribute the employer's share to the federal Social Security system on behalf of participating legislators 'elected to or serving in the Legislature on or after November 1, 1990,' but '[n]o other pension or retirement benefit

shall accrue as a result of service in the Legislature, such service not being intended as a career occupation.' This same provision further provides that 'This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law ..., but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security ....' Petitioners find ample support for their position in California cases confirming that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. (See *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119,120, 124 [192 Cal.Rptr. 762, 665 P.2d 534] [legislators]; *Olson v. Cory* (1980) 27 Cal.3d 532, 540541 [178 Cal.Rptr. 568, 636 P.2d 532] [judges); Betts v. Board of Administration (1978) 21 Cal.3d 859, 863864 [148 Cal.Rptr. 158, 582 P.2d 614] [state Treasurer]. . . .

According to petitioners, the applicable principle is set forth in Miller v. State of California, supra, 18 Cal.3d at page 817: '[U]pon acceptance of public employment plaintiff acquired a vested right to a pension based on the system then in effect. That system allowed him to earn successively higher levels of benefits based on his years of service and his highest average salary during three consecutive years.' (See also Olson v. Cory, supra, 27 Cal.3d at p. 541; Betts v. Board of Administration, supra, 21 Cal.3d at p. 863; Kern v. City of Long Beach, supra, 29 Cal.2d at pp. 855, 856.) Similar increased benefits from

continued service were provided legislators under the LRS. (See Gov. Code, § 9350.). . . .

Petitioners correctly observe that the pension provisions of Proposition 140 do not merely modify the LRS pension system; rather they terminate that system entirely as to additional benefits accruing for future services. Intervener argues that the 'transfer' or 'redirection' of pension funds to the federal Social Security system operates as a 'comparable new advantage' which justifies the impairment and consequently sustains the measure. Petitioners respond by asserting that every legislator already possessed the right to join the federal Social Security system, that 99 out of 120 legislators were already contributing to that system when Proposition 140 was adopted, and that the anticipated federal benefits will be far less than those provided by the LRS. Neither respondent Eu nor intervener has disputed those allegations.

We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service, despite the potential but unexercised limitations contemplated by article IV, section 4, of the state Constitution. We also conclude that the pension restriction of Proposition 140 must be deemed an impairment, not a mere 'modification' or 'adjustment,' of the vested pension rights of incumbent legislators.

Adams v. CalPERS, San Diego Superior Court, GIC 870672, is a Superior Court

case, which was not appealed. Therefore, the principles of *res judicata* apply.

Adams was a Superior Court Judge who was convicted of offenses while in office arising out of conduct in his judicial office. In 1982, prior to Adams beginning his last term of office, Government Code §75033.2 was passed stating that any judicial officer convicted of a felony, as Adams was, would not receive retirement benefits from the Judges' Retirement System. *Adams* stated:

> The High Court ruled, affirming a slew of progenitors [including Olson I], that 1) pensions are different from salaries, 2) pension rights vest when the officer first assumes his office, regardless of how many separate terms he serves thereafter, 3) any legislative effort to impair those rights runs afoul of Article I, section 10 of the United States Constitution.

WHEREFORE, The Board should order that the Contract (Settlement Agreement) entered into on October 12 1996 between Respondent and JRS is still in full force and effect and that JRS should pay to Respondent the amount of $352,898 on February 28, 2017; and that future monthly retirement benefits due Respondent are $9,593.69 until the next date of cost of living adjustment on September 1, 2017.

February 1, 2017

Paul G Mast

Paul G. Mast

PROOF OF SERVICE

In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.
AGENCY CASE NO. 2010-0825

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is

On February 1, 2017 I served the following document(s) by the method indicated below:

RESPONDENT'S MEMORANDUM **ARGUMENT**
DECLARATION OF PAUL G. MAST
RESPONDENT'S EXHIBITS

Marguerite Seabourne
Assistant Chief Counsel
CalPERS Lincoln Plaza
400 Q Street, Sacramento, CA

By email to allyson.mccain@calpers.ca.gov

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 1, 2017 at Irvine, CA.

Marci G. Mast

Marci G. Mast

PAUL G. MAST (CA Bar No. 28390)
H. Lee Horner, Jr. (CA Bar No. 14408)

Telephone:
Email:

Attorneys for Respondent

BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.	AGENCY CASE NO. 2010-0825 **DECLARATION OF PAUL G. MAST** Hearing Date: February 15, 2017 Hearing Location: Robert F. Carlson Auditorium CalPERS Lincoln Plaza North 400 Q Street, Sacramento, CA

Paul G. Mast, hereby declares as follows:[1]

In early 1995 Declarant contacted the Judges Retirement System (JRS) to confirm that his retirement benefits would begin on his upcoming birthday and to determine the amount of those benefits.

Declarant was surprised that his benefits would not include Cost of Living Adjustments as his benefits had vested during the period when, pursuant to the then existing provision of Government Code §68203 (GC §68203), and as stated in *Olson v. Cory, I* (*Olson*) judicial retirees would receive COLA retirement benefits for their entire period of service up until the end of what they called the "protected period".

Declarant was aware of the holding of *Olson* as several years earlier Declarant had been contacted by a Judge in the Inglewood Municipal Court who requested that Declarant prepare an analysis of *Olson* for presentation to the annual California Judges Conference. Declarant did so.

A discourse ensued which culminated in a letter from Respondent to JRS dated May 1, 1995, and a subsequent memo from Jim Niehaus of JRS to "Mike" dated 5/09/95 (both attached as Exhibit B) wherein he says, ". . . I think he has merit to his case even though Sue does not. Still I will write the denial letter but this new letter from him can be used as an appeal we can send it to Legal as an appeal or a request for legal opinion".

Subsequent thereto Respondent and representatives of JRS, including the JRS legal staff discussed the issue for over a year. Nothing was resolved. Respondent had briefed the issue by letter during that time.

Declarant submitted a Claim that his retirement benefits should be adjusted, for COLA increases, in accordance with the provisions of GC §68203 which were vested for his entire service according to *Olson*.

Said Claim was denied and an Appeal was then filed. Declarant's rights to COLA retirement benefits, including the ruling in *Olson* were fully set forth in both the Claim and the Appeal.

Subsequent to the filing of the Appeal, Declarant received a call from Maureen Reilly, Senior Staff Counsel for JRS. Initially Ms. Reilly did not think Declarant's appeal was warranted, however, after our discussion she stated she would research it and read Olson. Declarant later received another call from Ms. Reilly who said she had researched GC §68203 and Olson, and that she agreed with my position as stated in the Appeal and that I should receive COLA retirement benefits. She stated, however, that she could not agree with my Claim and it would have to be litigated, in that it were agreed to by Ms. Reilly, JRS would be forced to pay other judges about 400 million dollars. She did not want to do that. In response, I stated that would not have to be a problem, as I would enter into a non-disclosure agreement.

Declarant had not thought about the amount due to other judicial retirees, and had no way of knowing the amount that JRS would have to pay them. The amount, as well as the subject of paying other judicial retirees came from Ms. Reilly.

Ms. Reilly then stated that she could not make that decision, and would file the Statement of Issues.

Dated July 29, 1996 Respondent received a Statement of Issues (Exhibit C) from Ms. Reilly. Respondent had spoken to Ms. Reilly including just before and just after the receipt of the Statement of Issues During one of the two conversations around the Statement of Issues, Ms. Reilly stated that she thought Respondent was correct on the issues but she and JRS could not settle the case because, if JRS did so, they would have to pay other retired judges between 200 and 400 million dollars. Either during the same conversation or a later one, Respondent stated to Ms. Reilly that he had no intention of telling other retired judges about this and that Respondent would promise that in any agreement.

After that Respondent wrote a letter dated August 5, 1996 to Ms. Reilly (Exhibit D). The Attorney for Petitioner has taken this letter, ignored the dates and time frame and taking the letters out of context and not regarding their dates; referring only to the second to the last sentence of the August 5th letter; and ignoring the rest of the letter, alleges that Respondent was threatening or extorting JRS. This was not the case. The letter must be taken as a whole, starting with the beginning, "Pursuant to our recent telephone conversation, . . ." Respondent then discussed in the letter, the Statement of Issues and what the law was. It is to be noted that Ms. Reilly prior statement is referred to in the letter, and that as she very cogently pointed out in our telephone conversation as well as the letter, "the only way to resolve this matter is for CalPers to change their position on the claim".

The case was not settled at this time. On August 16, 1996, Respondent filed his Response to Statement of Issues and Points and Authorities.

Further discussions her had between Respondent and Ms. Reilly culminating in a letter from Ms. Reilly to Respondent dated September 20, 1996 (Exhibit F) (one and a half months after the attorney for Petitioner claims that Respondent had threatened and extorted Petitioner), stating that JRS had accepted the terms of the settlement offer in Respondent's August 5, 1996 letter. Presumably this meant that CalPERS was aware and had also accepted the settlement. This was followed by a letter of October 4, which included an agreement (the Contract) to be signed (Exhibit G). The contract was prepared solely by JRS without input from Respondent.

Subsequent to the signing of the Settlement Agreement (Contract) by Petitioner and JRS on October 12, 1996, JRS calculated the arrearage for the past benefit periods and calculated the cost of living increases throughout the years culminating in the increase in 1995 and the resultant first payment pursuant to the Contract (Settlement Agreement) on January 1, 1997. Respondent took no part in these calculations, was not informed of any of the calculations, and accepted without inquiry the calculations and the beginning benefit amount in January 1997. The calculations comprised and were am integral part of the

Settlement Agreement (Contract), and were therefore the agreed starting point for all subsequent calculations.

Respondent did not demand interest on the unpaid benefits prior to 1996, and they were therefore waived as a matter of law.

Although JRS questioned the amount of unpaid benefits that were due and the method of calculation, at no time did JRS dispute or challenge the validity of the Contract (Settlement Agreement), that had been entered into on October 12, 1996 by JRS and CalPERS. At no time did JRS or CalPERS file an Accusation to rescind the Contract nor were there ever any claims, court filings, or other actions taken to attempt to rescind the Contract. The Contract is in full force and effect and is still valid.

The Contract (Settlement Agreement) was properly entered into with valid consideration, as determined by the Administrative Law Judge in her Proposed Decision and Proposed Decision on Remand (see Respondent's Memorandum).

The Contract Settlement Agreement was never breached by Respondent, but was breached on many occasions by Petitioner JRS, as determined by the Administrative Law Judge in her Proposed Decision and Proposed Decision on Remand (see Respondent's Memorandum).

The Contract (Settlement Agreement) has never been rescinded and is in full force and effect. The only way a party to this or any other contract can avoid their obligations under a Contract is to bring an action to rescind the contract as provided by law (see Respondent's Memorandum). In this case the legal proceedings would have to be initiated by filing an Accusation and proceed through the administrative process and then through court. JRS has never filed an Accusation.

Petitioner's attorney has made many allegations and statements devised to allege the Contract is invalid. None of them are valid in that the only way that the Contract (Settlement Agreement) can be declared invalid is to follow the proper and legal procedures to rescind the Contract. This has never been done.

Likewise, Petitioner's Attorney has made allegations that the Contract (Settlement Agreement) should be ignored and that JRS should be permitted to

re-claim retirement benefits previously paid pursuant to the Contract (Settlement Agreement). This of course cannot be done as previously stated. In addition thereto, JRS cannot reclaim any retirement benefits previously made to any retiree except by first filing an Accusation and following the requisite procedure. This has never been done.

I hereby declare under penalty of perjury that the foregoing is true and correct. Signed in Irvine California on January 31, 2017.

Paul G Mast

Paul G. Mast

PROOF OF SERVICE

In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.
AGENCY CASE NO. 2010-0825

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is

On February 1, 2017 I served the following document(s) by the method indicated below:

RESPONDENT'S MEMORANDUM
DECLARATION OF PAUL G. MAST
RESPONDENT'S EXHIBITS

Marguerite Seabourne
Assistant Chief Counsel
CalPERS Lincoln Plaza
400 Q Street, Sacramento, CA

By email to allyson.mccain@calpers.ca.gov

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 1, 2017 at Irvine, CA.

Marci G. Mast

Marci G. Mast

CONTRACT

(SETTLEMENT AGREEMENT)

EXHIBIT A

SETTLEMENT AGREEMENT

between

JUDGES RETIREMENT SYSTEM and PAUL G. MAST

The parties to this agreement, the Judges Retirement System (JRS) and Paul G. Mast (Mast), hereby fully settle their dispute over his request to re-calculate his retirement allowance. The parties agree to the following terms:

1. It is not disputed that JRS must follow the formula for deferred retirements in Government Code section 75033.5

2. Using that formula, JRS will re-calculate Mast's allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975,the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to Olson v. Cory, (1980), 27 Cal. 3d. 532.

3. Said recalculated retirement allowance shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995.

4. Mast expressly waives his right to appeal this matter further to JRS or any other competent jurisdiction.

5. Each party will keep the terms of this agreement confidential.

6. Each party will bear their own costs in negotiating the terms of this agreement.

In settling, the parties do not admit any wrongdoing or breach of contractual obligations. The parties are settling this matter solely to avoid the expense and uncertainty of litigation.

By the signatures below, JRS and Mast agree to enter this settlement agreement as a legally binding contract on the date signed by the last party to sign.

Date: 10/22/96

MICHAEL PRIEBE, Manager
Judges' Retirement System

Date: 10-8-96

PAUL G. MAST
SSN [redacted]

5/9/95 JRS MEMO – NIEHAUS

5/1/95/ MAST LETTER TO JRS/NIEHAUS

EXHIBIT B

From: PA252 --PAJ
To: PA518 --PAJ

Date and time 05/09/95 09:15:23

From: Jim Niehaus
Judges' & Legislators' Retirement
LGSD 326-3883
Subject: Paul Mast
Mike this fellow has a good argument. My only concern to his argument is on page 2 paragraph 2 where he says he became a judicial pensioner on January 15, 1979. The term pensioner could be debated. Generally a pensioner is someone who receives a pension or allowance. Otherwise Mike I think he has merit to his case even though Sue does not. Still I will write the denial letter but this new letter from him can be used as an appeal we can send it to Legal as an appeal or a request for a legal opinion.

HAVE A GOOD DAY!

Paul G. Mast
Attorney at Law
[redacted]
Fax: (714) 448-8817

Judge Paul G. Mast (Ret.)

May 1, 1995

Judges Retirement System
400 P Street
P.O. Box 942705
Sacramento, CA 94229-2705

Fax: 916-326-3270

Attention: Jim Niehaus
Lead Analyst

Dear Mr. Niehaus:

Thank you for your recent telephone call. As communicated to you previously, I elect to have the salary at the time of my retirement adjusted by unlimited cost-of-living increases. I understand that your office is handling hundreds of pensions, all of which are being paid based upon the current salary of a sitting judge. The purpose of this letter is to address your concerns by explaining that I am entitled to the benefits which I am electing to receive and demonstrating that I am the only pensioneer so entitled.

Before reviewing the California Supreme Court holding presented in *Olson v. Cory*, 27 Cal. 3d 532 (1980), consider the following brief history of the legislative changes in the law regarding judicial compensation:

Prior to January 1, 1970 (1969 change in the law):
No provision for any cost-of-living increases in the compensation of judges or any other automatic increases.

Effective January 1, 1970:
Legislature instituted cost-of-living increases without any limitation or cap as to the amount of annual increase.

Effective January 1, 1977 (the 1976 change in the law):
Legislature imposed a 5 percent limitation or cap on the amount of annual increase.

In 1980:
Legislature linked the annual increase in judicial compensation to the compensation increases of

salaries of State Employees, might be greater than the CPI increase provided for under the pre-1976 law.

Other pertinent portions of *Olson v. Cory* follow.

> [W]e deal here with the right to compensation by persons serving their term of public office to which they have undisputed rights. '[Public] employment gives rise to certain obligations which are protected by the contract clause of the Constitution....' . . .
>
> Promised compensation is one such protected right. . . .
>
> Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. . . .
>
> A judge entering office is deemed to do so in consideration of -- at least in part -- salary benefits then offered by the state for that office. If salary benefits are diminished by the Legislature during a judge's term, or during the unexpired term of a predecessor judge (see Cal. Const., art. VI, @ 16; Gov. Code, @@ 71145, 71180), the judge is nevertheless entitled to the contracted-for benefits during the remainder of such term. The right to such benefit accrues to a judge who served during the period beginning 1 January 1970 to 1 January 1977, whether his term of office commenced prior to or during that time period.
>
> 'An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.' . . .
>
> [I]t is clear a pensioner's contractual benefits are merely derivative from covenants of employment. Moreover, as will be seen in our discussion of Proposition 6, that constitutional provision forecloses any salary reduction during a judge's term in office, including reduction in a cost-of-living provision enacted during the same term in office.
>
> The word 'salaries' in the last sentence of Proposition 6 is thus intended to mean cost-of-living salaries because the appropriating law then provided for annual cost-of-living adjustments. It follows that the provision in Proposition 6 that "[salaries] of elected state officers may not be reduced during their term of office" forecloses during that term any limitation on cost-of-living increases even though such increases were first provided by the Legislature during that same term. To the extent that the 1976 amendment to Government Code section 68203 contemplates such limitations it is unconstitutional.

Judicial pensioners whose benefits are based on judicial services terminating while section 68203 provided for unlimited cost-of-living increases in judicial salaries, acquired a *vested* right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office including the incumbent judge's or justice's unlimited cost-of-living increases.

You have asked whether I received any compensation after *Olson v. Cory*. Apparently there was some question in your office whether there was a payment made to judges in consideration of their waiving their rights under the old law. During the pendency of *Olson v. Cory*, the State Controller partially withheld salary from judges whose terms began prior to the 1976 change in the law. After *Olson v. Cory* was decided, the State Controller paid the salary which previously had been withheld. In my case, this payment was only for the differential in the salary from July 1, 1978 (the date the salary differential first began) until January 15, 1979 (the date I retired). The amount was very small, I believe about $200. There was no payment as consideration for giving up any rights which had been vested under the former law, as in fact there could not have been, as no such consideration or settlement was provided for by law or by court decision.

As you confirmed I am the only retired judge with a deferred retirement whose rights are still vested under the old law. The question is whether there are vested rights held by a large number of pensioners already receiving compensation who would be entitled to a recalculation, resulting in increased current and future pension benefits and an award of underpaid prior benefits. Obviously such a situation would cause administrative and fiscal burdens.

Any judge who has already begun receiving retirement benefits without requesting that his or her benefits be calculated under the old law to which he or she has vested rights, has elected to receive benefits under the new law. The Supreme Court recognized that a "protected" judge, upon beginning to receive benefits may make an *election* as to whether to receive benefits under the pre 1976 compensation plan, or under the plan existing at the time he received benefits. This election is referred to in Note 9 to *Olson v. Cory* quoted below.

> n9 The Legislature has clearly indicated its intent, in recognition of vested interests, to provide minimum levels or **to afford elections** by which **differing levels of compensation may become available to judicial pensioners.**

Upon receiving retirement benefits calculated under the law as it existed at the time of retirement, without requesting that retirement benefits be paid under the pre-1976 law, a judicial pensioner may be held to have made a *de facto* election to receive benefits under the then existing law.

When viewed prospectively, from the 1970's, and particularly after the change in the law in 1980, a judge would not know with a certainty whether his or her retirement benefits would be greater under the pre-1976 law or under the then prevailing law. This is because the legislature might increase the salaries of incumbent judges at any time (as it had several times before) or the automatic increase system as tied to the

State employees. This change is not relevant to our discussion.

Olson v. Cory holds that the rights of judges and judicial pensioners, whose terms began prior to the passage of the 1976 law are vested contractual rights and may not be abrogated. This holding is based upon the United States Constitution, Art. 1, § 10. the California Constitution Art. 1, §9 and Art. III, §4, and an initiative measure added to the California Constitution in 1972, which is referred to in *Olson v. Cory* as Proposition 6. As such, the compensation of judges may not be diminished during their term of office, nor may the compensation paid to judicial pensioners, or their rights thereto, be diminished, if they retired prior to beginning a new term of office.

The *Olson v. Cory* decision holds that the 1976 amendment impaired the vested rights of judicial pensioners as well as those of judges in office. As your records show the last term of judicial office which I held began January 1, 1975. During the middle of my term of office I retired January 15, 1979. Having retired during my term that began in 1975, I not only fall within the class of judges in office with vested rights, but as of the date of my retirement, January 15, 1979, I became a judicial pensioner.

The *Olson v. Cory* decision clearly holds that for all judges that retired during a term that began prior to the 1976 change in the law, the contractual rights for judicial pensioners are vested in accordance with the law as it was at the time the judges term began,. As a Judge who was elected to and began a term of office prior to the 1976 change in the law, and retired prior to the expiration of that term, my pension rights were completely vested in accordance with the law as it was at the time my term of office began on January 1, 1975. Pertinent portions of *Olson v. Cory* follow. Please note that the emphasis and highlighting of sections are mine and are not in the original.

> In the present case the state has purported to modify pension rights with the amendment of section 68203. Between 31 December 1969 and 1 January 1977, a judicial pensioner was entitled to receive benefits based on a specified percentage of the salary of a judge holding the judicial office to which the retired or deceased judge was last elected or appointed. (Gov. Code, @ 75000 et seq.) The salary for such a judicial office -- if the retired or deceased judge served in office during the period 1970 to 1977 -- was convenanted to increase annually with the increase in the CPI. The 1976 limitation on increases in judicial salaries is, in turn, calculated to diminish benefits otherwise available to those judicial pensioners. Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit. Again, we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included and that section 68203 as amended is unconstitutional as to certain judicial pensioners.

Based upon the law established by the California Sjupreme Court in *Olson v. Cory* I am in a unique set of circumstances. I elect calculation of my pension benefits under the old law to which I have vested rights.

Very truly yours,

Paul G. Mast

7/29/86 STATEMENT OF ISSUES

EXHIBIT C

KAYLA J. GILLAN, DEPUTY GENERAL COUNSEL
MAUREEN REILLY, SENIOR STAFF COUNSEL
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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Attorney for Petitioner

BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application for Retirement from JRS of PAUL G. MAST, Respondent, and JUDICIAL COUNCIL OF CALIFORNIA, Respondent.	CASE NO. [redacted] OAH NO. L-9605311 STATEMENT OF ISSUES

Petitioner James E. Burton, Chief Executive Officer of the Public Employees' Retirement System (PERS), states:

I

Petitioner makes and files this Statement of Issues in his official capacity as such and not otherwise.

II

Respondent Paul G. Mast (respondent) became a member of the Judges' Retirement System (JRS) on November 1, 1965, following his appointment to the Municipal Court in the Central District of Orange County. He was appointed to an unexpired six-year term, which ended in 1968. He was elected to two subsequent terms, taking his last oath of office on January 6, 1975. Mast did not

complete his last full term, but instead, resigned from office.

In connection with his resignation, respondent elected a "deferred retirement" under Government Code section 75033.5.[1] His actual retirement date was May 28, 1995. His benefits were calculated at the rate of 49.4752%, based on the incumbent officeholder's salary.[2]

III

Beginning in June 1994, respondent informed JRS that he had "vested rights" to benefits calculated at 49.4752% of his own salary on the date he resigned, and then escalated by a cost-of-living adjustment (COLA) for each year until his actual date of retirement.[3] This definition of compensation was authorized by former section 68203.

Section 68203 was amended on January 1, 1977 to eliminate the escalation clause. (Stats. 1976, ch. 1183.) After the amendment, judges became entitled to benefits calculated at 49.4752% of the incumbent officeholder's salary.[4]

IV

In letters dated July 10, 1994 and May 1, 1995, respondent explained his "vested rights" theory in detail, relying

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[1] All statutory references are to the Government Code.

[2] Respondent's allowance was also based on a total of 11 years and two months in service credit, which is not in dispute.

[3] Respondent is the last judge whose benefits were based on service during the time period the old law was still in effect. In this letter, he offers an interpretation of Olson that would make his re-calculation administratively feasible by JRS. His suggestions of how JRS could grant his request, but avoid the need to re-calculate the allowance of other judicial pensioners, are not ripe for the purposes of this appeal.

[4] The monthly retirement allowance is also adjusted with an annual COLA, which is not in dispute.

principally on the ruling in Olson v. Cory (1980) 27 Cal.3d 532 [164 Cal.Rptr. 217].[5] (See letter at Exhibit 1.) He asked JRS to re-calculate his allowance using the definition of compensation in former section 68203, as in effect on December 31, 1976. JRS had calculated Respondent's allowance based on the deferred retirement formula in Section 75033.5, incorporating the new definition of compensation in section 68203 as amended on January 1, 1977.

V

JRS denied respondent's request on May 15, 1995.[6] (See letter at Exhibit 2.) Respondent filed a timely appeal. (See letter of May 26, 1995 at Exhibit 3.) His appeal was acknowledged and this hearing scheduled accordingly, before the PERS Board of Administration (Board).[7]

VI

The only disputed issue concerns which definition of compensation must be used by JRS to calculate the retirement benefits now payable to respondent. Nevertheless, a hearing has been scheduled, for the purpose of allowing PERS to present testimony concerning its long-standing interpretation of the JRL.

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[5] This is the first in a series of three rulings by the High Court, following the amendment of section 68203. The two later rulings are not pertinent here, and we refer to the ruling as originally published on March 27, 1980.

[6] In earlier communications with respondent, JRS informed him that judges who still served after the amendment of section 68203, received additional compensation. This was designed as a "comparable new advantage" to offset the impairment. (See Betts, infra, at p. 864.) Respondent claims that he only received $200, by way of a technical salary adjustment.

[7] The 13-member board administers JRS as well as the Public Employees' Retirement System (PERS). (See sec. 75005.)

If the parties stipulate to the introduction of such evidence, this matter could proceed by written record.[8] If so, then JRS will also introduce a declaration, and such other evidence as the parties may stipulate.

VII

Under the deferred retirement provisions of section 75033.5, a judge is deemed retired even though he or she cannot receive benefits until reaching the minimum retirement age.[9] This statute is excerpted in pertinent part below:

> "75033.5. Notwithstanding any other provision of this chapter, any judge . . . may retire, . . . (and) after reaching the age which would have permitted him or her to retire for age and length of service under section 75025 . . . , receive a retirement allowance based upon the judicial service . . . , with which he or she is credited, in the same manner as other judges, . . . (and) the retirement allowance is an annual amount equal to 3.75 percent of the compensation payable, at the time payments of the allowance fall due, to the judge holding the office which the retired judge last held . . . ." (Emphasis added.)

The deferred retirement procedure was enacted on January 1, 1974. (Stats. 1973, ch. 1102.) In other words, it was existing law when the Legislature was debating the amendment to section 68203 during the 1976 session.

VIII

It is well-accepted that statutes in pari materia must be construed together, to promote harmony and avoid a repeal by implication. (Oden v. Board of Administration (1995) 23 Cal.App.

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[8] Under the Administrative Procedure Act, the Board may proceed on the Statement of Issues without a hearing. (Sec. 11505(b); see sec. 11504.5.)

[9] See sec. 75025 for linkages of age and service credit.

4th 194, 202 [28 Cal.Rptr.2d 388]; Rosenthal v. Cory (1977) 69 Cal.App.3d 950, 953 [148 Cal.Rptr. 442].)

The Chief Executive Officer finds that sections 75033.5 and 68203 are closely related, as applied to judges who elected a deferred retirement. He finds, the definition of compensation in new section 68203 is harmonious with the same definition in section 78203. He also finds, the definition in old section 68203 would be superseded by the "notwithstanding clause" in section 78203 for judges who elected a deferred retirement.[10] However, the rule of liberal construction cannot furnish a pretext to create a liability where none exists or appears to have been intended. (Neeley v. Board of Retirement (1974) 36 Cal.App.3d 815, 822 [111 Cal.Rptr. 841].)

The long-standing interpretation of a statute by the agency entrusted with its implementation will be given great weight by the courts. (Neeley, supra, at p. 820; City of Sacramento v. PERS (1991) 229 Cal.App.3d 1470, 1478 [280 Cal.Rptr. 847].) The Board has always interpreted the JRL as providing for the retirement allowance to be based on the salary of the current office holder at the time the payment is due.

Based on these principles of construction, the Chief Executive Officer has determined that the Legislature did not intend to "grandfather" judges who elected a deferred retirement so that their benefits could be calculated against their own last salary plus COLAs under former section 68203. Rather, he finds, the Legislature's intent was to leave intact the definition of

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[10] Pension laws are to be liberally construed. (Rosenthal, supra, at p. 954.)

"compensation" in section 75033.5, which is also harmonious with new section 68203. If it had intended otherwise, the Legislature could have made this clear when it amended section 68203 in 1976, when it defined compensation as the incumbent salary sans COLA.

IX

In Olson, the Court revisited its analysis of "the elements of compensation" that vest as a contractual right, which it had set forth in the seminal Betts v. Board of Administration (1978) 21 Cal.3d 859, 863 [148 Cal.Rptr. 158].[11] With one dissent, the Olson panel ruled that judges who served in office before the new law took effect had a "vested right" to the calculation of benefits under the old law. (Olson, supra, at p. 532.)

The Court extended its vesting theory to "judicial pensioners"[12] on a pro rata basis, as shown in the following excerpt from page 533 of the Olson decision:

> "Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired or deceased judge was last elected or appointed. [Citations to statute omitted.] Accordingly, a judicial pensioner cannot claim impairment of a vested right arising out of the 1976 amendment **except when the judge holding the particular judicial office could also claim such an impairment. The resolution of pensioner vested rights, then, is dependent on the foregoing resolution of judges' vested rights left unimpaired by the 1976 amendment."** (Bold emphasis added.)

Olson does not distinguish judicial pensioners from those judges who elected a deferred retirement under section 75033.5.

/ / /

/ / /

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[11] See Olson, supra, at fn. 3.

[12] Id., at fn. 5.

However, such a distinction is intrinsic in its analysis:

> "Judicial pensioners whose benefits are based on judicial service terminating between 31 December 1969 and 1 January 1977 acquired a vested pension benefit based on the salary of a judge occupying a particular judicial office. That salary . . . included an unlimited cost-of-living increase. As in the case of a judge . . . , a judicial pensioner is entitled to his proportionate share of the salary of the judge holding the office to which the retired . . . judge was last elected . . . , including a proportionate share of cost-of-living increases to such salary of the incumbent judge." (Olson, supra, at p. 533.)

X

For the reasons set forth above, it is the determination of the Chief Executive Officer that respondent is not entitled to benefits calculated at 49.4572% of his own last salary with COLAs. The Chief Executive Officer respectfully requests that the current calculation methodology of JRS be upheld.

BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

Dated: 7-29-96

BY Sandra C. Lund
SANDRA C. LUND
ASSISTANT EXECUTIVE OFFICER

8/5/96 MAST LETTER TO MAUREEN REILLY/JRS

EXHIBIT D

Judge Paul G. Mast (Ret.)

Fax: 619-770-6847

August 5, 1996

Maureen Reilly
Senior Staff Counsel
Legal Office
California Pers
Box 942707
Sacramento, CA 94229-2707

Re: In the Matter of the Application for Retirement from JRS of Paul G. Mast, Respondent, and Central Orange County Judicial District, Municipal Court, Respondent, Case No.

Dear Ms. Reilly:

Pursuant to our recent telephone conversation, I am writing at this time in order to attempt to resolve this matter. I have received the Statement of Issues and the Notice of Hearing. I recognize the fact that it is possible for a party to lose in any litigation regardless of how strong that party's position is. Even though it is clear to me that my position is correct, I can recognize the possibility that an Administrative Law Judge could rule adversely to me and that the matter would have to be taken to the court system. This is not what I want. I recognize that it would be burdensome to me as well as very devastating to CalPers. It is clear that it is in the interest of both sides to resolve the matter now. In that spirit I am writing this letter.

In reading your statement of issues, you make two points:

First, *Government Code Section 75033.5* does not change the arguments at all. That section must be interpreted with section *68203*, as you state, but it must be interpreted as it existed at the time I took office, not after *Section 68203* was later changed. The contractually vested rights were as they existed at the time of entering into the contract, i.e. when I took office. This was confirmed in *Olson v. Cory*.

Second, the *Neeley* and *City of Sacramento* cases gives power to the agency to make interpretations when there are ambiguities. They do not give power to the agency to interpret contrary to the established rule of law. The rule of law is clearly and cogently set forth in *Olson v. Cory*, wherein it states:

> A judge entering office is deemed to do so in consideration of -- at least in part -- salary benefits then offered by the state for that office. If salary benefits are diminished by the Legislature during a judge's term, or during the unexpired term of a predecessor judge [citations omitted], the

> judge is **nevertheless entitled to the contracted-for benefits** during the remainder of such term. The right to such benefit accrues to a judge who served **during the period** beginning 1 January 1970 to 1 January 1977, whether his term of office commenced prior to or during that time period. [bold type added]

As you know, the term of office from which I retired began on January 1, 1976, which was during the period specified in the above case.

In accordance with *Olson v. Cory*, as stated above, *Section 68203* provided for unlimited cost of living increases throughout my then-existing term. This was confirmed by the State Controller's office which paid me the balance of the salary due me in accordance with *Olson v. Cory*.

Olson v. Cory further states:

> Judicial pensioners whose benefits are based on **judicial services terminating while *section 68203* provided for unlimited cost of living increases in judicial salaries**, acquired a vested right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office **including the incumbent judge's or justice's unlilmited cost-of-living increases**. [bold type added]

After reading the Statement of Issues and the appropriate sections of *Olson v. Cory*, it seems to me that it is very certain that I will prevail on the claim.

As you very cogently pointed out in our telephone conversation, the only way to resolve this matter is for CalPers to change their position on the claim. What then can I give as an inducement to resolve the claim? What I can give is complete and total confidentiality.

At the present time, except for my wife, no one knows that I have made this claim. I have not discussed it with friends, judges, former judges, or anyone else. As part of a settlement, I would commit to never discuss or disclose the claim or settlement with anyone.

I first assumed judicial office when I was 33 years old, and retired when I was 46, in 1979. It is most unlikely that there is anyone who took deferred retirement when the law was as it was when I retired, that has not already begun receiving their retirement benefits. In other words, I am the last, and resolving this claim in a confidential manner can be expected to completely end the issue for CalPers.

If the claim goes to hearing and decision with the Office of Administrative Hearings (OAH), one of two things will happen, neither of which will be in the best interests of CalPers or the State of California. If I win the decision, the decision will be a matter of public knowledge; a copy will be sent to the other respondent, my former court; and the personnel of the OAH will be aware of the decision. Although I have no intention of publicizing any such decision, through one of the other sources, some lawyer or lawyers will undoubtedly become aware of the decision and of the need to pursue the rights of the other judges, widows of judges, and estates of judges who retired during the requisite time period.

If I lose at the hearing, I will be forced to take the matter to the appropriate court, which will have the same effect in regard to public knowledge and further claims as if I win at the hearing.

The window of opportunity to resolve the claim is therefore very short and is now. In resolving the claim, CalPers is not acceding to my position and is not agreeing that my claim is valid. What CalPers is doing is recognizing the economic facts of the case, and the possibility that they could lose. In effect it is like resolving a $100,000 lawsuit for $100. This is something that no reasonable litigator could turn down regardless of how strong he or she thought their position to be.

Very truly yours,

Paul G. Mast

8/16/96 MAST RESPONSE STATEMENT OF ISSUES

EXHIBIT E

PAUL G. MAST
Attorney at Law

Respondent

BOARD OF ADMINISTRATION

PUBLIC EMPLOYEE'S RETIREMENT SYSTEM

In the Matter of the Application for Retirement from JRS of PAUL G. MAST, Respondent, and JUDICIAL COUNCIL OF CALIFORNIA Respondent.	**CASE NO. OAH NO. L-9605311** **RESPONDENT'S RESPONSE TO STATEMENT OF ISSUES AND POINTS AND AUTHORITIES**

Paul G. Mast, Respondent respectfully submits this Response to Statement of Issues and Points and Authorities.

INTRODUCTION

Respondent, Paul G. Mast, a Municipal Court Judge, began his third term of office on January 6, 1975. Respondent retired during the pendancy of said term on January 15, 1979.

Respondent's retirement benefits were deferred until his sixty-third birthday on May 28, 1995. The claim which precipitated this proceeding was filed in June 1994, prior to Respondent receiving any retirement benefits.

Pursuant to the ruling in *Olson v. Cory* (1980), 27 Cal. 3d 532, 164 Cal.Rptr. 217, Respondent's pension rights vested in accordance with the law as it existed at the time he

took office on his final term, *i.e.* January 6, 1975. Respondent has requested that his pension rights be so calculated. Petitioner has refused.

STATEMENT OF ISSUES

Respondent agrees with Petitioner's Statement of Issues, except in three instances, the first two of which do not seem material.

1. Respondent initially assumed office and joined the Judges Retirement System on November 6, 1965 (not November 1).

2. On January 15, 1975, during Respondent's last term, Respondent did not "resign" from office, but "retired" from office.

3. Petitioner indicates in Note 6, "In earlier communications with respondent, JRS informed him that judges who still served after the amendment of section 68203, received additional compensation. This was designed as a 'comparable new advantage' to offset the impairment."

Respondent did not receive such a communication from JRS, but did receive an inquiry as to whether he received any compensation subsequent to *Olson v. Cory,* supra. *Olson v. Cory* concerned two matters, the question of whether salary rights of certain judges were vested and the question of whether pension rights of these same judges were vested. The Supreme Court determined that both were vested for judges who assumed office prior to January 1, 1977. The Controller of the State of California, having previously refused to pay judges any amount in excess of that authorized by the law as enacted and effective January 1, 1977, subsequent to *Olson v. Cory,* and in accordance with the order of the Supreme Court in that case, paid to those judges who had begun their term of office prior to January 1, 1977, and whose rights were thus vested, the balance of their salary which had been withheld from them. Respondent did receive that back pay which amounted to a very few hundreds of dollars. Said sum was received in 1980 or 1981. Respondent does not have a memory of or any records to indicate the exact amount received.

Respondent never received any money or other compensation designed as "a comparable new advantage" to offset the impairment to his pension rights, nor did he ever waive any pension rights.

Further, The Controller of the State of California can not pay money not authorized by law, and could not have paid "additional compensation" designed as a "comparable new advantage" to offset an impairment, unless such payment was authorized by the legislature by statute or the people by initiative or referendum. No such law was ever enacted and no such payment was ever authorized.

In addition, this issue was addressed by the Supreme Court in *Olson v. Cory* which specifically holds that there was no "comparable new benefit", when it states at page 541, "Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and ***provides no comparable new benefit***" [emphasis supplied].

POINTS AND AUTHORITIES

Respondent's pension rights are vested in accordance with Government Code section 68203 as it existed on January 6, 1975

The California Legislature amended, effective January 1, 1977, Government Code, Section 68203, limiting annual cost of living increases to judicial salaries to a maximum of five percent. Prior to the enactment, judicial salaries increased in accordance with the cost of living increases without a maximum limitation.

The Supreme Court, in *Olson v. Cory,* supra, ruled that said amendment was unconstitutional on the grounds that it impaired vested contractual rights in violation of the United States Constitution, stating that salaries of elected state officers may not be reduced during their term of office. The Supreme Court stated that the ruling applied to any judge who served **any portion** of his term prior to January 1, 1977, and as to **judicial pensioners**

whose benefits were based on the salary for the office of such a judge. Judicial pensioners are the judge and widows and orphans of the judge who also have pension rights.

The Supreme Court also clearly stated that a judge who completes a "protected term" [a "protected term" is a term that **began** between January 1, 1970 and December 31, 1976] and voluntarily embarks upon a new term can thereafter no longer claim to serve in a "protected term." Respondent does not fall within that category as he did not complete his "protected term" nor did he embark upon a new term, inasmuch as he retired January 15, 1979, prior to the expiration of his "protected term", Janusry 1, 1981.

The Supreme Court states that once vested, the rights can not be taken away, at page 538:

> Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. . . .
> In the instant case the Legislature in 1969 adopted the full cost-of-living increase provision, binding the state to pay persons employed at the represented compensation for their terms of office.
> Prior to the 1976 amendment judges had a vested right not only to their office for a certain term but also to an annual increase in salary equal to the full increase in the CPI during the prior calendar year.

On page 539 the Supreme Court states that the rights are contract rights applying to judges who served any part of his term during the 1970 to 1977 period (the "protected term"), and extends to the end of said term:

> A judge entering office is deemed to do so in consideration of - at least in part - salary benefits then offered by the state for that office. If salary benefits are diminished by the Legislature during a judge's term, . . . the judge is nevertheless entitled to the contracted-for benefits during the remainder of such term. The right to such benefit accrues to a judge who served *during* the period beginning 1 January 1970 to 1 January 1977, whether his term of office commenced prior to or during that time period.

In regard to judicial pensioners, the Supreme Court states that judicial pensioners have the same vested rights as the sitting judge during the "protected term" at pages 540 through 542:

> The 1976 amendment, in addition to impairing the vested rights of judges in office, also impairs those of judicial pensioners. A long line of this court's

> decisions has reiterated the principle that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment . . .any changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. Since no new comparable or offsetting benefit appeared in the modified plan,, we held the 1976 statute unconstitutionally impaired the pensioner's vested rights. . . .
>
> . . . The salary for such a judicial office - if the retired or deceased judge served in office during the period 1970 to 1977 - was covenanted to increase annually with the increase in CPI. The 1976 limitation on increases in judicial salaries is, in turn, calculated to diminish benefits otherwise available to those judicial pensioners. Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit. Again we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included and that section 68023 as amended is unconstitutional as to certain judicial pensioners.
>
> Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired or deceased judge was last elected or appointed. [citations omitted] Accordingly, a judicial pensioner cannot claim impairment of a vested right arising out of the 1976 amendment except when the judge holding the particular judicial office could also claim such an impairment.

Thus, the pension rights of a judge who retired during a "protected term" were vested for all time, the same as his or her salary was protected by his or her vested rights until such time as said judge retired during the "protected term".

In this case, Respondent was a judge holding such a particular judicial office, a "protected term", in that his term began January 6, 1975, which was within the window period of 1970 to 1977. His pension rights were forever vested by the fact that he retired during the "protected term" on January 15, 1979, prior to the expiration of his "protected term". Said "protected term" would have expired January 1, 1981, had Respondent not previously retired. The fact that Respondent was serving in such a "protected term" and had such vested rights was further confirmed by the State Controller's office when Respondent was paid the withheld arrearages to his salary in 1980 or 1981.

The Supreme Court further emphasizes the different treatment to be accorded the group of judges Respondent falls in (those with "protected terms") from another group of judges, stating at page 542:

> Judicial pensioners whose benefits are based on judicial services terminating while section 68203 provided for unlimited cost-of-living increases in judicial salaries [Respondent was in this class where the Court held in the *Olson v. Cory* case that section 68203 provided for unlimited cost-of-living increases until the end of Respondent's term that began January 6, 1975], acquired a *vested* right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office including the incumbent judge's or justice's unlimited cost-of-living increases.

The Supreme Court states that if a judge embarks on a new term after December 31, 1976 (which Respondent did not do), then his future salary and his pension rights are governed by the 1976 Amendment to Section 68203 on page 542:

> Finally, as in the case of judges or justices who enter upon a new or unexpired term of a predecessor judge after 31 December 1976, benefits of judicial pensioners based on the salaries of such judges will be governed by the 1976 amendment.

The conclusion of the Supreme Court is no page 546:

> We conclude that Government Code Section 68203 as amended in 1976, insofar as it would limit cost-of-living salary increases as provided by section 68203 before the 1976 amendment, cannot be constitutionally applied to (1) a judge or justice during any term of office, . . . if the judge or justice served some portion thereof (a "protected term") prior to 1 January 1977, and (2) a judicial pensioner whose benefits are based on some proportionate amount of the salary of the judge or justice occupying that office.

No comparable new benefit

The Petitioner in its Statement of Issues, infers that there may have been some "comparable new benefit" received by Respondent which would offset his vested pension rights. The Supreme Court in *Olson v. Cory* specifically holds that there was no "comparable new benefit", when it states at page 541, "Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and ***provides no comparable new benefit*** [emphasis supplied].

Other issues raised by Petitioner

In an effort to defeat Respondent's valid claim, Petitioner sets forth other issues which are specious and do not apply to the issues before this tribunal.

Petitioner states on page 5 at line 3 of the Statement of Issues that the Chief Executive Officer [who is the Petitioner in this matter] finds that sections 75033.5 and 68203 are closely related, and by his reasoning this means that since section 75033.5 was not amended in 1976, a judicial pensioners rights were not vested as stated by the Supreme Court. The Supreme Court has ruled on this issue, and the ruling is *res judicata.*

Not only was section 75033.5 in existence at the time of the 1976 amendment to section 68203 and thereafter, but it was considered by the Supreme Court in *Olson v. Cory*, and cited therein. In this regard the Supreme Court states as follows:

> Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired or deceased judge was last elected or appointed (See e.g., Gov. Code, §§ 75032, **75033.5** [emphasis supplied] . . . . Accordingly, a judicial pensioner cannot claim impairment of a vested right arising out of the 1976 amendment except when the judge holding the particular judicial office could also claim such an impairment.

Petitioner also states on page 5 at line 21, "Based on these principles of construction, the Chief Executive Officer [the Petitioner] has determined that the Legislature did not intend to "grandfather" judges . . . ." This statement may be true, but it only exhibits the lack of understanding that the Petitioner Chief Executive Officer has of *Olson v. Cory.* The holding in *Olson v. Cory* is that the 1976 Amendment to Section 68203, which exhibits the Legislative intent, was unconstitutional as applied to Respondent and the class of judges in which Respondent falls.

Next, Petitioner states at page 5, line 14, "The long-standing interpretation of a statute by the agency entrusted with its implementation will be given weight by the courts." In support of this proposition Petitioner cites *Neely v. Board of Retirement*, (1974) 36 C.A.3d 815, 111 Cal.Rptr. 841, and *City of Sacramento v. Public Employees Retirement System*, (1991) 229 Cal.App.3d 1470, 280 Cal. Rptr. 847. The cases do not stand for what Petitioner cites them for, but even if they did, the interpretation of the Petitioner Chief Executive Officer cannot

over-rule the California Supreme Court no matter how long he applied the erroneous interpretation.

In regard to the *Neely* case, the Board of Retirement held an administrative hearing, after which the Board of Retirement made a determination. This is the procedure in which this Tribunal is now engaged in. After a decision is made in this matter, the decision of this Tribunal will be given great weight. That is all that *Neely* says. In the instant case, Respondent before this time has not been given an administrative hearing and no determination has been made.

In addition, after stating that the Board of Retirement's decision will be given great weight, the Court proceeds to discuss all the issues and the meanings of the words and decides the case itself.

In the *Neely* case, the question was one of interpretation of the meaning of words in a statute. It was not the interpretation of the constitutionality of a law passed by the legislature. With all due respect, the Petitioner Chief Executive Officer is not as qualified as the Supreme Court to rule on the constitutionality of an act of the Legislature, and in the instant case is not in a position to over-rule the stated decision of the Supreme Court.

Likewise in the *City of Sacramento* case, the Court held that the ***Board of Administration's*** [emphasis supplied] interpretation of the Public Employees' Retirement Law (Gov. Code, §20000 et seq.) is to be accorded great weight unless clearly erroneous. The Court further states, however, that where the material facts are not disputed and the question involves only the interpretation and application of the act, a question of law is presented on which the appellate court must make an independent determination.

In the instant case, the material facts are not in dispute. The question involves only the interpretation and application of the law. A question of law is thus presented upon not only the appellate court, but also this Tribunal must make an independent determination.

WHEREFORE, Respondent respectfully requests that an order be made upholding his claim and confirming his vested pension rights.

Respectfully submitted,

August 16, 1996

Paul G. Mast
Respondent

9/20/96 JRS/REILLY LETTER ACCEPTING SETTLEMENT

EXHIBIT F

Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
Telecommunications Device for the Deaf - (916) 326-3240
(916) 558-4097
Telecopier: (916) 326-3659

September 20, 1996

VIA FAX

Paul G. Mast
[redacted]

Re: Appeal in the Matter of Application for Retirement

Dear Judge Mast:

This is to confirm in writing, that the Judges' Retirement System (JRS) has accepted the terms of your settlement offer as outlined in your letter of August 5, 1996. I will shortly draft a Settlement Agreement with a confidentiality clause, for your review and signature.

In the meantime, since we have settled in principle, JRS will cancel the hearing now scheduled for October 3, 1996. If you have any questions regarding the settlement procedure, please call me at the number shown above.

Sincerely,

Maureen Reilly

MAUREEN REILLY
Senior Staff Counsel

MLR:sol

cc: Michael Priebe

10/4/96 JRS/REILLY LETTER AND SETTLEMENT AGREEMENT

EXHIBIT G

Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
Telecommunications Device for the Deaf - (916) 326-3240
(916) 558-4097
Telecopier: (916) 326-3659

Ref. No. [redacted]

October 4, 1996

Judge Paul G. Mast, Retired
[redacted]

Dear Judge Mast:

Subject: In the Matter of the Application for Retirement from JRS of PAUL G. MAST, Respondent, and CENTRAL ORANGE COUNTY JUDICIAL DISTRICT, MUNICIPAL COURT, Respondent, Case No. [redacted]

The Judges' Retirement System (JRS) requires a written agreement to set forth the terms and conditions of our settlement in the subject matter. Please review the "duplicate original" agreement, enclosed.

If no revisions are necessary, please sign both originals and return them to me. Then, I will obtain the required signatures at JRS, and send you a fully-executed original for your records. If the language of this agreement is not acceptable, please call me at the number shown above.

Very truly yours,

MAUREEN REILLY
Senior Staff Counsel

MLR:jaw

Enclosure

cc: Michael Priebe

SETTLEMENT AGREEMENT

between

JUDGES RETIREMENT SYSTEM and PAUL G. MAST

The parties to this agreement, the Judges Retirement System (JRS) and Paul G. Mast (Mast), hereby fully settle their dispute over his request to re-calculate his retirement allowance. The parties agree to the following terms:

1. It is not disputed that JRS must follow the formula for deferred retirements in Government Code section 75033.5

2. Using that formula, JRS will re-calculate Mast's allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975,the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to Olson v. Cory, (1980), 27 Cal. 3d. 532.

3. Said recalculated retirement allowance shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995.

4. Mast expressly waives his right to appeal this matter further to JRS or any other competent jurisdiction.

5. Each party will keep the terms of this agreement confidential.

6. Each party will bear their own costs in negotiating the terms of this agreement.

In settling, the parties do not admit any wrongdoing or breach of contractual obligations. The parties are settling this matter solely to avoid the expense and uncertainty of litigation.

By the signatures below, JRS and Mast agree to enter this settlement agreement as a legally binding contract on the date signed by the last party to sign.

Date:_____

MICHAEL PRIEBE, Manager
Judges' Retirement System

Date: 10-9-96

PAUL G. MAST
SSN [redacted]

9/1/10 MAST CLAIM LETTER TO JRS/MONTGOMERY

EXHIBIT H

Paul Mast, Judge (Ret.)

September 1, 2010

Pamela Montgomery
Judges and Legislators Retirement System
Box 942705
Sacramento, CA 94229-2705

Re: Unpaid retirement benefits for Paul Mast

Dear Ms. Montgomery:

I have your letter of August 9, 2010 written in response to my many communications with you. Again your calculations are erroneous. In 2010 as in 2006 you proceeded on the wrong premise and therefore came up with a completely wrong conclusion. The current calculations are very much the same as the calculations you came up with in 2006.

In 2006 I explained the errors in a letter to you. You have ignored the law and the facts as stated in that letter and as they exist. You have stalled for four additional years while making one excuse after another. During that time the underpayment and therefore the problem has increased exponentially.

Computation of my retirement benefits was resolved in 1996 when The Judges Retirement System (JRS) and I entered into a Settlement Agreement.

As you did in 2006, you have again insisted in recalculating the retirement increases from 1979. As I did in my letter of 2006, I will again explain why recalculating the retirement increases from 1979 is not legal and is not acceptable.

I have submitted the calculation to my accountant, using your figures for the COLA adjustments as well as your figures for the amounts that have been paid. The summary of those calculations is attached.

Brief history of Settlement Agreement

When I became eligible to receive retirement benefits in May 1995, your office began the payments incorrectly. You applied the law as it applied to retirees in 1995. The law that should have been applied was the law that prevailed when I retired in January 1979. That law provided that the amount to be paid be adjusted annually from the date of my retirement, in accordance with the COLA for the respective time periods. When I objected to application of the incorrect law, and when discussion was to no avail, I filed for an Administrative Proceeding.

The attorney representing your office in that proceeding was Maureen Reilly, Senior Staff Counsel of the Board of Administration of the Public Employees' Retirement System. I represented myself.

During that proceeding, after the case was briefed on each side and before a hearing, it was determined by your office, with the advice of counsel, that I was correct, and that I was entitled to my benefits being adjusted for COLA from the date of my retirement, January 1979. This was pursuant to the three *Olson v. Cory* cases, particularly, *Olson v. Cory*, (1980) 27 Cal 3d. 532.

The administrative matter was fully resolved by the Settlement Agreement dated October 22, 1996 between JRS and me, a copy of which is attached.

Recalculating the retirement from 1979 is not legal and is not acceptable.

First: Government Code Section 20160 (b) does not apply

No error was made. You are making the error in your calculations.

However, even if an error had been made, it would not be a clerical error to which the Code Section refers. The amount due is based upon a settlement of litigation and a written Settlement Agreement.

Second: Settlement Agreement
You have proceeded on the wrong premise when you completely ignored the Settlement Agreement. I direct your attention particularly to paragraphs 2 and 3.

Paragraph 2 of the Agreement states:

> Using that formula, JRS will re-calculate Mast's allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975, the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to *Olson v. Cory*, (1980), 27 Cal. 3d 532.

Paragraph 3 of the Agreement states, in part: "Said recalculated retirement allowance . . . ."

"Said recalculated retirement allowance" are the key words showing you are in error in attempting to recalculate the amount of the retirement allowance *ab initio.*

When the Settlement Agreement says "Said recalculated retirement allowance" it is referring to Paragraph 2. It is not a qualified statement. It does not say, "if that calculation is correct." It does not say that the calculation made may be modified in the future by another calculation. It says that the calculation made by JRS at that time is that which will be used as the basis for the retirement allowance.

It should also be noted that I took no part in the calculation. I was not contacted or consulted and had no input into it. I relied on JRS to do it correctly and they did. I was not privy to the worksheets. They were never furnished to me.

The computed amount corresponded to the amount I expected to receive. If there was any miscalculation, the amount of the error was not significant enough to put me on notice that an error was made. If there was any miscalculation, the amount of the error was not significant enough to put anyone in your office on notice that the computed amount was unreasonable and therefore incorrect. The calculated amount is the recalculated retirement allowance as called for in paragraph 3 of the Settlement Agreement.

The Settlement Agreement was drafted by JRS, either by staff or by counsel. I took no part in its drafting or preparation. Although I do not see any ambiguities, any such that there may be would be construed in my favor and against yours, according to law.

The validity or finality of the Settlement Agreement is not affected by any subsequent dissatisfaction you may have with how it was drafted. The law favors settlements. The finality of a settlement must be honored. If there is any ambiguity in a settlement statement due to deficient drafting, the ambiguity must

be resolved in favor of the non-drafting party. The best indicator of the meaning of the Settlement Agreement is the behavior of JRS immediately after entering into the Agreement. You are estopped from changing the Agreement. Further, laches applies. The original calculation was made by your office in 1996. Even if it could be changed, it is too late to do so now.

What the Agreement says can best be determined by reading the Agreement itself. I realize that this Settlement Agreement was entered into before you were in the office. You cannot as a staff member review, revise, or otherwise alter the Agreement or the calculations.

Calculation of Benefits and Arrearages

I have submitted the calculation to my accountant, using your figures for the COLA adjustments as well as your figures for the amounts that have been paid. The summary of those calculations is attached.

I presented the question of my underpayment to my accountant for a correct determination of the amount due. I did not in any way speak to him ahead of time about what I thought was owed. He used the CPI table given to me by the Judges Retirement System, and took as correct the amount of the monthly payment for the last period that a proper adjustment and calculation was made. The first new adjustment being effective 9/1/99, the time your office stopped making proper adjustments.

The amounts determined to be unpaid and therefore due through October 2010 total $152,269, consisting of unpaid retirement allowance of $101,219 and interest of $51,050.

The amount of the monthly pension, beginning September 2010, is $8,550.59. A copy of the calculation is attached.

My accountant was not given your letter, and did not consider the additional payments JRS is making pursuant to that letter. Thus from the accountant's calculated amount must be deducted the following: $10,088.90 in unpaid retirement allowance that JRS is making on 9/1/10, the $317.85, adjustment for 9/1/10, and the $509.16 adjustment to be made 10/1/10. In addition, $86.33

interest must be deducted for the amount that has been paid and adjusted on 9/1/10.

The current unpaid amount due totals $141,775.55, consisting of unpaid retirement allowance of $90,812.25 and interest of $50,963.30. In addition the monthly pension must be adjusted to $8,550.59.

Confidentiality

I now direct your attention to Paragraph 5 of the Agreement, which states: "Each party will keep the terms of this agreement confidential."
I have not paid attention to the wording of Paragraph 5 until now, as I knew what the concerns of JRS were.

At the time of the settlement I was the only Retired Judge to have called this error to the attention of your office, and thus I am the only Retired Judge to have ever been paid in accordance with this law as far as I know.

I asked during the final discussion of the settlement why JRS wanted a confidentiality agreement. I was told that no retired judge was paid in accordance with the dictates of *Olson v. Cory*; that some 1,000 to 1,500 retired judges had been receiving retirement pay in violation of the dictates of that case; and that if JRS had to adjust the amounts previously paid, JRS would be paying out about four hundred million dollars. This discussion was held in 1996. Since then these retirees have accrued additional amounts they are owed. In addition, 15 additional years of interest has also accrued.

I have been writing to you and your predecessor for ten years to have you calculate my retirement benefits correctly. The time is up. If the Retirement System does not pay the amount due and adjust the amount payable each month by the October 1 payment, I will submit it to an attorney. I cannot wait another four years for another response. I also cannot wait indefinitely and allow this problem to outlive me.

As you well know, I have out of my respect for the State of California, not taken my underpayment issue to an attorney previously, as I believe that doing so would have a disastrous effect on the State. I believe that your office is well aware of the consequences of my seeking legal assistance.

After Michael Priebe left your office, his successor Steve Benitez did not know what to do. For three years Mr. Benitez delayed the question and did nothing, despite my repeated requests and directions. Then you came into the office. Since then you have repeatedly delayed the resolution of the matter and diverted the resolution by coming up with various claims and positions.

I urge you to resolve this matter now.

I am sending a copy of this letter to the Members of the Board of the Public Employees Retirement Board and separately to John Chiang, the Controller of the State of California (who is also a Member of the Board).

The best way to contact me is by email at

I will be moving from my temporary residence in La Quinta to a permanent residence in Laguna Woods by the end of September.

Thank you for your consideration.

Respectfully,

/s/
Paul Mast, Judge (Ret.)

Enclosures as stated

Copies as stated

5/11/10 JRS DENIAL OF MAST'S CLAIM

EXHIBIT I

CalPERS
California Public Employees' Retirement System
Judges' Retirement System
P.O. Box 942705
Sacramento, CA 94229-2705
TTY: (916) 795-3240
(916) 795-3688 phone • (916) 795-1500 fax
www.calpers.ca.gov

May 4, 2011

CERTIFIED MAIL – Return Receipt Requested
The Honorable Paul Mast (Ret.)

Dear Judge Mast:

This is in response to your letter of September 1, 2010, in which you continue to disagree with our calculations of your retirement allowance.

The Settlement Agreement you signed on October 8, 1996, provided for the Judges' Retirement System (JRS) to calculate your allowance based on the definition in former Government Code (GC) section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to Olson v. Cory (1980), 27 Cal. 3d. 532. We have complied with the terms of the Settlement Agreement and have calculated your retirement allowance based on the following:

1. The salary of a Municipal Court Judge as of January 15, 1979, under GC section 68203, **prior** to the amendment on January 1, 1977, which was $51,193, or a monthly salary of $4,266.08. We previously provided documentation that confirmed that this was the judicial salary of a Municipal Court Judge under GC section 68203, prior to the amendment on January 1, 1977, using the full CPI increase. This salary does reflect the higher of the two salaries that were paid to Municipal Court judges as of January 15, 1979.

2. Cost-of-living adjustments (COLA) have been applied to your current allowance consistent with the full CPI increase applied to judicial salaries prior to January 1, 1977. We confirmed that all COLA increases to judicial salaries **prior to the** amendment in GG section 68203 on January 1, 1977, were based upon the California Consumer Price Index, Urban Wage Earners (CCPI-W). The change to the index was measured from December to December and the increase was applied the following September 1st.

When you received your first retirement allowance effective May 28, 1995, you were paid a percentage of the active judicial salary in effect at that time. In October 1996, the Settlement Agreement was signed and JRS staff recalculated your allowance. However, there was a substantial error made during that calculation and the amount paid to you was incorrect.

In calculating the COLA for September 1987, JRS staff inadvertently applied a 9% COLA to the salary, instead of the actual 1.9% COLA[1], resulting in a 7% increase to salary that should not have been applied. Over the years, this error resulted in an overpayment to you totaling approximately $94,304.19.

Your current monthly allowance of $7,438.09 is correct based on the terms of the 1996 Settlement Agreement. GC section 20160 (b) requires that we correct all errors made by the System. JRS cannot pay you based on an erroneous amount calculated in error by JRS staff in 1996. Therefore, we are denying your request for additional increases to your monthly allowance and your request for a lump sum payment of unpaid retirement allowance and interest.

You have the right to file an appeal of this determination. An appeal, if filed, must be sent in writing to the above address within 30 days of the mailing of this letter in accordance with sections 555-555.4, Title 2, California Code of Regulations (enclosed). The appeal should set forth the factual basis and the legal authorities for such appeal.

If you file an appeal, the CalPERS Legal Office will contact you and handle all further requests for information.

Sincerely,

Pamela Montgomery

Pamela Montgomery, Manager
Judges' Retirement System

[1] Based on CPI-U used for Legislators' Retirement System allowances

5/31/10 MAST'S APPEAL OF JRS' DENIAL

EXHIBIT J

Paul G. Mast, Judge (Ret.)

May 31, 2011

California Public Employees Retirement System
Judges' Retirement System
400 Q Street
Sacramento, CA 95811

FEDEX Tracking Number 8741 6952 0932

And submitted electronically to Pamela Montgomery
Pamela_Montgomery@CalPERS.CA.GOV

Re: Appeal from Determination in Letter Dated May 4, 2011
By Pamela Montgomery, Manager, Judges' Retirement System
Denial of My Request for Additional Increases to Monthly Allowance
And My Request for a Lump Sum Payment of Unpaid Retirement
Allowance and Interest

Ladies and Gentlemen:

I Paul G. Mast ("Mast") hereby give Notice of Appeal from the denial in the May 4, 2011 letter to me by Pamela Montgomery, Manager, ("Ms. Montgomery") Judges' Retirement System ("JRS") of my request for additional increases to monthly allowance and my request for a lump sum payment of unpaid retirement allowance and interest contained in my previous letter dated September 1, 2010.

Mast retirement computation was previously the subject of a proceeding before the Board of Administration Public Employees' Retirement System:

Case No.
OAH No. L-9605311
In the Matter of the Application for Retirement from JRS
PAUL G. MAST, Respondent, and
JUDICIAL COUNCIL OF CALIFORNIA, Respondent ("Proceeding")

Mast hereby incorporates herein by reference the following:

1. The entire file in the Proceeding, including:

   A. Respondent Mast's Response to Statement of Issues and Points and Authorities dated August 16, 1996 ("Response") and

   B. Settlement Agreement between Judges' Retirement System and Paul G. Mast dated October 22, 1996 ("Settlement").

2. All letters from Mast to JRS, including those dated December 2, 2002; August 1, 2003; September 16, 2003; November 10, 2003; March 11, 2004; June 7, 2004; November 8, 2006; and September 1, 2010.

3. The entire file of JRS ("JRS file"). JRS is in possession of the JRS file, including charts, indexes, worksheets, calculations, identification of personnel working on file, and whatever else is contained therein. Mast has requested a copy of the JRS file, but it has not been received to this date.

The Judges' Retirement System ("JRS") and Paul G. Mast ("Mast") **fully settle[d]** [emphasis added] their dispute over his request to recalculate his retirement allowance in the Settlement Agreement dated October 22, 1996.

In the letter dated May 4, 2011, Ms. Montgomery fails to mention the Proceeding and Settlement.

Prior to entering into the Settlement Agreement, JRS calculated the amount of retirement allowance to which Mast was entitled pursuant to *Olson v. Cory*, (1980), 27 Cal. 3d. 532.

The following were agreed upon between Mast and JRS before the parties entered into the Settlement:

1. The amount of the retirement allowance then payable to Mast ("recalculated retirement allowance");

2. The amount of the accrued arrearages due to Mast ("accrued arrearages");

3. The fact that the retirement allowance then payable to Mast would be annually adjusted in accordance with the requisite Cost of Living Adjustment ("COLA") as stated in the Statute.

The parties entered into the Settlement Agreement and the dispute was fully settled.

Mast received monthly payment of recalculated retirement allowance, received accrued arrearages, and JRS applied the annual COLA to the recalculated retirement allowance each January.

During the settlement negotiations it was Mast's understanding that the annual COLA adjustment was based upon the September CPI and applied the following January.

In any year for which the annual calculation for the COLA was not completed in time for the January payment, arrearages accrued. When the annual calculation was completed, any accrued arrearages for months beginning in January were paid. Mast's recalculated retirement allowance was adjusted annually until approximately the year 2000.

JRS calculated the annual COLA according to the Settlement Agreement. Mast has never seen any actual worksheet. Mast has not been able to obtain a chart of the **three** salary classes paid at that time. Mast was not informed of the numbers, indexes, or calculations used. Mast was only informed of the amounts calculated for the recalculated retirement allowance and the accrued arrearages.

On May 28, 1995 Mast was paid on the same basis as all other judges. JRS computed the recalculated retirement allowance and determined the accrued arrearages **before** the Settlement was signed. **During the settlement negotiations** the discussion included the amount of monthly retirement allowance and the amount of arrearages. **Mast specifically remembers this because he was asked to waive the arrearages in a specific amount**.

Since the time JRS stopped performing the annual calculations based upon the annual COLA, Mast has written many letters to JRS.

There have been personnel changes at JRS including changes in the Manager. In 1996 Michael Priebe signed the Settlement as Manager. After Mr. Priebe, Steve Benitez served as JRS Manager. After Mr. Benitez, Ms. Montgomery began serving as JRS Manager. Mast was told that the personnel changes caused administrative difficulties in calculation and application of the annual COLA because the Mast calculation was unique for JRS.

There never was an issue regarding overpayment. The issues were getting the annual COLA calculated (JRS was late) and knowing how to do the calculation (JRS needed someone competent to work on the unique case).

The parties knew the meaning and intent of the Settlement. The written agreement, prepared by JRS, memorialized the agreement between the parties. No figures, calculations, percentages, or other numbers were used. No CPI Index was mentioned by name.

However, JRS calculated according to the Settlement Agreement. Mast has never seen an actual worksheet. Mast has not been able to obtain a chart of the three salary classes paid at the time of retirement. Mast was not informed of any numbers, charts, or worksheets used in calculating the recalculated retirement allowance. Mast was only informed of the calculated amount.

The parties relied on the 1996 Settlement as a fully settling their dispute. Mast relied on the Settlement. JRS relied on the Settlement. JRS continued to rely on it in subsequent years.

As stated above, JRS is in possession of the JRS file, including charts, indexes, worksheets, calculations, identification of personnel working on file, and whatever else is contained therein.

JRS had sole responsibility for calculation of the recalculated retirement allowance. Mast discusses this in the letter dated September 1, 2010 to JRS. Mast was not contacted or consulted. Mast did not offer input. The JRS worksheets were not provided to Mast.

When JRS computed the recalculated retirement allowance and accrued arrearages, JRS presented its conclusions to Mast **prior** to the Settlement. The JRS calculations were used as the **basis** for the Settlement. The amounts were acceptable to both JRS and Mast.

Counsel represented JRS at the time of the Settlement. The Settlement document was drafted either by JRS staff or by its counsel. Mast did not participate in the drafting.

In the JRS letter dated May 4, 2011 Ms. Montgomery states, in part:

> The Settlement Agreement you signed on October 8, 1996, provided for the Judges' Retirement System (JRS) **to calculate** [emphasis added] your allowance based on the definition in former Government Code (GC) section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to Olson v. Cory (1980), 27 Cal. 3d. 532.

The language of the paragraph purports to present the gist of the Settlement. The Settlement best speaks for itself and can be read in its entirety. Any change in wording is a change in meaning. The above portion of the May 4, 2011 letter is a rewriting of paragraph 2 of the Settlement. The first critical difference is that the actual Settlement says that JRS **will re-calculate**; it does **not** say **to calculate**.

The second critical difference is that the actual Settlement Agreement uses paragraph 2 as a definition for paragraph 3:

> **Said recalculated retirement allowance** shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995.

In Ms. Montgomery's letter dated May 4, 2011 paragraph 3 is entirely omitted.

What is the meaning of the Settlement?

The Settlement Agreement needs to be read in whole. There were settlement negotiations prior to the creation of the Settlement. Then there were actions of JRS based on the Settlement Agreement. These actions included payment of the **recalculated retirement allowance, accrued arrearages, and annual COLA** for years subsequent to the Settlement. Mast received the payments that he expected to receive pursuant to the Settlement Agreement.

When personnel changes at JRS made it difficult for JRS to timely calculate the annual COLA, there was the beginning of what eventually was more than the previous annual delay measured in months and reflected in the arrearages paid when the annual COLA calculation was completed. While JRS was under the management of Mr. Benitez communications were exchanged but no calculations were completed because of clerical difficulties.

Subsequently JRS management changed. Ms. Montgomery and Mast exchanged various communications prior to the May 4, 2011 letter. By some time in 2009 Ms. Montgomery said that she had some questions about the legal agreement and was waiting for word from her attorneys. Ms. Montgomery was speaking about the 1996 Settlement Agreement and wondering about legal issues. Her guess was that legal had not looked at the case yet. By August 9, 2010 Ms. Montgomery was writing a letter to Mast, followed by the letter dated May 4, 2011.

The Settlement Agreement is an Accord and Satisfaction

The California Civil Code defines accord and satisfaction.

Section 1521 provides;

An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

Section 1523 provides:

Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction.

JRS, prior to May 28, 1995, calculated what they said would be Mast's retirement allowance. In Mast's Response, Mast formally presented legal authority from three *Olson v. Cory* cases. Initially Mast, familiar with Olson v. Cory, *supra*, advised JRS that they were in error in their calculations. JRS responded that they were not wrong, and later stated that they were not aware of *Olson v. Cory* and had never applied any holdings in that case to any retirement allowance.

A dispute thereby existed, and the matter was set before the Board of Administrative Hearings (Proceeding, *supra*). Points and Authorities were filed by JRS. Points and Authorities were then filed by Mast. After the attorneys for JRS examined Mast's Points and Authorities, they and their client JRS concluded that Mast was correct in his claim. Discussions resulted in the Settlement Agreement.

During those negotiations, the recalculation of the retirement benefits was accomplished leading up to both the initial monthly allowance (recalculated retirement allowance) and calculation of the arrearages that had accrued after May 1995 (accrued arrearages).

Demand was made by JRS during the negotiations that Mast waive the arrearages. Mast declined to waive the arrearages, and the arrearages were paid at or about the time of the signing of the Settlement Agreement (Settlement). JRS and/or its attorneys drafted the entire Settlement Agreement.

Thereafter, the retirement benefits were adjusted each January, based upon the previous September CPI. These were the dates JRS stated were proper and Mast did not question that. Mast felt at this time that JRS was forthright, and did not question any calculations. The calculations were made honestly by JRS, and both parties relied upon them.

Mast now finds that in fact the COLA calculations should have been made, and the adjustments applied in July of each year (see Government Code section 68203, *infra*). Mast is not asking for recalculation of retirement benefits based upon the proper COLA adjustments for the time prior to the failure of JRS to abide by the Settlement Agreement in about the year 2000, even though a recalculation would result in additional benefits owed to Mast. Mast recognizes that the sanctity of the Settlement Agreement precludes this just as it precludes JRS from recalculating the benefits on the basis of alleged error in calculations.

Said attempt by JRS to recalculate *ab initio* the monthly benefits [benefits] which were recalculated by JRS prior to creation of the1996 Settlement is unlawful in that the agreed upon amounts and subsequent Settlement were an Accord and Satisfaction; any such re-calculation is barred on the grounds of the rules governing rescission of agreements, laches, and estoppel.

Rescission Requires Reasonable Diligence

A party wishing to rescind an agreement must use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability.

A portion of California Civil Code Section 1691addresses the issue of timeliness as follows:

> ... to effect a rescission a party to the contract must, **promptly** [emphasis added] upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind. . .

The Court in *Gestad v. Ellichman* (124 Cal.App.2d 831, 269 P.2d 661, April 29, 1954) said:

> Section 1691, Civil Code, requires the party who wishes to rescind an agreement to use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability. In such a suit acting promptly is a condition of his right to rescind, Victor Oil Co. v. Drum, 184 Cal. 226, 243, 193 P. 243;Neff v. Engler, 205 Cal. 484, 488, 271 P. 744, and therefore diligence must be shown by the actor whereas in other actions laches is an affirmative defense to be alleged by the defending party. Absence of explanation of delay may even cause a complaint for rescission to be demurrable. Bancroft v. Woodward, 183 Cal. 99, 109, 190

> P. 445. A delay of more than one month in serving notice of rescission requires explanation. Campbell v. Title Guarantee Etc. Co., 121 Cal.App. 374, 377, 9 P.2d 264. The diligence is required throughout and it applies as well to the time a person will be held aware of his right to rescind as to the time he will be held to have discovered the facts on which that right is based. Bancroft v. Woodward, supra, 183 Cal. 99, 108, 190 P. 445; First Nat. Bk. v. Thompson, 212 Cal. 388, 401, 298 P. 808.

In the instant matter JRS had full knowledge of the facts, had full knowledge of the appropriate CPI, had full knowledge of the law, and had the ability at any time to recalculate the retirement benefits. The failure to do so for **fifteen years** clearly precludes their ability to rescind or attack the Settlement Agreement. As stated above the Settlement Agreement incorporated the calculations of the retirement benefits and arrearages that were part and parcel of the Agreement.

Changing the Settlement Agreement is Barred by Laches

The principle of laches is an equitable doctrine that recognizes the necessity of the finality and sanctity of agreements. The courts have held uniformly that even relatively short delays in seeking to rescind or change an ageement is barred by laches.

In the case of *Fabian (infra)*, following, three years after the agreement and one and one-half years after the party was put on "inquiry" the party attempted to rescind, the Court held that rescission was barred by laches. The Mast 1996 Settlement Agreement was created **fifteen years** ago.

Ms. Montgomery would argue that she does not want to rescind the agreement; she wants recalculate the amount due under the Agreement. She would be wrong. The calculation done by JRS in 1996 was both part and parcel of the Agreement and the underlying factor of the entire Settlement Agreement.

To recalculate is to destroy the essence of the Settlement Agreement. It is therefore an attempt to rescind the Settlement Agreement.

Further, as shown in *Fabian*, it is not material and should not be considered whether Mast was prejudiced by the fifteen-year delay.

> 'To bar an action for rescission on the ground of laches it is unnecessary to show that the defendants were prejudiced by the delay.' Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779, 781. In this case the complaint dated and filed July 9, 1951, alleges that plaintiff disavows and rescinds the agreement 'hereby' which causes the rescission to be nearly three years after the agreement and more than one and one-half years after she had shown by her letter to have been put on inquiry. Gestad v. Ellichman et al, *supra*.

In conclusion, Mast Retirement Benefits were annually adjusted (although not always in a timely manner) in accordance with the Settlement Agreement until approximately 2000. Any attempt at this late date to recalculate the amount due or revisit the Settlement is prohibited by the principles of laches.

Thereafter the personnel at JRS changed. The new personnel did not understand what was necessary for them to do, would not follow directions from Mast, and would not seek assistance elsewhere to determine what they should do. (Mast believes that the Manager Steve Benitez was in good faith, but did not understand what had to be done).

In approximately 2005, the personnel at JRS changed, as did their attitude. Thereafter, they no longer tried to determine what they were obligated to do under the Settlement. Over a period of about six years they refused to do anything and came up with one invalid reason after another to avoid paying the amount due. The May 4, 2011 Determination is a continuation of that avoidance.

Attacking the Stipulation Agreement is Barred by Estoppel.

The California Evidence Code Section 623 states:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

In the instant case, JRS in the conduct of the discussion prior to the Settlement Agreement, led Mast to believe that the calculations that were the basis for Settlement Agreement were true and correct. This amounts to statements and conduct, as stated in the Code section. As such, JRS is now estopped from claiming that the calculations of the Retirement Benefits were incorrect. This includes those calculations that are part and parcel of and incorporated into the Settlement Agreement as well as those calculations that occurred in subsequent years.

JRS is not permitted to change or contradict the Settlement Agreement, or the calculations that were the basis of it because estoppel applies.

Other: Starting Salary

In view of the above, the amount of starting salary used by JRS in the calculations is not material. However, I do not agree that the starting salary referred to in the May 4, 2011 Determination is correct, as I have not been provided with any documentation to so indicate. The starting salary was determined by JRS in 1996, as part of the calculation of the retirement benefits leading up to the Settlement Agreement. Mast does not know, and was not advised by JRS of what starting salary was used for the calculations. Whatever it was, Mast and JRS are bound by the amount used by JRS in 1996 during the settlement negotiations and Settlement Agreement for all of the reasons previously stated.

California Government Code Section 68203 Sets Adjustment Dates

There are questions of application of COLA both in when the change to the index is measured and when the increase is applied.

The proper adjustment periods are presented in Government Code section 68203, and are clear on the face of that section.

California Government Code Section 68203 was amended in 1969 to state:

> In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each

justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year.

California Government Code Section 68203 was amended in 1976 to state:

> On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%).

The Legislature may change contractual benefits if they give something of equal, similar, or greater value in exchange. (*Olson v. Cory*, *supra*.) Changing the adjustment and increase dates from September to July would be such a change as something of equal, similar, or greater value is given.

Neither the current Government Code section 68203 nor the 1981 amendment is relevant to the issues herein, as no changes in the relevant portions of the Statute has been made.

The May 4, 2011 Determination states at the end of item 2:

> The change to the index was measured from December to December and the increase was applied the following September 1st.

This is not correct.

Mast does not know why or how JRS used an adjustment period of January based upon the prior September CPI during the periods adjustments were made, ending in about 2000. However, Mast does not challenge nor ask to recalculate the adjustments made up to about 2000 for the above-stated reasons.

The date of the COLA calculation that applies in this matter is July 1. The COLA is from July 1 of the preceding year to July 1 of the current year. The increase is effective on July 1st of each year.

California Government Code Section 20160 Precludes Changes in the 1996 Settlement Agreement and in Any Prior Calculations

California Government Code Section provides in pertinent parts:

(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which **in no case shall exceed six months** after discovery of this right. . .

(b) . . .board shall correct all actions taken as a result of errors or omissions of . . . this system.

In the May 4, 2011 letter Ms. Montgomery states, "GC Section 20160 (b) requires that we correct all errors made by the System." She overlooked that GC Section 20160 (a)(1) precludes any such correction under any circumstances at this time.

Ms. Montgomery cites Government Code Section 20160 as her basis for attacking the Settlement Agreement and recalculating the benefits *ab initio*. Nothing in this section would give JRS the right or ability to overrule, attack, abandon, or recalculate a Settlement. In the instant case, if there is any reason to look at Government Code Section 20160, there is no reason to look beyond (a)(1). Even if there were any calculation errors as Ms. Montgomery contends, no changes may be made.

ACCOUNTING

Mast submitted a letter dated August 9, 2010 and included an accounting prepared by his accountant showing the amount of arrearages due to that date and the amount the Retirement Benefits should be each month.

The submitted accounting assumed the stated dates of adjustment, *supra*, stated by JRS were correct. These dates involved using the CPI period of

December to December with the COLA being applied the subsequent September. Mast now finds that such dates were incorrect. Refer to California Government Code Section 68203 for the correct dates.

Mast will provide an updated accounting, using the calculation and adjustment dates set forth in Government Code Section 68203. If there will be a formal hearing before the Board of Administrative Hearings, the updated accounting will be submitted with the Points and Authorities. If no hearing is applied for, then the updated accounting will be submitted to JRS through the CalPERS Legal Office.

Respectfully submitted,

Paul G. Mast

CALCULATION OF UNPAID BENEFITS DUE TO MAST AS OF MARCH 1, 2017

EXHIBIT K

RETIREMENT BENEFIT CALCULATIONS-JANUARY 1, 1997 TO PRESENT

PAUL G. MAST

COLA ADJUSTED SALARY PERIOD CALCULATION

Start Da 12/31/96 — 49.4572% — i 0.0000%

Daily Interest Calculation	
Assumes interest is calculated based on daily interest using a 365 day year X the number of days in period	
Total Amount Due Mar 1, 2017	352,898
Total Principal due	172,182
Total Accrued Interest Du	180,716

Year	Month	COLA Increase	Annual Salary	Monthly Salary	Protected	Total Benefit Due	Benefit Paid	Amount Owed in Period	Accum Amount Owed	Number of Days Interest Due	Daily Interest due from prior pmt date @
1997	1/1/97		143,004.38	11,917.03	5,893.83	5,893.83	5,720.08	173.75	173.75	31	-
1997	2/1/97			11,917.03	5,893.83	5,893.83	5,720.08	173.75	347.50	31	1.48
1997	3/1/97			11,917.03	5,893.83	5,893.83	5,720.08	173.75	522.73	28	2.68
1997	4/1/97			11,917.03	5,893.83	5,893.83	5,720.08	173.75	699.16	31	4.46
1997	5/1/97			11,917.03	5,893.83	5,893.83	5,720.08	173.75	877.37	30	5.77
1997	6/1/97			11,917.03	5,893.83	5,893.83	5,720.08	173.75	1,056.89	31	7.48
1997	7/1/97			11,917.03	5,893.83	5,893.83	6,936.93	(1,043.10)	21.27	30	8.72
1997	8/1/97			11,917.03	5,893.83	5,893.83	5,893.83	0.00	29.99	31	0.18
1997	9/1/97	1.026	146,436.49	12,203.04	6,035.28	6,035.28	5,893.83	141.45	171.62	31	0.26
1997	10/1/97			12,203.04	6,035.28	6,035.28	5,893.83	141.45	313.33	30	1.42
1997	11/1/97			12,203.04	6,035.28	6,035.28	5,893.83	141.45	456.20	31	2.67
1997	12/1/97			12,203.04	6,035.28	6,035.28	5,893.83	141.45	600.32	30	3.76
1998	1/1/98			12,203.04	6,035.28	6,035.28	5,893.83	141.45	745.54	31	5.12
1998	2/1/98			12,203.04	6,035.28	6,035.28	5,893.83	141.45	892.11	31	6.36
1998	3/1/98			12,203.04	6,035.28	6,035.28	5,893.83	141.45	1,039.92	28	6.87
1998	4/1/98			12,203.04	6,035.28	6,035.28	6,436.07	(400.79)	646.00	31	8.87
1998	5/1/98			12,203.04	6,035.28	6,035.28	6,029.39	5.89	660.76	30	5.33
1998	6/1/98			12,203.04	6,035.28	6,035.28	6,029.39	5.89	671.99	31	5.64
1998	7/1/98			12,203.04	6,035.28	6,035.28	6,029.39	5.89	683.51	30	5.55
1998	8/1/98			12,203.04	6,035.28	6,035.28	6,029.39	5.89	694.95	31	5.83
1998	9/1/98	1.019	150,243.83	12,520.32	6,192.20	6,192.20	6,029.39	162.81	863.59	31	5.93
1998	10/1/98			12,520.32	6,192.20	6,192.20	6,029.39	162.81	1,032.33	30	7.13
1998	11/1/98			12,520.32	6,192.20	6,192.20	6,029.39	162.81	1,202.26	31	8.80
1998	12/1/98			12,520.32	6,192.20	6,192.20	6,029.39	162.81	1,373.88	30	9.92
1999	1/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	1,546.61	31	11.72
1999	2/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	1,721.13	31	13.19
1999	3/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	1,897.13	28	13.25
1999	4/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	2,073.19	31	16.18
1999	5/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	2,252.18	30	17.11
1999	6/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	2,432.10	31	19.21
1999	7/1/99			12,520.32	6,192.20	6,192.20	6,029.39	162.81	2,614.11	30	20.07
1999	8/1/99			12,520.32	6,192.20	6,192.20	6,801.25	(609.05)	2,025.13	31	22.29
1999	9/1/99	1.03	153,098.47	12,758.21	6,309.85	6,309.85	6,125.96	183.89	2,231.32	31	17.27
1999	10/1/99			12,758.21	6,309.85	6,309.85	6,125.96	183.89	2,432.48	30	18.41
1999	11/1/99			12,758.21	6,309.85	6,309.85	6,125.96	183.89	2,634.78	31	20.74
1999	12/1/99			12,758.21	6,309.85	6,309.85	6,125.96	183.89	2,839.42	30	21.74
2000	1/1/00			12,758.21	6,309.85	6,309.85	6,125.96	183.89	3,045.05	31	24.21
2000	2/1/00			12,758.21	6,309.85	6,309.85	6,125.96	183.89	3,253.16	31	25.97
2000	3/1/00			12,758.21	6,309.85	6,309.85	6,532.10	(222.25)	3,056.88	29	25.95
2000	4/1/00			12,758.21	6,309.85	6,309.85	6,261.34	48.51	3,131.34	31	26.07
2000	5/1/00			12,758.21	6,309.85	6,309.85	6,261.34	48.51	3,205.92	30	25.84
2000	6/1/00			12,758.21	6,309.85	6,309.85	6,261.34	48.51	3,280.27	31	27.34
2000	7/1/00			12,758.21	6,309.85	6,309.85	6,261.34	48.51	3,356.12	30	27.07
2000	8/1/00			12,758.21	6,309.85	6,309.85	6,261.34	48.51	3,431.70	31	28.62
2000	9/1/00	1.043	157,691.42	13,140.95	6,499.15	6,499.15	6,261.34	237.81	3,698.13	31	29.27
2000	10/1/00			13,140.95	6,499.15	6,499.15	6,261.34	237.81	3,965.20	30	30.52
2000	11/1/00			13,140.95	6,499.15	6,499.15	6,261.34	237.81	4,233.52	31	33.82
2000	12/1/00			13,140.95	6,499.15	6,499.15	6,261.34	237.81	4,505.15	30	34.93
2001	1/1/01			13,140.95	6,499.15	6,499.15	6,261.34	237.81	4,777.89	31	38.42
2001	2/1/01			13,140.95	6,499.15	6,499.15	6,261.34	237.81	5,054.12	31	40.75
2001	3/1/01			13,140.95	6,499.15	6,499.15	6,892.48	(393.33)	4,701.53	28	38.92
2001	4/1/01			13,140.95	6,499.15	6,499.15	6,471.72	27.43	4,767.87	31	40.10
2001	5/1/01			13,140.95	6,499.15	6,499.15	6,471.72	27.43	4,835.39	30	39.34

Start Da 12/31/96					49.4572%		0.0000%		Total Accrued Interest Du		180,716
Year	Month	COLA Increase	Annual Salary	Monthly Salary	Protected	Total Benefit Due	Benefit Paid	Amount Owed in Period	Accum Amount Owed	Number of Days Interest Due	Daily Interest due from prior pmt date @
2001	6/1/01			13,140.95	6,499.15	6,499.15	6,471.72	27.43	4,902.16	31	41.24
2001	7/1/01			13,140.95	6,499.15	6,499.15	6,471.72	27.43	4,970.83	30	40.45
2001	8/1/01			13,140.95	6,499.15	6,499.15	6,471.72	27.43	5,038.71	31	42.39
2001	9/1/01	1.025	164,472.15	13,706.01	6,778.61	6,778.61	6,471.72	306.89	5,387.99	31	42.97
2001	10/1/01			13,706.01	6,778.61	6,778.61	6,471.72	306.89	5,737.85	30	44.46
2001	11/1/01			13,706.01	6,778.61	6,778.61	6,471.72	306.89	6,089.20	31	48.93
2001	12/1/01			13,706.01	6,778.61	6,778.61	6,471.72	306.89	6,445.02	30	50.25
2002	1/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	6,802.16	31	54.96
2002	2/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	7,164.02	31	58.01
2002	3/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	7,528.92	28	55.16
2002	4/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	7,890.97	31	64.21
2002	5/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	8,262.06	30	65.12
2002	6/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	8,634.07	31	70.46
2002	7/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	9,011.42	30	71.25
2002	8/1/02			13,706.01	6,778.61	6,778.61	6,471.72	306.89	9,389.56	31	76.85
2002	9/1/02	1.03	168,583.96	14,048.66	6,948.08	6,948.08	6,471.72	476.36	9,942.76	31	80.08
2002	10/1/02			14,048.66	6,948.08	6,948.08	6,471.72	476.36	10,499.19	30	82.05
2002	11/1/02			14,048.66	6,948.08	6,948.08	6,471.72	476.36	11,057.60	31	89.54
2002	12/1/02			14,048.66	6,948.08	6,948.08	8,646.24	(1,698.16)	9,448.97	30	91.25
2003	1/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	9,835.36	31	80.58
2003	2/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	10,211.09	31	83.88
2003	3/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	10,590.11	28	78.62
2003	4/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	10,963.88	31	90.31
2003	5/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	11,349.34	30	90.47
2003	6/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	11,734.96	31	96.79
2003	7/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	12,126.89	30	96.84
2003	8/1/03			14,048.66	6,948.08	6,948.08	6,652.93	295.15	12,518.87	31	103.42
2003	9/1/03	1.016	173,641.47	14,470.12	7,156.52	7,156.52	6,652.93	503.59	13,125.88	31	106.76
2003	10/1/03			14,470.12	7,156.52	7,156.52	6,652.93	503.59	13,736.23	30	108.31
2003	11/1/03			14,470.12	7,156.52	7,156.52	6,652.93	503.59	14,348.13	31	117.14
2003	12/1/03			14,470.12	7,156.52	7,156.52	10,080.40	(2,923.88)	11,541.39	30	118.40
2004	1/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	12,163.38	31	98.43
2004	2/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	12,765.40	31	103.73
2004	3/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	13,372.71	29	101.81
2004	4/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	13,978.12	31	114.04
2004	5/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	14,595.75	30	115.35
2004	6/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	15,214.68	31	124.47
2004	7/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	15,842.74	30	125.55
2004	8/1/04			14,470.12	7,156.52	7,156.52	6,652.93	503.59	16,471.88	31	135.11
2004	9/1/04	1.036	176,419.74	14,701.64	7,271.02	7,271.02	6,652.93	618.09	17,225.08	31	140.47
2004	10/1/04			14,701.64	7,271.02	7,271.02	6,652.93	618.09	17,983.65	30	142.14
2004	11/1/04			14,701.64	7,271.02	7,271.02	6,652.93	618.09	18,743.88	31	153.37
2004	12/1/04			14,701.64	7,271.02	7,271.02	6,652.93	618.09	19,515.34	30	154.67
2005	1/1/05			14,701.64	7,271.02	7,271.02	6,652.93	618.09	20,288.10	31	166.43
2005	2/1/05			14,701.64	7,271.02	7,271.02	6,652.93	618.09	21,072.63	31	173.02
2005	3/1/05			14,701.64	7,271.02	7,271.02	6,652.93	618.09	21,863.74	28	162.25
2005	4/1/05			14,701.64	7,271.02	7,271.02	7,360.81	(89.79)	21,936.20	31	186.46
2005	5/1/05			14,701.64	7,271.02	7,271.02	6,829.90	441.12	22,563.78	30	181.02
2005	6/1/05			14,701.64	7,271.02	7,271.02	6,829.90	441.12	23,185.92	31	192.43
2005	7/1/05			14,701.64	7,271.02	7,271.02	6,829.90	441.12	23,819.47	30	191.33
2005	8/1/05			14,701.64	7,271.02	7,271.02	6,829.90	441.12	24,451.92	31	203.14
2005	9/1/05	1.037	182,770.85	15,230.90	7,532.78	7,532.78	6,829.90	702.88	25,357.93	31	208.53
2005	10/1/05			15,230.90	7,532.78	7,532.78	6,829.90	702.88	26,269.34	30	209.25
2005	11/1/05			15,230.90	7,532.78	7,532.78	6,829.90	702.88	27,181.47	31	224.03
2005	12/1/05			15,230.90	7,532.78	7,532.78	6,829.90	702.88	28,108.38	30	224.30
2006	1/1/06			15,230.90	7,532.78	7,532.78	6,829.90	702.88	29,035.56	31	239.71
2006	2/1/06			15,230.90	7,532.78	7,532.78	6,829.90	702.88	29,978.15	31	247.62
2006	3/1/06			15,230.90	7,532.78	7,532.78	6,829.90	702.88	30,928.65	28	230.82
2006	4/1/06			15,230.90	7,532.78	7,532.78	6,829.90	702.88	31,862.35	31	263.76
2006	5/1/06			15,230.90	7,532.78	7,532.78	6,829.90	702.88	32,828.99	30	262.93
2006	6/1/06			15,230.90	7,532.78	7,532.78	6,928.93	603.85	33,695.76	31	279.97
2006	7/1/06			15,230.90	7,532.78	7,532.78	6,928.93	603.85	34,579.58	30	278.05
2006	8/1/06			15,230.90	7,532.78	7,532.78	6,928.93	603.85	35,461.48	31	294.90
2006	9/1/06	1.033	189,533.37	15,794.45	7,811.49	7,811.49	6,928.93	882.56	36,638.95	31	302.42

Start Da 12/31/96					49.4572%		0.0000%		Total Accrued Interest Du		180,716
Year	Month	COLA Increase	Annual Salary	Monthly Salary	Protected	Total Benefit Due	Benefit Paid	Amount Owed in Period	Accum Amount Owed	Number of Days Interest Due	Daily Interest due from prior pmt date @
2006	10/1/06			15,794.45	7,811.49	7,811.49	6,928.93	882.56	37,823.93	30	302.34
2006	11/1/06			15,794.45	7,811.49	7,811.49	6,928.93	882.56	39,008.83	31	322.57
2006	12/1/06			15,794.45	7,811.49	7,811.49	6,928.93	882.56	40,213.96	30	321.90
2007	1/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	41,418.42	31	342.95
2007	2/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	42,643.93	31	353.22
2007	3/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	43,879.72	28	328.34
2007	4/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	45,090.62	31	374.21
2007	5/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	46,347.40	30	372.08
2007	6/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	47,602.04	31	395.26
2007	7/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	48,879.86	30	392.81
2007	8/1/07			15,794.45	7,811.49	7,811.49	6,928.93	882.56	50,155.23	31	416.85
2007	9/1/07	1.041	195,787.97	16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	51,712.42	31	427.73
2007	10/1/07			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	53,280.50	30	426.73
2007	11/1/07			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	54,847.56	31	454.38
2007	12/1/07			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	56,442.29	30	452.60
2008	1/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	58,035.23	31	481.35
2008	2/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	59,656.91	31	494.93
2008	3/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	61,292.19	29	475.81
2008	4/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	62,908.34	31	522.71
2008	5/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	64,571.39	30	519.11
2008	6/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	66,230.84	31	550.67
2008	7/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	67,921.86	30	546.53
2008	8/1/08			16,315.66	8,069.27	8,069.27	6,928.93	1,140.34	69,608.73	31	579.25
2008	9/1/08	1.001	203,815.28	16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	71,659.16	31	593.63
2008	10/1/08			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	73,723.97	30	591.33
2008	11/1/08			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	75,786.48	31	628.73
2008	12/1/08			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	77,886.39	30	625.38
2009	1/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	79,982.95	31	664.23
2009	2/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	82,118.36	31	682.11
2009	3/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	84,271.65	28	632.28
2009	4/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	86,375.11	31	718.68
2009	5/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	88,564.97	30	712.76
2009	6/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	90,748.91	31	755.30
2009	7/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	92,975.39	30	748.85
2009	8/1/09			16,984.61	8,400.11	8,400.11	6,928.93	1,471.18	95,195.42	31	792.91
2009	9/1/09	1.021	204,019.09	17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	97,467.91	31	811.84
2009	10/1/09			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	99,759.33	30	804.30
2009	11/1/09			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	102,043.21	31	850.76
2009	12/1/09			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	104,373.55	30	842.05
2010	1/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	106,695.19	31	890.11
2010	2/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	109,064.88	31	909.91
2010	3/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	111,454.37	28	839.76
2010	4/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	113,773.72	31	950.50
2010	5/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	116,203.80	30	938.85
2010	6/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	118,622.23	31	991.00
2010	7/1/10			17,001.59	8,408.51	8,408.51	6,928.93	1,479.58	121,092.81	30	978.86
2010	8/1/10			17,001.59	8,408.51	8,408.51	17,334.98	(8,926.47)	113,145.20	31	1,032.70
2010	9/1/10	1.014	208,303.49	17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	115,324.90	31	964.92
2010	10/1/10			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	117,436.82	30	951.65
2010	11/1/10			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	119,535.47	31	1,001.52
2010	12/1/10			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	121,683.99	30	986.40
1/2011	1/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	123,817.39	31	1,037.74
2/2011	2/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	126,002.12	31	1,055.93
3/2011	3/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	128,205.06	28	970.18
4/2011	4/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	130,322.23	31	1,093.35
5/2011	5/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	132,562.58	30	1,075.41
6/2011	6/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	134,784.99	31	1,130.51
7/2011	7/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	137,062.50	30	1,112.23
8/2011	8/1/11			17,358.62	8,585.09	8,585.09	7,438.09	1,147.00	139,321.74	31	1,168.89
9/2011	9/1/11	1.024168	211,219.74	17,601.65	8,705.28	8,705.28	7,438.09	1,267.19	141,757.82	31	1,188.16
10/2011	10/1/11			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	144,090.43	30	1,169.77
11/2011	11/1/11			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	146,404.67	31	1,228.82
12/2011	12/1/11			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	148,777.95	30	1,208.12
1/2012	1/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	151,130.53	31	1,268.80

Start Da 12/31/96					49.4572%		0.0000%		Total Accrued Interest Du		180,716
Year	Month	COLA Increase	Annual Salary	Monthly Salary	Protected	Total Benefit Due	Benefit Paid	Amount Owed in Period	Accum Amount Owed	Number of Days Interest Due	Daily Interest due from prior pmt date @
2/2012	2/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	153,543.79	31	1,288.86
3/2012	3/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	155,977.12	29	1,224.63
4/2012	4/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	158,346.21	31	1,330.20
5/2012	5/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	160,820.86	30	1,306.66
6/2012	6/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	163,271.98	31	1,371.50
7/2012	7/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	165,787.95	30	1,347.31
8/2012	8/1/12			17,601.65	8,705.28	8,705.28	7,560.82	1,144.46	168,279.71	31	1,413.86
9/2012	9/1/12	1.02	216,324.50	18,027.04	8,915.67	8,915.67	7,560.82	1,354.85	171,048.43	31	1,435.11
10/2012	10/1/12			18,027.04	8,915.67	8,915.67	7,940.04	975.63	173,459.17	30	1,411.48
11/2012	11/1/12			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	176,035.89	31	1,479.29
12/2012	12/1/12			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	178,680.41	30	1,452.63
1/2013	1/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	181,298.29	31	1,523.81
2/2013	2/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	183,987.34	31	1,546.14
3/2013	3/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	186,698.72	28	1,416.64
4/2013	4/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	189,280.60	31	1,592.19
5/2013	5/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	192,038.04	30	1,561.93
6/2013	6/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	194,765.20	31	1,637.73
7/2013	7/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	197,568.17	30	1,306.66
8/2013	8/1/13			18,027.04	8,915.67	8,915.67	7,750.43	1,165.24	200,040.07	31	1,614.21
9/2013	9/1/13	1.016	220,650.99	18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	202,997.84	31	1,705.97
10/2013	10/1/13			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	206,047.36	30	1,675.12
11/2013	11/1/13			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	209,066.04	31	1,757.20
12/2013	12/1/13			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	212,166.79	30	1,725.19
1/2014	1/1/14			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	215,235.54	31	1,809.39
2/2014	2/1/14			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	218,388.48	31	1,835.56
3/2014	3/1/14			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	221,567.60	28	1,681.52
4/2014	4/1/14			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	224,592.67	31	1,889.56
5/2014	5/1/14			18,387.58	9,093.98	9,093.98	7,750.43	1,343.55	227,825.78	30	1,853.32
6/2014	6/1/14			18,387.58	9,093.98	9,093.98	9,378.03	(284.05)	229,395.06	31	1,942.93
7/2014	7/1/2014			18,387.58	9,093.98	9,093.98	7,913.19	1,180.79	232,518.78	30	1,892.95
8/2014	8/1/2014			18,387.58	9,093.98	9,093.98	7,913.19	1,180.79	235,592.52	31	1,982.95
9/2014	9/1/2014	1.014	224,181.41	18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	238,773.90	31	2,009.17
10/2014	10/1/14			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	241,981.48	30	1,970.34
11/2014	11/1/14			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	245,150.24	31	2,063.65
12/2014	12/1/14			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	248,412.31	30	2,022.96
1/2015	1/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	251,633.69	31	2,118.50
2/2015	2/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	254,950.60	31	2,145.97
3/2015	3/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	258,294.99	28	1,963.04
4/2015	4/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	261,456.44	31	2,202.78
5/2015	5/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	264,857.63	30	2,157.52
6/2015	6/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	268,213.57	31	2,258.74
7/2015	7/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	271,670.73	30	2,213.28
8/2015	8/1/15			18,681.78	9,239.49	9,239.49	8,041.07	1,198.42	275,082.42	31	2,316.85
9/2015	9/1/15	1.024	227,319.95	18,943.33	9,368.84	9,368.84	8,032.82	1,336.02	278,735.29	31	2,345.94
10/2015	10/1/15			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	282,339.97	30	2,300.10
11/2015	11/1/15			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	285,898.81	31	2,407.84
12/2015	12/1/15			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	289,565.39	30	2,359.21
1/2016	1/1/16			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	293,183.34	31	2,389.47
TOTALS								**152,420.18**	**295,572.81**		**143,152.63**
2/2016	2/1/16			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	296,831.55	31	2,500.31
3/2016	3/1/16			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	300,590.60	29	2,367.46
4/2016	4/1/16			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	304,216.80	31	2,563.48
5/2016	5/1/16			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	308,039.02	30	2,510.37
6/2016	6/1/16			18,943.33	9,368.84	9,368.84	8,110.10	1,258.74	311,808.13	31	2,627.00
7/2016	7/1/16			18,943.33	9,368.84	9,368.84	7,472.55	1,896.29	316,331.42	30	2,573.01
8/2016	8/1/16			18,943.33	9,368.84	9,368.84	7,472.55	1,896.29	320,800.72	31	2,697.72
9/2016	9/1/16		232,775.63	19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	325,300.69	31	2,735.84
10/2016	10/1/16			19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	329,838.77	30	2,684.35
11/2016	11/1/16			19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	334,325.36	31	2,812.91
12/2016	12/1/16			19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	338,940.52	30	2,758.82
1/2017	1/1/17		232,775.63	19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	343,501.58	31	2,890.53

Start Da 12/31/96				49.4572%		0.0000%		Total Accrued Interest Du		180,716
Year	Month	COLA Increase	Annual Salary	Monthly Salary Protected	Total Benefit Due	Benefit Paid	Amount Owed in Period	Accum Amount Owed	Number of Days Interest Due	Daily Interest due from prior pmt date @
Feb-17	2/1/17		19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	348,194.35	31	2,901.62
Mar-17	3/1/17		19,397.97	9,593.69	9,593.69	7,791.45	1,802.24	352,898.39	28	2,940.82

PROOF OF SERVICE

In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.
AGENCY CASE NO. 2010-0825

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is

On February 1, 2017 I served the following document(s) by the method indicated below:

RESPONDENT'S MEMORANDUM
DECLARATION OF PAUL G. MAST
RESPONDENT'S EXHIBITS

Marguerite Seabourne
Assistant Chief Counsel
CalPERS Lincoln Plaza
400 Q Street, Sacramento, CA

By email to allyson.mccain@calpers.ca.gov

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 1, 2017 at Irvine, CA.

Marci G. Mast

Marci G. Mast