

1 PAUL G. MAST (CA Bar No. 28390)

2 [REDACTED]

3 Telephone: [REDACTED]

4 Email: [REDACTED]

5 Respondent

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**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

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11 In the matter of the Amount of Proper)
12 Benefits Payable to)

AGENCY CASE NO. 2010-0825

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14 PAUL G. MAST, Judge, Ret.)

OAH NO. 2015-030996

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**RESPONDENT'S REPLY TO
OPPOSITION TO MOTION TO STRIKE
DECLARATION OF PAUL G. MAST**

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Hearing Date: November 30, 2015
Hearing Location: Los Angeles, CA

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INTRODUCTION

In its Introduction to the Opposition to Motion to Strike, Petitioner completely misstates the facts and the law.

The Motion to Strike is to strike paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of its Statement of Issues. In these paragraphs, Petitioner seeks to re-litigate the prior case ██████████ OAH No. L-9605311. This case was settled pursuant to the Settlement Agreement (Exhibit O, page 5 of the Trial Brief) in 1996 and cannot be rescinded or re-litigated here.

REPLY TO PETITIONER'S SUMMARY OF ARGUMENT

During the legal proceedings pending in 1996, Respondent entered into settlement discussions with the attorneys for Petitioner. Those settlement discussions lead to the Settlement Agreement. Respondent never convinced a JRS employee of anything, and in particular did not convince an employee that he should be receiving benefits that he was not entitled to receive. The Settlement Agreement was not negotiated with a "JRS employee," but with the attorneys representing JRS. The Settlement Agreement was signed by Michael Priebe, the Manager of the Judges' Retirement System (JRS), but Respondent did not negotiate with him, convince him of anything, or in any manner discuss the litigation with him.

The Petitioner is precluded from canceling the Settlement Agreement almost twenty years after it was agreed to, as set forth in the Points and Authorities in support of the Motion to Strike.

Even if the arguments of Petitioner were correct, pursuant to Government Code sections 20160 and 20164(b)(1) JRS is not entitled to recoup overpayments to Respondent over the years. Government Code §20160 states:

(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.** [Emphasis added.]

A Limitation of Actions is also imposed on Petitioner by Government Code 20164(b)(1) which states:

(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows: (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

Exhibit B to Petitioner's Opposition to the Motion to Strike is fallacious and should be stricken.

Respondent did not breach the Settlement Agreement as alleged by Petitioner. As set forth in Respondent's Trial Brief, Petitioner breached the Settlement Agreement on numerous occasions throughout the years. Only after many years of attempting to have JRS abide by the Settlement Agreement did Respondent give notice to JRS, the State Controller, and all members of the Board of Administration of the California Public Employees' Retirement System (see the letters of September 10, 2010, attached as Exhibit U to the Trial Brief) that if the payments due pursuant to the Settlement Agreement were not made, that he would have to consult with an attorney. After waiting nine more months, Respondent did consult an attorney.

Petitioner, on the one hand, states that the "confidentiality clause" in the Settlement Agreement is void as against public policy (See the Declaration of Paul G. Mast in support of The Trial Brief), and on the other hand states that Respondent has breached said "confidentiality clause." It cannot be both ways.

Petitioner uses very inflammatory language to falsely state what occurred before and after consulting an attorney. Respondent did not “threaten” JRS or the other recipients of the September 10, 2010 letters. Respondent did point out to them the necessity of their acting by stating what inevitably would occur if Respondent consulted an attorney. Respondent did not initiate any litigation in 2012, as Petitioner states. Respondent did consult with his attorney, who did initiate litigation, and did write legal documents as counsel to him.

REPLY TO “FACTUAL BACKGROUND”

Petitioner seeks to equate the Settlement Agreement with a “contract” or a “bargaining agreement.” It is neither. Further, Petitioner has taken quotes from those cases out of context. A review of the cases reveals they do not apply to the issue before this Court in determining the effect of the Settlement Agreement.

Petitioner quotes from Government Code section 75033.5 (GC §75033.5), and states that it holds that it restricts the retirement benefits of Respondent to a percentage of the salary of a judge “holding the office (superior court judge, appellate court justice, etc.)” which Respondent formally held. Government Code §75033.5 preceded the enactment of both the 1969 and the 1976 Amendments to Government Code section 68203, and therefore that restriction does not apply to situations where cost-of-living adjustments were vested pursuant to *Olson v. Cory I*, 27 Cal.3d 532, 636 P.2d 532, 178 Cal.Rptr. 568, (*Olson I*).

The retirement benefits were vested before the enactment of the 1976 Amendment to Government Code section 68203. The Supreme Court in *Olson I* held that the retirement benefits earned by a judge or justice during the period of time the 1969 Amendment to Government Code section 68203 was in effect (including that judicial officer’s service before the 1969 Amendment) to the end of any term that began while said section was in effect (the protected period) were vested and could not be diminished (unless a corresponding benefit were authorized, which was not done). This is fully discussed in the Trial Brief and the Supplemental Trial Brief, *infra*.

Respondent’s entire judicial service was during the protected period.

Respondent's rights to deferred retirement benefits were in accordance with the 1969 Amendment to GC §68203 and with the decision in *Olson I*.

Respondent prepared a Supplemental Trial Brief in relation to the Supreme Court Decision in *Olson I* to present at the hearing of this matter if it became relevant. Respondent is hesitant to burden the Court with an additional brief. Petitioner's misstatements as to *Olson I* requires Respondent to file the Supplemental Trial Brief at this time.

Petitioner is also in error stating that the holding in *Staniforth v. Judges' Retirement System*, which it cites, upholds their interpretation of *Olson I*. This is not entirely true. *Staniforth* did uphold its position in part, but it did not uphold its position in regard to judges who retired during their protected periods. That Court upheld the right of ten such judges and justices to enhanced retirement benefits, subject to a consideration of whether another statute of limitations could be applied (which there is not any). Petitioner re-opened the entire issue of deferred retirement benefits during the pending second appeal in *Staniforth*. Respondent is confident that the pending decision in the second appeal will at least uphold Respondent's position of deferred retirement benefits for those judicial officers who retired during their protected period.

Respondent will have present at the hearing in this matter the briefs he wrote in the pending appeal in *Staniforth*, should they become relevant.

There is also a case pending in the Superior Court, County of Sacramento, challenging Petitioner's interpretation of *Olson I*. Respondent is not privy to the status of said case.

All of this discussion might be moot in light of the admission by Petitioner in footnote 2, at page 7, of its Opposition, which states in part: "Retirement rights vest upon employment, so judges who began judicial service at different times might be subject to different terms and conditions."

This was the basis for the Settlement Agreement and is the reason the Settlement Agreement was entered into by the parties.

Petitioner is in error on page 3 of the Opposition wherein it states that

Respondent is entitled to "49.46%" (of the applicable judicial salary). This is more than Respondent is entitled to. The correct percent is 49.4572%. This is only mentioned as we do not need an additional element of confusion.

The citation of various Civil Code sections by Petitioner is in error. This case is governed by the more specific Government Code sections 20160 and 20164(b)(1) specified above. In addition, the Civil Code sections do not apply to the matters before this Court. There was no mistake, duress, menace, fraud, or undue influence leading up to the Settlement Agreement. The mutual intent of the parties leading up to the Settlement Agreement were ascertainable and lawful. The Settlement Agreement was not a contract as meant by the Civil Code. It was a settlement of a pending legal matter.

In regard to the question of "consideration," the Settlement Agreement settled a legal dispute. Additional consideration was given when Respondent gave up his right to interest on the unpaid retirement benefits for the period May 28, 1995 to January 1, 1997.

In Note 3 in the Opposition, Petitioner states that Government Code Section 20160 (GC §20160) applies only to when a "member" wants to correct his or her own error. Respondent does not know if this interpretation is correct; however if it is, then the only section that applies is Government Code section 20164(b)(1) which applies a three year limitation on the right of Petitioner to correct errors or omissions.

The statements of Respondent in regard to GC §20160 emanates from a letter dated May 4, 2011, from Pamela Montgomery attached hereto as Exhibit X.

Based on that letter, Respondent stated in his Points and Authorities in Support of the Motion to Strike as follows:

In a letter dated May 4, 2011, Pamela Montgomery states, 'GC Section 20160 (b) requires that we correct all errors made by the System.' She overlooked that GC §20160 (a)(1) precludes any such correction under any circumstances **at this time** (more than six months after discovery of this right).

Ms. Montgomery cited 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 The Settlement Agreement. 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.

EXHIBIT F

Petitioner attached Exhibit F to his Opposition. Exhibit F is not referenced in the Opposition, and therefore Respondent moves to have it stricken. Exhibit F was attached to the Opposition to embarrass Respondent – which it does.

The fact that Exhibit F is attached, however, requires Respondent to respond. In the *Staniforth* case, then pending in the San Diego Superior Court, Respondent prepared and argued the opposition to JRS' demurrer to the Petition and Complaint in that case. The ruling on the demurrer was that it was over-ruled. Despite the fact that the ruling was in his favor, Jorn Rossi, the attorney-of-record for the Petitioners and Plaintiffs started yelling at Respondent on the steps of the courthouse, stating that he was overly cordial to Mr. Rieger (the attorney for JRS) and that it hurt Mr. Rossi's case. Mr. Rossi dismissed Respondent from the case and the case proceeded with a client, who was a law professor and who was one of his clients (the son of a justice). In the appellate decision, the ruling was against the Petitioners and Plaintiffs, except for ten of them who had retired during their protected periods. The law professor, son of the justice, wrote the briefs emphasizing the rights of those judicial retirees who retired during the protected period (which included his father), to the detriment of the other judicial retirees.

When the case was again appealed to the appellate court Mr. Rossi requested that Respondent write the briefs on appeal, which he did. The appeal is now awaiting argument.

Respectfully submitted,

November 20, 2015

Paul G Mast

Paul G. Mast

DECLARATION OF PAUL G. MAST

Paul G. Mast hereby declares that the following is true and correct.

The Settlement Agreement was not negotiated with a "JRS employee," but with the attorneys representing JRS. The Settlement Agreement was signed by Michael Priebe, the Manager of the Judges' Retirement System, Respondent did not negotiate with Mr. Priebe, convince him of anything, or in any manner discuss the litigation with him.

Respondent did not breach the Settlement Agreement as alleged by Petitioner. As set forth in Respondent's Trial Brief, the Petitioner breached The Settlement Agreement on numerous occasions throughout the years. Only after many years of attempting to have JRS abide by the Settlement Agreement did Respondent give notice, on September 10, 2010, to JRS, the State Controller, and all members of the Board of Administration of the California Public Employees' Retirement System, that if the payments due pursuant to the Settlement Agreement were not made, that he would have to consult with an attorney. After waiting nine more months, Respondent did consult an attorney.

Petitioner is also in error stating that the holding in *Staniforth v. Judges' Retirement System*, which it cites, upholds their interpretation of *Olson I*. This is not entirely true. *Staniforth* did uphold its position in part, but it did not uphold its position in regard to judges who retired during their protected periods. That Court upheld the right of ten such judges and justices to enhanced retirement benefits, subject to a consideration of whether another statute of limitations could be applied (which there is not any).

Petitioner's attorney again complains about late filing. Respondent wishes to address that. At the inception of this case, Petitioner made a motion to continue this case on the ground that the attorney, Jeffrey Rieger, handling the case had been placed on a leave of absence. Respondent did not oppose this motion and it was granted. At the same time, Petitioner made a motion on the same ground to continue the date for the filing of a Response brief in the *Staniforth* case in the appellate court. Respondent objected to that continuance.

The time for filing the brief was continued for a month until September 9, 2015. One week after these continuances were granted, Mr. Rieger returned to work.

Respondent is 83 years old and must allot and plan his time carefully. If the brief were filed on time, Respondent would have had until September 29, 2015 to file the Reply brief. Mr. Rieger did not file the Response brief on September 9, 2015 and further did not file it until the appellate court gave him a fifteen-day notice to file it. He finally filed it on October 2, 2015. Respondent was required to file his Reply by October 22, 2015 and did in fact file it on October 20, 2015.

The problem that Respondent then had was that instead of having 23 days from September 31, 2015 (the day his Reply brief would have been due) until October 23, 2015 to file his list of exhibits and witnesses, and shortly thereafter to file the Motion in Limine, Respondent had only three days, which was not sufficient time. Respondent has done his best to abide by this Court's timelines and will continue to do so.

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Irvine, California, November 20, 2015

Paul G Mast

Paul G. Mast

PAMELA MONTGOMERY LETTER – MAY 4, 2011

EXHIBIT X



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 GC 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.

JUDGES

JRS-A 000341

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The Honorable Paul Mast (Ret)
May 4, 2011
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2011

In calculating the COLA for September 1987, JRS staff inadvertently applied a 9% COLA to the salary, instead of the actual 1 9% COLA¹, 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 \$84,304.19.

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, Manager
Judges' Retirement System

JUDGES

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

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PROOF OF SERVICE

**In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.
AGENCY CASE NO. 2010-0825 OAH NO. 2015-030996**

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 [REDACTED];

On Nov 20, 2015 I served the following document(s) by the method indicated below:


**REPLY TO OPPOSITION TO MOTION TO STRIKE, DECLARATION OF PAUL G. MAST
SUPPLEMENTAL TRIAL BRIEF**

by placing the document(s) listed above in a sealed envelope(s) with postage fully prepaid and deposited it with the United States Postal Service at Irvine, California addressed as set forth below.

Jeff Rieger
Harvey L. Leiderman, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

By email to JRieger@ReedSmith.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 20, 2015 at Irvine., CA.



Marci G. Mast