

Filed OAH
By: yparker Date:12/18/15 5:00

1 Harvey L. Leiderman (SBN 55838)
Email: hleiderman@reedsmith.com
2 Jeffrey R. Rieger (SBN 215855)
Email: jrieger@reedsmith.com
3 REED SMITH LLP
101 Second Street, Suite 1800
4 San Francisco, CA 94105-3659
Telephone: +1 415 543 8700
5 Facsimile: +1 415 391 8269

6 Attorneys for Petitioner
The Judges' Retirement System
7

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

11 In re the Matter of the Recalculation of Benefits
of

12 PAUL G. MAST,

13 Respondent.
14
15
16
17

AGENCY CASE NO. 2010-0825

OAH NO. 2015030996

THE JRS's POST-HEARING BRIEF

Hearing Date/Time: Nov. 30, 2015 at 9:00 a.m.
Hearing Location: Los Angeles, CA

SMITH LLP
A limited liability partnership formed in the State of Delaware

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

RESPONDENT'S
EXHIBIT
33
PENGLAD 000-631-6583

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

The primary question before this Court is whether Respondent Mast (“Mast”) can obtain benefits in excess of those provided by law, by threatening to publicize a frivolous legal theory that would expose the Judges’ Retirement System (“JRS”) to hundreds of millions of dollars of additional liabilities and substantial defense costs. He cannot. Benefits must be paid according to law. If Mast’s legal theory was correct, then all qualifying retired judges should be paid according to that theory. Mast’s legal theory is not correct, and therefore no retired judge should be paid according to that theory. Basic principles of contract law and sound public policy entitle the JRS to pay Mast the correct amount prospectively and recover the overpayments it has made to Mast.

Further, even if the settlement agreement at issue were deemed enforceable, Mast breached its confidentiality provision in the most spectacular fashion imaginable. After obtaining excess benefits in exchange for his promise to not publicize his legal theory, he rounded up dozens of other plaintiffs to pursue that legal theory against the JRS. That litigation, in which Mast hoped to make millions of dollars in contingency fees, resulted in *Staniforth v. Judges’ Retirement System* (2014) 226 Cal.App.4th 978. That unanimous opinion confirmed what should have always been obvious to Mast: His legal theory had no merit.

The JRS has paid Mast over \$500,000 (in principal and interest) that it should not have paid him, and the JRS has also incurred substantial legal fees defending against the frivolous claims Mast encouraged others to bring in 2012. In this proceeding, the JRS seeks to (1) adjust Mast’s pension to the statutorily authorized amount prospectively, and (2) recoup all of the overpayments, plus interest. More specifically, the JRS respectfully requests that this Court issue a Proposed Decision to the CalPERS Board of Administration that recommends a reasonable repayment plan under which deductions will be made from Mast’s ongoing JRS benefit payments.

II. FACTUAL BACKGROUND

A. The JRS Must Pay Benefits According To Law

The JRS is a retirement plan for qualified retired judges and justices in California, who were first appointed or elected before November 9, 1994. The Judge’s Retirement Law, Government Code sections 75000 *et seq.*, governs the calculation of a JRS retirement allowance. The JRS is

1 administered by the California Public Employees' Retirement System Board of Administration
2 ("CalPERS Board"). See Gov't Code § 75005; Cal. Const. Art. XVI, § 17. The CalPERS Board is
3 required to administer CalPERS "in a manner to best provide benefits to the participants of the
4 plan." *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470,
5 1493. The CalPERS Board "cannot fulfill this mandate unless it investigates applications and pays
6 benefits only to those members who are eligible for them." *McIntyre v. Santa Barbara County*
7 *Employees' Ret. Sys.* (2001) 91 Cal.App.4th 730, 734.

8 It is well settled that contracts purporting to require a public retirement system to pay
9 benefits in excess of those provided by law are not enforceable. In *Police Officers' Ass'n v. City of*
10 *Pomona* (1997) 58 Cal.App.4th 578, 585, the court explained: "Statutory definitions delineating the
11 scope of the Public Employees' Retirement System (PERS) compensation cannot be qualified by
12 bargaining agreements." See also *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201
13 (same). The result is the same when the individuals purporting to grant benefits in excess of what is
14 legally authorized are staff members of the retirement system. This is because "[t]he object of a
15 contract must be lawful when the contract is made ..." Civ. Code 1596; see also *Medina v. Board of*
16 *Retirement* (2003) 112 Cal.App.4th 864, 871 ("Any purported contract to give appellants the pension
17 benefits [in excess of those provided by law] was invalid ...") Further, "estoppel is barred where the
18 government agency to be estopped does not possess the authority to do what it appeared to be
19 doing." *Id.* at 870; see also *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th
20 522, 542-43 (holding that CalPERS could not be estopped to pay a member a higher allowance).

21 **B. Mast's Judicial Service And Lawful Retirement Allowance**

22 Mast became a member of the JRS on November 8, 1965 and took his last oath of office on
23 January 6, 1975. On January 15, 1979, he resigned from his last judicial office and elected a
24 deferred retirement from the JRS under Government Code section 75033.5.

25 At all relevant times Government Code section 75033.5 has provided that Mast's retirement
26 allowance must be "an annual amount equal to 3.75 percent of the compensation payable, at the time
27 payments of the allowance fall due, to the judge holding the office which [Mast] last held prior to his
28 [] discontinuance of his [] service as judge, multiplied by the number of years and fractions of years

1 of service with which [Mast] is entitled to be credited at the time of his [] retirement, not to exceed
2 20 years.” Thus, like every other JRS retired judge, Mast is entitled to receive an allowance that is
3 based on a formula that takes account of an active judge’s salary.

4 Mast became entitled to receive a monthly allowance from the JRS on May 28, 1995, and the
5 JRS began paying him an allowance in compliance with Government Code section 75033.5. Based
6 on Mast’s 13.19 years of judicial service, he was entitled to receive 49.46% of the compensation
7 paid to the active judge holding the judicial office from which he retired.

8 **C. Mast’s Frivolous Assertion That The Supreme Court Adopted A Legal Theory That It**
9 **Rejected In *Olson v. Cory***

10 Around the time Mast became entitled to receive his retirement allowance, he began asserting
11 that, pursuant to *Olson v. Cory* (1980) 27 Cal.3d 532, his retirement allowance should not be based
12 on the “compensation payable, at the time payments of the allowance fall due, to the judge holding
13 the office which [Mast] last held prior to his [] discontinuance of his [] service as a judge.” He
14 asserted that, instead, *Olson v. Cory* required the JRS to apply annual cost of living increases directly
15 to Mast’s own last judicial salary to set the benchmark for calculating his retirement allowance. *See*
16 Exhibit 5-8. Mast’s interpretation of *Olson v. Cory* was always, and still is, wrong.

17 In *Olson v. Cory*, the California Supreme Court held that the Legislature’s imposition of a
18 5% cap on annual salary increases impaired sitting judges’ vested rights when that 5% cap was
19 applied to annual salary increases during a judicial term that began before January 1, 1977 (a
20 “protected term”). The Court also held, however, that the salary for any judge who began a new
21 judicial term after January 1, 1977, was properly subject to the 5% cap on annual salary increases.

22 Because the allowance of a retired judge is based on a percentage of an active judge’s salary,
23 the Court also held that imposing the 5% cap on the salary paid during a protected term impaired the
24 vested rights of any retired judge whose allowance was based on a that salary.

25 In *Olson v. Cory*, the plaintiff class asserted the same theory that Mast asserted 15 years later
26 in 1995. We know this because, in *Olson v. Cory*, the Second Appellate District described and
27 rejected that theory, explaining: “Plaintiff pensioners contend that, regardless of the application of
28 the 1976 amendment to sitting judges, the pensions of judicial pensioners must be computed by

1 reference to the hypothetical salaries that would have become payable to active judges in the absence
2 of the 1976 amendment.” 1979 Cal.App. LEXIS 1825 at **11. The Second Appellate District
3 analyzed California vested rights law as applied to public pensions and explained: “[W]e conclude
4 that the promise made by the Judges’ Retirement Law to judicial pensioners is that their pensions
5 will vary in specified direct proportions with the salaries payable to active judges.” *Id.* at **16. Put
6 another way: “The pensioner floats in water whose origin is the current judicial office, and like
7 water his rights cannot rise above their source.” *Id.* at **38.

8 Unlike the Second Appellate District, the Supreme Court did not expressly describe the
9 “hypothetical judge” theory in its opinion. Based on the Supreme Court’s rationale and holding,
10 however, it is clear that the Supreme Court rejected that theory just as resoundingly as the Second
11 Appellate District had rejected it. The Supreme Court explained that “a judicial pensioner cannot
12 claim impairment of a *vested* right arising out of the 1976 amendment except when the judge holding
13 the particular judicial office could also claim such an impairment. The resolution of pensioner
14 vested rights, then, is dependent on the foregoing resolution of judges’ vested rights left unimpaired
15 by the 1976 amendment.” *Olson, supra*, 27 Cal:3d at 541-42 (emphasis in original). Thus, *Olson v.*
16 *Cory* did not establish a new methodology for calculating retired judges’ benefits, decoupled from
17 active judges’ salaries. To the contrary, the Supreme Court held: “Vested or not, a pensioner’s right
18 entitles him or her to benefits based on the prevailing salary for the judge or justice occupying the
19 particular judicial office, regardless of the date of termination of judicial services giving rise to the
20 pension.” *Id.* at 542.

21 The Supreme Court’s rejection of Mast’s theory was consistent with “vested rights” pension
22 law both before and after *Olson v. Cory*. Under that precedent, to understand a pensioner’s vested
23 rights, a court must analyze exactly what the pensioner was promised during employment. *See, e.g.,*
24 *International Ass’n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292. Here, the promised
25 pensions to judges who served between January 1, 1970 and December 31, 1976, included the
26 condition that Legislature could change the method for determining active judges’ salaries, upon
27 which Appellants’ retirement allowances would be based, so long as the change was not applied to
28 judicial terms that began before the effective date of the change. As the Supreme Court explained in

1 *Olson v. Cory*: “A judge who completes one term during which he was entitled to unlimited cost-of-
2 living increases and elects to enter a new term has impliedly agreed to be bound by salary benefits
3 then offered by the state for the different term.” *Olson*, supra, 27 Cal.3d at 540. In other words,
4 Mast was promised that his pension would be based on an active judge’s salary, but he was not
5 promised that active judges’ salaries would forever be determined by the same method as when he
6 provided his judicial service.

7 Footnote 7 of *Olson v. Cory* removes any doubt about whether the Supreme Court rejected
8 Mast’s theory: “The net effect of our holding in the instant case is to allow a judicial pensioner but
9 one increment of increase, that being the increment of prorata increase in the salary of the judge
10 occupying the office formerly occupied by the retired or deceased judge. While that salary
11 fluctuates with cost-of-living increases, the judicial pensioner’s proportionate share is his basic
12 retirement allowance and it is not increased by any cost-of-living factor.” *Id.* at 542, fn.7.

13 **D. The “Settlement Agreement”**

14 Despite the plain meaning of *Olson v. Cory*, Mast disputed the amount of his allowance, and
15 contended that the Supreme Court adopted the very theory it rejected. *See* Exhibits 5-8. He first
16 tried to convince the JRS that he was the only judicial pensioner who was entitled to additional
17 amounts based on his “unique set of circumstances.” *See* Exhibit 6, at 536 and 540. When that did
18 not work, he claimed that his theory applied broadly to many other retired judges and justices and he
19 threatened to publicize his theory if the JRS did not settle. *See* Exhibit 7.

20 Mast’s threats achieved their intended result. An October 1996 settlement agreement
21 provided that the JRS would pay Mast a retirement allowance “based on the definition in former
22 Government Code section 68203, as in effect on January 6, 1975, the date his last term began, and
23 based on the compensation he was entitled to on the date of his retirement, January 15, 1979,
24 pursuant to *Olson v. Cory*, (1980) 27 Cal.3d 532.” *See* Exhibit 1. The settlement agreement also
25 provided that “each party will keep the terms of this agreement confidential.” *Id.*

26 Mast claims that the confidentiality provision was the JRS’s idea. *See* Exhibit 14, at 838 (“I
27 agreed with your office, which was not a moral thing for me to do nor was a moral thing for your
28 office to propose, that our settlement would remain confidential.”); Exhibit 16, at 415 (“the JRS

1 refused to go ahead with the settlement unless I would agree to a non-disclosure agreement”). But,
2 the record is clear that Mast was using the threat of publicizing his theory in order to coerce a
3 settlement out of the JRS, and it was Mast who proposed the confidentiality provision. In an August
4 5, 1996 letter to counsel for the JRS, Mast wrote: “What then can I give as an inducement to resolve
5 the claim? What I can give is complete and total confidentiality. At the present time, except for my
6 wife, no one knows that I have made this claim. I have not discussed it with friends, judges, former
7 judges, or anyone else. As part of a settlement, I would commit to never discuss or disclose the
8 claim or settlement with anyone.” See Exhibit 7, at 1054. At the end of the letter he made what he
9 described in his testimony as a “sales pitch.” Hearing Transcript, at 132:7-10. He wrote: “The
10 window of opportunity to resolve the claim is ... very short and is now. In resolving the claim,
11 CalPers is not acceding to my position and is not agreeing that my claim is valid. What CalPers is
12 doing is recognizing the economic facts of the case and the possibility that they could lose. In effect
13 it is like resolving a \$100,000 lawsuit for \$100. This is something that no reasonable litigator could
14 turn down regardless of how strong he or she thought their position to be.” *Id.* at 1055. He
15 explained in another letter that he sent on the same day: “[M]y proposed resolution will save PERS
16 and the State of California between 200 million and 400 million dollars ...” See Exhibit 8, at 1098.

17 **E. The JRS’s Overpayments To Mast**

18 Since entering into the settlement agreement, the JRS has calculated Mast’s retirement
19 allowance by applying annual cost of living increase to Mast’s last judicial salary to set the
20 benchmark for calculating his retirement allowance. This has resulted in overpayments to Mast in
21 the total principal amount of over \$170,000, as of September, 30, 2015. With interest at the JRS’
22 current assumed rate of investment return (7.5%), the harm to the JRS is \$515,514.74, as of
23 September 30, 2015. *Id.* All of these calculations are set forth in Exhibit 21.

24 **F. Mast Encouraged Dozens Of Plaintiffs To Pursue Litigation Against The JRS**

25 Mast was receiving amounts that no other judge received, but he claimed that the JRS was
26 paying him too little under the settlement agreement. He claimed to have a “guilty conscience
27 (Exhibit 12, at 447) and was “living with the guilt of entering into an immoral agreement” (Exhibit
28 11, at 462). For several years, he repeatedly reminded the JRS of that guilt he claimed to be living

1 with, while he tried to extract more money out of the JRS. *See* Exhibits 11-16. During that time, he
2 was also reminding the JRS that the claims of the other judges were worth approximately
3 \$400,000,000 back in 1996 and “the Statute of Limitations does not apply” to those claims. *See*
4 Exhibit 13, at 429. He was “not proud of entering into the Confidentiality Agreement” (*id.*), but he
5 was willing to continue honoring that “immoral” agreement, so long as the JRS paid him more
6 money. *See* Exhibits 11-16; Hearing Transcript, at 106:25-107:8.

7 After several years of writing letters to the JRS, Mast ratcheted up his efforts to coerce the
8 JRS into paying him more money. On September 1, 2010, he wrote letters to the JRS, the CalPERS
9 Board members, the state Controller and the state Attorney General, explaining that he would
10 continue to honor the confidentiality provision, but only if the JRS paid him over \$140,000 and an
11 increased retirement allowance prospectively. *See* Exhibit 17. He wrote to the Controller: “Out of
12 my respect for the State of California, I have not taken the underpayment issue to an attorney
13 previously, as I believe that doing so would have a disastrous effect on the State. I believe that JRS
14 is well aware of the consequences of my seeking legal assistance.” *Id.* at 2. If the JRS did not pay
15 him the additional amounts he sought, he threatened the State of California with \$1 billion in
16 liabilities. *Id.* His letter to JRS Manager Pamela Montgomery stated: “I have been writing to you
17 and your predecessor for ten years to have you calculate my retirement benefits correctly. The time
18 is up. If the Retirement System does not pay me the amount due and adjust the amount payable each
19 month by the October 1 payments, I will submit it to an attorney.” *Id.* at 384.

20 The JRS did not give in to Mast’s demands, so Mast carried through with this threats. He
21 teamed up with attorney Jorn Rossi and encouraged dozens of retired judges and justices (and the
22 heirs of deceased retired judges and justices) to pursue claims against the JRS based on the same
23 frivolous legal theory Mast had asserted in 1995. Mast prepared a letter that described his claim in
24 1995 and the settlement thereof, and Rossi included that letter in the solicitation packet he sent the
25 putative plaintiffs. *See* Exhibit 23. Mast’s efforts to assert the very claims his settlement agreement
26 was designed to prevent went far beyond writing that letter. In Mast’s own words to Rossi:

27 You called me a “whistle blower.” Come on Jorn, I gave you a complete case which
28 will be unbelievable profitable to each of us. We agreed to work together and share

1 the profits equally. I laid out the complete theory of law for you and although you
2 doubted I was right for a long time, I believe that now, only after our preparation for
3 the demurrer, that you are convinced we are correct ... I wrote the Petition ... I
4 prepared the claims, researched the files, did the accounting, invented the accounting
5 system, wrote the points and authorities, and in effect laid out the entire claim
6 procedures. This was in addition to finding the addresses of the judges, spouses, and
7 heirs. *See Exhibit 22, at 1456.*

8 The San Diego Superior Court sustained the JRS's general demurrer to Mast's and Rossi's
9 case. The District Court of Appeal for the Fourth Appellate District affirmed the trial court's
10 judgment in *Staniforth v. Judges' Retirement System* (2014) 226 Cal.App.4th 978. The court
11 explained: "To the extent pensioners' claims are based on the theory that *Olson I* held judicial
12 pensioners are exempted from changes in the underlying salary structure applicable to actual active
13 jurists, those claims must fail, and the trial court correctly sustained JRS's demurrer without leave to
14 amend." *Id.* at 990-91.

15 III. LEGAL ARGUMENT

16 A. The JRS Is Entitled To Rescind The Settlement Agreement

17 The settlement agreement says that Mast's retirement allowance will be calculated "pursuant
18 to *Olson v. Cory* (1980) 27 Cal.3d 532." That means his allowance should be tied to an active
19 judge's salary. Unfortunately, CalPERS staff has, over the years, relied on Mast's assertion that his
20 pension should increase each year by full Consumer Price Index, and has overpaid him based on that
21 assertion. This assertion was erroneous in 1996 when JRS started paying Mast these additional
22 amounts and is still erroneous today. Accordingly, JRS is entitled to correct this error and recoup
23 the overpayments it made to Mast. *See Civ. Code § 1689(b)(1)* (rescission based on mistake).

24 The JRS has several bases to rescind the settlement agreement, which, as a matter of law,
25 was never enforceable. Civil Code section 1689(b) allows for rescission of a contract: "(1) If the
26 consent of the party rescinding, or of any party jointly contracting with him, was given by mistake,
27 or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance
28 of the party as to whom he rescinds, or of any other party to the contract jointly interested with such
party. (2) If the consideration for the obligation of the rescinding party fails, in whole or in part,
through the fault of the party as to whom he rescinds. (3) If the consideration for the obligation of

1 the rescinding party becomes entirely void from any cause. (4) If the consideration for the
2 obligation of the rescinding party, before it is rendered to him, fails in a material respect from any
3 cause. (5) If the contract is unlawful for causes which do not appear in its terms or conditions, and
4 the parties are not equally at fault. (6) If the public interest will be prejudiced by permitting the
5 contract to stand. ..." All six of the above bases for rescission apply here.

6 Mast earned his JRS benefits through his judicial service. Those JRS benefits are determined
7 under the Judges Retirement Law, Government Code sections 75000 *et seq.* Mast's employment
8 contract was subject to the same terms and conditions as every other judge who took the bench at the
9 same time as Mast. There is no legal basis to pay Mast more than he is entitled to receive under the
10 Judges' Retirement Law. *See* Civ. Code § 1636 ("A contract must be so interpreted as to give effect
11 to the mutual intention of the parties as it existed at the time of contracting, so far as the same is
12 ascertainable and lawful."); *see also Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074.

13 In *Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, the court explained: "The
14 terms and conditions relating to employment by a public agency are strictly controlled by statute or
15 ordinance, rather than by ordinary contractual standards." *Id.* at 134-35. In *Oden, supra*, 23
16 Cal.App.4th at 208, the court explained: "Statutory definitions delineating the scope of [public
17 retirement] compensation cannot be qualified by bargaining agreements."

18 Further, courts regularly invalidate settlement agreements that are in conflict with governing
19 law. *See, e.g., Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 934-37;
20 *League of Residential Neighborhood Advocates v. City of Los Angeles* (9th Cir. 2007) 498 F.3d 1052,
21 1055-57; *Trancas v. City of Malibu* (2006) 138 Cal.App.4th 172. As the court explained in *Medina*
22 *v. Board of Retirement* (2003) 112 Cal.App.4th 864, 871: "Any purported contract to give
23 [retirement system members] the pension benefits [in excess of those provided by law] was invalid."

24 Of course the rule could not be otherwise. If it were, benefits would not be governed by law,
25 but rather by the extent of the errors made by the fallible individuals and computer systems that
26 administer the benefits. Through excusable human or computer error, incompetence or even
27 collusion, unauthorized windfalls would become contractually protected. This would render the law
28 governing retirement allowances impotent.

1 **B. Mast Did Not Provide Lawful Consideration Under The Settlement Agreement**

2 The California Supreme Court has explained: “[W]here consideration for an agreement
3 consists of an exchange of promises, that one party’s promise is illusory generally means there is no
4 consideration.” *Steiner v. Thexton* (2010) 48 Cal.4th 411, 423. Here, the only consideration Mast
5 provided was his agreement to maintain the confidentiality of the settlement agreement. That
6 consideration was illusory, because the settlement agreement was a public record by law. *See* Gov’t
7 Code § 6250 *et seq.* (the “Public Records Act”). Further, transparency is particularly important for
8 this kind of agreement that results in the payment of public funds to one retired judge that no other
9 retired judge receives. *See San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955 (“It is
10 difficult to imagine a more critical time for public scrutiny of its governmental decision-making
11 process than when the latter is determining how it shall spend public funds.”) The lack of
12 transparency was particularly troubling here, given that the settlement agreement was premised on
13 the belief that Mast would receive something that many other judges and justices were also entitled
14 to receive, but would not receive so long as Mast complied with the confidentiality provision.

15 Given that the only consideration Mast provided under the settlement agreement was
16 illusory, no enforceable contract was ever formed between Mast and the JRS. Further, as previously
17 explained, estoppel is not available to Mast in these circumstances. *Medina, supra*, 112 Cal.App.4th
18 at 870-71; *City of Pleasanton, supra*, 211 Cal.App.4th at 542-43.

19 **C. Mast Cannot Enforce The Settlement Agreement Because He Breached It**

20 Another independent reason why the settlement agreement is unenforceable is that Mast
21 breached its confidentiality provision. The purpose of the confidentiality provision was to prevent
22 the JRS from having to defend against other claims by other retired judges and justices that were
23 based on Mast’s legal theory.

24 Mast used the threat of his breach in an effort to extract additional money from the JRS.
25 When his threats did not obtain the desired result, he encouraged dozens of other individuals to
26 pursue the very type of claims that the confidentiality agreement was designed to prevent. He did
27 this because he thought he would make millions of dollars in contingency fees. The JRS incurred
28 significant expense defending against those frivolous claims and Mast’s breach renders the

1 settlement agreement unenforceable against the JRS. *See* Civ. Code § 1689(b)(2).

2 **D. The JRS May Offset Mast's Allowance To Recover The Overpayments Made To Him**

3 Government Code section 20160(b) provides: "[T]he board shall correct all actions taken as
4 a result of errors or omissions of the university, any contracting agency, any state agency or
5 department, or this system." Here, the JRS's overpayment to Mast was an error.¹

6 Further, the law authorizes the JRS to recover amounts that have been overpaid through
7 offsets to the JRS's ongoing benefit payments to Mast. Government Code section 20163 provides in
8 pertinent part: "Adjustments to correct overpayment of a retirement allowance may also be made by
9 adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as
10 the case may be, will receive the actuarial equivalent of the allowance to which the member is
11 entitled." *See Foster v. Pension Board of the City of Alameda* (1937) 23 Cal.App.2d 550, 555 ("It is
12 immaterial whether said overpayments were made by respondent board under a mistake of fact or
13 under a mistake of law. In either event, the respondent board was entitled to recover the amount of
14 said overpayments from petitioner."); *Barrett, supra*, 189 Cal.App.3d at 1602 ("A public officer may
15 only collect and retain such compensation as is specifically provided by law and any money paid by
16 a governmental agency without authority of law may be recovered from such officer.")

17 **E. This Court Has Broad Discretion To Recommend A Fair Recoupment Plan**

18 The CalPERS Board is constitutionally entrusted with "plenary authority and fiduciary
19 responsibility for ... administration of the system." Cal. Const., art. XVI, § 17. It is Board's job to
20 determine the proper retirement allowance paid to members out of the trust funds that the Board
21 administers. *See McIntyre, supra*, 91 Cal.App.4th at 734; *see also* Gov't Code § 20125.

22 It is well established that retirement boards have broad discretion with respect to the recovery
23 of overpaid benefits. For example, in *City of Oakland v. Oakland Police & Fire Retirement System*
24 (2014) 224 Cal.App.4th 210, the court explained: "Given this statutory backdrop – where the
25 Board's decision making must prioritize the rights of retirees while making complex decisions

26 ¹ Mast's claim that the JRS had only six months to make this correction is based on a highly misleading citation.
27 Under Government Code section 20160(a)(1), if a member requests a correction of the member's own error, the member
28 has six months to seek a correction. That limitation does not apply to system errors, which the "board shall correct,"
under subdivision (b).

1 impacting multiple variables – we believe that the Board has discretion to decide whether, how and
2 to what extent any overpayments made to [] retirees should be repayable to [the retirement
3 system].” *Id.* at 244-45.

4 Here, the JRS seeks to pay Mast his lawful allowance prospectively and recoup the
5 overpayments to him, which together with interest at the CalPERS assumed rate of return of 7.5%,
6 amounts to \$515,514.74, as of September 30, 2015. Mast’s repayment obligation should be satisfied
7 through reasonable offsets to the ongoing lawful benefits that the JRS pays him.

8 **F. Mast Was Not Entitled To Retire At Age 60**

9 Mast was credited with approximately 13.2 years of judicial service when he left the bench in
10 1979. In 1995, he turned 63 and began receiving a retirement allowance, pursuant to Government
11 Code section 75033.5. He now claims that the JRS should have allowed him to retire in 1992, when
12 he turned 60. Mast is wrong.

13 Government Code section 75033.5 provides, in pertinent part: “No judge shall be eligible to
14 receive an allowance pursuant to this section until the attainment of at least age 63 unless the judge
15 is credited with 20 years of judicial service and has attained age 60.” Mast was credited with less
16 than 20 years of judicial service and therefore was not eligible to retire until he was age 63.

17 There is no ambiguity in the above provision of section 75033.5. Mast simply asks this
18 Court to ignore the entire provision. Doing so would violate the most basic rules of statutory
19 construction. *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (“Words used in a statute ... should
20 be given the meaning they bear in ordinary use. If the language is clear and unambiguous there is no
21 need for construction”) Further, it was sensible for the Legislature to add this provision to
22 section 75033.5, because it incentivizes judges who take the bench at a young age to remain on the
23 bench until they accrue 20 years of service, at which time they become eligible for a full retirement
24 allowance under Government Code section 70025(h).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

The JRS respectfully requests that the Court issue a proposed decision recommending that the CalPERS Board (1) bring Mast's prospective benefits into compliance with the law, and (2) implement a fair recoupment plan for the overpayments made to Mast under which amounts will be deducted from his ongoing JRS monthly payments.

DATED: December 18, 2015.

REED SMITH LLP

By



Jeffrey R. Rieger
Attorneys for Petitioner The JRS