

Filed OAH
By: RSainz Date:01/20/16 2:54

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 REPLY TO RESPONDENT'S
FINAL ARGUMENT**

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
34



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

This case is unique, but the legal principles at issue are fundamental. The Judges' Retirement System ("JRS") owes fiduciary duties to all JRS members and beneficiaries; not just Respondent Paul G. Mast ("Mast"). The JRS's governing laws therefore must apply equally to all JRS members and beneficiaries. The law does not allow Mast to retain a windfall just because, in 1996, he was able to threaten the JRS with massive liabilities and wear down a JRS attorney with his tenacity. The JRS's Post-Hearing Brief contains all of the legal and evidentiary citations that the Court needs to issue a proposed decision in this matter. Below, the JRS briefly responds to Mast's 78-page filing in order to set the record straight on a few issues.

II. ARGUMENT

A. The Settlement Agreement Was Invalid As A Matter Of Law

JRS benefits must be based on law. They cannot be based on what the most tenacious member is able to extract from JRS with threats of massive liabilities and promises of confidentiality. The JRS provided numerous authorities to support this proposition in its Post-Hearing Brief. Mast's efforts to nitpick those authorities by discussing the immaterial factual differences between this case and those cases are unavailing. The principles of those cases are well-settled, they are based on sound public policy and they apply to the present case.

B. There Is No Evidence That The CalPERS Board Approved The Settlement Agreement

Mast claims that the settlement agreement was approved by "the Administrator of the Judges' Retirement System, the Board of Directors of the California Public Employees' Retirement system." Respondent's Final Argument at 3. There is no evidence that the CalPERS Board was even aware of the settlement agreement, much less approved it. The legal principles that invalidate the settlement agreement exist precisely so that the kind of injustice that occurred here can be undone. If Mast had convinced an attorney for Coca Cola that Coca Cola could save \$400 million by paying Mast a couple thousand dollars a month, he might have a somewhat stronger case. The law is different when windfalls have been paid with public funds.

1 **C. Mast Cannot Re-litigate *Staniforth v. JRS***

2 In 1996, Mast was able to confuse a JRS attorney as to what *Olson v. Cory* (1980) 27 Cal.3d
3 532 required, but he was not able to confuse the Fourth District Court of Appeals in 2014. Mast's
4 reading of *Olson v. Cory* has always been wrong. In *Staniforth v. Judges' Retirement System* (2014)
5 226 Cal.App.4th 978, the Fourth District Court of Appeal confirmed that in the clearest of terms.

6 Further, the published opinion in *Staniforth v. JRS* was not based on a single sentence taken
7 out of context, as Mast claims. It was based on the entirety of *Olson v. Cory* and a body of well-
8 settled law about when and how public pension rights become vested. To understand a pensioner's
9 vested rights, a court must analyze exactly what the pensioner was promised during employment.
10 See, e.g., *International Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292. Here, the
11 pension that was promised to Mast included the condition that Legislature could change the method
12 for determining active judges' salaries, so long as the change was not applied to judicial terms that
13 began before the effective date of the change. In other words, Mast was promised that his pension
14 would be based on an active judge's salary, but he was not promised that active judges' salaries
15 would forever be determined by the same method as when he provided his judicial service. Also,
16 there are several statements in *Olson v. Cory* that are direct rejections of Mast's legal theory:

- 17
- 18 • “[A] judicial pensioner cannot claim impairment of a *vested* right arising out
19 of the 1976 amendment except when the judge holding the particular judicial
20 office could also claim such an impairment. The resolution of pensioner
21 vested rights, then, is dependent on the foregoing resolution of judges' vested
22 rights left unimpaired by the 1976 amendment.” *Olson, supra*, 27 Cal.3d at
23 541-42 (emphasis in original).
 - 24 • “Vested or not, a pensioner's right entitles him or her to benefits based on the
25 prevailing salary for the judge or justice occupying the particular judicial
26 office, regardless of the date of termination of judicial services giving rise to
27 the pension.” *Id.* at 542.
 - 28 • “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 prorata
increase 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 judicial pensioner's proportionate share is his basic retirement
allowance and it is not increased by any cost-of-living factor.” *Id.* at 542, fn.7
(emphasis added).

1 These statements show that the Supreme Court rejected Mast's theory in *Olson v. Cory*.¹ In
2 *Staniforth v. JRS*, the Fourth District Court of Appeal rejected that same theory because a unanimous
3 panel of three justices understood the letter and spirit of *Olson v. Cory*; not because they were
4 tricked by a single sentence taken out of context.

5 **D. The Court Of Appeal Did Not Accept Any Part Of Mast's Theory In *Staniforth v. JRS***

6 Mast repeatedly suggests that the court in *Staniforth v. JRS* validated some part of his reading
7 of *Olson v. Cory*. See Respondent's Final Argument at 6, 11 and 30. That is not true at all. The
8 Court of Appeal remanded ten claims back to the trial court because those ten plaintiffs alleged, as a
9 factual matter, that their ancestors were never paid amounts owed to them under the correct reading
10 of *Olson v. Cory* that the JRS has always advocated. *Staniforth, supra*, 226 Cal.App.4th at 991-94.
11 The Court of Appeal held that the claims of those ten plaintiffs should not have been dismissed on
12 demurrer, because it disagreed with the trial court that the statute of limitations ran on those claims
13 when each judge or justice died. *Id.* That remand was not, in any way, a validation of any aspect of
14 Mast's incorrect reading of *Olson v. Cory*. As discussed above, the opinion in *Staniforth v. JRS*
15 completely rejects Mast's reading of *Olson v. Cory*.

16 **E. The Story Mast Tells About The Settlement Agreement And Its Breach Is Not Credible**

17 As we explain in Section II(A), *supra*, the settlement agreement is unenforceable as a matter
18 of law. Thus, the factual disputes in this case should not matter. If the Court believes those factual
19 disputes matter, though, the JRS submits that Mast's story is not credible. That story is inconsistent
20 with any reasonable reading of the record before the Court, and Mast has proven through his conduct
21 that he will say or do anything to advance his own financial interests. For example:

22 (1) Mast first tried to extract a settlement out of the JRS by claiming he was the only
23 retired judge who would benefit from his theory, but when that did not work he switched tactics and
24 claimed his theory applied to many other judges and justices, and promised not to tell those other
25

26 ¹ It was not improper for the JRS to quote the lower appellate court's unpublished opinion in *Olson v. Cory*, as
27 Mast claims on page 19 of his brief. The JRS was not citing the quoted language as binding precedent. The JRS was
28 citing that language only to show that Mast's theory was actually raised in the *Olson v. Cory* proceedings, because that
fact was not as clear from the Supreme Court opinion in *Olson v. Cory*. The Supreme Court opinion is the only opinion
that has any precedential value and the JRS has never contended otherwise. Both courts rejected Mast's theory.

1 judges and justices about his theory if the JRS paid him off. *See* Exhibit 6 (at 536 and 540) and
2 Exhibit 7.

3 (2) Mast claims that the confidentiality agreement was the JRS's idea and he just went
4 along with it. *See, e.g.*, Exhibit 23 ("JRS insisted that the Settlement Agreement include [the
5 confidentiality agreement]."). But, the record is perfectly clear that Mast was using the threat of
6 publicizing his legal theory in order to coerce a settlement out of the JRS, and it was Mast who
7 proposed the confidentiality provision. He wrote: "What then can I give as an inducement to
8 resolve the claim? What I can give is complete and total confidentiality. At the present time, except
9 for my wife, no one knows that I have made this claim. I have not discussed it with friends, judges,
10 former judges, or anyone else. As part of a settlement, I would commit to never discuss or disclose
11 the claim or settlement with anyone." Exhibit 7, at 1054. He also wrote: "The window of
12 opportunity to resolve the claim is ... very short and is now. In resolving the claim, CalPers is not
13 acceding to my position and is not agreeing that my claim is valid. What CalPers is doing is
14 recognizing the economic facts of the case and the possibility that they could lose. In effect it is like
15 resolving a \$100,000 lawsuit for \$100. This is something that no reasonable litigator could turn
16 down regardless of how strong he or she thought their position to be." *Id.* at 1055. In another letter
17 he sent on the same day he wrote: "[M]y proposed resolution will save PERS and the State of
18 California between 200 million and 400 million dollars ..." *See* Exhibit 8, at 1098. These are not
19 the statements of someone who was agreeing to someone else's proposal.

20 (3) Mast claimed in his communication to the plaintiffs that he and Jorn Rossi solicited to
21 pursue *Staniforth v. JRS* that he was "not proud" of his decision to enter into the confidentiality
22 agreement. Exhibit 23. But, he was writing to those plaintiffs only because the JRS had not agreed
23 to pay him about \$140,000 and a higher retirement allowance in exchange for him continuing to
24 honor that confidentiality provision. *See* Exhibits 11-18; Corrected Hearing Transcript at 107:14-22.

25 (4) Mast claims it was not initially his intent to represent the plaintiffs in *Staniforth v.*
26 *JRS* and the lawsuit was just the natural result of his attorney, Rossi, learning about Mast's dispute
27 with the JRS. *See* Corrected Hearing Transcript at 103:4-24. Mast claims he became co-counsel
28 with Rossi only after it became clear to him that Rossi was not able to handle the case on his own.

1 *Id.* But, communications between Mast and Rossi show that they had agreed from the start to split
2 equally the massive contingency fee award they were seeking. He wrote to Rossi: "Before we
3 started this case, I asked you if you could recommend someone who could take on this case and
4 handle the entire thing. You replied to me that you would do it. Since you were my friend, that was
5 good with me. Our agreement was that we would each get half the fees, and you would do all the
6 work involved." Exhibit 22 at 1439. This is in direct conflict with his claim that he only started
7 working on the case and agreed to the fee split after Rossi proved incapable of handling the case.
8 Also contradicting that claim, Mast wrote to Rossi: "I gave you a complete case which will be
9 unbelievable profitable to each of us. We agreed to work together and share the profits equally." *Id.*
10 at 1456. It is perfectly clear from Mast's own writings that Mast was always the driving force
11 behind *Staniforth v. JRS* and he was doing the lion share of the work. *Id.* at 1439-40. Indeed, Mast
12 explained that Rossi had "doubted [Mast] was right for a long time." *Id.* at 1456.

13 (5) On top of these clear inconsistencies between his story and the evidence, Mast has
14 shown that he will criticize and blame others whenever he thinks it will help him justify his own
15 conduct. Mast criticizes JRS staff members as "intransient", "incompeten[t]" and "ill-trained," and
16 he claims they had an "obstructionist attitude", created a "facade" and used "diversionary and
17 delaying tactics." Respondent's Final Argument at 5, 36 and 37; Corrected Hearing Transcript at
18 110:17-20. Mast has accused the undersigned of "gross misconduct", making "false statements",
19 "mislead[ing]" courts, engaging in "egregious" conduct, engaging in "unethical and unlawful"
20 conduct, putting his firm's interest over his client's interest and engaging in other unspecified
21 unethical conduct. Respondent's Final Argument at 6, 7, 12, 14, 19, 31, and 37; Corrected Hearing
22 Transcript at 134:12-18. Mast claims that Rossi was "incapable of ... analyzing the law and writing
23 briefs" and threw Mast off the *Staniforth v. JRS* case because Rossi "wanted to collect all of the
24 fees" for himself. *Id.* at 103:10-12 and 133:18-19. Mast believes that the plaintiffs in *Staniforth v.*
25 *JRS* lost, in part, because the former Duke Law professor who wrote their appellate brief had a
26 financial conflict of interest that caused him to write the brief "in such a manner to prefer his
27 position." Corrected Hearing Transcript at 133:19-24. Finally, Mast believes the three appellate
28 justices who ruled against the plaintiffs in *Staniforth v. JRS* were so lacking in judicial competence

1 that the undersigned was able to “trick” them into misreading *Olson v. Cory* with one sentence taken
2 out of context. *Id.* at 134:12-18. According to Mast, everyone else is incompetent or unethical, and
3 Mast is the only retired judge in California who was smart enough to realize that for over three
4 decades the JRS never complied with the California Supreme Court’s directives in *Olson v. Cory*.

5 In sum, if the Court finds Mast’s story relevant at all, the Court should reject that story as
6 untrue. The weight of the evidence shows that Mast used the confidentiality agreement to obtain a
7 windfall 1996 and then, after failing to coerce the JRS into paying him additional public funds in
8 2010, he breached the confidentiality agreement by encouraging litigation that he hoped would make
9 him millions of dollars in contingency fees.

10 **F. Mast Has No Legitimate Statute Of Limitations Or Equitable Defense**

11 Mast’s statute of limitations arguments are without merit. As explained in the JRS Post-
12 Hearing Brief, Mast’s claim that the JRS had only six months to make a correction is based on a
13 highly misleading citation. Under Government Code section 20160(a)(1), if a member requests a
14 correction of the member’s own error, the member has six months to seek a correction. Subdivision
15 (b) applies to system errors and it states that the “board shall correct” those errors, without including
16 any period of limitations. Further, there is no three-year statute of limitations that prevents the JRS
17 from recovering all of the overpayments it made to Mast through administrative offsets to his
18 monthly retirement allowance. Case law is clear that the statutes of limitations in Government Code
19 sections 20160 *et seq.*, upon which Mast relies, are “limitation periods for ‘actions’ that do not apply
20 to administrative proceedings.” *City of Oakland v. Public Employees’ Retirement System* (2002) 95
21 Cal.App.4th 29, 51. CalPERS has not initiated any “action” in superior court, so that statute of
22 limitations does not apply. For all of the reasons stated in *City of Oakland*, *supra*, 95 Cal.App.4th at
23 43-51, this Court should reject Mast’s statute of limitations defense.²

24 Further, the equitable defenses Mast asserts are not available to him as a matter of law.
25 Although “equitable relief is flexible and expanding, its power cannot be intruded in matters that are

26 ² Even if the Court were to accept Mast’s statute of limitations defense, the Court should still issue a proposed
27 decision recommending that JRS recover all payments that were made since December 29, 2008, which is three years
28 before the JRS informed Mast that it would be seeking recover of overpayments in this proceeding, in a December 29,
2011 letter.

1 plain and fully covered by positive statute.” *Barrett v. Stanislaus County Employees Retirement*
2 *Assn.* (1987) 189 Cal.App.3d 1593, 1608. The proper amount of Mast’s JRS benefits is a matter that
3 is “plain and fully covered by statute” (i.e., the Judges’ Retirement Law), so Mast cannot avoid
4 repaying his overpayments based on equitable principles. *See also City of Pleasanton v. Board of*
5 *Administration* (2012) 211 Cal.App.4th 522, 542-43 (holding that CalPERS could not be estopped to
6 pay a member a higher allowance than allowed by statute). Put simply, it does not matter whether
7 Mast has come to rely on his windfall or whether he thinks the JRS waited too long to correct that
8 windfall. By law, that windfall must be corrected.³

9 **G. Mast’s Reading Of Government Code Section 75033.5 Has No Merit**

10 Government Code section 75033.5 provides: “No judge shall be eligible to receive an
11 allowance pursuant to this section until the attainment of at least age 63 unless the judge is credited
12 with 20 years of judicial service and has attained age 60.” Mast asks this Court to ignore that entire
13 sentence in section 75033.5, as if it did not exist at all. The rules of statutory construction do not
14 permit such a reading of a statute. That sentence must have some meaning. It has no meaning at all
15 if a judge may retire at age 60 with less than 20 years of judicial service. The phrase
16 “notwithstanding any other provision of this chapter” in the beginning of section 75033.5 is not the
17 Legislature’s way of saying that we should ignore a sentence that appears later in that very same
18 section 75033.5.⁴

19 **III. CONCLUSION**

20 With interest at the JRS’s current assumed rate of investment return (7.5%), the harm of
21 Mast’s conduct to the JRS has \$515,514.74, as of September 30, 2015. *See Exhibit 21.* That figure
22 does not even include the substantial defense costs the JRS incurred defending against Mast’s
23 frivolous claims in *Staniforth v. JRS*. The CalPERS Board has broad discretion to correct the error

24 _____
25 ³ In any event, Mast’s actions in 2011-12 mooted any possible argument that the JRS had received material
26 consideration under the settlement agreement. The JRS promptly sought relief after Mast breached the confidentiality
27 provision of the settlement agreement.

28 ⁴ It is irrelevant that another retired judge with less than 20 years of judicial service was paid benefits starting at
age 60, in error. Mast’s benefits (and every other retired judge’s benefits) are governed by the Judges’ Retirement Law.
Just because one judge received benefits in error does not mean Mast is entitled to receive those same excess benefits.
Judge London, who is highlighted in Respondent’s Final Argument, died on September 15, 2013.

1 at issue and therefore this Court has broad discretion in recommending what action the Board should
2 direct the JRS to take in order to correct that error.

3 The JRS respectfully requests that the Court issue a proposed decision recommending that
4 the CalPERS Board bring Mast's prospective benefits into compliance with the law, and implement
5 a fair recoupment plan for the overpayments made to Mast (or at least a portion thereof). The
6 recoupment plan should be based on reasonable deductions to Mast's ongoing monthly JRS benefits
7 (and any continuing benefits owing to his spouse after his death), so that Mast and his spouse receive
8 some reasonable income from the JRS, while the JRS has a reasonable opportunity to recover some
9 or all of the amounts that were improperly paid to Mast since 1996.

10 DATED: January 20, 2016.

REED SMITH LLP

11
12 By _____

13 Jeffrey R. Rieger
14 Attorneys for Petitioner The JRS
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Filed OAH
By: RSainz Date:01/20/16 2:54

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

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

11 In re the Matter of the Recalculation of Benefits
of
12 PAUL G. MAST,
13 Respondent.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGENCY CASE NO. 2010-0825
OAH NO. 2015030996
PROOF OF SERVICE
Hearing Date/Time: Nov. 30, 2015 at 9:00 a.m.
Hearing Location: Los Angeles, CA



PROOF OF SERVICE

In re the Matter of Recalculation of Benefits of Paul G. Mast
Office of Administrative Hearings, Los Angeles, CA
Agency Case No.: 2010-0825; OAH No. 2015030996

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 REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105. On January 20, 2016, I served the following document(s) by the method indicated below:

THE JRS'S REPLY TO RESPONDENT'S FINAL ARGUMENT

- by transmitting via facsimile on this date from fax number +1 415 391 8269 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).
- by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.
- by transmitting via email to the parties at the email addresses listed below:

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

Paul Mast Email: [REDACTED]	Respondent
--------------------------------	------------

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 20, 2016, at San Francisco, California.

Jeffrey R. Stegar

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