PAUL G. MAST (CA Bar No. 28390)
[redacted]
Telephone: [redacted]
Email: [redacted]

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 OAH NO. 2015-030996 **RESPONDENT'S FINAL ARGUMENT** Hearing Date: November 30, 2015 Hearing Location: Los Angeles, CA

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PREFACE

This Argument is extremely lengthy, however it is necessary due to the plethora of issues raised by Petitioner that are irrelevant to the issues before this Court they must be discussed.

This Argument is hyperlinked to allow the Court to quickly move through the document if it is being considered in electronic (pdf.) form. Click inside the square around a Page number to go to that page.

The Argument is organized to make it shorter. At the beginning of most sections is a synopsis, to allow the Court to quickly determine and dispose of immaterial and irrelevant issues. If the Court agrees with the facts stated, the Court may choose to move to the next section.

There are only two legitimate issues before the Court: (1) calculation of the amount of underpayment of deferred retirement benefits due and owing to Respondent for the period January 1, 1997 to the present (Page 50); (2) calculation of the amount of deferred retirement benefits due and owing to Respondent caused by the failure of Petitioner to begin paying Respondent deferred retirement benefits on his 60th birthday (Page 56).

The other parts of the argument relate to irrelevant and immaterial issues raised by Petitioner to divert the Court in the consideration of the relevant issues. These are:

1. The attempt to re-litigate the issues which were before this Court in 1996 and which were the subject of the Settlement Agreement entered into at that time. (Pages 7 through 35)
2. The consideration of the breach of the Settlement Agreement. Petitioner breached the Settlement Agreement on numerous occasions as shown in Exhibit Q. Respondent never breached the Settlement Agreement. A party to an agreement cannot be held to

have breached an agreement if the other party has previously breached the agreement. (Pages 35 through 42)

3. Petitioner raising the issues in 1 and 2, above requires that Respondent analyze the 1969 and 1976 Amendments to Government Code section 68203, including the Supreme Court decision in *Olson v. Cory* 26 Cal.3d 672, 178 Cal.Rptr. 568 (1980) (*Olson I*). An analysis of *Olson I* is attached as Exhibit LL.

Also argued is The Motion in Limine to restrict the consideration of the amount of under payment of deferred retirement benefits due and owing to Respondent for the period January 1, 1997 to the present. (Page 46)

All of the Exhibits, previously electronically filed, and physically filed in a notebook at the hearing were authenticated in Respondent's Trial Brief and the Declaration of Paul Mast to Respondent's Trial Brief.

REPLY TO JRS' POST HEARING BRIEF

In Petitioner's "Post Hearing Brief" Petitioner begins by making vitriolic, prejudicial, inflammatory, and untrue statements in an apparent attempt to avoid the issues in the case and to prejudice the Court against Respondent. These statements are not relevant to any of the issues before the Court, are objected to, and should be stricken.

Respondent has not obtained benefits in excess of those provided by law. His deferred retirement benefits were paid pursuant to a Settlement Agreement entered into nineteen years ago as a result of contested litigation. The Settlement Agreement was entered into and prepared by Petitioner's Attorney, approved and signed by the Manager of the Judges' Retirement System, as well as approved by the Administrator of the Judges' Retirement System, the Board of Directors of the California Public Employees Retirement System. The inflammatory statement of Petitioner that in some non-stated fashion, Respondent took advantage of,

threatened, or used undue influence on unsuspecting employees of Petitioner is not based upon any evidence and is completely fallacious and prejudicial.

Petitioner's attorney cites Exhibits 5 to 8 to attempt to show Respondent was engaged in some nefarious or threatening activity. The Exhibits do not show this. Exhibit 5 is a letter dated March 27, 1995, written before any retirement benefits were paid. It simply raises the subject of calculation of deferred retirement benefits. Exhibit 6 contains an explanation of the law. Petitioner's attorney states that the letter says Respondent said he is the only retired judge vested to receive those benefits. The letter seems to say that, but in context, and reading a paragraph at the center of the second page, what it really says, is that he is the only judge with claimed vested rights who has not already started receiving retirement benefits. This is consistent with the facts, as Respondent was the youngest judicial appointee at the time he took office. Apparently the letter was part of an ongoing conversation Respondent had with Mr. Niehaus.

Exhibit 7 is a letter dated August 5, 1996 with Staff Counsel Maureen Riley wherein the reference is to the discussions of the Confidentiality Clause, which were pre-cursers to the Clause. Exhibit 8 is a cover letter to Staff Counsel Maureen Riley, also dated August 5, 1996, advising of the filing of the Response to the Statement of Issues. Nothing Exhibits 5-8 is a threat. If anything, they show Respondent attempting to be cooperative with JRS in not subjecting JRS to claims.

Exhibits 13,14, 15, and 16 were written in an entirely different timeframe: 2008 and 2009 after Petitioner, by Manager Pamela Montgomery, breached the Settlement Agreement for many years. See the section on Breach of the Settlement Agreement by Petitioner (Page 35). Exhibits 13, 14 and 15 were not threats, they were pleas for her to stop breaching the Settlement Agreement so that Respondent would not have to undertake legal action. At the trial Petitioner's Attorney examined Respondent *ad nauseum* as to why if Respondent felt he was morally wrong in promising confidentiality, he did not at that time advise other judicial retirees of the law. The reason, as testified to, was that Respondent had given his

word to Petitioner, and to Staff Attorney Maureen Reilly. (not if JRS paid him more money as Petitioner's Attorney states in his Brief)

Exhibit 16 is a letter dated January 7, 2009 to the Attorney for JRS written at the request of Pamela Montgomery. It is apparent that Ms. Montgomery expected the attorney to support her position re her failing to make COLA since 2006. The attorney apparently did not support her decision, and she stated that she would make her own decision. See the Declaration of Marci Mast, Exhibit HH, and the discussion of this in the section of Breach of the Settlement Agreement by Petitioner (Page 35).

Petitioner's attorney misstates the meaning of the letters of September 1, 2010. Respondent had been suffering the breach of JRS and Ms. Montgomery since 2006. It became clear she was intransient. These letters were a final attempt to get someone in a senior authority to take an interest and help solve the problem. It was never a demand for anyone to pay Respondent $140,000 or pay the consequences. It was a request for assistance in having the Settlement Agreement abided by. Exhibit Q shows the amount of benefits that were due at that time. This entire matter of the September 1, 2010 letters is irrelevant, as no one ever responded to or acted upon these letters in any fashion. Petitioner's attorney only brings them up, as with the earlier letters, in order to vilify Respondent and prejudice the Court against him.

Respondent at no time threatened to publicize a frivolous legal theory of threatened Petitioner with any dire consequences. Petitioner's attorney's statement that Respondent "was using the threat of publicizing his theory in order to coerce a settlement out of JRS" is unfounded, fallacious, and untrue. In 1996 Respondent was dealing with the Staff Attorney for JRS. Any agreement had to be approved by the Manager of JRS, and also by the appropriate officer of CalPERS. These are not people or entities that would make a decision contrary to law on the basis of coercion.

Respondent presented his claim in the normal manner for such claims. It was considered, researched, and evaluated by the legal department of Petitioner. Petitioner, through its attorneys, determined that Respondent's claim was valid; the Settlement Agreement was entered into. There was no nefarious conduct on the part of Respondent. (Exhibit LL attached hereto)

Petitioner's Attorney references the *Staniforth* case and states that Respondent's claim has no merit (it is "not a legal theory" as he categorizes it.) The Court in *Staniforth* did adopt, for a part of the judicial officers in the case, the fallacious argument that was based on three words taken out of context in the case (discussed in detail *infra*) and the Court did rule as to certain judicial officers that COLA enhanced retirement benefits did not reply. As to other judicial officers who retired during the protected period, the Court ruled that COLA enhanced retirement benefits did apply.

Because of gross misconduct on the part of Petitioner's attorney in presenting to the trial court a judgment from a different, unrelated case, and representing it as a judgment from the trial court in *Olson I*, the case is again before the Appellate Court. All of the issues regarding COLA enhanced benefits are again before that Court. (Exhibits MM and NN, attached hereto)

Petitioner's attorney makes a claim that Petitioner is entitled return of all COLA retirement benefits, which is in violation of Government Code section 20164(b)(1) (GC §20164(b)(1)). Petitioner ignores that GC §20164(b)(1) states that there is a limitation of three years from the date of payment in which Petitioner can reclaim any amounts paid through errors or omissions. The Settlement Agreement is binding; it cannot be rescinded; the principles of laches apply; and the principle of estoppel applies. [Discussed in detail in a complete analysis of Government Code sections 20160 to 20164.] (Page 42 ff)

There is no "principle of contract law" or any "sound public policy" that entitles JRS to correct the "amount prospectively" or to recover overpayments made to Respondent, and Petitioner has cited no authority for such.

Petitioner's attorney makes many other false statements as to the facts and particularly as to the law in The JRS' Post-Hearing Brief. These will be addressed in the discussion of the various issues in this Argument.

MOTION TO STRIKE

Synopsis:

The paragraphs in the Statement of Issues referred to in the Motion to Strike relate to the same issues as were the subject of the Office of Administrative Hearing's case [redacted] OAH No. L-9605311 in 1996. That case resulted in the Settlement Agreement entered into by the parties in 1996.

The Settlement Agreement was and is binding and can neither be rescinded nor can the issues be re-litigated.

If there were grounds for rescission, which there were not, a party would have had to promptly give notice of rescission. Notice has never been given and cannot be given 19 years after the Settlement Agreement was entered into. Civil Code Section 1691, *Gestad v. Ellichman,* 124 Cal.App.2d 831 (1954).

Changing or revoking the Settlement Agreement is barred by laches.

Attacking the Settlement Agreement is barred by estoppel.

Government Code section 20160 precludes changes in the 1996 Settlement Agreement or any prior calculations.

Government Code section 20164(b)(1) proscribes a limitation of three years for Petitioner to correct errors or omissions.

Upon granting the Motion to Strike the Court may consider going to Page 28.

Argument re Motion to Strike

In paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of its Statement of Issues, Petitioner seeks to rescind the Settlement Agreement between the parties entered into in 1996 and re-litigate the prior case [redacted] OAH No. L-9605311. That case was settled pursuant to the Settlement Agreement (Exhibit O page 5) entered into in 1996 and cannot be rescinded or re-litigated here.

As stated in the Declaration of Paul G. Mast, Respondent's Trial Brief, Respondent's Exhibits, and in testimony prior to his 63rd birthday Respondent advised Petitioner that he was entitled to cost-of-living adjustment (COLA) increases on his deferred retirement benefits (Exhibit W). Petitioner denied that Respondent was entitled to COLA increases on his deferred retirement benefits; Respondent filed a claim; Petitioner responded with a determination letter denying the claim; Respondent filed an appeal; and the matter was referred to the Office of Administrative Hearings for determination.

In the 1996 Administrative Hearing JRS filed a Statement of Issues (Exhibit N page 1). Respondent filed a Response to Statement of Issues and Points and Authorities (Exhibit N page 8). Those documents show that the issues in that prior case are identical to the issues Petitioner seeks to re-litigate.

In Petitioner's cross examination of Respondent, although who initiated any part of the negotiations or discussion resulting in the Settlement Agreement is not relevant, Petitioner seems to be alleging that the Settlement Agreement negotiations and particularly the "confidentiality clause" were initiated by Respondent. This was not the case, as Respondent testified.

Either before or immediately after Petitioner filed the Statement of Issues, telephone discussions occurred between the attorney for Petitioner, Maureen Riley, Senior Staff Counsel, and Respondent. Part of the discussions involved settlement of the case. At that time, Ms. Riley did not believe and did not acknowledge that Respondent was correct in his claim. Ms. Riley stated, however, that even if he were correct, she could not settle because of the multitude of other judges who were entitled to the same benefits. She mentioned that the total of the claims could be four hundred million dollars. Respondent indicated that he had no intention of informing other judges of the matter. The matter of a confidential settlement was mentioned, but not dwelled upon, as Ms. Montgomery did not then believe Respondent's claim was valid. Subsequent to those discussions, Respondent sent a letters dated August 5, 1995 (Exhibit O page 2) to Ms. Reilly, enclosing a copy of his then unfiled Response to the Statement of Issues (filed on August 15, 1995, Exhibit N page 8). At that time Ms. Reilly did not concede that Respondent's claim was valid.

After Ms. Reilly researched the issues, there were further discussions between Ms. Reilly and Respondent wherein Ms. Reilly conceded that Respondent was correct in his claim. A Settlement Agreement was agreed to which included a confidentiality clause.

Respondent received a letter dated September 20, 1996 from Maureen Reilly, (Exhibit O page 1), which states in part, "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."

Respondent's letter of August 5, 1996 (Exhibit O page 2) quotes *Olson I*:

> 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 judge's or justice's unlimited cost-of-living increases.**

Ms. Reilly stated in her reply letter that the position of Respondent as stated in his brief and in the letter of August 5, 1996 was adopted. The parties agreed that COLA increases were to be paid to Respondent retroactive to the beginning of the time of his receiving deferred retirement benefits and thereafter, with regular benefits and increases paid monthly beginning January 1, 1997. Respondent waived interest, which had accrued on the underpaid portion of Respondent's benefits for the period before January 1, 1997.

The parties entered into a written Settlement Agreement (Exhibit O, page 5), which was drafted entirely by Petitioner without consultation with Respondent.

A retroactive payment was made for the balance of the COLA adjusted monthly benefits for the period after May 28, 1995 to December 31, 1996. Beginning January 1997 COLA monthly benefits in accordance with the calculations of JRS were made. Benefit payments for the month are paid on the last day of the month. No interest was paid on the unpaid benefits between May 28, 1995 and the date of the retroactive payment of those benefits. In accordance with Civil Code §3290 Respondent has waived interest for this retroactive payment.

Petitioner argues that the confidentiality clause was against public policy and therefore the entire Settlement Agreement is void. Respondent does not know whether of not the confidentiality clause was against public policy and Petitioner does not present any authority for this conclusion. Petitioner would have the burden of proof.

If it were against public policy, however, it would have been Petitioner's error in putting such a clause in the Settlement Agreement. Further, the Settlement Agreement would not be voided even if the confidentiality clause were against public policy. Respondent entered into the Settlement Agreement in good faith and

without any knowledge that Petitioner was precluded, if it were, from placing a confidentiality clause into the Settlement Agreement.

The Settlement Agreement, including the confidentiality clause, was entirely drafted by Petitioner. The confidentiality clause prohibits Respondent from revealing "the terms of the agreement." From the discussions with Ms. Reilly, Respondent knew what her concerns were, and Respondent thereafter always followed what he knew her concerns were in not communicating with other judges.

At this time, however, what is material is not that understanding, but the statement "the terms of the agreement." Respondent now knows that confidentiality clauses are strictly construed and the nature of the confidentiality must be specifically stated. This was not done. This will be further discussed under Respondent Did Not Breach the Settlement Agreement. (Page 38)

What is pertinent is that if the clause were against public policy, it could not be held against Respondent who entered into it in good faith and always abided by it. It would not invalidate the Settlement Agreement, but at most would be bifurcated from it. Civil Code section 1599 states: "Where a contract has several decoupled objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Petitioner's Attorney misstates the decision in *Staniforth* 226 Cal.App.4th 978. *Staniforth* did hold that certain benefits were not due to certain judges and justices. It also held, which Petitioner does not state, that ten judges and justices who retired "during the protected period," were entitled to COLA increased benefits. Respondent did retire during his protected period. That case is now again before the appellate court, and because of allegations raised by Petitioner, the entire issue of COLA benefits for all judges and justices, not just the ten referred to above, may be considered by that court.

The *Staniforth* case is not relevant or material to these proceedings. Petitioner raises it as a diversion and a distraction and a matter of confusion. A

decision of an appellate court cannot be used to abrogate a Settlement Agreement entered into by the parties nineteen years earlier.

Petitioner makes an unsubstantiated claim that Respondent owes Petitioner a large amount of money. Petitioner has not presented any evidence of any over-payment, although an unauthenticated exhibit was attached to one of the filed documents. It is clear that the Settlement Agreement was properly entered into and there were no overpayments of deferred retirement benefits.

Petitioner's attorney neglects to include in his argument that even if there were any overpayment, Government Code section 20164(b)(1) (GC §20164(b)(1)) states very clearly that in the event of an error or omission in amounts paid to a beneficiary, Petitioner may only recoup overpayments for the last three years:

> (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.

Under Petitioner's heading, "The JRS Must Pay Benefits According to Law," Petitioner correctly cites Article XVI, section 17 of the California Constitution, which states that Petitioner is a fiduciary in regard to the Respondent. Respondent would further point out that Petitioner's Attorney is therefore also a fiduciary, and his actions to repeatedly mislead this Court, as has been shown and will be shown *infra*, is a violation of that fiduciary duty.

Petitioner cites *City of Sacramento v. Public Employees Retirement System,* (1991) 229 Cal.App.3d 1460, 1493. It concerns a question as to whether a federal law in regard to overtime may be applied to certain state employees. There is nothing relevant in this case.

Next, Petitioner cites *Mcintyre v. Santa Barbara County Employees' Ret.*

Sys., (2001) 91 Cal.App.4th 730, 734. In *Mcintyre* the question was whether the procedure followed by the retirement system in hiring experts and an attorney to evaluate the disability claim of Mcintyre was a breach of the fiduciary duty of the retirement system. The holding was that it was not. In Respondent's case, Petitioner had its attorneys evaluate the law and the claim prior to entering into the Settlement Agreement with Respondent. The *Mcintyre* case thus confirms that the procedure followed leading up to the Settlement Agreement in this case was proper, and that the Settlement Agreement is valid.

Police Officers' Ass 'n v. City of Pomona, (1997) 57 Cal.App.4th 578, 575, concerns whether a collective bargaining agreement can alter the manner in which contributions **into** CalPERS can be changed. It is completely irrelevant.

Oden v. Board of Administration, (1994) 23 Cal.App.4th 194, 201 concerns an employer's contributions into the retirement fund on behalf of the employee, and in addition the employee's compensation. It is also completely irrelevant.

Medina v. Board of Retirement, (2003) 112 Cal.App.4th 864, 871, two deputy sheriffs (classed as safety members) became district attorneys, and by error continued to be classified as safety members. The court held that the classification could be corrected and estoppel did not apply, stating "estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public." The cited part of this case is also irrelevant.

The Court further stated, which would be relevant to the case before this Court:

> In *Longshore v. County of Ventura* (1979) 25 Cal.3d 14 [157 Cal. Rptr. 706, 598 P.2d 866], the Supreme Court recognized the existence of cases which applied estoppel to the area of public employee pensions, in which the courts 'emphasized the unique importance of pension rights to an employees well-being.' (*Id.* at p. 28.) In each of these instances the **potential injustice to employees or their dependents clearly outweighed any adverse effects on established public policy.** [Emphasis supplied.]

Petitioner's Attorney again quotes a portion of a case, leaving out the provision that supports Respondent's case, in order to mislead this Court.

City of Pleasanton v. Board of Administration, (2012) 211 Cal.App.4th 522, 542-43 did not involve the question of estoppel to attempt to revoke a Settlement Agreement. It involved an attempt to invoke an equitable estoppel theory to **require** CalPERS to make retroactive payments (estop it from denying making the payments). Although the word estoppel is in the *Pleasanton* case, the word has a different meaning than the word estoppel as used in the instant case. Respondent is not attempting to apply a theory of estoppel to require Petitioner to pay deferred retirement benefits. Estoppel applies here to prevent a party from attacking a nineteen-year-old Settlement Agreement.

In addition, Petitioner's attorney misstates the holding when he says the holding was that CalPERS could not be estopped to pay a member a higher allowance. The decision clearly means that CalPERS could be estopped to pay a member a higher allowance, but in *City of Pleasanton v. Board of Administration* the facts to sustain estoppel are not present. The Court states: ". . .find section 20636 *did* at all times preclude PERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law."

The Court did discuss situations when the doctrine of estoppel would require PERS to make retroactive corrections.

The *Pleasanton* case is entirely irrelevant in this matter. The misstatement as to the ruling of the case is egregious, however, in that Petitioner's Attorney herein was the PERS attorney in that case and should have been able to cite it correctly, as well as to recognize that the case is irrelevant to estoppel in these proceedings.

Petitioner cites Civil Code section 1596, which states: "The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed."

Petitioner does not indicate why it is citing this code section, but Respondent can only assume it is in regard to Petitioner's allegation that the confidentiality clause in the Settlement Agreement is against public policy and is therefore void. Petitioner cites no authority for this.

Petitioner fails to cite Civil Code section 1599, which states: "Where a contract has several decoupled objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Thus, even if the confidentiality clause is void, the Settlement Agreement is a valid agreement.

Petitioner falsely states that Respondent (frivolously) asserts that the Respondent asserts the Supreme Court adopted a legal theory that it rejected in Olson v. Cory. This is patently wrong (Exhibit LL).

This entire consideration of the meaning of *Olson I* is not material or relevant to the issues before this Court. This was an issue that was litigated and settled by the Settlement Agreement in the 1996 proceeding before the Office of Administrative Hearings. It cannot be brought up again after nineteen years because Petitioner's Attorney wishes to try the issue again.

Petitioner correctly states that *Olson I* held that applying the 1976 Amendment to GC §68203 impaired the rights of sitting judges. What Petitioner omits is that *Olson I* also said that the rights of judicial pensioners who served at some time between January 1, 1970 and January 1, 1977 are entitled to COLA increases based on their judicial service prior to January 1, 1977 and including until the end of any term of office that began before January 1, 1977 (the protected period) were also impaired.

Petitioner speaks about the retirement benefits of a retired judge being based on a percentage of an active judge's salary. That refers to a provision in GC §75033.5 which was enacted before the 1969 Amendment to GC §68203. *Olson I* did hold that was true for payments made during the protected period, as the active judge's salary had been adjusted for cost of living changes. This is what *Olson I* meant when it used the phrase "for our purposes." The *Olson I* "purpose" was to determine benefits due prior to the date of the decision, March 27, 1980 (during the protected period). *Olson I* further held that it was a violation of the Contracts Clause of the United States Constitution to apply that provision of GC §75033.5 to the retirement benefits of retired judicial officers, in that the right to COLA retirement benefits for the time served during the protected period and before were **vested** during their judicial service.

Petitioner previously claimed that judicial pensioners with vested retirement benefit rights have no more rights to COLA than non-vested judicial pensioners. In making this claim, Petitioner interpreted the meaning a critical paragraph from *Olson I* exactly opposite to its true meaning. In the context of this paragraph non-vested judicial pensioners are those judicial pensioners who retired before January 1, 1970. **Taken in context**, and with footnote 6 (from *Olson I)* confirming it, this paragraph states 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, non-vested judicial pensioners were entitled to the same COLA retirement benefits as vested judicial pensioners. *Olson I* was dated March 27, 1980.

> 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 [footnote 6.] 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.]
>
> *Olson I* footnote 6 states:
>
> > 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.

The ruling in *Olson I* is clear: "[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* that **"a public employee's pension rights are an integral element of compensation and a vested contractual right. . ."** Since Respondent's COLA retirement benefits were vested during the period before the end of the protected period, retirement benefits based on services during and before the protected period are subject to COLA. Vesting means that COLA remains in effect for benefits paid after the end of the protected period for benefits earned during the protected period.

The telling provision is the last sentence of the paragraph wherein it states: "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." This clearly indicates that judges serving before this, during the protected period, will not be

governed by the 1976 amendment.

On page 3 line 26, of The JRS's Post-Hearing Brief, Petitioner seeks to **cite from a case that does not exist:** an opinion purportedly from a Second District opinion of Olson v. Cory. The ruling of the Appellate Court was appealed to the Supreme Court. When the Supreme Court granted a hearing, as a matter of law, the Appellate Court opinion and decision were immediately revoked and were a nullity.

Under appellate procedure in California in 1979-1980, the grant of a hearing in *Olson* "operate[d] to nullify the opinion and decision of the Court of Appeal." *People v. Ford*, 30 Cal.3d 209, 216, 635 P.2d 1176, 1179 (1981):

> without some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written.

The Supreme Court appeal was (at that time) deemed to be an appeal from the trial court.

Thus, the Supreme Court's *Olson* opinion examined the correctness of the judgment of the superior court, not the court of appeal. The opinion of the California Supreme Court in *Olson* disagreed with the conclusion of the court of appeal that the 1977 Amendment to GC §68203 was constitutional as applied to judicial pensioners in every respect. The Supreme Court held that the 1977 Amendment to GC §68203 was "unconstitutional as to certain judicial pensioners." 27 Cal.3d at 541, 636 P.2d at 538.

The dispositional clause of the Supreme Court in *Olson* – referring to the judgment of the trial court – states that "[t]he judgment is affirmed" with respect to the certain judicial pensioners *Olson* referred to in the passage quoted above. 27 Cal. 3d at 548, 636 P.2d at 542.

The striking of any appellate court opinion and its publishing are automatic. The opinion and its decision, by law, **are not to be cited for any**

purpose. Petitioner's reference does not even contain a citation, only a referral to Lexis.

This attempt to cite a non-existent case in unethical and unlawful. To do so before this Court is an insult and an affront to this Court.

Not only was the opinion revoked, the holding of the Supreme Court was just the opposite of that which Petitioner alleges. The Supreme Court did not confirm what the appellate court stated; it held the directly opposite.

The trial court had ruled that all retired judicial officers were entitled to COLA retirement benefits. The Supreme Court affirmed the trial court in respect to retired judicial officers "in part." *Olson I* held that judicial officer's retirement benefits were decoupled from active judges salaries. During such time as the active judges were receiving COLA adjusted salaries pursuant to the 1969 Amendment to GC §62803, judicial retirement benefits were based on active judges salaries. The legislature could change the salaries of judicial officers for future terms, but could not change retirement benefits as they were vested. When the 1976 Amendment to GC §62803 changed the salaries of judicial officers for future terms, it did not change the vested COLA benefits of judicial retirees. Therefore, after the protected period of sitting judicial officers, the benefits of judicial retirees would continue to have cost-of-living adjustments (COLA).

"In part" in the decision means the application of *Olson I* to a particular judicial officer varies upon dates of active service and date of retirement. The effect of *Olson I* is that there are four categories of retired judicial officers:

1. Those who retired prior to January 1, 1970 (no COLA retirement benefits);

2. Those who served after January 1, 1970, who retired during their protected period (fully vested COLA retirement benefits – Respondent is in this group);

3. Those who served after January 1, 1970 who retired after their protected period (vested COLA retirement benefits solely for the proportion of their service to the end of their protected period);

4. Those whose judicial service began after January 1, 1977 (no COLA retirement benefits).

When the Supreme Court decision said affirmed "in part," the meaning was the trial court decision was not affirmed for judicial officers in the first and fourth categories (as the trial court had ruled). Active judicial service after January 1, 1970 (and before the end of the protected period) was necessary for vested COLA retirement benefits.

When the Supreme Court stated "for our purposes" (in the paragraph quoted on Pages 16 and 17) it meant for the period until the date of its decision: March 27, 1980.

The Petitioner misstates the meaning of "vested or not" as used in the same paragraph.

When the Supreme Court stated "vested or not," it meant that during the period during which the decision was written, non-vested judicial retirees (category one) would receive the benefit of COLA retirement benefits because sitting judges were then receiving COLA salaries.

For categories three and four, the benefit of the COLA was derivative; when active judicial salaries were no longer subject to COLA, no additional COLA vested. For category three, COLA retirement benefits applied to judicial service that occurred up and to the end of the judicial officer's protected period.

***Olson I* – Footnote 7**

In reference to the statement on Page 5, line 7 of Petitioner's "JRS's Post-Hearing Brief" referring to Footnote 7 of *Olson I* Petitioner again partially quotes a portion of a reference, takes the phrase out of context, and thereby falsely argues to the Court that the Supreme Court ruled exactly the opposite of what it did rule.

In response Respondent presents footnote 7 in its entirety, segregating sections, and commenting following each segregated section with comments in brackets:

> 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, that being the increment of prorate 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 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. The second aspect of increase in *Betts*, which is disapproved in *Olson I* is what *Olson I* refers to as the fluctuating salary of the incumbent in the office occupied by the pensioner. This type of increase is not allowed for those judicial retirees receiving COLA (for the period of judicial service in which COLA retirement benefits vested).]

> 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 term "cost of living increases" is confusing out of context. While the sitting judicial officer is receiving COLA – prior to the end of the protected period – judicial retirees are also receiving the benefit of COLA.]

> the judicial pensioner's proportionate share is his basic retirement allowance and it is not increased by any cost of living factor.

["Cost of living factor" refers to increases in the basic fluctuations of the sitting judge's salary after January 1977, caused by periodic increases in judicial salaries or by subsequent legislation relating to cost of living. After the 1976 Amendment to GC §68203, until 1980 there were other cost of living adjustments with a limit of 5% increase to judicial salaries. This is not relevant here, but relates to a confusion of the terms used. Any law granting COLA to judges after 1977, would not be relevant here, and would not apply or enhance the benefits of any judicial officers receiving COLA for their protected period. "Cost of living increases" refers to COLA.]

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, B*etts* 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."

In *Olson I* the Supreme Court holds that a judicial pensioner is entitled to only one type of increase: the cost of living adjustment increase vested during the protected period. Since the judge holding the particular office is getting COLA increases as authorized by the 1969 Amendment, there would be no further increase to that COLA vested portion of retirement benefits for salary increases received by sitting jurists after 1977. In the same manner, the portion of the retirement benefits of the jurist that vested for the period after the protected period would receive the benefit of increases to the actual salaries of sitting jurists. There would be no COLA for this period. There is never a "double increment of increase."

As stated, *supra*, in this part of footnote 7 "cost of living factor" refers to increases in the basic fluctuations of the sitting judge's salary after January 1977. "Cost of living increases" refers to COLA. "Cost of living factor" refers to periodic increases in the salaries of sitting judges under the 5% limitation of the 1976 law.]

> Betts is distinguishable [from *Olson* I] 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.]

Footnote 7 states: "In the instant case [*Olson I*] 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." The Court is referring to the time in which the opinion was written, prior to March 27, 1980, wherein salaries of incumbent judges were fluctuating base on cost of living adjustments.

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.

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 judicial 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 judicial officer's salary. The jurists' retirement benefits would be calculated under two formulas: first, COLA retirement benefits for the portion earned during the protected period, but without any benefit derived from fluctuating judicial salaries after the protected period; second, for the percentage of judicial service which occurred after their protected period there would be no COLA increases as that portion of the retirement benefits would fluctuate with the sitting judicial officer's salary.

THE MEANING OF THE *OLSON I'* CONCLUSION

The Conclusion confirms what Respondent has said *supra*. The Conclusion 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.]

Olson I, in its conclusion, thereby states, as it does in the body of the opinion 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 judicial pensioners. The

Court is saying that since the 1976 law is unconstitutional as to judicial pensioners, the pension rights for judicial pensioners [who served in a judicial office during the protected period] remained the same as they were before the enactment of GC §68203, 1976 Amendment. Those pension rights were that they would receive cost-of-living adjusted retirement benefits for the length of time of their judicial service during the protected period, prior to the 1976 Amendment and until the conclusion of any term that started before January 1, 1977.

It is not stated explicitly in the Conclusion, but it is clear that the meaning of the Court is that for any judicial service earned in a new term that began after the first day in January 1977, that retirement benefits would not earn vested cost-of-living adjusted retirement benefits. *In re Marriage of Alarcon* (1983) 149 Cal.App.3d 544 , 196 Cal.Rptr. 887 (*Alarcon*) confirms this in the following passage:

> 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, and the appeal was designated as being an appeal from the trial court. The trial court had entered a judgment declaring that the GC §60823, 1976 Amendment was unconstitutional as to all retirees (not only those who had service during the protected period). The *Olson I* judgment affirmed that part of the judgment of the trial court that the GC §60823, 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. *Olson 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 January 1, 1970).

If there is any question as to the continuous right to the already vested retirement benefits continuing to be vested despite taking a new term after the GC §60823, 1976 Amendment, *Betts* makes it clear when it stated, *supra*:

> '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]. *Betts, supra. at* 29.

Alarcon agrees: "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, supra.*

Respondent never threatened to publicize a legal theory, frivolous or not. Respondent's legal analysis was correct and all qualifying retired judges should have been paid in accordance with the law. The Judges' Retirement System chose

not to so pay other judges enhanced retirement benefits, but that is not a matter that should be considered by this Court.

There are neither "basic principles of contract law" nor public policy that pertain to this case. The Settlement Agreement is not a contract, but an agreement settling then pending litigation. Petitioner has cited no law that would relate any "public policy" to the matter before this Court.

THE SETTLEMENT AGREEMENT CANNOT NOW BE RESCINDED

Petitioner argues that it wants to rescind the agreement; it wants recalculate the amount due under the Settlement Agreement. This would be wrong. The calculation done by JRS in 1996 was an integral part of the Settlement 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.

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 1691 addresses the issue of timeliness as follows:

> ... to effect a rescission a party to the contract must, promptly 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 demurable. 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.

JRS had full knowledge of the facts, had full knowledge of the appropriate Consumer Price Index (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 nineteen years clearly precludes their ability to rescind or attack the Settlement Agreement. As stated, *infra,* the Settlement Agreement incorporated the calculations of the retirement benefits and arrearages that were integral to the Settlement Agreement.

Petitioner has not even tried to show reasonable diligence to act to rescind the Settlement Agreement, and cannot do so after the passage of nineteen years. Respondent does not know, and was not advised by JRS, what factors were used for the calculations. Whatever they were, Respondent and JRS are bound by the amounts used by JRS in 1996 during the calculations used in the Settlement Agreement to determine the arrearages as well as the amount of the January 1, 1997 retirement benefit, which was the starting point for the subsequent calculations.

Petitioner cites Civil Code section 1636, "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Also applicable is Civil Code section 1638, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

The Settlement Agreement properly gives effect to the mutual intention of the parties as shown by its language. Petitioner seems to claim that the Settlement Agreement was unlawful, based on an appellate court decision some nineteen years later, which Petitioner claims came to an interpretation of *Olson I* that was different than the interpretation made by the Petitioner and the Respondent at the time they entered into the Settlement Agreement. Even ignoring the facts that the Appellate Court did not arrive at a different interpretation as to judicial officers who retired during the protected period (as did Respondent), and that the decision that they did make was based on a misrepresentation of Petitioner's attorney, as shown elsewhere in this Argument. The Settlement Agreement cannot be rescinded nineteen years later on the basis of a decision in an unrelated case.

The *Little* case cited by Petitioner has no relevance. It concerns an arbitration agreement relating to an employee. Interestingly, however, the case states: "the offending provision can be severed and the rest of the arbitration agreement left intact." This is relevant if credence is given to the unproven theory of Petitioner that the confidentiality clause of the Settlement Agreement is against public policy, and is therefore unlawful. This is discussed at Page 39.

Little further states, "Moreover, there is no indication that the state of the law was 'sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that this [appellate arbitration provision] was drafted in bad faith.' (*Armendariz, supra,* 24 Cal.4th at pp. 124-125, fn. 13.)" In the instant case, despite the various assertions of Petitioner's attorney, there is no evidence that the Settlement Agreement was drafted by Petitioner in bad faith. The reason there is no evidence is that there was no bad faith by either party. As in *Little,* in the instant case there was no indication that the that the state of the law was sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that this [Settlement Agreement] was drafted in bad faith.

The reference to the *Markman* case is not relevant. There is no dispute that Respondent's rights are based on the 1969 Amendment to GC §68203. Nothing further, nothing less.

Oden discusses bargaining agreements. That does not relate to this case, which is based upon a statute.

Summit Media LLC concerns a Settlement made in direct contravention of a statute. Nothing similar to that is present in this case wherein the basis of the case is to abide by the 1969 Amendment to GC §68203. *League of Residential Neighborhood Advocates* is a federal case concerning the necessity of a public hearing before taking an action. *Trancas* pertains to an agreement not to follow regulatory procedures. None of these cases are at all relevant to the matter before this Court.

Even if these cases were in some manner relevant, the rescission of the agreements took place promptly, timely, and upon notice as required by law.

In footnote 2 of The JRS' (1) Opposition to Respondent Mast's Motion to Strike, and (2) Pre-Hearing Brief, Petitioner states:

> Retirement rights vest upon employment, so judges who began judicial service at different times might be subject to different terms and conditions. For example, judges who began their service on or after November 9, 1994 are members of the Judges' Retirement System II, rather than the JRS.

This is a correct statement of the law. It is the basis for the holding in *Olson I,* the determination of the law which led to the Settlement Agreement, and confirms that when Petitioner's Attorney mislead the Appellate Court in *Staniforth* in his argument regarding the "vested or not" paragraph, *supra,* his argument to the Court was wrong. As referred to elsewhere herein, the question whether cost-of-living adjustments as part of judicial pensioners retirement benefits were vested during judicial service during the protected period and before is again before the Appellate Court in the second appeal in the *Staniforth* case.

CHANGING OR REVOKING 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 agreement is barred by laches. In *Fabian v. Alphonzo E. Bell Corp.*, 55 Cal.App.2d 413, 415, 130 P.2d 779, 781, 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 1996 Settlement Agreement was created nineteen years ago.

As shown in *Fabian*, it is not material and should not be considered whether Respondent was prejudiced by the nineteen-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*, 415.

In *Gestad* 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.*

Laches precludes attacking the Settlement Agreement at this time.

ATTACKING THE SETTLEMENT AGREEMENT IS BARRED BY ESTOPPEL

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, during the conduct of the discussion prior to the Settlement Agreement JRS led Respondent to believe that they would calculate the amount of the COLA for Settlement Agreement. This constitutes 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 an integral part of and incorporated into the Settlement

Agreement as well as the initial calculation that was the basis for subsequent years. JRS is neither permitted to change or contradict the Settlement Agreement nor the calculations that were an integral part of it. Estoppel applies.

PETITIONER'S ATTORNEY'S FALSE ALLEGATIONS ABOUT RESPONDENT

Respondent filed a claim, the claim was denied, Respondent filed an Appeal of the Denial, a Statement of Issues was filed, negotiations with the Attorney for JRS began, a Response to the Statement of Issues was filed. Maureen Reilly, the attorney for JRS, researched the issue and agreed with Respondent as to his COLA rights, but was reticent to go forward with a settlement because of the rights of other judicial retirees. A Settlement Agreement was reached. Respondent did not represent that he was the only judge entitled to COLA increased retirement benefits.

There were no threats by Respondent and no improper influence on the attorney or other employees of JRS, and there is no evidence to the contrary.

Petitioner's attorney makes unsubstantiated allegations, that are immaterial and irrelevant, even if they were true – which they are not.

Respondent at all times did nothing but attempt to have JRS comply with a legal Settlement Agreement. JRS never suggested that the agreement was anything but lawful. One manager of JRS, Pamela Montgomery, took the attitude that she did not want to comply with the agreement, and for over five years she attempted to avoid complying with the Settlement Agreement, see Page 35.

Respondent's letters to JRS from 2005 to 2010, and the letters to JRS, the State Controller, and the Members of the Board of CalPERS were in no way threats, as Petitioner's attorney alleges as he again takes their meaning out of context. They were pleas to cooperate in complying with the Settlement Agreement. Respondent did alert them to the unintended consequences that would follow if Respondent were forced to engage an attorney to represent him in enforcing the Settlement Agreement.

In Court Petitioner's attorney examined repeatedly asked Respondent why he continued to urge JRS to comply with the Settlement Agreement, when Respondent felt he acted immorally in not alerting other retired judges to their rights to COLA on their retirement benefits. Petitioner's attorney again fails to see the context. Respondent, despite later regretting thinking only of himself, gave his word to Maureen Riley and JRS. Despite the fact that the confidentiality clause, only limited revealing the "Terms of the Agreement," Respondent did not speak to anyone about their rights or what the law was.

Petitioner raises an appellate court case, *Staniforth,* claiming it as a basis for voiding the Settlement Agreement. An appellate court case, nineteen years after the parties entered into a valid Settlement Agreement reached in settlement of litigation between the parties, does not have any relevance and cannot be authority for voiding the nineteen-year old Settlement Agreement. The *Staniforth* case is irrelevant in these proceedings. Even if it were relevant, it cannot overrule a Supreme Court decision handed down in 1980.

Petitioner's Attorney again takes a part of a decision out of context and misrepresents it. What Petitioner states is only part of the decision. The *Staniforth* court also stated that in regard to judicial officers who retired during the protected period (of which Respondent was one), COLA to their retirement benefits were applicable. This issue is again before the same appellate court. The entire question of COLA to judicial pensioners will be considered. (See Exhibit MM, Appellant's Opening Brief, and Exhibit NN, Appellant's Reply Brief, attached hereto.)

Petitioner cites Civil Code section 1636, "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Also applicable is Civil Code section 1638, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

The Settlement Agreement properly gives effect to the mutual intention of the parties as shown by the language in the Settlement Agreement. Petitioner

seems to claim that the Settlement was unlawful, based on an appellate court decision some nineteen years later, which Petitioner claims came to a conclusion that the interpretation of *Olson I,* was different than the conclusion made by the Petitioner and the Respondent prior to the time they entered into the Settlement Agreement. Even ignoring the facts that the appellate court did not arrive at a different conclusion as to judicial officers who retired during the protected period, and that the decision that they did make was based on a misrepresentation of Petitioner's attorney, as shown elsewhere in this Argument, a valid Settlement Agreement cannot be rescinded nineteen years later on the basis of a decision in an unrelated case.

Respondent did not breach the Settlement Agreement. (Page 38)

Even if Petitioner were entitled to recover any amounts from Respondent, Petitioner's Attorney again takes phrases out of context and partially states the law in advocating a result contrary to law. There is a limitation period of three years from the date a payment was made for the Petitioner to recoup any amount paid because of an error or omission (Government Code section 20164(b)(1), *infra.*)

PETITIONER'S BREACH OF SETTLEMENT AGREEMENT

Synopsis:

Subsequent to the Settlement Agreement the Petitioner failed to make proper adjustment's to Respondent's deferred retirement benefits, including making any from 2006 to 2010. Each of these failures is a breach of the Settlement Agreement by Petitioner. Respondent makes no claim to any penalty for these breaches. Under the law, Petitioner cannot claim a breach by Respondent subsequent to Petitioner's breach of the Settlement Agreement.

The Court may consider going to Page 38.

The Settlement Agreement was breached by the failure of JRS to abide by the Agreement in failing to make COLA to the benefits as stated *supra.*

Pamela Montgomery, Manager of JRS, stopped the COLA to Respondent's deferred retirement benefits about 2006. Ms. Montgomery directed her staff not to make Cost of Living Adjustments to Respondent's benefits (Exhibit T). Respondent wrote a multitude of emails and letters to Ms. Montgomery from 2006 to 2010, requesting the benefits be adjusted and asking for information about what was happening.

The following facts are from the Declaration of Marci Mast to Respondent's Trial Brief) filed herein.

It is undisputed that Ms. Montgomery unilaterally stopped Respondent's deferred retirement benefits COLA. In January 2009 she created a façade of cooperation by speaking with Marci Mast; describing Petitioner's difficulties understanding what to do; claiming that she was waiting for a response "from legal," which she contacted in July 2008; and requesting that Respondent submit a copy of a meaningless letter, which Respondent had not received; she also asked Respondent to write her a letter for her to forward to the attorney, to which she would request that the attorney contact Respondent.

These facts show that Ms. Montgomery claimed that Petitioner's 1996 calculations did not exist or could not be found and that the new staff could not re-create the calculations or back into the numbers. Respondent was certainly not accountable for any incompetence of Petitioner in hiring proper staff or maintaining proper records. Ms. Montgomery claimed that because Petitioner did not know which Consumer Price Index (CPI) to use, she wanted to ignore the Settlement Agreement and restart calculations. Ms. Montgomery used diversionary and delaying tactics.

By July 2009 Respondent learned that the attorney would not communicate with him, that attorney advice to Ms. Montgomery is confidential, and that she will either take advice or not. After a long delay for her to receive the attorney's direction, she revealed that she would decide what to do.

In 2010 Respondent learned that Petitioner's confusion and ill-trained staff issues continued. In a telephone conversation, Ms. Montgomery said that Steve B. [Benitez] "did not know how to calculate" Respondent's COLA. In a later telephone conversation she said that Steve B. "now knows what to do," but that she refused to do it.

Initially founded on Ms. Montgomery not agreeing with the Settlement Agreement, couched in "not understanding," "too vague" and blamed on "not knowing what to do." In this Court's hearing Petitioner expanded this to question Respondent's conduct in having the Settlement Agreement created.

In 1996 Staff Counsel, Maureen Reilly, represented Petitioner; her interests aligned with those of Petitioner. Today Petitioner is represented by outside counsel, with independent pecuniary interests. The ability of Petitioner's counsel to charge more fees as the case continues, incentivizes the creation of allegations; motivates misquotes and misrepresentations of case law and statutes; ignores the potential additional amount of interest liability of Petitioner; ignores the Settlement Agreement; and rewards failure to make a sincere effort to resolve the case. This supports Respondent's argument.

Petitioner continues to breach the Settlement Agreement as shown in a letter dated September 18, 2015 (Exhibit V page 17) advising Respondent of a COLA increase based on "the California Consumer Price Index, Urban Wage Earners and Clerical Workers (CCPI-W), December 2013 to December 2014." See Page 53 for discussion of the proper CPI.

In December 2002 a benefit increase and a partial arrearage payment were made. Thereafter, until April 2005, there were neither benefit increases nor arrearage payments, except for a partial arrearage payment in December 2003. The failure to make any benefit increases from December 2002 through April 2005 was a breach of the Settlement Agreement. From April 2005 until August 2010 there were neither benefit increases nor arrearage payments.

During all or part of the period from 2006 to 2010 Ms. Montgomery recalculated the CPI many times, including recalculating the calculations done by JLVFF prior to January 1, 1997. (JLVFF is the part of JRS that calculated the benefits due Respondent. Exhibit L page 1) Ms. Montgomery found a CPI category which was not used by JLVFF, not used by the Controller's Office, not used by Respondent, and which was an improper CPI. August 2010 she then created an accounting, claiming that JLVFF had made an error in its initial calculations, and that all the CPI calculations had been made in error. She stated that an amount was due to Respondent, and had that amount, $10,880, sent to Respondent's account, as reflected in Exhibit Q.

Petitioner's August 2010 payment of $10,880 and the statement that an amount was due for unpaid deferred retirement benefits were clear admissions that JRS breached the Settlement Agreement prior to August 2010.

Respondent rejected this accounting entirely, as he advised Ms. Montgomery.

RESPONDENT DID NOT BREACH THE SETTLEMENT AGREEMENT AS PETITIONER ALLEGES

Synopsis:

Petitioner breached the Settlement Agreement multiple times between 2003 and 2010 when failing to abide by the Settlement Agreement to increase Respondent's retirement benefits as was required and therefore not properly paying Respondent's retirement benefits. Petitioner continues to breach the Settlement Agreement in not calculating current increases pursuant to CCPI-U (All Urban Consumers). Respondent has not breached the non-disclosure clause in the Settlement Agreement. Non-disclosure clauses must be strictly construed. The non-disclosure clause prohibits Respondent only from disclosing the "Terms of the Agreement." Respondent never disclosed the "Terms of the Agreement."

Petitioner alleges that non-disclosure agreements by Petitioner are "against public policy." If so, there was no valid clause for Respondent to breach.

Anything Petitioner is alleging as a breach by Respondent would have occurred subsequent to the breach of the Agreement by Petitioner.

The Court may consider going to Page 42.

Petitioner breached the Settlement Agreement multiple times between 2003 and 2010 when failing to abide by the Settlement Agreement to increase Respondent's retirement benefits as was required and therefore not properly paying Respondent's retirement benefits. Petitioner continues to breach the Settlement Agreement by not calculating current increases pursuant to CCPI-U (All Urban Consumers). Respondent has not breached the confidentiality clause in the Settlement Agreement. Anything Petitioner is alleging as a breach by Respondent would have occurred subsequent to the breach of the Settlement Agreement by Petitioner.

Petitioner's attorney stated during the Meet and Confer telephone conference on November 6, 2015 that began at 10:05 a.m. that the phrase in the Settlement Agreement "each party will keep the terms of this agreement confidential" is invalid as against public policy. In addition, he stated all of the documents relating to the matter are of public record and are available to anyone.

It is not possible to violate the terms of an invalid confidentiality provision.

Nevertheless, Petitioner has alleged that Respondent breached the confidentiality clause in the Settlement Agreement by consulting an attorney in 2011, after the claim in this matter was denied. Said allegation is completely false.

Respondent did not understand or know this in 1996. Respondent entered into the Settlement Agreement in good faith and thereafter abided by the confidentiality clause in good faith. If it is in fact an invalid provision, it would be bifurcated out of the Settlement agreement, and the terms of the Settlement

Agreement would still be binding on the parties. Civil Code section 1599 states: "Where a contract has several decoupled objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Respondent did not reveal the terms of the Settlement Agreement to anyone until he consulted with an attorney, nine months after the letters of September 1, 2010.

The confidentiality clause states that the "Terms of the Agreement" would not be disclosed. Respondent never has disclosed the terms of the agreement to anyone other than the attorney. Non-disclosure agreements (confidentiality clauses) must be strictly construed. Consulting an attorney in regard to a breach of the Settlement Agreement cannot be construed as a breach of the confidentiality provision, if there were such a valid provision.

In re *Marriage of Williams* 29 Cal. App. 3d 369 states:

> Where the parties question the interpretation of critical language in an instrument, the language will generally be held to be ambiguous (see Collins v. Home Savings & Loan Assn. (1962) 205 Cal. App. 2d 86, 97 [22 Cal.Rptr. 817]), and where ambiguity or uncertainty in the terms of a written instrument cannot otherwise be reconciled, the agreement must be construed most strictly against the party whose agent prepared the instrument or the ambiguous portion thereof. (Civ. Code, § 1654; Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 162 [94 Cal. Rptr. 453]; Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399 [81 Cal. Rptr. 140].)

Terms of the Agreement means only what the terms of the agreement were. It does not preclude discussing the law or the rights of other retirees pursuant to *Olson I*. Respondent, however, did not discuss the law with anyone except for his attorney.

Prior to consulting an attorney, Respondent communicated by letter dated September 1, 2010 with Pamela Montgomery, Manager of JRS (Exhibit U page 1). On the same day, September 1, 2010, Respondent also communicated by letters

mailed to John Chiang, the State Controller, and each and every member of the Board of Directors of the California Public Employees' Retirement System (CalPERS) (Exhibit U page 7 ff.). Respondent outlined the breach of JRS, and as an attachment to the letter sent a copy of the letter dated September 1, 2010, which was sent to Ms. Montgomery on the same day. Respondent requested their assistance in curing the problem, and gave notice of Respondent's intent to consult an attorney. Respondent received no reply from anyone.

Petitioner, the State Controller, and the Board of Directors of CalPERS were all put on notice of Respondent's intent to engage an attorney, and the probable effects thereon in regard to other judicial pensioners making claims for unpaid retirement benefits. They all elected not to take any action.

Petitioner accuses that in some manner corresponding with JRS and CalPERS was some nefarious act. It was not. It was a plea for help in resolving a problem that had remained unsolved for five years. This allegation is ridiculous and immaterial to the case, as the letters were not responded to or acted upon in any fashion. As such, they do not relate in any manner to the issues before this Court.

Respondent waited nine months after the letters of September 1, 2010, hoping that there would be a response, before consulting with an attorney on May 16, 2011.

Petitioner had already breached the Settlement Agreement at the time Respondent consulted an attorney, thus no action on Respondent's part could have constituted a breach. Nevertheless, Respondent did not discuss or reveal the "Terms" of the Settlement Agreement to anyone other than the attorney.

Respondent did not breach the Settlement Agreement.

GOVERNMENT CODE SECTIONS 20160 THROUGH 20164

Even if Petitioner were entitled to recover any amounts from Respondent, Petitioner's Attorney takes phrases out of context and partially states the law in advocating a result contrary to law. There is a three-year limitation period from the date a payment was made for the Petitioner to recoup any amount paid because of an error or omission (Government Code section 20164(b)(1), *infra.*)

Petitioner's Attorney has made many misrepresentations in regard to Government Code sections 20160 through 20164. This necessitates Respondent presenting a complete analysis of said sections.

The final result of the applicability of these sections to the case before this Court is very concise and very simple. GC §20164(b) states: "**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. . . ," [Emphasis supplied]

The only thing in issue in this case is "payments into or out of the retirement fund." Therefore, in accordance with GC §20164(b), the remainder of GC sections 20160 through 20163 are irrelevant and need not be considered.

Following the above-quoted portion of GC §20164(b) the section continues with the manner of payments into or out of the retirement fund. In regard to payments into the retirement fund, GC §20164(b)(1) states: "**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.**" [Emphasis supplied]

The law as it applies to the instant case is that if Respondent were to owe any amount to Petitioner, the right to recover would be limited to three years subsequent to the date of the erroneous payment. As to any amount owed to Respondent by Petitioner, there is no period of limitation that applies. This is

consistent with laws prevailing regarding the obligations of fiduciaries to its beneficiaries (which is the case here). See the section on Statute of Limitations, *infra* (Page 74.)

Government Code sections 20160 through 20164 (with the deletion of some irrelevant portions that have not been raised by Petitioner) are as follows:

> 20160. (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.**
> [subsections omitted]
> (c) The duty and power of the board to correct mistakes, as provided in this section, **shall terminate** upon the expiration of obligations of this system to the party seeking correction of the error or omission, **as those obligations are defined by Section 20164.** [subsections omitted]
>
> 20161. [section omitted – there is no section 20162]
>
> 20163. (a) If more or less than the correct amount of contribution required of members, the state, or any contracting agency, is paid, proper adjustment shall be made in connection with subsequent payments, or the adjustments may be made by direct cash payments between the member, state, or contracting agency concerned and the board or by adjustment of the employer's rate of contribution. Adjustments to correct any other errors in payments to or by the board, including adjustments of contributions, with interest, that are found to be erroneous as the result of corrections of dates of birth, may be made in the same manner. Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled. Losses or gains resulting from error in amounts within the limits set by the California Victim Compensation and Government Claims Board for automatic write off, and losses or gains in greater amounts specifically approved for write off by the California Victim Compensation and Government Claims Board, shall be debited or

credited, as the case may be, to the reserve against deficiencies in interest earned in other years, losses under investments, and other contingencies.

(b) No adjustment shall be made because less than the correct amount of normal contributions was paid by a member if the board finds that the error was not known to the member and was not the result of erroneous information provided by him or her to this system or to his or her employer. The failure to adjust shall not preclude action under Section 20160 correcting the date upon which the person became a member.

(c) The actuarial equivalent under this section shall be computed on the basis of the mortality tables and actuarial interest rate in effect under this system on December 1, 1970, for retirements effective through December 31, 1979. Commencing with retirements effective January 1, 1980, and at corresponding 10-year intervals thereafter, or more frequently at the board's discretion, the board shall change the basis for calculating actuarial equivalents under this article to agree with the interest rate and mortality tables in effect at the commencement of each 10-year or succeeding interval.

20164. (a) . . . [The omitted portion pertains to "optional settlements," which are not in issue here.]
The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting agencies to this system in respect to retired members formerly employed by them, respectively, **continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged.** The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.
(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.**
(2) **In cases where this system owes money to a member or**

beneficiary, the period of limitations shall not apply. [further subsections are not relevant.] [Emphasis supplied.]

CALIFORNIA GOVERNMENT CODE SECTION 20160 PRECLUDES CHANGES IN THE 1996 SETTLEMENT AGREEMENT AND ANY PRIOR CALCULATIONS

Response to the irrelevant allegations of Petitioner regarding GC §20164(b), (b)(1), and (b)(2), *supra.*

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 now.

Contrary to the invocation of Section 20160 by Ms. Montgomery, Petitioner's Attorney in this proceeding states and alleges that Section 20160, and its six-month limitation, applies only to retirement benefit beneficiaries and not to JRS. True or not, this provision of Section 20160 does not apply. Government Code Section 20160(a)(1) (six months), controls.

Petitioner's Attorney, contradicts his witness and states that GC §20160 does not apply, that GC §20163 applies. Petitioner's Attorney cites GC §20163 out of context and ignores the controlling GC §20164(b), which

states in part, *supra*: "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. . ."

Government Code section 20164(b)(1) provides a the three-year limitations period for the adjustment of errors or omissions made by the Judges' Retirement System, or where the Judges' Retirement System makes an erroneous payment to a member or beneficiary, as follows:

> (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.** [Emphasis supplied]

Thus, if Petitioner made any errors in calculating the COLA or the initial amount of benefits due in January 1997, Petitioner had three years to correct any such errors. Three years has long since passed. If there were any overpayments since January 1997, Petitioner's right to collect from Respondent would only apply within three years of any such payment.]

MOTION IN LIMINE

IN 1996 THE PARTIES ENTERED INTO A SETTLEMENT AGREEMENT IN REGARD TO THE THEN PENDING LITIGATION, OAH NO. L-9605311. AS AN INHERENT PART OF THE SETTLEMENT AGREEMENT PETITIONER (JRS) COMPUTED THE AMOUNT OF COLA ADJUSTED BENEFITS DUE AS WELL AS THE AMOUNT OF THE INITIAL DEFERRED RETIREMENT BENEFITS THAT WERE DUE ON JANUARY 1, 1997.

THE INITIAL COMPUTATION BY JRS IS BINDING ON BOTH

PARTIES.

Synopsis:

Petitioner and Respondent entered into a Settlement Agreement at the end of 1996. Pursuant to the Settlement Agreement, Petitioner, without consultation or input from Respondent, Petitioner calculated the amount of unpaid deferred retirement benefits due Respondent to January 1, 1997, and also calculated the amount of deferred retirement benefits beginning January 1, 1997. Said calculations and amounts were accepted by Respondent and became an integral part of the Settlement Agreement.

Petitioner herein attempts to recalculate the amount of deferred retirement benefits, recalculating COLA beginning in 1979. Petitioner has not been able to determine what it did to arrive at the calculations that were used in regard to the Settlement Agreement on January 1, 1997, or what those calculations were.

Petitioner has produced no evidence that the prior calculations were incorrect or what they allege would be the proper calculations.

Petitioner calculated in 1996 that the deferred retirement benefit to be paid to Respondent effective January 1, 1997 was $5,893.83.

The Motion in Limine should be granted: calculations of errors in the amount of deferred retirement benefits should begin January 1, 1997, with the benefit amount effective January 1, 1997 of $5,893.83.

The Court may consider going to Page 50.

Petitioner's computation during 1996 leading up to the payment of arrearages before January 1, 1997 and the initial benefit payment effective January 1, 1997 were an inherent part of the Settlement Agreement binding on both parties. See the Respondent's Notice of Appeal (Exhibit V page 1 ff.) in 2011 leading to this proceeding; the Statement of Issues filed by Petitioner (Exhibit N page 1); and the Response to the Statement of Issues filed by Respondent (Exhibit N page 8).

PRE-1997 CALCULATIONS

In 1995 Respondent claimed that he was entitled to cost-of-living adjustments (COLA) on his deferred retirement benefits. As stated above, Respondent filed a claim; Petitioner denied said claim; Respondent appealed the denial; and proceedings began before the Office of Administrative Hearings (OAH). During those proceedings, the parties settled all issues pursuant to The Settlement Agreement entered into between the parties. Petitioner has breached said Agreement by failing to apply the proper COLA throughout the years. Respondent has not breached the Agreement. An unpaid amount of deferred retirement benefits is due to Respondent.

In the Pre-trial Hearing in this case, the Court stated that she would only consider the adjustments and calculations after the Settlement Agreement, January 1, 1997. However, no formal order was made.

Paul G. Mast, in his Declaration re Respondent's Trial Brief filed in these proceedings, testified:

> JRS in this proceeding attempts to allege that their calculations prior to January 1, 1997 were in error. Declarant does not agree that the calculations were in error. It is virtually impossible for either JRS or Declarant to determine at this time what JRS did when making the calculations prior to January 1, 1997. In addition to the fact that both parties accepted the calculations of JRS leading up to January 1, 1997, it is clear and undisputed that a statute of limitations applies to JRS' ability to now attack or question the calculations that it made, under Government Code §20164 (b)(1) which states that: in case of an error or omission, or an overpayment to a retiree, JRS has a limit of three years to correct an error or omission, or to make a claim for such overpayment.

In Respondent's Notice of Appeal, dated May 31, 2011, he stated the following, which was reiterated in Respondent's Declaration re Trial Brief, and is still true and correct:

> 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 Agreement as fully settling their dispute. Mast relied on the Settlement Agreement. JRS relied on the Settlement Agreement. JRS continued to rely on it in subsequent years. JRS had sole responsibility for calculation of the recalculated retirement allowance. 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 Agreement.[This is slightly wrong. It was after the signing of the Settlement Agreement, but was part of the Settlement Agreement. The JRS calculations were used as the basis for the Settlement Agreement. The amounts were acceptable to both JRS and Mast . . .
>
> Demand was made by JRS during the negotiations that Mast waive the accrued arrearages. Mast declined to waive the accrued arrearages, and the accrued arrearages were paid at or about the time of the signing of the Settlement Agreement. JRS and/or its attorneys drafted the entire Settlement Agreement . . .
>
> Mast specifically remembers this because he was asked to waive the arrearages in a specific amount. [This sentence is from page 4 of the Notice of Appeal.]

Civil Code Section 1523 discussed precludes the recalculation of benefits prior to January 1, 1997:

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

Said attempt by Petitioner to recalculate *ab initio* the monthly benefits [benefits] which were calculated by Petitioner prior to creation of the 1996 Settlement Agreement is unlawful in that the agreed upon amounts and subsequent Settlement Agreement were an Accord and Satisfaction; any such

recalculation is barred on the grounds of the rules governing rescission of agreements, laches, and estoppel *supra*.

These doctrines were previously discussed.

Consideration was raised by Petitioner's Attorney. The Settlement Agreement sets forth the consideration: "Mast expressly waives his right to appeal this matter further to JRS or any other competent jurisdiction," "Each party will bear their own costs in negotiating the terms of this agreement," and "The parties are settling this matter solely to avoid the expense and uncertainty of litigation." Additional consideration was: foregoing the right to file suit; foregoing the right to continue with a suit; and Respondent's waiver of interest for the period May 28, 1995 to January 1, 1997.

The determination of the underpayment of COLA deferred retirement benefits should begin effective January 1, 1997, and should be based on the benefit determined and paid effective January 1, 1997 by JRS.

The calculations of Petitioner prior to January 1, 1997, for the period May 28, 1995 to January 1, 1997, including the deferred retirement benefits and the amount of deferred retirement benefits calculated effective January 1, 1997, cannot be changed.

CALCULATION OF UNPAID DEFERRED RETIREMENT BENEFITS FROM JANUARY 1, 1997 TO THE PRESENT BASED UPON THE SETTLEMENT AGREEMENT

The initial amount of deferred retirement benefits (January 1997) paid to Respondent was $5,893.83 (Exhibit P page 1). Page 1 of Exhibit P is a letter from Jim Niehaus, Retirement Program Specialist II of JRS, stating that for the first six months of 1997 the benefits were erroneously paid at $5,720.08 and that a catch-up payment was being made to bring the amount of the benefits paid for the period to $5,893.83 per month. This is confirmed by a schedule provided by Petitioner

(Exhibit P page 2). That schedule lists all the benefits received by Respondent from May 1995 until April 2010. Respondent confirmed that the schedule is correct. The schedule of benefits received (Exhibit P page 2) reveals that from January 1997 until the time JRS stopped making COLA to the benefits, *infra*, the COLA was erroneously made effective January of each year instead of September of each year as dictated by GC §68203.

In order to properly compute the deficiency in the amount of deferred retirement benefits due Respondent after January 1, 1997, it is necessary to first determine when the adjustments must be made and to identify the proper CPI Index to use.

Olson v. Cory, I, 27 Cal.3d, 636 P. 2d 532 (1980), (*Olson I*) states in its conclusion:

> 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.

Government Code section 68203 as amended in 1969 (1969 Amendment GC §68203) provided for judicial salary increases (COLA adjustments) to be applied annually on September 1, based on the CPI index of the State of California for the previous year as follows:

> 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 to 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.

THE PROPER CONSUMER PRICE INDEX TO USE IS ALL URBAN CONSUMERS (CCP I–U)

As testified to in the Declaration of Paul G. Mast to Respondent's Trial Brief:

The California Supreme Court stated that the increase for the year 1976 was 5.327%. They were referring to the increase from December 1975 to December 1976. By referring to the Consumer Price Index for this period The Supreme Court was referencing the California Consumer Price Index for All Urban Consumers (CCPI-U) and not the California Consumer Price Index for Wage Earners and Clerical Workers (CCPI–W).

In the Trial Brief Declarant has put forth the portion of the Consumer Price Index of the State of California for the years 1975 and 1976. The change in the index for CCPI–U is stated to be 5.4%. The change in the index for CCPI–W is stated to be 5.5%. Declarant has manually computed the increases. The manual calculation of the amount of increase indicates that the change for CCPI–W is accurate at 5.5%. The manual calculation of the amount of increase for CCPI-U, however, indicates that the more exact calculation of the increase is 5.350554%. The Supreme Court stated the increase was 5.327%. The difference between the manually calculated percentage and the Supreme Court stated percentage is 0.023554%, which is minimal.

According to the records of the JRS, the salary of a municipal court judge in 1976 was $3,769.57. Increasing that salary by the Supreme Court percentage (5.327%), the September 1, 1977 salary would be $3,971.27, whereas if it were adjusted by the manually calculated increase (5.350554%), the September 1, 1977 salary would be $3,970.39. The difference between the two calculated increases is 88 cents.

It is clear, therefore, that the Supreme Court in their calculations was using the Consumer Price Index for All Urban Consumers (CCPI–U). The difference between the manual calculation and the Supreme Court calculation is because the current data available from the California Department of Industrial Relations in regard to the Consumer Price Index for 1975 and 1976 is only carried out to one decimal point, whereas it seems that the Supreme Court was using more accurate data, which was carried out to additional decimal points.

RESPONDENT COMPUTES THE AMOUNT OF RETIREMENT BENEFITS THAT PETITIONER SHOULD HAVE PAID AND THE AMOUNT ACTUALLY PAID (EXHIBIT Q EXCEL SPREADSHEET)

Effective January 1, 1997, pursuant to the Settlement Agreement, Petitioner paid deferred retirement benefits of $5,720.08. On July 7, 1997, Jim Niehaus Retirement Program Specialist II (JRS) wrote to Respondent (Exhibit P page 1) advising him that the initial amount of benefits should have been $5,893.93, and that the unpaid amount was being paid.

Exhibit Q shows the following:

The beginning deferred retirement benefit, as calculated by Petitioner, was $5,893.93 per month.

On September 1, 1997, the deferred retirement benefit should have been raised to $6,035.98. It was not raised until April 1998 and a partial arrearage payment was made.

The next increase was made August 1999. Thereafter, no increases were made in September of any year; increases and partial back payments were made subsequent to January 1 of each year until January 1, 2002. No increase either in September 2001 or January 2002 was made.

In December 2002 a benefit increase and a partial arrearage payment were made.

Thereafter, until April 2005, there were neither benefit increases nor arrearage payments, except for a partial arrearage payment in December 2003. The failure to make any benefit increases from December 2002 through April 2005 was a breach of the Settlement Agreement.

Respondent did not receive a 2.9% increase in his deferred retirement benefits in 2003.

[Petitioner served notice in these proceedings that it would be introducing a letter of October 24, 2003, from Anne Woodward, Manager of the Judges' Retirement System, addressed [not to Respondent individually] to Retirees and Annuitants of the Judges' Retirement System, informing them that there would be a 2.9% salary increase for active judges and that retirees would receive a comparable increase in retirement benefits. Respondent does not know if he received this letter, but it is clear that Respondent did not receive this increase. Respondent's gross retirement benefits received from January 1, 2003 until April 30, 2005 was static at $6,652.93. There was one additional amount paid on December 31, 2003. Respondent did not receive, and **should not have received the 2.9% increase as it would have been a "double increment" of benefit enhancement as defined by *Olson I*.** Respondent was to receive COLA, not enhancements when sitting judicial officer's salaries were increased. Said October 24, 2003 letter is therefore irrelevant to these proceedings. Respondent does not know if Petitioner has abandoned this suggested allegation.]

From April 2005 until August 2010 there were neither benefit increases nor arrearage payments.

After August 2010, benefit increases were made based on September 1 of each year, but not in a timely manner, and partial arrearage payments were made.

The benefit increases made by Petitioner initially seem to have been based on CCPI-U All Urban Consumers (although not using the correct time periods). Subsequent to 2010 the benefit increases were made pursuant to CCPI-W, Wage Earners and Clerical Workers. This is the wrong index.

Summarizing, Exhibit Q shows that the cost-of-living adjustments were made late in 2002, 2003, 2005, and 2006. No COLAs were made in 2004, 2007, 2008, or 2009. In 2010 Petitioner presented an incorrect accounting and made an arrearage payment. As Exhibit Q shows, the amounts of arrearages were in error,

Pursuant to the California Constitution, article XVI, section 17, Petitioner owed Respondent a fiduciary duty. Said fiduciary duty included paying retirement benefits as required by law.

GOVERNMENT CODE §75033.5

The Court has stated that she will access the code sections directly. This beginning part is presented here with interlineations showing the applicability of the code section to this case.

GC §75033.5 (Exhibit A) states (in part):

> **Notwithstanding any other provision of this chapter**, any judge with at least five years of service, may retire, and upon his or her application therefor to the Judges' Retirement System **after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 had he or she remained continuously in service as a judge up to that age,**

[As is shown below, this exactly describes Respondent's judicial service. Respondent would have been permitted to retire under Government Code Section 75025(h): **Age 60, with an aggregate of 20 years of service as a judge** had he remained continuously in service as a judge up to that age.]

> receive a retirement allowance based upon the judicial service as a judge of a court of record, **with which he or she is credited, in the same manner as other judges,** except as otherwise provided by this section 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 prior to his or her discontinuance of his or her service as judge, multiplied by the number of years and fractions of years of service with which the retired judge is entitled to be credited at the time of his or her retirement, not to exceed 20 years.

[This means that Respondent would be retired at age 60, "in the same manner as other judges," but his retirement benefits would be calculated in accordance with the formula above (49.4572% for Respondent).]

> A judge of a justice court who renders part-time service after January 1, 1990, shall receive a reduced retirement allowance based upon actual service rendered.
>
> If a judge has served more than five years but less than 12 years, the above percentage of compensation payable shall be reduced 0.25 percent for each year that the service of the judge is less than 12 years. For the purposes of calculating the percentage of compensation payable, part-time service shall be the equivalent of full-time service.
>
> No judge shall be eligible to receive an allowance pursuant to this section until the attainment of at least age 63 **unless the judge is credited with 20 years of judicial service and has attained age 60.**

[Petitioner has quoted out of context and incompletely from the above sentence, stating that it provides that Respondent's deferred retirement benefits should have begun at age 63. Petitioner ignores the end of the sentence: "**unless the judge is credited with 20 years of judicial service and has attained age 60.**" Respondent was credited with 20 years of judicial service in accordance with this section, which states at its beginning: "**after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 had he or she remained continuously in service as a judge up to that age,** receive a retirement allowance based upon the judicial service as a judge of a court of record, **with which he or she is credited, in the same manner as other judges. . .**"]

The sentence quoted by Petitioner is separated from the part of the GC 75033.5 by provisions placed after provisions applying to justice court judges. The wording relating to justice court judges refers to actual service. If the section meant "actual service" when it said "credited" it would have said "actual service."

In using the word "credited" they were referring to the beginning of the paragraph which credits certain judicial officers with service "**had he or she remained continuously in service as a judge up to that age,** receive a retirement allowance based upon the judicial service as a judge of a court of record, **with which he or she is credited, in the same manner as other judges.**"

Petitioner also ignores the first words of the section: "**Notwithstanding any other provision of this chapter.**" If the Legislature intended that the sentence relied upon by Petitioner should over-ride the first words in the section, it would have added to the first words "Except as otherwise provided in this section." They did not as they intended what they said: "any other provisions of this chapter." The sentence relied upon by Petitioner is clearly "a provision in this chapter." The intent of the Legislature that a judge, such as Respondent, would qualify for the beginning of deferred retirement benefits at age 60 cannot be disputed.

In addition thereto, although this provision of the retirement law is placed in the section relating to deferred retirement benefits, the retirement is pursuant to Government Code section 75025 ". . . after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 . . ." The retirement age pursuant to GC §75025(h) is 60 years. [If it pertains at all, the sentence quoted by Petitioner pertains only to retirement under GC §75033.5, not to retirement pursuant to GC §75025.] No other subsection [except (h)] of GC §75025 would meet the criteria in the first paragraph of GC §75033.5. The other subsections pertain to judicial officers who take office at an older age and who, if they qualify under GC §75025 would receive retirement benefits at 65 percent rather than a lesser amount under GC §75033.5.

As an example, GC §75025(b) states: "Age 69, with an aggregate of 12 years of service as a judge within the 16 years immediately preceding the effective date of retirement." In this instance, a judicial officer would have an option of beginning retirement benefits under GC §75033.5 at age 65 at a benefit rate of 45

percent, or delaying the beginning retirement benefits until age 69 when he would have a benefit rate of 65 percent.

Government Code §75033.5 is all-encompassing, the majority of retired judicial officers retire under this section. As an example, a judge beginning judicial service at age 45, and leaving judicial service at age 55, would receive benefits pursuant to GC §75033.5, at age 63, with the benefits calculated according to the formula in this code section.

Petitioner bases its sole defense to this issue on taking one sentence out of context and stating that Respondent is not entitled to benefits until 63 years of age.

GOVERNMENT CODE §75025

Government Code §75025 (Exhibit B) states, in part:

> Every judge who has the age and service qualifications specified in one of the following subdivisions, and who is not ineligible for retirement under Section 75026, shall be retired for service upon filing notice of retirement with the Judges' Retirement System, specifying the date upon which his or her retirement is to become effective: . . . (h) **Age 60, with an aggregate of 20 years of service as a judge.** (Emphasis supplied.)

In accordance with GC §75025 (Exhibit B), provided for in GC §75033.5 (Exhibit A), Respondent was eligible to begin receiving retirement benefits on his 60th birthday, May 28, 1992. Petitioner did not begin paying retirement benefits to Respondent until his 63rd birthday, May 28, 1995.

As provided for by GC §75033.5, Respondent had more than five years of judicial service prior to the end of his judicial service in January 1979. If Respondent had remained continuously in judicial service after January 1979, in November 1985, at age 53, he would have qualified for retirement at age 60.

Pursuant to its fiduciary duty to Respondent and pursuant to the *Hittle* case, *infra*, Petitioner had a duty to advise Respondent of his right to begin receiving retirement benefits on his 60th birthday. Petitioner failed to do so.

Respondent has presented six documents or series of documents in confirmation of his right to receive deferred retirement benefits at age 60. One was discussed at the trial (Exhibit E) at which time Petitioner's Attorney stated, to the effect: you cannot go by one entry in a document. There is not just the one document; there are six.

The following documents, all having been authenticated and provided as records by the Judges' Retirement System (see the Declaration of Paul G. Mast to Respondent's Trial Brief) confirm that Respondent had a right to begin receiving retirement benefits at age 60, that the Judges' Retirement System knew of Respondent's right (although, even if the Judges' Retirement Systems employees did not know of the right, Respondent still possessed that right), and had an obligation to notify Respondent of that right.

Memo from Respondent's file

Included in the documents provided by Petitioner Judges' Retirement System, as part of the file of Respondent, is an undated, handwritten, computation worksheet (Exhibit E), which includes the following notations:

§75025 5/28/92 (age 60)

75033.5

calculations of percentage per year, resulting in a total retirement benefit of 49.4572%.

Due 5/28/95 (age 63)

The entry "§75025 5/28/92 (age 60)" makes it clear that Petitioner knew of Respondent's right to have his benefits begin at age 60. Petitioner's attorney argued that this alone does not prove anything. When taken with the other evidence presented herein, it is an important item of proof.

The calculation of the amount of retirement benefits is correct on the memo and is the same under either of the two code sections (3.75% per year is a benefit of 49.4572%). This percent of benefits payable is agreed to by the parties and is not an issue in this matter.

This memo shows that Petitioner was aware of the option of Respondent to have his benefits begin at age 60 under GC §75025, but chose to ignore it and not advise Respondent that he had the "option" to begin receiving benefits at age 60. Petitioner began Respondent's retirement benefits at age 63.

Respondent uses the word "option," as that is the designation in the *Hittle* case. The choices are to begin receiving retirement benefits at 49.4572% on Respondent's 60th birthday or on Respondent's 63rd birthday. There would be no economic benefit to Respondent in delaying the receipt of benefits for three years.

LUI OUTLINE

Justice Edmund Lui, Court of Appeal, Second Appellate District, prepared an *Outline of the Judges' Retirement System.* In the Cover Letter accompanying the Outline he stated that the Outline was "utilized at the California Judicial College in connection with the Retirement and Benefits Seminar . . ."

The Cover Letter and Page 11 of the *Outline of the Judges' Retirement System* are attached as Exhibit C were obtained from documents produced by the Judges' Retirement System and authenticated in the Declaration of Paul G. Mast and Respondent's Trial Brief. [It is unclear if this Exhibit was entered into evidence. If it was not, Respondent moves to admit it at this time, as it is a document from the records of Petitioner, and was authenticated in Declaration of Paul G. Mast to Respondent's Trial Brief and fully set forth in Respondent's Trial Brief.]

In said Cover Letter Justice Lui states: "I would like to acknowledge Sue Myers, the Manager of the Judges' Retirement System, for her assistance in editing this outline."

The relevant portion of Justice Lui's Outline appears on Page 11 as follows:

> PART SIX: EXAMPLES OF RETIREMENT ALLOWANCE COMPUTATION
>
> Fact Situation No. 1:
>
> Judge No. 1 assumes the bench for the first and only time at age 34 serving 12 continuous years. Judge No. 1 elects deferred retirement under § 75033.5 at age 46. Since the judge has not served 20 years, Judge No. 1 is not eligible to receive an allowance until the 63rd birthday which will be equal to 45% allowance.
>
> Under § 75033.5, Judge No. 1 may 'upon his application therefor to the Judges Retirement System after reaching the age which would have permitted him to retire for age and length of service under § 75025 had he remained continuous in service as a judge up to such age, receives a retirement allowance based upon the judicial service as a judge of a court of record, with which he is credited, the same manner as other judges . . . .' **Under this section, if Judge No. 1 had served as a judge for 20 years, Judge No. 1 would have retired with 20 years of service at age 54 and would have received the retirement allowance at age 60.** (Emphasis supplied.)

This part of Justice Lui's outline discusses GC §75033.5, the section relating to deferred retirement. A judge taking deferred retirement pursuant to GC §75033.5 generally cannot receive retirement benefits until his 63rd birthday (see the first paragraph above). However, an exception to the general rule as stated in the Fact Situation, *supra*, is stated more completely in GC §75033.5, as follows:

> Notwithstanding any other provision of this chapter, any judge with at least five years of service, may retire, and upon his or her application therefor to the Judges' Retirement System after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 had he or she remained continuously in service as a judge up to that age, receive a retirement allowance based upon the judicial service as a judge of a court of record, with which he or she is credited, in the same manner as other judges. . . .

This is the subject of the second paragraph of Part Six, Fact Situation No. 1 of the Lui Outline wherein Justice Lui states, ". . . Judge No. 1 would have retired with 20 years of service at age 54 and would have received the retirement allowance at age 60."

This is the exact description of the retirement benefits Respondent should have received, in that he "would have retired with 20 years of service at age 53 and would have received the retirement allowance at age 60."

Petitioner should have advised Respondent that he had the option of receiving benefits at age 60 rather than at age 63. The benefit payments would have been the same in either case (49.4572%).

LETTER OF NOVEMBER 16, 1978

Respondent, while still a sitting judge, received a letter dated November 16, 1978 (Exhibit D page 1) from the Office of State Controller Kenneth Cory, the Administrator of the Judges' Retirement System, which stated (in part):

> §75033.5 provides that a judge with at least 5 years of service may retire and upon attaining the age at which he would have been eligible to retire for age and length of service under §75025, receive an allowance. The allowance is 3.75% multiplied by the number of years and fractions of years of service with which the retired judge is entitled to be credited at the time of his retirement.

This letter confirms the law that Respondent was entitled to the initiation of benefits at age 60. It does not constitute a notification of Respondent's rights as required by *Hittle, infra,* which states, in part, "When a retiree has a choice between retiring under one of two retirement plans, he or she must be given a clear informed choice before making a binding election."

This letter did not give Respondent a clear informed choice. The letter was written 14 years before retirement benefits should have begun; did not specify that

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This letter did not give Respondent a clear informed choice. The letter was written 14 years before retirement benefits should have begun; did not specify that

the benefits should begin at age 60; did not include the phrase "had he or she remained continuously in service as a judge up to that age;" only referred to the length of service under GC §75025; and did not state that if Respondent did nothing, his benefits would begin at age 63.

[The State Controller was the Administrator of the Judges' Retirement System until approximately 1979, at which time the administration was transferred to the Board of Directors of the California Public Employees' Retirement System.]

LETTER OF JUNE 16, 1994

On June 16, 1994, approximately one year before Respondent's 63rd birthday and two years after his 60th birthday, Respondent received a letter (Exhibit F) from Jim Niehaus, Retirement Specialist II, Judges' Retirement System, which said in part, "However, I want to assure you that you will receive the maximum benefits allowable under the retirement law."

The letter shows that Petitioner knew of its fiduciary duty to Respondent, and had a duty to investigate and determine all of Respondent's rights to retirement benefits.

STATEMENT OF ISSUES

Petitioner filed a Statement of Issues (Exhibit N page 1) in regard to a claim filed in **1996** by Respondent alleging that he was entitled to COLA retirement benefits (CASE NO.: [redacted] OAH No. L-9605311). In said Statement of Issues, **Petitioner** cited GC 75033.5 (page 4, line 10) as follows:

> 75033.5. Not withstanding any other provisions 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.)[Emphasis was added by Petitioner in the Statement of Issues.]

In an apparent effort (which was successful) to mislead Respondent, the Petitioner extracted from the citation the following language wherever the citation had ellipses (. . .), which Respondent includes below (in bold type) as follows:

> 75033.5. Not withstanding any other provisions of this chapter, **any judge with at least five years of service,** may retire, **upon his or her application therefor to the Judges' Retirement System** (and) after reaching the age which would have permitted him or her to retire for age and length of service under section 75025 **had he or she remained continuously in service as a judge up to that age,** receive a retirement allowance based upon the judicial service **as a judge of a court of record,** with which he or she is credited, in the same manner as other judges, **except as otherwise provided by this section** (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 **prior to his or her discontinuance of his or her service as judge, multiplied by the number of years and fractions of years of service with which the retired judge is entitled to be credited at the time of his or her retirement, not to exceed 20 years.** (Emphasis added.)

The extractions by Petitioner could only have been made for the purpose of secreting from Respondent that his retirement benefits should have begun at the time of his 60th birthday instead of his 63rd birthday. This secretion was a clear violation of Petitioner's fiduciary duty to Respondent, as provided for by article XVI, section 17 of the California Constitution, *infra,* as well as contrary to *Hittle.*

OTHER JUDICIAL RETIREES

Other judges who assumed office before their 40th birthday and retired with less than 20 years of service qualified for and received benefits on their 60th birthday. Petitioner's Attorney acknowledged this in Court, saying they were errors.

JUDGE ROBERT LONDON

The information below was obtained from Judge London's file provided by JRS and, except for Judge London's birthday, was also provided under the Public Information Act.

Judge Robert London was born [redacted]. He assumed his first judicial office on October 7, 1971 and served until and retired on May 15, 1981 at total of over nine years. He began receiving retirement benefits on April 21, 1993, the day after his 60th birthday.

Judge London received a letter dated May 14, 1981 (Exhibit G) from Terry Kagiyama, Manager, Judges' Retirement System, advising him that he would begin receiving retirement benefits of "31.2259% of the rate of the level of judicial salary then in effect, [which] will commence on April 20, 1993 . . ."

JRS prepared four internal calculation worksheets regarding Judge London (Exhibit H), one dated April 15, 1993, the others undated. All the worksheets calculated his retirement benefits at 31.2259% and all determined the date for the beginning of his benefits as April 20, 1993, his 60th birthday. One worksheet indicated that he was retiring pursuant to GC §75025 and another that he was retiring pursuant to GC § 75033.5.

Petitioner's Attorney admitted at the trial that there were other judicial officers that had been retired under this section at age 60, but said, "They were mistakes."

ACTUARIAL CONSIDERATION

The Legislature in enacting this provision of the retirement law followed valid actuarial considerations.

The provision of the retirement law that "any judge with at least five years of service, may retire, and upon his or her application therefor to the Judges'

Retirement System after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 had he or she remained continuously in service as a judge up to that age, receive a retirement allowance based upon the judicial service as a judge of a court of record, with which he or she is credited, in the same manner as other judges" is based upon sound actuarial principles.

Pursuant to GC §75025 it has been actuarially determined that a judge who serves 20 years by his 60th birthday should receive full retirement benefits of 75% for life.

Under the above-quoted provision of the law it has been provided, and it has been actuarially determined, that a judge who serves 19 years on the bench by his 59th birthday is qualified to receive his pension of 71.25% benefits on his 60th birthday. In addition to his normal contributions for 19 years, ongoing interest is actuarially considered for all of his contributions including during the final year before his 60th birthday.

In the case of a judge taking the bench at age 39 and thereafter serving 12 years until he or she is 51 years old, in addition to his or her contributions into the retirement fund, his or her contributions earn interest for nine additional years until he or she is 60. His or her total pension benefit is 45% when the benefits start on his or her 60th birthday.

Respondent took the bench when he was 33 years old and served 13 plus years until he retired from the bench at age 46. For the next 13 plus additional years his contributions earned interest and at age 60 he qualified to retire at a benefit rate of 49.4572%. This was part of the actuarial determination when GC § 75025 and GC §75033.5 were initially enacted.

RETIREE MUST BE GIVEN A CLEAR INFORMED CHOICE

When a retiree has a choice between retiring under one of two retirement plans, he or she must be given a clear informed choice before making a binding election. Respondent was not given a "clear informed choice." See the Declaration of Paul G. Mast to Respondent's Trial Brief.

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

> Hittle contends that the trial court erred in finding that he knowingly waived his right to apply for disability retirement. The trial court's finding that Hittle was not ignorant of this right when he withdrew his retirement contributions was based on the court's determination that the handwritten notation on the second form letter Hittle received from SBCERA - which provided simply, 'If you have filed, or intend to file for disability retirement you should not withdraw the above contributions' - constituted 'specific notice' to him of his right to apply for disability retirement. We conclude that there is no substantial evidence to support the trial court's findings that SBCERA adequately informed Hittle of the existence of his right to apply for disability retirement and that Hittle was therefore apprised of this right when he withdrew his retirement contributions. Accordingly, we conclude that Hittle's withdrawal of his retirement contributions cannot be deemed to constitute a valid waiver of his right to apply for disability retirement. [*Id.* at 389]
>
> [I]t is settled law in California that a purported 'waiver' of a statutory right is not legally effective **unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation.**' (Citations omitted.) '**The first requirement of any waiver of statutory or constitutional rights, of course, is that it be knowingly and intelligently made.**' (Citation omitted.) ['the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived']; and (Citation) ['One can waive only that of which he is aware and cannot waive that of which he is ignorant'].)

> 'The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' [Citation omitted.] This is particularly apropos in cases in which the right in question is one that is 'favored' in the law....' (Citation omitted.) **The right to a pension is among those rights clearly 'favored' by the law.** '[T]he rule [is] firmly established in this state that **pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved.** Pension provisions in our law are founded upon sound public policy and **with the objects of protecting, in a proper case, the pensioner and his dependents** against economic insecurity. ...' (Citations omitted.) [*Id.* at 389 – 390]. [Emphasis supplied]

Petitioner did not give any notice, and certainly not an adequate notice, to Respondent advising Respondent of his right to receive retirement benefits at age 60. Respondent had not been fully informed of the existence of the right to receive benefits at age 60. Respondent at no time made a knowing and intelligent waiver. Pension rights are clearly favored in the law and must be liberally construed and applied so that Respondent's rights to retirement benefits as a result of the legislation granting such rights may be achieved. *Hittle, supra.*

The *Hittle* case requires that Respondent be "fully informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation." This clearly was not done.

The *Hittle* case is applicable to Respondent's election whether to retire at age 60 or to retire at age 63, pursuant to GC §75025 as provided by GC §75033.5. There was no notification to Respondent of his right to receive retirement benefits at age 60, and there could not have been an intelligent waiver. There was no waiver of statutory or constitutional rights knowingly and intelligently made.

If there is any doubt, ambiguity, or question whether there was a notice or a waiver, the burden is on the Petitioner "to prove . . . by clear and convincing

evidence that does not leave the matter to speculation . . . [D]oubtful cases will be decided against a waiver." (*Hittle, supra.)*

The amount of unpaid retirement benefits for the period May 28, 1992 to May 28, 1995, including interest is calculated on the attached Exhibit I. Exhibit I is an Excel Spreadsheet automatically calculating the amounts due. It is similar to Exhibit Q, discussed above, except it is simpler in that no benefits were paid during the period of non-payment of deferred retirement benefits.

The amount due is $1,637,527 if paid by March 31, 2016 and thereafter as shown on Exhibit I Page 6.

PETITIONER IS A FIDUCIARY IN RESPECT TO RESPONDENT

The fiduciary relationship of Petitioner with Respondent is established in the California Constitution and confirmed by case law.

California Constitution, Article XVI, section 17 states (in part):

> b. The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. **A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.** [Emphasis supplied.]

City of Oakland v. Public Employees' Retirement System (2002) 95 Cal. App. 4th 29 [115 Cal. Rptr. 2d 151], states:

> The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will [95 Cal. App. 4th 40] assure prompt delivery of benefits and related services to the participants and their beneficiaries. . .

INTEREST

Interest is payable on all amounts due Respondent in accordance with *Olson v. Cory*, 35 Cal.3d 390 197 Cal.Rptr. 843 (1983) *(Olson III)*. The rate of interest is 10 percent per annum compounded on a daily basis.

Petitioner has not disputed that interest must be paid on any unpaid deferred retirement benefits.

INTEREST IS PAYABLE FROM THE DAY EACH RETIREMENT BENEFIT PAYMENT IS DUE AT 10 PERCENT PER ANNUM COMPOUNDED DAILY

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 the California Constitution, article XV, section 1, which states (in part):

> (1) For any loan or forbearance of any money, goods, or things in action, if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum....

Civil Code section 3289 (CC §3289) states that the amount of interest shall be 10 percent per annum. Ten percent has been the interest rate at all relevant times.

In *Olson III* the California Supreme Court opinion states:

> CERTAINTY REQUIREMENTS OF CIVIL CODE SECTION 3287, SUBDIVISION (a)

Plaintiffs base their claims to interest on Civil Code section 3287, subdivision (a). It provides: 'Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.' Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions. (citations) Interest is recoverable on each salary or pension payment from the date it fell due. (citation). . . .

Plaintiff judges and judicial pensioners claim interest on the salary and pension increases to which this court held them entitled in *Olson* v. *Cory* (1980) 27 Cal.3d 532 [178 Cal.Rptr. 568, 636 P.2d 532] (*Olson v. Cory I*). [*Olson v. Cory III*, *supra*, at p. 395].

The state is therefore the debtor; moreover, it is subject to claims of interest under Civil Code section 3287, subdivision (a), which states that it 'is applicable to recovery of damages and interest from any such debtor, including the state, or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.' *Id.*, at p.403.

An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a). *Id.*, at p. 404.

Nothing in the wording of Civil Code section 3287 suggests that the right to recover interest from the state varies in accordance with the particular fund out of which the underlying obligation was payable. As explained, we have concluded that even the right to interest on salary increases payable out of the state's general fund is not nullified or diminished by any obligation that the Controller may have to refrain from paying apparent debts of the state that are clouded by legal uncertainties until those uncertainties are removed. Thus, the existence of such an obligation with respect to the Judges' Retirement Fund, relied on in *Jorgensen*, does not establish any difference between the right to interest on debts payable out of that fund and the right to interest on debts payable out of the state's general fund. Accordingly, plaintiffs are entitled to interest on judicial pension payments adjudged in *Olson v. Cory I.* Statements to the contrary in *Jorgensen v. Cranston, supra*, 211 Cal.App.2d 292, 300-

> 302, *Willens v. Cory, supra,* 53 Cal.App.3d 104,and *Gibbons & Reed Co. v. Dept. of Motor Vehicles* (1963) 220 Cal.App.2d 277, 289 [33 Cal.Rptr. 688], are disapproved. *Id.*, at p. 406.

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 opinion 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 but not dealing with retirement law is 2 Cal Admin Code § 1138.72.

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

The Excel Spreadsheets, at Exhibits I and Q, calculate interest compounded monthly.

STATUTE OF LIMITATIONS

Pursuant to Government Code section 20164 (b)(2), (GC §20164 (b)(2)), no statute of limitations applies to these claims.

PURSUANT TO GOVERNMENT CODE §20164 (b)(2) THE CLAIMS OF RESPONDENT MUST BE PAID IN FULL AND ARE NOT BARRED BY ANY OTHER SECTIONS OF THE CODE OF CIVIL PROCEDURE

GOVERNMENT CODE § 20164 (b)(2)

Government Code §20164(b)(2) (GC §20164(b)(2)) states that there is no period of limitation where the Judges' Retirement System owes money to a member or a beneficiary:

> (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

This was discussed by *Staniforth v. Judges' Retirement System* (2014) 226 Cal. App. 4th 978, at 994 :

> The final ground for the trial court's denial of the motion was that all of JRS's obligations to these 10 claimants were extinguished under section 20164, subdivision (a). Although that subdivision specifies the obligations of the system continues 'throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged,' it contains no explicit statute of limitations for accrued but unpaid pension payments that might form a chose in action that the decedent's estate or trust might be entitled to assert. Instead, the only *explicit* statute of limitations described in section 20164 is the three-year limitations period provided in subdivision (b) '[f]or the purposes of payments into or out of the retirement fund for adjustment of errors or omissions,' which provides three-year limitation on the *system's* right to collect for erroneous payments out of the system (*id.* at subds. (b)(1) & (b)(3)), but that subdivision also specifies that **'[i]n cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.'** [Emphasis supplied.]

See also *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 [115 Cal.Rptr.2d 151] (*Oakland)* which ruled:

> The City further argues that this action is subject to a three-year statute of limitation because it essentially seeks to enforce a statutory duty . . .
>
> The statute of limitations contained in Government Code section 20164(b) applies to erroneous payments into or out of

> the retirement fund, [95 Cal. App. 4th 36] not to reclassifications. The three year statute of limitations in the Code of Civil Procedure is also inapplicable. Government Code section 20164(a) provides that **CalPERS' obligations to its members 'continue throughout their respective memberships' and its obligations to retired members continue throughout the lives of the retired members, and thereafter until all obligations to their respective beneficiaries, if any, have been discharged'** [emphasis supplied]. To the extent that the two statutes conflict, the more specific language in the retirement statute should govern. **CalPERS also notes that section 20164 is a substantive statute creating an ongoing duty to properly discharge its obligations. The procedural statute of limitations does not appear to override this duty.** [Emphasis supplied.]

Petitioner has no Statute of Limitations defense.

In GC 20164 (b)(2), as compared to Government Code §20164 (b)(l) (GC §20164 (b)(l)), the Legislature recognized and applied the settled principle of law that in a case where a fiduciary relationship is present, there shall be no period of limitation on the duty of the fiduciary to pay monies owed to the beneficiary. If there is a liability situation, rather than a fiduciary obligation, where an overpayment was made to a beneficiary (establishing the liability), a three year period of limitation applies (GC §20164 (b)(l).

Oakland states: "Pursuant to Code of Civil Procedure § 312, the statutes of limitations in the Code of Civil Procedure apply only to civil action and civil special proceedings..."

Oakland began as an administrative proceeding before PERS and came to the courts of law for judicial review of PERS actions. Accordingly, the court there applied the rule that:

> [a]n administrative proceeding is neither a 'civil action' (Code Civ. Proc. section 22,312) nor a special proceeding of a 'civil nature' (id., section 23,363)..."Id. At 48, I l5 Cal. Rptr. 2d at 165. Therefore no

> statute of limitations in the Code of Civil Procedure could be applied in City of Oakland.

This case is an administrative proceeding before JRS, a unit of CalPERS, seeking payment of arrearages owed to Respondent. JRS wrote a determination letter rejecting the entire claim. Thus, the procedural posture of the case at bar is the same as in *Oakland* for purposes of applicability of the Code of Civil Procedure. This case is an administrative action subject to review in the courts, not a civil action. The statutes of limitations of the Code of Civil Procedure do not apply.

Government Code section 20164(b)(1) provides a the three-year limitations period for the adjustment of errors or omissions made by the Judges' Retirement System, or where the Judges' Retirement System makes an erroneous payment to a member or beneficiary, as follows:

> (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.

Thus, if JRS made any errors in calculating the COLA or the initial amount of benefits due in January 1997, JRS had three years to correct any such errors. Three years has long since passed.

In GC §20164 (b)(2), as compared to GC §20164 (b)(1), the Legislature recognized and applied the settled principle of law that in a case where a fiduciary relationship is present, there shall be no period of limitations on the duty of the fiduciary to pay monies owed to the beneficiary.

CONCLUSION

The Court's decision should recommend that:

The total amount due for unpaid retirement benefits from January 1,1997 to the present (Exhibit Q Page 4), is $300,463 if paid by March 31, 2016, $304,098 if paid by April 30, 2016, and $307,919 if paid by May 31, 2016,and thereafter as shown on Exhibit Q, and with monthly deferred retirement benefits of $9,368.84, payable each month until the next COLA effective September 1, 2016.

The Petitioner Judges' Retirement System should pay to Respondent the amount of unpaid deferred retirement benefits for the period May 28, 1992 to May 28, 1995. The amount due is $1,637,527 if paid by March 31, 2016 and thereafter as shown on Exhibit I page 6.

Respectfully submitted,

January 11, 2016

Paul G Mast

Paul G. Mast, Respondent

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]A [redacted];

On JANUARY 11, 2016 I served the following document(s) by the method indicated below:

RESPONDENT'S FINAL ARGUMENT

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 JANUARY 11 2016 at Irvine, CA.

Marci G. Mast
Marci G. Mast

ANALYSIS-*OLSON V. CORY I*

EXHIBIT LL

RETIREMENT BENEFITS ARE VESTED ACCORDING TO *OLSON I* DURING THE PROTECTED PERIOD

Cost-of-living adjustment increased retirement benefits, earned during the protected period and 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 GC §68203 1976 Amendment **impaired vested rights** to COLA increases for justices and judges, 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.** [emphasis supplied]. *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 *Olson I.*

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

Petitioner 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 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.

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 GC §68203 1976 Amendment 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 previously has made the claim 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. The Petitioner 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.

Footnote 6 of *Olson I* states:

> 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.

This proves Respondent's position. On the 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 the other 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." (*Olson I* footnote 5 states: "As used herein, the phrase 'judicial pensioners' refers to both retired judges and other persons whose benefits are based on services of a deceased judge, e.g., the surviving spouse or minor children of a deceased or retired judge.")

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, then it would contradict the finding in *Olson I, supra*, 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* "However, it is not necessary **for our purposes** to determine a judicial pensioner's right as being vested" means for the time before the *Olson I* decision was handed down, March 27, 1980.

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* 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 [nonlegislative 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* increment of increase, a 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 would argue out of context from foonote 7, *infra,* 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."

By quoting this one sentence, Petitioner would suggest that applying COLA increases to retirement benefits of Respondent would somehow constitute a double increment of increase. This is not true; judicial retirees would get only one increment of increase, that being the COLA. Those judicial retirees would not receive any increases attributable to the increase of salaries of sitting judges. As part of retirement benefits attributable to service during the protected period and before, COLA increases are vested for their entire retirement.

The actual current salary of a sitting judge in their office would not be considered.

In the same manner, any jurist beginning a new term after their protected period ends would continue to have vested COLA retirement benefits for the period before the new term; there is no divestment provision in GC §68203 1976 Amendment. However, retirement benefits attributable to service at the beginning of the new term and thereafter would not receive cost-of-living adjustments. The retirement benefits for said period would be based on the future actual current salary of a sitting judge. This is not present in the instant case, as Respondent retired during his protected period.

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

Olson I footnote 7 is complex. The meaning of the footnote is that *Olson I* holds retirement beneficiaries ending their judicial service during their protected period are entitled to vested COLA retirement benefits. It 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 afterwards**. The retirement benefits for that period would be based on the justice or judges salary for that particular judicial office.

Respondent has separated the sections of footnote 7 and have inserted italicized 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 <u>both</u> 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."

In Olson I, the Supreme Court holds that a judicial pensioner is entitled to only one type of increase: that being the cost of living adjustment increase vested during the protected period. Since the judge holding the particular office is getting COLA increases as authorized by the 1969 Amendment, there would be no further increase to that vested portion of his retirement benefits for increases received by sitting jurists after 1977. In the same manner the portion of the retirement benefits of the jurist vested for the period after the protected period would receive the benefit of increases to the actual salaries of sitting jurists.

As stated, supra, in this part of footnote 7 "cost of living factor" refers to increases in the basic fluctuations of the sitting judge's salary after January 1977. The definition of "basic retirement allowance," excerpted from footnote 7 below, "In the instant case legislation exists directing increases cost of living or otherwise in the basic retirement allowance" *includes the cost of living allowance vested during the protected period.]*

> 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.]

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[1] he became subject to the 1973 amendment barring deferred retirement for judges who had gone on the federal bench. Before the *Alarcon* court, JRS relied on 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 in the latter situation providing more protection.

Alarcon 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 was 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 recognizing 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 MEANING OF *OLSON I'S* CONCLUSION

The Conclusion confirms what Respondent has said *supra*. The Conclusion 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]

Olson I, in its conclusion, thereby states, as it does in the body of the opinion 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 judicial pensioners. The Court is saying that since the 1976 law is unconstitutional as to judicial pensioners, the pension rights for judicial pensioners [who served in a judicial office during the protected period] remained the same as they were before the enactment of GC §68203, 1976 Amendment . Those pension rights were that they would receive cost-of-living adjusted retirement benefits for the length of time of their judicial service during the protected period, prior to the 1976 Amendment and until the conclusion of any term that started before January 1, 1977.

It is not stated explicitly in the Conclusion, but it is clear that the meaning of the Court is that for any judicial service earned in a new term that began after the first day in January 1977, that retirement benefits would not earn vested

cost-of-living enhanced retirement benefits. *Alarcon, supra* confirms this in the passage from, 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, and the appeal was designated as being an appeal from the trial court. The trial court had entered a judgment declaring that the GC §28603, 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 GC §28603, 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. *Olson 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* does not directly address the question of whether judicial retirees who started a new term after the protected period would also have COLA retirement benefits for the additional period, but to so suggest, and

Respondent does not suggest, would be contrary to the ruling in regard to active judges embarking on a new term subsequent to the protected period having taken the new term voluntarily and agreeing to the salary terms (and presumably the future retirement terms) from that date on.

If there is any question as to the continuous right to the already vested retirement benefits continuing to be vested despite taking a new term after the GC §28603, 1976 Amendment, *Betts* makes it clear when it stated, *supra*:

> '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]. *Betts, supra. at* 29.

Alarcon agrees: "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, supra.*

STANIFORTH

APPELLANT'S OPENING BRIEF

EXHIBIT MM

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division I

CASE # D068174

FAYE STANIFORTH, et al Petitioners/Plaintiffs, Appellants

VS.

THE JUDGES RETIREMENT SYSTEM, Administered by the

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES

RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA

Respondent/Defendant

Appeal from the Superior Court of California, County of San Diego

The Hon. Joel Pressman, Judge

(Case #37-201200093475CU-MC-CTI)

APPELLANTS OPENING BRIEF

JORN S. ROSSI, SBN 86721

PAUL G. MAST, Of Counsel, SBN 28390

41735 Elm St. Ste. 102, Murrieta, CA 9256

Tel: 951-471-5328 – Fax: 951-600-7565

Email: lawrossi2000@yahoo.com

Attorney for Appellants

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D068174
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Jorn S. Rossi, Esq. #86721 41735 Elm Street, Suite 102 Murrieta, Ca. 92562 TELEPHONE NO.: (951) 471-5328 FAX NO. (Optional): (951) 600-7565 E-MAIL ADDRESS (Optional): lawrossi2000@yahoo.com ATTORNEY FOR (Name): Appellants	Superior Court Case Number: 37-2012-00093475-CU-MC-CTL FOR COURT USE ONLY
APPELLANT/PETITIONER: Fay Staniforth, et al. RESPONDENT/REAL PARTY IN INTEREST: The Judges' Retirement System	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Appellants

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) see attachment	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June _____, 2015

Jorn S. Rossi, Esq. by Paul G. Mast ▶ Paul G Mast

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

Certificate of Interested Entities or Persons
D068174

ATTACHMENT

Any Judge of the Superior Court or of the Municipal Court, their spouses or heirs, who served at any time between January 1, 1970 and January 1, 1977, and retired prior to January 5, 1981.

Any Justice of the Appellate Court or of the Supreme Court, their spouses or heirs, who served at any time between January 1, 1970 and January 1, 1977, and retired prior to January 5, 1987.

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CERTIFICATE OF INTERESTED PERSONS OR ENTITIES

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STATEMENT OF THE NATURE OF THE ACTION

This is an administrative law case. The allegations are that a state agency, the Judges' Retirement system (JRS), failed to adhere to several sections of the Government code, resulting in underpayment of judicial pensions. In *Staniforth v. Judges' Retirement System* 4th App. Dist. Div. 1 No. D064111 (2014) 226 Cal. App. 4th 978, 993 (*Staniforth* D064111) (AAF Vol. 2, pg. 294) this Court previously decided the following:

1. ten Appellants (Petitioners/Plaintiffs) who retired from service during the "protected period" as defined in *Olson v. Cory, I,* 27 Cal.3d, 636 P. 2d 532 (1980) (*Olson I*) were entitled to cost of living adjustments (COLA) retirement benefits for the benefits received during the protected period (AAF Vol. 2, pg. 312):
2. pursuant to Government Code §20164(b)(2) (GC §20164), there was no statute of limitations which would prevent a judgment for such enhanced retirement benefits (AAF Vol. 2, pg. 315); and
3. should there have been a final judgment determining an amount that was due, that could be executed upon, that only then a statute of limitations could apply which would prevent a judgment for the amount of benefits due at this time (AAF Vol. 2, pg. 314).

The primary issue in this case is whether a declaratory judgment in a subsequent case activated Code of Civil Procedure section 337.5 (CCP §337.5).

THE TEN REMAINING PETITIONERS/PLAINTIFFS

The ten remaining Appellants (Petitioners/Plaintiffs) are:

A. John F. Aiso, Jr., Trustee, The Aiso Family Trust (Justice John F. Aiso);
B. Elena Friedman-Weiss and Marcia L. Friedman Cohen, Successor Co-Trustees The 1992 Friedman Family Trust Agreement (Justice Leonard M. Friedman);
C. William J. Reppy and Michael Reppy (Justice William A. Reppy);
D. Alan C. Call (Judge Joseph L. Call);

E. James M. Fogg, Edward P. Fogg, Jr., Phoebe Fogg Miller, and Fred T. Fogg II (Judge Edward P. Fogg);

F. Marlene Quayle Duffin and Donald Quayle, Jr (Judge Donald K. Quayle);

G: Mary Jo King, Margaret K. Stephan, Paul Eric Stephan, and Katy Stephan (Judge Morris J. Stephan);

H. Patrick F. Wickhem and Patricia Ann Wickhem, Successor Trustees, The Declaration of Trust Dated January 12, 1976 between Frank Wickhem and Mildred C. Wickhem; (Judge Frank Wickhem);

I: James D. Hewicker and John A. Hewicker (Judge John A. Hewicker); and

J. Dorna L. Seagraves, Successor Trustee of the Seagraves Trust (Judge Roy W. Seagraves).

STATEMENT OF THE RELIEF SOUGHT IN THE TRIAL COURT

Appellants (Petitioners/Plaintiffs) sought issuance of a writ of mandate under Code of Civil Procedure section 1085/1094.5 to compel JRS to make payments to compensate for JRS's failure to pay sums owed as judicial pension allowances. A Complaint for Money Owed is also before the Court.

STATEMENT OF THE JUDGMENT APPEALED FROM

Appellants appeal from the Order-General Demurrer, incorporated in the Judgment (AAF Vol. 1, pg. 266).

San Diego County Superior Court per Judge Joel Pressman entered an order sustaining without leave to amend the general demurrer filed by JRS addressing the question of whether the action is precluded by the statute of limitations pursuant to CCP §337.5. A judgment consistent with the foregoing orders was entered (AAF Vol. 1, pg. 266), which was appealed.

STATEMENT THAT THE ORDER IS FINAL

Judge Pressman's orders have been incorporated into a judgment that is final and may be raised by appeal pursuant to Code of Civil Procedure 472 c (a).

STATEMENT OF THE FACTS

This is the second appeal brought by Appellants in this case. Appellants were all judges or justices of courts of record in California, their spouses, beneficiaries or heirs who claim vested rights to COLA increases to all or part of their retirement benefits, pursuant to the 1969 Amendment to Government Code section 68203 (GC §68203) and in accordance with *Olson I.*

PRIOR JUDGMENT OF THIS COURT IN THIS CASE

Rights to Underpayments

This Court held in its prior decision, *Staniforth* D0604111 (AAF Vol. 2, pg. 294), that *Olson I* ruled that judicial pensioners who served some part of their term between January 1, 1970 (the effective date of the 1969 Amendment to GC §68203) and January 1, 1977 (the effective date of the 1976 Amendment to GC §68203) had no **vested** rights to COLA increases except those who retired during the protected period, and then only as to benefits received during the protected period (AAF Vol. 2, pg. 312).

This Court further found that as to ten Appellants, the "alleged underpayments *during* the protected period-were based on underpayments that would have fallen *within* the ambit of *Olson I's* protected periods, and JRS does not contend otherwise (AAF Vol. 2, pg. 312).

This Court ruled that if such payments were not barred by a statute of limitations, then said ten plaintiffs were entitled to judgment.

Limitation of Actions

Code of Civil Procedure section 337.5

This Court further ruled in *Staniforth* D0604111, contrary to the finding of the trial court, that:

> there is nothing on the face of pensioners' petition revealing any part of this segment of the claims of the 10 claimants was part of a judgment that would have triggered the limitations period under Code of Civil Procedure section 337.5. (AAF Vol. 2, pg. 313).

This Court further stated:

> the time under Code of Civil Procedure section 337.5 only begins to run upon entry of a final enforceable judgment (*Kertesz v. Ostrovsky* (2004)115 Cal.App.4th 369, 373), which requires a final determination of the rights of the parties within the meaning of Code of Civil Procedure section 577 and " ' " 'leaves nothing to be done but to enforce by execution what has been determined.' " ' " (*Center for Biological Diversity v. California Fish & Game Com.* (2011) 195 Cal.App.4th 128. (AAF Vol. 2, pg. 313).

Further, this Court cited *Olson v. Cory, III,* 35 Cal.3d 390, 673 P.2d 720, 197 Cal.Rptr. 843 (1983).

> As explained by Olson III, Olson I did not result in a final judgment on which execution could proceed: because the declaratory judgment adjudicated in *Olson v. Cory I* was not in itself enforceable. The purpose of declaratory relief is 'to enable the parties to shape their conduct so as to avoid a breach.' [Quoting *Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.] Though declaratory relief may properly be accompanied by coercive relief [citation], the judgment in *Olson v. Cory I* was purely declaratory. It contained no enforceable provision, such as one directing a particular party to pay a specified sum to another party." (*Olson III, supra,* 35 Cal.3d at p. 400.) (AAF Vol. 2, pg. 314).

By way of *dicta*, this Court stated,

> Arguably, some final enforceable judgment was subsequently entered by the trial court on remand from *Olson III* that would have triggered Code of Civil Procedure section 337.5." (AAF Vol. 2, pg. 314, note 6).

However, respectfully, this Court was in error in stating that some final enforceable judgment would be possible on remand from *Olson III,* in that *Olson III* was a **declaratory judgment** which concerned only interest applicable to unpaid retirement benefits that had accrued under the dictates of *Olson I,* which was also a declaratory judgment, as this Court found. *Olson III* did not concern itself with principal payments as determined by *Olson I.*

Based on the statement of this Court that there may be some other statute of limitation that applies, JRS alleged in the current proceeding that the rights of the

judicial retirees and their beneficiaries were barred by CCP § 337.5. To substantiate that claim, Respondent JRS requested that the trial court take Judicial Notice of certain documents that Respondent JRS **alleged** constituted a final judgment of amounts due pursuant to *Olson I* and further alleged said amounts constituted the claims which are the subject matter before this Court. Said allegations were completely false as *Olson I* resulted in a declaratory judgment and there was never a final judgment, as previously determined by this Court, and as *Olson III* also was a declaratory judgment, which, as stated *supra*, concerned interest only and never considered any principal benefits payable under *Olson I*. As will be shown *infra,* the judgment presented in the Request for Judicial Notice was a Declaratory Judgment, did not in any way relate to the amounts due pursuant to the three *Olson* cases: *Olson I*, Olson v. Cory, II, 134 Cal.App.3d 85, 184 Cal.Rptr. 325, (1982), or *Olson III*. It is entirely irrelevant to the matters before this Court.

Request for Judicial Notice

Respondent JRS requested judicial notice of certain documents in the trial court. The said Request for Judicial Notice is attached hereto in the Appendix (AAF Vol. 1, pg. 185).

The documents presented in the Request for Judicial Notice have no relation in any manner to this case, and in fact pertain entirely to unrelated matters (and completely unrelated to the 1970 or 1976 amendments to GC §68203), as will be discussed *infra*. Further, even if the documents did concern the matters before this Court, the Request for Judicial Notice requested judicial notice of a Declaratory Judgment and the documents therein show that no final judgment (as defined by this Court in its former judgment, set forth *supra)* was reached in the case referred to in the Request for Judicial Notice. Therefore it could not have activated the time period in CCP § 337.5, even if the subject matter were relevant.

Government Code §20164

In overruling the trial court's ruling that the claims were time barred by Government Code §20164 (GC §20164) this Court stated that said section:

> specifies the obligations of the system continues 'throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged,' it contains no explicit statute of limitations for accrued but unpaid pension payments that might form a chose in action that the decedent's estate or trust might be entitled to assert. (AAF Vol. 2, pg. 315).

Other Statutes of Limitations

This Court determined in the section of its opinion entitled "The Remaining Issue" (AAF Vol. 2, pg. 315) that unless precluded by a statute of limitations, ten Appellants who retired during the protected period were entitled to COLA in retirement benefits for the period of their retirement to the end of the protected period, January 5, 1981 for trial court judges and January 5, 1987 for appellate court and Supreme Court justices.

This Court stated in *Staniforth* D0604111:

> However, it appears the exhibits attached to the complaint also reflected that at least a segment of each of the claims pleaded by the 10 claimants--alleged underpayments **during the protected period**--were based on underpayments that would have fallen within the ambit of **Olson I's protected periods**, and JRS does not contend otherwise [Emphasis supplied] (AAF Vol. 2, pg. 312).

ARGUMENT

This Court ruled in *Staniforth* D060411 that *Olson I* did not result in a final judgment:

> As explained by Olson III, Olson I did not result in a final judgment on which execution could proceed: because the declaratory judgment adjudicated in *Olson v. Cory I* was not in itself enforceable. The purpose of declaratory relief is 'to enable

> the parties to shape their conduct so as to avoid a breach.' [Quoting *Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.] Though declaratory relief may properly be accompanied by coercive relief [citation], the judgment in *Olson v. Cory I* was purely declaratory. It contained no enforceable provision, such as one directing a particular party to pay a specified sum to another party (*Olson III, supra,* 35 Cal.3d at p. 400.)] (AAF Vol. 2 pg. 314).

This Court did state that another statute of limitations may apply.

The Respondents presented to the superior court a Request for Judicial Notice consisting of Exhibit A and Exhibit B. (AAF Vol. 1, pg. 185)

Exhibit A was a Declaratory Judgment in Los Angeles Superior Court case 000896 (case 896).

Exhibit B was a conglomeration of docket sheets from three separate cases, un-separated and unidentified, as will be discussed *infra*.

Code of Civil Procedure section 337.5

The trial court ruled in its judgment (AAF Vol. 1, pg. 266).

1. the 2nd Petition and Complaint is barred by the statute of limitations in CCP § 337.5(b);

2. although the judgment in *Olson I* was declaratory, Exhibit A provided a subsequent judgment entered June 28, 1986 (hereafter case 896) in that JRS was required to make specified payments to judges and justices who were owed amounts under the courts three decisions [meaning *Olson I, Olson II, and Olson III];* and

3. the Court rendering the judgment in Exhibit A resolved all liability issues.

The trial court's decision is in error. The Declaratory Judgment in case 896 (in Exhibit A) referred to in the trial court decision does not order JRS to comply with *Olson I, Olson II or Olson III.*

Exhibit A presents a Judgment for Declaratory Relief. On its face it is not a final judgment as defined by this Court in Staniforth D0604111. The case on which the trial court Decision is made (case 896), **does not relate in any manner to *Olson I, Olson II, or Olson III.*** Case 896 is a separate and unrelated action [bearing the same name in the caption as the three Olson cases] and concerns a subsequent amendment (the 1981 Amendment) to GC §68203. *Olson I, III*, and the instant case concern the 1969 amendment to GC §68203. *Olson II* concerns a constitutional amendment. See further descriptions of these cases, *infra*.

Said case 896 was originally filed on November 8, 1984, subsequent to the last decision in any of the three Olson cases. The Declaratory Judgment was filed on June 18, 1986.

The Request for Judicial Notice was submitted to the superior court falsely and fraudulently with the intent to mislead the superior court. If repeated herein to also mislead this Court. The case in the Request for Judicial Notice (case 896), and as stated above was not in any manner a case related to *Olson I, Olson, II, or Olson III* and did not in any manner concern the provisions of law ruled on in *Olson I* or the claims which were the basis of *Olson I* or which are the basis of the claims in this case. These are harsh words and harsh charges, but they will be completely proven and justified.

The Various Amendments to GC §68203.

In **1969**, GC §68203 was amended effective the first Monday in January 1970 to provide for COLA on September 1 of each year for judicial salaries, based on the CPI index of the State of California for the previous year (December to December).

In **1976**, GC §68203 was amended effective the first Monday in January 1977 to provide for a 5 percent cap on any COLA increases. [This 1976 Amendment and the previous 1969 Amendment are the subject of *Olson I* as well as the subject of the instant case].

During **1980**, Proposition 6, a Constitutional Amendment, passed by the voters of California, amending GC §68203 to eliminate all COLA for judicial officers. This

Constitutional Amendment was the subject in *Olson II,* wherein it was held unconstitutional. *Olson II* contained neither a money judgment nor a declaratory judgment regarding money owed or to be paid.

The **1981** Amendment to GC §68203 increased the salary of justices and judges by the average percentage increase for California State employees. The 1981 Amendment was enacted in 1980 to be effective the first Monday in 1981. This Amendment was the subject of Proposition 6, *supra.*

This **1981** amendment to GC §68203 which is the subject of the Declaratory Judgment presented by JRS in Exhibit A. The Amendment states (in part):

> SECTION 1. Section 68203 of the Government Code is amended to read: 68203. (a) On July 1, 1980, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California State employees; provided, that in any fiscal year in which the Legislature places a dollar limitation on salary increases for state employees the same limitation shall apply to judges in the same manner applicable to state employees in comparable wage categories. (b) For the purposes of this section, salary increases for state employees shall be such increases as reported by the Department of Personnel Administration. (c) The salary increase for judges and justices made on July 1, 1980, for the 1980-81 fiscal year, shall in no case exceed five percent.

The Three *Olson* Cases and Case 896

For clarity, we must next consider the nature of the three Olson cases and case 896 in Exhibit A.

Olson I was a suit for writ of mandate seeking an order that certain judicial salaries and retirement benefits should be increased by COLA established by the 1969 Amendment to GC §68203. A Declaratory Judgment was entered, but no money judgment or final judgment that would trigger a statute of limitations was ever issued.

Olson II was a suit to declare that the 1980 Constitutional Amendment (Proposition 6) was unconstitutional. The result of the suit was that the 1980

Constitutional Amendment was held unconstitutional. No money judgment was sought or decreed. The decision did hold that the 1981 amendment to GC §68203 was not repealed by the amendment and must be followed.

Olson III was a Petition for Writ of Mandate seeking an order that pre-judgment interest should be applied to any payments due on unpaid judicial salaries or retirement benefits. The result of this suit was that a writ of mandate was issued that pre-judgment interest was due on unpaid judicial salaries and retirement benefits pursuant to Civil Code §3287. No money judgment was sought or decreed.

Case 896, a Los Angeles Superior Court case named *Lester Olson v. Kenneth Cory*, filed on November 8, 1984, which seeks a declaratory judgment related to the 1981 Amendment to GC §68203. It does not seek any money judgment that could be executed upon. It neither concerns or relates in any manner to the 1969 Amendment to GC §68203, nor does it relate in any manner to *Olson I, II, or III,* except that *Olson I* and *II* are cited as authority for the court's Declaratory Judgment (AAF Vol. 1, pg. 190). Case 896 is Exhibit A to the Request for Judicial Notice (AAF Vol. 1, pg. 188).

The Request for Judicial Notice

Defendants misrepresented the nature of Exhibits A and B by stating in their Request for Judicial Notice:

Exhibit A is a "Judgment ordering the JRS to comply with *Olson v. Cory I, II,* and *III.*" (AAF Vol. 1, pg. 186).

Exhibit B is "The Los Angeles Superior Court's dockets for *Olson v. Cory I, II,* and *III.*" (AAF Vol. 1, pg. 186)

Misrepresentation Request for Judicial Notice Exhibit A

In regard to the Request for Judicial Notice, nowhere in Exhibit A is there any judgment or other statement ordering JRS to comply with *Olson v. Cory I, II,* and *III,* or any of them. Exhibit A is a Declaratory Judgment of an unrelated case, case 896, (*albeit* with the same name, "*Olson v. Cory,*" as in *Olson v. Cory I, II, and III).*

Case 896 of which the Declaratory Judgment labeled Exhibit A is part was originally filed on November 8, 1984 (long after the decisions in *Olson v. Cory I, II, and III*). Case 896 concerns rights of judicial officers pursuant to the 1981 Amendment to GC §68203 (which will be discussed further, *infra*). Furthermore it was a "Summary Judgment in Declaratory Relief" and did not meet the criteria for a final judgment set down by this Court in *Staniforth* D0604111. The Summary Judgment in Declaratory Relief in case 896 contained no enforceable provision, such as one "directing a particular party to pay a specified sum to another party. (*Olson III, supra,* 35 Cal.3d at p. 400.)" (AAF Vol. 2, pg. 314).

Misrepresentation Request for Judicial Notice Exhibit B

The Request for Judicial Notice Exhibit B (AAF Vol. 1, pg. 3195) shows the clear intent of Respondents to obfuscate and misrepresent their claims that CCP §337.5 applies.

Exhibit B is a single exhibit lumping together dockets of three separate cases with no separation between the cases, no clear indication of which pages apply to which case, and no indication as to case names or any other designation. It can be said with certainty that these are not the dockets of *Olson I, II, **and** III*. Plaintiffs believe that the first may be *Olson I*. Plaintiffs believe that the third is case 896, which is the Superior Court case to which Exhibit A relates. Plaintiffs have no idea what the second case is, but would not be surprised if it were either *Olson II or III*.

Although Exhibit B is not referenced in the demurrer, the only thing in common with *Olson I, II, and III* is the number of cases: three.

Further, there would seem to be no reason for these dockets to be presented to the court even if they related to relevant cases – which they do not.

In the General Demurrer to the 2nd Amended Complaint filed by Respondents in the instant case the Respondents allege on Page 5 (AAF Vol. 1, pg. 179).that Exhibit A states,

> With the instant General Demurrer, we provide that final Judgment. A true and correct copy of the Judgment

> ordering the JRS to comply with *Olson v. Cory I, Olson v. Cory II* and *Olson v. Cory III,* entered by the Los Angeles Superior Court on June 18, 1986, is attached to the JRS' Request for Judicial Notice as Exhibit 'A.' Thus, any claims to enforce *Olson v. Cory I* became time barred on June 18, 1996. (AAF Vol. 1, pg. 179).

As stated above and shown below, it does not make such an order. Said statement in the demurrer is completely false. Said judgment is a "Summary Judgment in Declaratory Relief" dealing solely with the issues concerning the 1981 Amendment to GC §68203.

In the Reply Brief In Support of General Demurrer, page 3 line 25 (AAF Vol. 1, pg. 259). Respondent argues:

> From pages 2 through 5 of the Judgment [Exhibit A], it clearly states that it was 'ordered, adjudged and decreed' that JRS was required to make specified payments to the different classes of retired judges and justices who were owed amounts under *Olson v. Cory I, II, and III.* (AAF Vol. 1, pg 259).

That is absolutely false, which will be shown in the detailed analysis of Exhibit A, *infra*. In case 896 the Declaratory Judgment establishes three classes of judges in regard to the 1981 Amendment. None of this relates to *Olson v. Cory I, II, and III.* None of these three Olson cases establish three classes of judges and/or justices.

ANALYSIS OF EXHIBIT A OF THE REQUEST FOR JUDICIAL NOTICE

Does the Court Order in Exhibit A meet the criteria to activate CCP §337.5? Respondent purports that it is a final judgment. It is necessary to examine the order with particularity.

Exhibit A (AAF is a document entitled "Summary Judgment in Declaratory Relief," dated June 18, 1986. The case name is Lester E. Olsen v. Kenneth Cory, Los Angeles Superior Court Case Number 000896 (case 896). Even though the case names are all the same, case 896 is not *Olson I, II or III. Olson I, II, and III* were all decided by

the Supreme or Appellate Courts prior to November 8, 1984, the date of the original filing of case 896. There is no money judgment or any executable amount in the Declaratory Judgment in case 896.

On its face it is a declaratory judgment. The title says so: "Summary Judgment in Declaratory Relief. The initial paragraph says so: ". . . . plaintiffs are entitled to a declaratory judgment . . . "(AAF Vol. 1, pg. 188). There is nothing in the order inconsistent with a declaratory judgment.

The declaratory judgment begins on page 2 (AAF Vol. 1, pg. 188) of the "Summary Judgment in Declaratory Relief" and consists of the following:

1. The Court first defines three groups of justices and judges:

Group I: Supreme and appellate court justices who had or have protected terms under *Olson I* and *Olson II,* "which terms commenced in January 1971 and January 1975 and expired or will expire in January 1983 and January 1987, respectively. This group, including related pensioners, numbers approximately 15."

Group II: "Supreme and appellate court justices (and related pensioners) who were elected or appointed to terms commencing after the enactment of the 1976 amendment and prior to the enactment of the 1981 amendment. Their term length is 12 years.

The superior and municipal court judges (and related pensioners) who were elected or appointed to terms commencing in **January 1977 and January 1979,** which terms expired in January 1983 and January 1985, respectively. These terms commenced after the 1976 amendment and prior to the 1981 amendment. Their term length was six years.

These justices and judges had or have protected terms under *Olson II* not under *Olson I.*

Group III: All other justices and judges (and related pensioners) whose terms commenced in **January 1981 and thereafter.**

Only the roman numerals of these groups is in common with the three *Olson* cases.

2. The court declares that the **1981 amendment** is applicable to all three groups of justices and judges "who held office on its effective date or who took office thereafter."

3. "[A]ll justices and judges have **vested contractual salary benefits, including provisions for salary increases,** which are in effect not only when they commence their terms, but which are thereafter conferred during said terms; and any **salary reductions** during a justice's or judge's term, including in a cost-of-living provision enacted during the same term, **is constitutionally foreclosed."** [emphasis supplied]

4. "The Court declares that the justices and judges (and related judicial pensioners) in Group I and Group II are entitled under Article 1, Section 10 of the United States Constitution (Contracts Clause) . . . . and the decisions in *Olson I* and *Olson II* to the higher of any salary increases arising from the application of the 1981 amendment or as to Group I justices, the 1969 amendment to GC § 68203 . . . ."

5. In this paragraph the Court declared that there was no constitutional bar that would prohibit the application of the **1981 amendment** to any Group I or Group II justice or judge. [emphasis supplied]

6. This paragraph declares the various percentages applicable in regard to Group I or Group II judges and related pensioners which are to be added on various dates to the salaries and pensions pursuant to the **1981 amendment.** [emphasis supplied]

7. In this paragraph the Court declares that the defendants had not paid the respective salary and related pension increases to Group I and Group II justices and judges and orders them to do so pursuant to the **1981 amendment** and further orders them to do so together with interest.

8. This paragraph declared that certain affirmative defenses were not valid.

9. The Court declared that the judgment was directed only as to the issue of liability and reserved other issues. [As to the issue of liability, the court is referring to the fact of liability and not to the amount of liability, as alleged by Respondents in the instant case.]

A subsequent declaratory judgment relying on case law in *Olson I* and *Olson II* does not convert *Olson I, II,* and *III* to a final judgment.

The Respondents falsely represented Exhibit A when they alleged in the Demurrer (AAF Vol. 1, pg. 179) that Exhibit A is "a judgment ordering JRS to comply with *Olson v. Cory I, II, and III.*"

Respondents falsely represented Exhibit A when they alleged in the Reply Brief to the Demur (AAF Vol. 1, pg. 259) that Exhibit A: "clearly states that it was 'ordered, adjudged and decreed' that JRS was required to make specific payments to the different classes of retired judges and justices who were owed amounts under *Olson v. Cory I, II, and III.*"

Exhibit A presented to the trial court (which was the basis for that court's ruling) was fraudulently represented. Exhibit A (AAF Vol. 1, pg. 188). related solely to the 1981 amendment to GC §68203 and did not relate to the matters before this Court which concern only the 1969 amendment. Further, it was a Declaratory Judgment based only on the 1981 Amendment to GC §68203. Also it was not a money judgment upon which execution could be based.

However, Exhibit A does rely on *Olson I* as authority for the fact that COLA increases to salaries and pensions are vested for those periods of time of judicial service, including the protected period, during which the law granting the COLA increases was in effect.

THE TEN PLAINTIFFS HEREIN ARE ENTITLED TO COLA INCREASES UNTIL THE END OF THE PROTECTED PERIOD

The Appellants contend that consistent with *Staniforth* D064111 (AAF Vol. 12, pg. 294). ruling any pensioner who retired during the protected period, or their heirs

or beneficiaries were entitled to pensions adjusted for COLA increases until the end of the protected period, January 5, 1981 for trial judges and January 5, 1987 for appellate and Supreme Court justices.

[The dates used herein are the dates specified in the *Staniforth* D064111 ruling: January 5, 1981 and January 5, 1987. The effective date of the 1976 Amendment to GC §68203 is the first Monday in January 1977. Trial judges hold six year terms, meaning the end of the protected period is January 3, 1983. Supreme and appellate justices hold twelve-year terms, meaning the end of the protected period is January 2, 1989. It is respectfully requested that the dates be corrected in the ruling in this proceeding.]

As stated before *Staniforth* D064111 : states:

> However, it appears the exhibits attached to the complaint also reflected that at least a segment of each of the claims pleaded by the 10 claimants--alleged underpayments during the protected period--were based on underpayments that would have fallen within the ambit of Olson I's protected periods, and JRS does not contend otherwise (AAF Vol. 2, pg. 312).

INTEREST

Pursuant to *Olson III* at p. 395 each retiree is entitled to interest on the unpaid benefits from the dates that the benefits should have been paid to him or her. The interest due is provided by Civil Code Section 3287 (CCP §3287) and the amount of the interest is proscribed by Civil Code Section 3289 (CCP §3289). CCP §3289 states that the rate of interest shall be 10 percent per annum. Ten percent has been the interest rate at all relevant times.

In *Olson III* the California Supreme Court opinion states at pages 401-402:

> **CERTAINTY REQUIREMENTS OF CIVIL CODE SECTION 3287, SUBDIVISION (a)**

> Plaintiffs base their claims to interest on Civil Code section 3287, subdivision (a). It provides: 'Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.'
>
> Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions. (Citations omitted.) Interest is recoverable on each salary or pension payment from the date it fell due. (Citations omitted).

Such interest is compound interest. The Court of Appeals of California, Fourth Appellate District, Division Two considered the question of compounding and, held in *Westbrook v. Fairchild*, 7 Cal.App.4th 889 at pp. 894-895, 9 Cal.Rptr.2d 277:

> 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.) [*Id.*]

Interest is to be Computed on a Daily Basis

In *Olson* III, the opinion states: Interest is recoverable on each salary or pension payment from the date it fell due. (Citations omitted.) *Olson v. Cory* III, *supra*, at p. 402.

The compounding of interest on a daily basis 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 but not dealing with retirement law is 2 Cal Admin Code § 1138.72.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court for San Diego County should be reversed and the Court ordered to enter Judgment for the Ten Petitioner/Plaintiffs who retired during their protected periods for the amount of COLA Benefits that should have been and were not paid for the time benefits became due during the protected periods, the first Monday in January 1977 to January 3.1983 for trial judges and January 2, 1989 for appellate and Supreme Court justices, together with interest at 10% compounded daily.

Respectfully submitted,

Jorn S. Rossi

By Paul G Mast
Paul G. Mast

CERTIFICATION OF WORD COUNT

Paul G. Mast, hereby certifies that the foregoing Appellant's Opening Brief contains 5,674 words, as determined by Microsoft Word, Macintosh Edition, Word Count.

Paul G Mast

Paul G. Mast

PROOF OF SERVICE

I AM OVER THE AGE OF EIGHTEEN, EMPLOYED BY OR AM A MEMBER OF THE CA. STATE BAR, AND AM NOT A PARTY TO THE WITHIN ACTION. MY BUSINESS ADDRESS IS 41735 ELM STREET, SUITE 102, MURRIETA, CA 92562.

ON **JULY** 9, **2015**, I SERVED THE FOLLOWING DOCUMENTS DESCRIBED AS: **APPELLANTS' OPENING BRIEF** ON INTERESTED PARTIES IN THIS ACTION BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE ADDRESSED AS FOLLOWS:

For service on The Judge's Retirement System:
HARVEY LEWIS LEIDERMAN, ESQ.
REED SMITH LLP
101 SECOND ST., SUITE 1800
SAN FRANCISCO, CA. 94105
FAX: (415) 391-8269

For service on the trial court:
CLERK OF THE COURT- CIVIL
Attn. Honorable Judge Joel M. Pressman
San Diego Superior Court
Hall of Justice
330 West Broadway, Dept. 66
San Diego, Ca. 92101

CLERK OF THE SUPREME COURT OF CALIFORNIA
350 McAllister St.
San Francisco, Ca. 94102
[Electronically served pursuant to Cal. Rules of Court 8.212 (c)(2)]

AND THEN MAILING IT TO THEM VIA THE U.S. POSTAL SERVICE BY DEPOSITING SUCH ENVELOPE(S) IN THE MAIL AT MURRIETA, CA.WITH POSTAGE THEREON FULLY PREPAID.
I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED **JULY** 9, **2015**, AT MURRIETA, CA.

Jorn S. Rossi
Jorn S. Rossi

STANIFORTH

APPELLANT'S REPLY BRIEF

EXHIBIT NN

D068174

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division I

CASE # D068174

FAYE STANIFORTH, et al Petitioners/Plaintiffs, Appellants

VS.

THE JUDGES' RETIREMENT SYSTEM, Administered by the

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES

RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA

Respondent/Defendant

Appeal from the Superior Court of California, County of San Diego

The Hon. Joel Pressman, Judge

(Case #37-201200093475CU-MC-CTI)

APPELLANTS REPLY BRIEF

JORN S. ROSSI, SBN 86721

PAUL G. MAST, Of Counsel, SBN 28390

41735 Elm St. Ste. 102, Murrieta, CA 92562

Tel: 951-471-5328 – Fax: 951-600-7565

Email: lawrossi2000@yahoo.com

Attorney for Appellants

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I. The June 18, 1996 Judgment in Case 896 Lacks Subject Matter Relevance, Is Not a Final and Enforceable Judgment, is Not Fairly and Accurately Presented, and Appellants Overcome The Presumption That The Trial Court Decision Was Correct When It Found that Appellants Claims Are Barred by Code of Civil Procedure 337.5 (b)

The Appeal is from an order of the Superior Court sustaining on all issues a demurrer brought by Respondent on the basis that a 1986 judgment of the Superior Court of Los Angeles County in a case Appellant has designated as "case 896" and Respondent has designated "Olson v. Cory, IV" was a final, executable judgment as described in *Staniforth v. Judges' Retirement System* (2014) 226 Cal. App. 4th 978 (*Staniforth)*, and therefore was the basis for the activation of a statute of limitation as provided for in Code of Civil Procedure 337.5 (C.C.P. §337.5). [The case Respondent designates as "Olson v. Cory, IV" is neither an appellate case nor so designated in another court. Appellants continue to use the designation "case 896."]

Case 896 requires careful examination as Appellants contend that, as in the trial court, Respondent again improperly and with knowledge presents a declaratory judgment on an unrelated case (case 896) (RB 9). Respondent states falsely and inaccurately, "On remand, the JRS provided the trial court with a final enforceable judgment that ordered the JRS to comply with Olson v. Cory I, Olson v. Cory II an Olson v. Cory III, and which was entered by the Los Angeles Superior Court on June 18, 1986. AA1 188-93."

A. The Case 896 June 18, 1986 Judgment Concerns a 1981 Amendment, not the 1969 and 1976 Amendments to Government Code §68203

Appellants presented in a line-by-line analysis in their Opening Brief (App.Op.Br. 13) that the declaratory judgment in case 896 concerned only the 1981 Amendment to Government Code §68203, and in no manner applied to *Olson v. Cory I*, (1980) 27 Cal.3d 532, 636 P.2d 532, 178 Cal.Rptr. 568 (*Olson I*) (except citing it for authority) or to *Olson III*. Further it is clear that nothing in the declaratory judgment related in any manner to amounts determined to be due to Appellants or judicial retirees in *Olson I*. Nothing in said declaratory judgment orders JRS to comply with *Olson I*, as stated in Respondent's Response (RB 12). *Olson I* concerned the 1969 and 1976 Amendments to Government Code §68203, whereas case 896 concerned the 1981 Amendment to GC §68203.

Similar in title to the case at issue before this Court, case 896 was not in any manner relevant to (*Olson I*) or the issues before this Court, in that it concerned a 1981 Amendment, *infra* (effective the first day of January, 1982) that was not enacted until after the decision in *Olson I*, March 27, 1980 (final June 27, 1980). As set forth in Appellant's Opening Brief, *Olson I*, concerned the 1969 and the 1976 Amendments to Government Code §68203 (GC §68203), whereas case 896 and the judgment thereon concerned the 1981 Amendment to GC §68203 (1981 Amendment).

B. The Case 896 June 18, 1986 Judgment Is Not a Final Enforceable Judgment as Defined by This Court in *Staniforth*

This Court in *Staniforth* stated:

> [T]he time under Code of Civil Procedure section 337.5 only begins to run upon entry of a final enforceable judgment (*Kertesz v. Ostrovsky* (2004) 115 Cal.App.4th 369, 373), which requires a final determination of the rights of the parties within the meaning of Code of Civil Procedure section 577 and " ' " 'leaves nothing to be done but to enforce by execution what has been determined.' " ' " (*Center for Biological Diversity v. California Fish & Game Com.* (2011) 195 Cal.App.4th 128, 141, fn. 7.) . . . As explained by *Olson III*, *Olson I* did *not* result in a final judgment on which execution could proceed:
> 'because the declaratory judgment adjudicated in *Olson v. Cory I* was not in itself enforceable. The purpose of declaratory relief is 'to enable the parties to shape their conduct so as to avoid a breach.' [Quoting *Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.] Though declaratory relief may properly be accompanied by coercive relief [citation], the judgment in *Olson v. Cory I* was purely declaratory. It contained no enforceable provision, such as one directing a particular party to pay a specified sum to another party.' (*Olson III, supra,* 35 Cal.3d at p. 400.) *Staniforth* 993

Case 896 does not provide a "specified sum" *Olson v. Cory III* (1983) 35 Cal. 3d 390 (*Olson III*) that each party is entitled to collect from JRS, the hallmark of a final judgment.

Paragraph 6 of the June 18 1996 declaratory judgment states in each subsection (a-e) that certain Groups of justices and judges are entitled to a specified percent of salary increase(s); in some cases, less a percent of salary

increases previously paid. (AA1 191) This is not an "enforceable provision." This is a declaratory judgment specifying the manner in which certain salary increases should be paid. This neither constitutes a final executable judgment as specified in *Staniforth, supra,* nor is it coercive in any manner. In addition as stated, *supra,* it relates to salary adjustments after the 1981 Amendment, beginning in January 1982.

Respondent claims that the judgment in case 896 was "accompanied by coercive relief ... [with an] enforceable provision ... " (RB 13) ignoring the fact that case 896 applies only to the 1981 Amendment to GC §68203 and neither contains a provision for coercive relief nor an enforceable provision. Respondent claims that,

> From pages 2 through 5, the Judgment clearly states that it was 'ordered, adjudged and decreed' that the JRS was required to make payments to the different classes of retired judges and justices who were owed amounts under *Olson v. Cory I, Olson v. Cory II and Olson v. Cory III* (as well as the challenge that was made in *Olson v. Cory IV*). (RB 10)

Respondent clearly attempts to mislead this Court. Benefits pursuant to *Olson I* were not considered in case 896. The declaratory judgment did not make an order in regard to any such benefits. The reference to *Olson I* (other than citing it as authority) was in regard to classifying certain justices. For its purpose in determining rights under the 1981 Amendment, the court in case 896 divided judges and justices into three classes; Class I justices were apparently those who, in 1986, were still serving terms during the "protected period" as defined by *Olson I.* Separating the judicial officers into classes based

upon their dates of service does not make the action a class action.

No retirement benefits were ordered in *Olson v. Cory II*, 134 Cal.App.3d 85 (*Olson II*). The only decision therein was to declare 1981 Proposition 11 amending the Constitution unconstitutional.

The use of the words "ordered, adjudged and decreed" in a declaratory judgment does not make it coercive in nature and does not constitute "coercive relief." The declaratory judgment did not contain an enforceable provision, such as one directing a particular party to pay a specified sum to another party.

This Court stated, *supra,* in *Staniforth* in regard to the declaratory judgment in *Olson I*:

> Though declaratory relief may properly be accompanied by coercive relief [citation], the judgment in Olson v. Cory I was purely declaratory. It contained no enforceable provision, such as one directing a particular party to **pay a specified sum** to another party. (*Olson III*, supra, 35 Cal.3d at p. 400.) [emphasis supplied] *Staniforth 993.*

The same would apply to the declaratory judgment in case 896 if it were pertinent, which it is not.

No retirement benefits were ordered pursuant to *Olson III*, which was limited to a determination of whether interest should be applied and the rate thereof.

Respondent attempts (RB 11) to make excuses for its improper presentation to the trial court. However, Respondent repeats the same improper representations to this Court. This can only be intentional.

The perfidy is clearly shown however, in Exhibit II of the Request for Judicial Notice (AA1 – 195), wherein the Respondent presented to the Superior Court docket sheets from three unrelated cases, each running into the next, with no case names or titles, in an apparent attempt to make it seem like the declaratory judgment in case 896 was part of *Olson I*. Even though the Superior Court was requested to take Judicial Notice of Exhibit II, it was never cited for any purpose in the Superior Court or in this Court.

C. Respondent's Statements to The Superior Court and This Court Regarding The Case 896 June 18, 1986 Judgment Are False and Misleading and Therefore The Trial Court Decision Was Not Correct When It Found that Appellants Claims Are Barred by Code of Civil Procedure 337.5 (b)

In Appellants' Opening Brief, Appellants specified in a line-by-line analysis (AOB 13), why the proffered declaratory judgment in case 896 does not apply to the matter before this Court (or the trial court). Respondent has not in its Response contested any of the issues outlined therein. The reason is clear: there is no valid response. Respondent has elected to avoid the issues by raising other untrue and irrelevant arguments.

The Respondant states:

> The June 18, 1996 judgment, however, contains just such an 'enforceable provision.' Paragraph 6 specifies exactly the method by which the salaries and retirement allowances of the plaintiff class members were to be adjusted from January 1982 through January 1987. (RB 13).

Respondent states (RB 2) that case 896, "applied the rulings from *Olson v. Cory, I* and *Olson v. Cory, II*." This is untrue. Case 896 (referenced in the

Response as Olson v. Cory, IV) referred to those cases only in establishing **categories** of justices and judges as part of the consideration of its decision on the 1981 Amendment. It did not in any manner apply the rulings of *Olson I* or *Olson II* (*or Olson III*) relating to benefits owed or any other issues.

The 1986 judgment in case 896 is not applicable to the question of whether some statute of limitation applies to the case before this Court. First it was a declaratory judgment, and did not constitute a basis for any statute of limitations pursuant to the decision of this Court in its prior decision in *Staniforth, supra,* pg. 3.

Respondent further states (RB 2), "It applied the rulings . . . as well as Olson v. Cory III's directive to pay interest" (AA1 192). Case 896 does not cite *Olson III*. The declaratory judgment in case 896 provides for interest at a 7 percent rate. As stated in *Olson III* the correct rate of interest is 10 percent pursuant to Civil Code §3287 and Article XV, Section 1 of the California Constitution. See section on Interest, *infra*.

Respondent seems to claim in the Response that they were confused by the number of cases bearing the name Olson v. Cory (RB 11). This is beyond belief. Appellants and their attorneys have been litigating with Harvey Leiderman, Jeffrey Rieger, and Reed & Smith since the beginning of 2012 in the instant case. *Olson II* has never been a consideration, as it dealt with the validity of the 1981 Proposition 11 amending the California Constitution. The Proposition had nothing to do with the amount of benefits. *Olson III* dealt with

interest only. It had nothing to do with retirement benefits, other than they were the basis for interest. In regard to case 896, this was a case completely unknown to Appellants. Appellants can only assume the attorneys for Respondent found this case in the files of Respondent, motivated by *Staniforth*, in footnote 6, "Arguably, some final enforceable judgment was subsequently entered by the trial court on remand from *Olson III* that would have triggered Code of Civil Procedure section 337.5."

Respondent states (RB 2), "That judgment in Olson v. Cory IV [case 896] is the last judgment in the Olson v. Cory saga." There is no such "Olson v. Cory saga."

There are three unrelated cases all entitled Olson v. Cory. The first case had two Supreme Court decisions, *Olson I*, that applies to the issues before this Court, and its companion (*Olson III*), which relates to interest on the pay and benefits determined due in the declaratory judgment in *Olson I*. The second case is (*Olson II*), which relates to 1981 Proposition 11, a Constitutional Amendment (enacted by vote of the electorate) and which is not relevant in any manner to the issues before this Court. The third case is case 896, which is a trial court case first appearing in this litigation in the Request for Judicial Notice in the Superior Court (AA1 185). Case 896 is in not related to the issues before this Court; Respondent inaccurately and improperly claims it is in some manner a final judgment in *Olson I*.

Respondent knowingly presented the declaratory judgment in case 896 to the Superior Court, representing it to be a final, enforceable judgment in

Olson I. It is not related to *Olson I.* Case 896 relates to a 1981 Amendment to GC §68203. The 1981 Amendment to GC §68203 was not in existence at the time of *Olson I.* The declaratory judgment in case 896 was unenforceable and had no coercive provisions.

II. The Judgment Dated June 17, 1986 Pursuant to *Olson III* Is Not a Final Judgment and Contains No Coercive Relief

Respondent presented a Motion Requesting this Court to take Judicial Notice of an Order of the Superior Court dated June 17, 1986 in case 000437, ordering that a Peremptory Writ of Mandate issue.

Both *Olson I* and *Olson III* were appeals from case 000437.

The Order of June 17, 1986 clearly is not a final and enforceable judgment, *infra.* Although it is not clear from Respondent's Response Brief, it does not appear that Respondent claims that said judgment is final and enforceable.

The Order commands Defendants Jesse Huff and Kenneth Cory each to perform their ministerial duties. This Order issued June 17, 1986, whereas the Supreme Court decision in *Olson III* was dated December 30, 1983.

The Order of June 17, 1986 at page 2 contains the following wording: "2. *Olson I* is a final and enforceable judgment on the **issue of plaintiffs' entitlement to interest**, and no further judgment is necessary to entitle plaintiffs to payment of the interest awarded by this decision. . . . " [emphasis supplied]. *Olson I* is a Supreme Court case that rendered a declaratory

judgment, not a final enforceable judgment. It does not relate to interest. Perhaps the Court meant to say "*Olson III.*" *Olson III* is a Supreme Court case that rendered a declaratory judgment in regard to interest that was due to the date of the issuance of the declaratory judgment in *Olson I.* It was not a final and enforceable judgment.

Although the Order contains the term "final and enforceable judgment," it does not meet the *Staniforth* definition of "final and enforceable judgment," *Staniforth* at 993. The judgment neither contains a sum certain that can be executed upon nor is it coercive in any manner.

The June 17, 1986 Order refers to entitlement of interest. There is neither a suggestion that there was ever a final and enforceable judgment relating to retirement benefits, nor is there any suggestion that there was any such judgment that would change this Court's former *Staniforth* ruling that there was no final and enforceable judgment. (see *Staniforth supra,* pg. 3)

In summary, the Order of June 17, 1986 by the Los Angeles Superior Court, subsequent to *Olson III* directed two state officers to perform their "ministerial duties." The record before the Court does not indicate whether they did or did not. This is not a question for this Court, but a question for the trial court. The Appellants are obligated to present a complete accounting to the trial court. These methods of discovery and computation are also trial court considerations. Neither the calculation mechanics nor the fiscal impact are part

of the instant matter. The newly proffered June 17, 1986 declaratory judgment in the *Olson* trial court case 000437 has no bearing on this appeal, including interest that may have been paid subsequent to the declaratory judgment.

Bringing forth this declaratory judgment that does not pertain to the issues before this Court seems to be another attempt to divert the Court as *supra*.

III. Appellants' Arguments Are Rational and Correct

Respondent alleges (RB 16) that Appellants argue they claim to be owed benefits as a result of a final enforceable judgment. That is not Appellants claim, and Appellants are surprised to learn that after four years Respondent believes this is what Appellants claim. Appellants claim that as a result of the declaratory judgment handed down on March 27, 1980 (*Olson I*), the Court declared that Appellants were entitled to receive certain benefits. The judgment in *Olson I* could not have been enforced by execution and was not a coercive judgment. *Staniforth* 993.

In regard to interest, Respondent states that Appellants claim 10 percent post-judgment interest. That is also incorrect. The interest is not post-judgment; it is **pre**-judgment interest. **No executable or coercive judgment was ever entered in *Olson I*.** Thus, *Olson III* ordered pre-judgment interest paid pursuant to Civil Code §3287 (CC §3287). The rate of interest pursuant to CC §3287 for pre-judgment interest is 10 percent

(California Constitution Article XV, section 1). Post judgment interest, which is not relevant to this case, is set at 7 percent.

Respondent cites a case (RB 16) stating that for periodic support payments the statute of limitations runs in relation to each payment, and that since the last payment would have been due before January 1, 1987, the statute of limitations would have run before 1990. The reply to this is obvious. We are not dealing with support payments; we are dealing with retirement benefit payments due from a fiduciary to a beneficiary. As will be discussed *infra*, it is not material to the question of limitation of actions whether or not the last retirement benefits that could have been due to Appellants is prior to January 1, 1987 (RB 16). In accordance with Government Code §20164 (b)(2) (GC §20164 (b)(2)), discussed *infra,* there is no limitation on the time in which such benefits must be paid. They must be paid until they are paid in full.

Respondent accuses (RB 17) Appellants of trying to "nitpick" the 1986 judgment on "internal labels." This is completely false. There are no "internal labels," only designations established by the Supreme Court in *Olson III*. These designate separate cases (*Olson v. Cory, I and II*), and two decisions in one case (*Olson I and III*). The only "internal label" was that created by Respondent: (Olson v. Cory IV) for case 896. Appellants opinion is Respondent's creation was "internally created" to promote confusion.

The Response at the end of page 17 refers to the manner in which Appellants characterized the actions of Respondent in presenting and representing the declaratory judgment in case 896. Appellants' counsel

apologized to this Court for using such strong language, but felt and still feels that it was warranted and necessary. Appellants' counsel writing this Reply has been practicing law and on the bench since 1958, and can honestly state he has never before encountered such egregious conduct. The Court has the representations made to the trial court and to this Court and can make its own determination on the conduct and whether sanctions are warranted.

Respondent (RB 18) states: "The JRS described the June 18, 1986 judgment as 'the Judgment ordering the JRS to comply with *Olson v. Cory I, Olson v. Cory II* and *Olson v. Cory III*.' That is exactly what the June 18, 1986 judgment did. . ." [Respondent's Memorandum of Points and Authorities in Support of General and Special Demurrer, AA1 179, lines 24-26].

Respondent's statement originally made to the trial court and now presented to this Court (RB 18) is patently false and misleading. The referenced document, the declaratory judgment in case 896, does not order JRS (Respondent) to comply with anything in regard to *Olson v. Cory, I, Olson v. Cory II*, or *Olson v. Cory III*. This Court has the declaratory judgment in case 896, AA1 page 185. This Court has Appellants' Opening Brief analyzing line-by-line the declaratory judgment (AOB 13). Respondent quotes from its Memorandum of Points and Authorities, but at no time points out where there is such an order in the declaratory judgment. The reason, of course, is that it is not there. Appellants' counsel cannot understand how one page after they question the actions of Appellants' counsel, Mr. Leiderman and Mr. Rieger repeat the same mischaracterizations and misrepresentations.

IV. Pursuant to Government Code §20164 (b)(2) The Claims of Appellants Must Be Paid in Full and Are Not Barred By Any Other Sections of the Code of Civil Procedure Government Code § 20164 (b)(2)

A. Government Code § 20164 (b)(2)

Respondent refers to a litany of Code of Civil Procedure sections in the hope that one of them will in some way apply to this case. None of them does. What Respondent fails to do is discuss or refer to the one applicable code section, GC § 20164 (b)(2). This was discussed by this Court in in its prior opinion:

> The final ground for the trial court's denial of the motion was that all of JRS's obligations to these 10 claimants were extinguished under section 20164, subdivision (a). Although that subdivision specifies the obligations of the system continues 'throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged,' it contains no explicit statute of limitations for accrued but unpaid pension payments that might form a chose in action that the decedent's estate or trust might be entitled to assert. Instead, the only *explicit* statute of limitations described in section 20164 is the three-year limitations period provided in subdivision (b) '[f]or the purposes of payments into or out of the retirement fund for adjustment of errors or omissions,' which provides three-year limitation on the *system's* right to collect for erroneous payments out of the system (*id.* at subds. (b)(1) & (b)(3)), but that subdivision also specifies that **'[i]n cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.**' (*Id.* at subd. (b)(2).) *Staniforth*, 994 [emphasis supplied].

GC §20164 (b)(2) states that there is no period of limitation where the Judges' Retirement System owes money to a member or a beneficiary:

> (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

See also *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 [115 Cal.Rptr.2d 151] (*Oakland)* which ruled:

> The City further argues that this action is subject to a three-year statute of limitation because it essentially seeks to enforce a statutory duty and/or to obtain relief on ground of mistake.
>
> The statute of limitations contained in Government Code section 20164(b) applies to erroneous payments into or out of the retirement fund, [95 Cal. App. 4th 36] not to reclassifications. The three year statute of limitations in the Code of Civil Procedure is also inapplicable. Government Code section 20164(a) provides that **CalPERS' obligations to its members 'continue throughout their respective memberships' and its obligations to retired members continue throughout the lives of the retired members, and thereafter until all obligations to their respective beneficiaries, if any, have been discharged'** [emphasis supplied]. To the extent that the two statutes conflict, the more specific language in the retirement statute should govern. **CalPERS also notes that section 20164 is a substantive statute creating an ongoing duty to properly discharge its obligations. The procedural statute of limitations does not appear to override this duty** [emphasis supplied].

Staniforth 993, in overruling the trial court's ruling that the claims were time barred by Government Code §20164 (GC §20164) stated that GC §20164:

> specifies the obligations of the system continues 'throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged,' it contains no explicit statute of limitations for accrued but unpaid pension payments that might form a chose in action that the decedent's estate or trust might be entitled to assert.

Thus, Respondent has no Statute of Limitations defense.

In GC 20164 (b)(2), as compared to Government Code §20164 (b)(l) (GC §20164 (b)(l)), the Legislature recognized and applied the settled principle of law that in a case where a fiduciary relationship is present, there shall be no period of limitation on the duty of the fiduciary to pay monies owed to the beneficiary. If there is a liability situation, rather than a fiduciary obligation, where an over-payment was made to a beneficiary (establishing the liability), a period of limitation (therein three years) applies. *City of Oakland* states, *supra*: "To the extent that the two statutes [referring to other C.C.P. statutes] conflict, the more specific language in the retirement statute should govern. CalPERS also notes that section 20164 is a substantive statute creating an ongoing duty to properly discharge its obligations. The procedural statute of limitations does not appear to override this duty." *Id.* at 37.

The California Constitution, article XVI, section 17, provides in relevant part: "Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system. . ."

There is no final judgment that would have triggered the commencement of any statute of limitations. This Case is not a civil action to which the Code of Civil Procedure could apply.

Oakland states: "Pursuant to Code of Civil Procedure § 312, the statutes of limitations in the Code of Civil Procedure apply only to civil action and civil

special proceedings..."

Oakland began as an administrative proceeding before PERS and came to the courts of law for judicial review of PERS actions. Accordingly, the court there applied the rule that "[a]n administrative proceeding is neither a 'civil action'(Code Civ. Proc. section 22,312) nor a special proceeding of a 'civil nature'(id., section 23,363)..."Id. At 48, I l5 Cal. Rptr. 2d at 165. Therefore no statute of limitations in the Code of Civil Procedure could be applied in City of Oakland."

The case at bar also began as administrative action before JRS, a unit of CalPERS. The Second Amended Complaint alleges that claims were filed with the JRS seeking payment of arrearages owed judicial pensioners and their successors-in-interest. JRS wrote determination letters rejecting all of the claims. Thus, the procedural posture of the case at bar is the same as in *Oakland* for purposes of applicability of the Code of Civil Procedure. This case is an administrative action subject to review in the courts, not a civil action. The statutes of limitations of the Code of Civil Procedure do not apply.

Witkins' treatise states:

> The general and special statutes of limitation referring to actions and special proceedings are applicable only to judicial proceedings; they do not apply to administrative proceedings [Citations] Limitation periods are, however, provided for in the acts governing some administrative proceedings. (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, section 405(2), p. 510; Now found in 3 Witkins. Cal. Procedure (5th ed. 2008). Actions. section 430(2)1.

Nevertheless Appellants will respond to the allegations set forth in the Response.

B. Code of Civil Procedure §338(a)

C.C.P. §338(a) states: " Within three years: (a) An action upon a liability created by statute, other than a penalty or forfeiture."

Respondent asserts that since this action is based on an application of Government Code §75006, C.C.P. §338(a) applies. This action is not based upon that code section, which relates to the order in which beneficiaries inherit. Further, this section does not take precedence over the more specific section GC §20164 (b)(2), and this Court has so ruled. *Staniforth* at 993, 994.

C. Code of Civil Procedure §§ 337 and 339

C.C.P.§337 states: "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing."

C.C.P §339 states: "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing."

This action is based upon accrued and unpaid retirement benefits, not on any contract, oral or in writing [this is true despite the fact that the basis of the *Olson I* decision was that the 1976 Amendment to GC § 62803 was a violation of the Contracts Clause of the United States Constitution.]

Further, this section does not take precedence over the more specific section GC §20164 (b)(2), and this Court has so ruled. *Staniforth* at 993, 994.

D. Code of Civil Procedure § 343

C.C.P §343 states: " An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

This section does not take precedence over the more specific section GC §20164 (b)(2), which states "[i]n cases where this system owes money to a member or beneficiary, the period of limitations shall not apply."

The fact that the justices or judges are living or dead is not material to the provisions of GC §20164 (b)(2).

Respondent states (RB 3), "They [Appellants] claim that it took three decades for the descendants of these ten deceased judges and justices to realize that the JRS never complied with the rulings in the Olson v. Cory cases by paying the sums due to their ancestors." Then Respondent (RB 20, 21) makes an impassioned plea: "there is simply no excuse for Appellants delay here. . . ." Appellants need no excuse. Although these statements are not material to the issues in the case, Appellants must reply.

In making these statements Respondent infers that somehow Appellants procrastinated or that the delay in presenting the claims in someway denies them the rights to make the claims. This is patently incorrect. The law is clear that no limitation of actions applies. The Respondent was and is a fiduciary pursuant to article XVI, section 17 of the California Constitution. As such Respondent had a duty to see that its fiduciary obligations were met and

that all beneficiaries of the Judges' Retirement System, whether justices and judges or their beneficiaries, were paid the full retirement benefits that they earned, for which they paid, and to which they were entitled. The jurists that constitute the membership in the Judges' Retirement System all paid contributions into the System during their tenures as justices and judges. The benefits being sought by Appellants constitute amounts earned and contributed by their respective justices and judges. The Appellants herein had every right to rely on, as they did, Respondents fulfilling their fiduciary duties. We are not concerned in the instant case with anything akin to a suit for damages or breach of contract. What we are concerned with is the right of Appellants to recover from Respondent retirement benefits that were earned and paid for, and rightfully should have been paid by Respondent to the justices and judges and their beneficiaries.

This was recognized by the California Legislature and was the rationale for Government GC §20164 (b)(2) which states, "In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply."

V. Justice Friedman and Judge Seagraves are owed retirement benefits under *Olson I*

A. *Staniforth* Ruling As It Applies To Vested Retirement Benefits Of Justice Friedman and Judge Seagraves

Respondent claims (RB 21):

> Because a retired judge or justice's pension is based on an active judge or justice's salary, it naturally follows that any judge or justice who left the bench on or after January 1, 1977, could not have been due additional amounts under *Olson v. Cory I.*

That statement (RB 21) is wrong. As discussed *infra* in *Olson I (p.23) and Betts (pg.30)*, although a judicial pension was based on an active justice's or judge's salary prior to January 1, 1977, after January 1, 1977, the COLA benefits of retired judges and justices were vested for the period prior to and to the end of their service during their protected period. Those vested rights could not be revoked unless replaced by other benefits of a similar value, *infra*. The retirement benefits after January 1, 1977, are based on the COLA retirement benefits, which were vested rights of Justice Friedman and Judge Seagraves.

The Respondent's theory is that the retirement benefits were based on an active justice's or judge's salary. This is incorrect. There were jurists earning cost-of-living adjusted (COLA) salaries holding the same particular judicial office (Appellate Court Justice, Superior Court Judge, etc.) as Justice Friedman and Judge Seagraves, until January 1, 1981 for judges and January 1, 1987 for justices. During the period of time after January 1, 1977 to the end of the final protected term, there were two (and later three) levels of salary being paid to a justice or judge holding the same particular office. The different levels of salaries resulted when some justices and judges first assumed office or began a new term after January 1, 1977. Their salaries (and future vested pension rights for the period after January 1, 1977) were governed by the 1976 Amendment to GC §68203.

Respondent's theory that "particular judicial office" means the seat the judicial officer held in the courthouse is incorrect. If that were the definition of "particular judicial office," *Olson I* would be meaningless, *infra*.

The decision in *Staniforth* does not differentiate between times during the protected period before or after January 1, 1977. The decision states that:

> a *segment* of each of the claims pleaded by the 10 claimants--alleged underpayments *during* the protected period--were based on underpayments that would have fallen *within* the ambit of *Olson I's* protected periods, and JRS does not contend otherwise. *Staniforth* at 992.

Respondent quotes a part of *Olson I* but then misinterprets the quoted section. In *Olson I*, the Court stated:

> Likewise, a judge entering office for the first time on or after 1 January 1977, including a judge entering upon his own term or upon the unexpired term of a predecessor judge, cannot claim any benefit based on section 68203 before the 1976 amendment. *Id.* at 540.

It is clear that *Olson I* held that those justices and judges serving part of their judicial service during the protected period (the period from the first day in January 1970 to the first day of January 1977, and until the completion of any term of office that began therein) received as part of their compensation, the vesting of cost-of-living adjusted (COLA) retirement benefits during their protected period.

Likewise, any justice of judge first taking office after the first day in January 1977 did not receive any vested cost-of-living retirement benefits in accordance with the 1969 Amendment to GC §68203, as that amendment was abrogated by the 1977 Amendment to GC §68203.

Any justice or judge starting a new term after the first day of January 1977, would not **further accrue** any cost-of-living adjusted retirement

benefits for that future service. Beginning the new term of office, however, would not abrogate any retirement benefits already vested (see the authority cited, *infra).* The result is that for any justice or judge beginning such a new term after the protected period ends, that part of that justice's or judge's retirement benefits earned before and during the protected period are subject to cost-of- living adjustments; that part of his/her retirement benefits, for the period after their protected period ended, is based on the current salary of a justice or judge holding that particular judicial office (Superior Court Judge, Appellate Court Justice, etc.).

Justice Friedman and Judge Seagraves retired during their protected period term of office but after the first day of January 1977. Each was still serving a term of office during which COLA retirement benefits were vesting.

Respondent alleges that vested retirement benefits are not vested after the protected period (and thus are not vested at all). This is not the law, as shown below.

B. Retirement Benefits Are Vested According to *Olson I* During The Protected Period

Justice Friedman's and Judge Seagrave's [and those of the other eight Appellants] cost-of-living adjustment increased retirement benefits, earned during the protected period and 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 and judges, 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.** [emphasis supplied]. *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 *Olson I.*

C. The Context of *Olson I* Must Be Considered in Interpreting the Decision

Respondent 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 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 Respondent. Second it indicates that no judicial pensioner (even the non-vested) lost any rights on the first Monday in January 1977, as Respondent alleges in regard to Justice Friedman and Judge Seagraves.

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."

Respondent previously has made the claim 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. The Respondent 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.

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.

This proves Appellants' position. On the 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 the other 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." (*Olson I* footnote 5 states: "As used herein, the phrase 'judicial pensioners' refers to both retired judges and other persons whose benefits are based on services of a deceased judge, e.g., the surviving spouse or minor children of a deceased or retired judge.")

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, then it would contradict the finding in *Olson I, supra*, 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.

D. *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 [nonlegislative 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* increment of increase, a 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.

Respondent quotes one sentence (RB 23) out of context from foonote 7, *infra,* 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." By quoting this one sentence, Respondent suggests that applying COLA increases to retirement benefits of Appellants would somehow constitute a double increment of increase. This is not true; judicial retirees would get only one increment of increase. As part of retirement benefits attributable to service during the protected period and before, COLA increases vested for their entire retirement.

Each of the ten Appellants herein retired during their protected period. Each would receive increases in retirement benefits based solely on cost-of-living adjustments (COLA). The actual current salary of a sitting judge in their office would not be considered.

In the same manner, any jurist beginning a new term after their protected period ends would continue to have vested COLA retirement benefits for the period before the new term; there is no divestment

provision in the 1976 Amendment to GC §68203. However, retirement benefits attributable to service at the beginning of the new term and thereafter would not receive cost-of-living adjustments. The retirement benefits for said period would be based on the future actual current salary of a sitting judge.

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

The Respondent knows the meaning of the phrase "double increment" of increase. It comes directly out of *Betts*, *supra*, and should not be used to mislead the court. The above section of *Betts* makes this clear.

Olson I footnote 7 is complex. The meaning of the footnote is that *Olson I* holds retirement beneficiaries ending their judicial service during their protected period are entitled to vested COLA retirement benefits. It 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 afterwards**. The retirement benefits for that period would be based on the justice or judges salary for that particular judicial office.

Appellants have separated the sections of footnote 7 and have inserted italicized 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 <u>both</u> 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."

> *In Olson I, the Supreme Court holds that a judicial pensioner is entitled to only one type of increase: that being the cost of living adjustment increase vested during the protected period. Since the judge holding the particular office is getting COLA increases as authorized by the 1969 Amendment, there would be no further increase to that vested portion of his retirement benefits for increases received by sitting jurists after 1977. In the same manner the portion of the retirement benefits of the jurist vested for the period after the protected period would receive the benefit of increases to the actual salaries of sitting jurists.*
> *As stated, supra, in this part of footnote 7 "cost of living factor" refers to increases in the basic fluctuations of the sitting judge's salary after January 1977. The definition of "basic retirement allowance," excerpted from footnote 7 below,* "In the instant case legislation exists directing increases cost of living or otherwise in the basic retirement allowance" *includes the cost of living allowance vested during the protected period.]*
>
> 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.]*

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 earneing 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.

E. *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 [1] he became subject to the 1973 amendment barring deferred retirement for judges who had gone on the federal bench. Before the *Alarcon* court, JRS relied on the

[1] JRS called this "an 'unprotected term.'" Id. at 552, 196 Cal. Rptr. at 891.

> 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 in the latter situation providing more protection.

Alarcon 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 was 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 recognizing 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.

F. The Respondent Misinterprets the Meaning of *Olson I's* Conclusion

Respondent states (RB 23):

> [The] Conclusion" section of Olson v. Cory I went into great detail about how individual judges, justices and judicial pensioners would have different rights based on the timing of the relevant judicial terms. Id. at 546-48.

Appellants analyze the Conclusion of the Opinion in *Olson I*. The Conclusion confirms what Appellants have said *supra*. The Conclusion 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]

Olson I, in its conclusion, thereby states, as it does in the body of the opinion 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 judicial pensioners. The Court is saying that since the 1976 law is unconstitutional as to judicial pensioners, the pension rights for judicial pensioners [who had judicial time during the protected period] remained the same as they were before the enactment of the 1976 amendment to GC §68203. Those pension rights were that they would receive cost-of-living adjusted retirement benefits for the length of time of their judicial service prior to the 1976 amendment.

It is not stated explicitly in the Conclusion, but it is clear that the meaning of the Court is that for any judicial service earned in a new term that began after the first day in January 1977, that retirement benefits would not earn vested cost-of-living enhanced retirement benefits. This was confirmed in the passage from *Alarcon, 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, and the appeal was designated as being an appeal from the trial court. The trial court 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. *Olson 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* does not directly address the question of whether judicial retirees who started a new term after the protected period would also have COLA retirement benefits for the additional period, but to so suggest, and Appellants do not suggest, would be contrary to the ruling in

regard to active judges embarking on a new term subsequent to the protected period having taken the new term voluntarily and agreeing to the salary terms (and presumably the future retirement terms) from that date on.

If there is any question as to the continuous right to the already vested retirement benefits continuing to be vested despite taking a new term after the 1976 Amendment, *Betts* makes it clear when it stated, *supra*:

> '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]. *Betts, supra. at* 29.

Alarcon agrees: "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, supra.*

F. Summary of Vested Retirement Rights

Appellants did not intend during these proceedings to challenge the prior decision of this Court in *Staniforth*. The subject was not broached in Appellants' Opening Brief. When the Respondent challenged the validity of the claims of Justice Friedman and Judge Seagraves, including misconstruing the Conclusion of *Olson I, supra,* Appellants were required to discuss the issue. This by necessity led to a complete discussion of **vested** retirement benefits that had been earned by Appellants, what the vesting of retirement benefits means and how it effects the retirement benefits earned by not only all ten Appellants, but by all judicial officers who served some part of their service during the protected period.

The conclusion and result was clearly stated in *Olson I* and other cases. Judicial officers who served some part of their service during the protected period are entitled to COLA retirement benefits for the time of their protected period and before, during the first twenty years of their service. Any service during the first twenty years of their service, which occurred after their protected period does not earn COLA protected retirement benefits. For that service, retirement benefits are a proportionate amount of the salary of a sitting judge. By way of example: if a judicial officer served 15 years during a protected period and 5 years after the protected period, he/she would receive retirement benefits of 56.25 percent of the salary of the last particular judicial office he/she held as it was on January 1, 1977, enhanced by COLA each year on September 1, based on the December-to-December change in the Consumer Price Index, All

Urban Consumers, for the prior year. In addition, the judicial officer would receive 18.75 percent of the current salary of a judicial officer holding the particular judicial office last held by the pensioner.

Appellants understand that this is contrary to the holding in *Staniforth*. Appellants respect the Court although they strongly disagree with the prior ruling.

VI. Interest Is Payable From The Day Each Retirement Benefit Payment Is Due At 10 Percent Per Annum Compounded Daily

Appellants have set forth in their Opening Brief the authority for the recovery of interest in accordance with *Olson III*. Respondent has not responded to this, except to dispute the rate of interest. As Respondent states, effective January 1, 1986, Civil Code §3289 (CC 3289) specified a rate of interest at 10 percent. The innuendo is that prior to that CC §3289 specified a different rate of interest. It did not. It did not specify any rate of interest. Both before and after January 1, 1986, the legal rate of interest for pre-judgment interest was specified at 10 percent by the California Constitution, article XV, section 1, which states (in part):

> (1) For any loan or forbearance of any money, goods, or things in action, if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum....

VII. Judge Call's Calculations Are a Matter For The Trial Court

Respondent is stating (RB 25) a false conclusion regarding Judge Call, caused by its inability to read and understand the Excel Spreadsheet. This is a matter for the trial court, not this Court.

VII. Conclusion

Appellants request the Court enter its order that:

1. Pursuant to GC 20164 (b)(2) there is no statute of limitations that applies to the claims made herein.
2. That no other statutes of limitations apply to the claims before the Court.
3. That the Appellants are entitled to cost-of-living adjustments retirement benefits for the time of their protected period and before, during the first twenty years of their service. The benefits calculated based on salary of the last particular judicial office he/she held as it was on January 1, 1977, enhanced by cost-of-living adjustment each year on September 1, based on the December-to-December change in the Consumer Price Index, All Urban Consumers, for the prior year. Any service during the first twenty years of their service which occurred after their protected period does not earn COLA protected retirement benefits but earns retirement benefits based on the salary of the judicial officers holding the particular judicial office.
4. In regard to the judicial officers whose claims were dismissed pursuant to *Staniforth,* the Court should do what it considers just and proper.
5. Interest on the amount of retirement benefits due from the date each

benefit accrued at the rate of 10 percent per annum compounded daily.

6. For costs on appeal.

Respectfully submitted,

October 19, 2015 Jorn S. Rossi

By Paul G Mast
Paul G. Mast - Of Counsel

Certification of Word Count

Paul G. Mast, hereby certifies that the foregoing Appellant's Opening Brief contains 12,867 words, as determined by Microsoft Word, Macintosh Edition, Word Count.

Paul G Mast
Paul G. Mast

PROOF OF SERVICE

I AM OVER THE AGE OF EIGHTEEN, EMPLOYED BY OR AM A MEMBER OF THE CA. STATE BAR, AND AM NOT A PARTY TO THE WITHIN ACTION. MY BUSINESS ADDRESS IS 41735 ELM STREET, SUITE 102, MURRIETA, CA 92562.

ON **OCTOBER 20, 2015**, I SERVED THE FOLLOWING DOCUMENT DESCRIBED AS: **APPELLANTS' REPLY BRIEF** ON INTERESTED PARTIES IN THIS ACTION BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE ADDRESSED AS FOLLOWS:

For service on The Judge's Retirement System:
Jeffrey R. Rieger, Esq.
REED SMITH LLP
101 Second St., Suite 1800
San Francisco, Ca. 94105

For service on the trial court:
Hon Joel S. Pressman, Dept. 66
San Diego Superior Court
330 West Broadway
San Diego, Ca. 92101

By electronic service through Court of Appeal e-submission, California Rules of Court, Rule 8.212 (c) (2)

Supreme Court of California
350 McAllister Street
San Francisco, Ca. 94102

AND THEN MAILING IT TO THEM VIA THE U.S. POSTAL SERVICE EXPRESS MAIL OVERNIGHT DELIVERY BY DEPOSITING SUCH ENVELOPE(S) IN THE MAIL AT MURRIETA, CA.WITH POSTAGE THEREON FULLY PREPAID.
I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED **OCTOBER 20, 2015**, AT MURRIETA, CA.

Jorn S. Rossi
Jorn S. Rossi