

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

2 [REDACTED]
3 Telephone: [REDACTED]
4 Email: [REDACTED]

5 Respondent

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BOARD OF ADMINISTRATION

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CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

AGENCY CASE NO. 2010-0825

13 PAUL G. MAST, Judge, Ret.)

OAH NO. 2015-030996

14)

**RESPONDENT'S TRIAL BRIEF
DECLARATION OF PAUL MAST**

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Hearing Date: November 30, 2015

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Hearing Location: Los Angeles, CA

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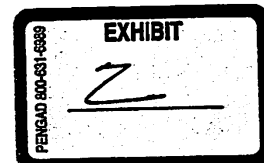
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DECLARATION OF PAUL G MAST

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

Declarant was born [REDACTED]. He became a judge on November 8, 1965, at the age of 33. Declarant served as a judge continuously until January 15 1979, at which time he took a deferred retirement after service of more than 13 years. If Declarant had continued in active judicial service he would have served 20 years at age 53.

At no time before, during, or after his judicial service was Declarant ever advised or did he know that he was entitled to begin receiving his deferred retirement benefits at age 60.

Declarant read the file of Judge Robert London and observed that Judge London served nine years in his judicial offices. He became a judge prior to age 40 and started receiving his deferred retirement benefits at age 60. Declarant, at the time he read the file, thought that the Judges' Retirement System (JRS) made an error in starting Judge London's benefits at age 60. Declarant was familiar with Government Code §20164 (b)(1), which provides a three-year limitation on the ability of JRS to correct errors and to reclaim overpayment of benefits. Declarant, therefore, did nothing further at that time. Declarant was concerned as to how JRS made this error.

When Petitioner instituted these proceedings before the Office of Administrative Hearings in 2014 based on a claim filed and denied in 2011, Declarant was motivated to research whether or not JRS made an error in regard to Judge London. Declarant discovered that pursuant to Government Code §§ 75033.5 and 75025 (attached as Exhibits A and B to the Points and Authorities attached to the Trial Brief) JRS had not made an error in regard to Judge London. Declarant discovered he had the same right; his deferred retirement benefits should have started on his 60th birthday.

Declarant discovered from documents produced in a JRS file of a retired judicial officer, that Justice Edmond Lui had written an outline dealing with judges' retirement benefits in connection with a course he taught at the California Judges' College.

1 Declarant never attended the California Judges' College, as he had attended the
2 National Judges' College at the University of North Carolina, Chapel Hills, before
3 California began its judges' college.

4 Declarant read Justice Lui's Outline and confirmed that his deferred retirement
5 benefits should have begun on his 60th birthday. On Page 11 of the Outline it states, and
6 gives an example, that a judge who assumes office before his 40th birthday and retires
7 with less than 20 years of service, qualifies to receive deferred retirement benefits on his
8 60th birthday, if he would have served 20 years as a judge had he remained in judicial
9 service.

10 Declarant further found that Sue Myers, Manager of the Judges' Retirement
11 System, had edited and approved Judge Lui's Outline.

12 The Outline serves to show knowledge by JRS that Declarant's deferred
13 retirement benefits should have begun on his 60th birthday. The Outline does not
14 constitute notice and a clear informed choice, as stated in *Hittle* (set forth in the Trial
15 Brief).

16 Pursuant to *Hittle* when a retiree has a choice of receiving retirement benefits
17 under either one of two retirement plans, JRS is required to notify the retiree of his
18 choices and to give him or her a clear, informed choice before a binding election is made
19 by the judicial officer. JRS did not do so. Declarant was never advised of his right or that
20 he had a choice to begin to receive deferred retirement benefits on his 60th birthday.

21 Declarant did receive the letter dated November 16, 1978 (Exhibit D Page 1) from
22 William Bierly, Chief of Accounting for Kenneth Cory, State Controller. That letter did
23 not state that Declarant could start receiving deferred retirement benefits at age 60. The
24 letter does speak of both Government Code §§75033.5 and 75025. It does not state after
25 that had he remained continuously in service for a period of 20 years he would receive
26 retirement benefits at age 60. Even if the letter had included such phrase, it would not
27 have constituted a clear informed choice as required by *Hittle*.

28 Declarant was not in an adversarial relationship with JRS. Declarant understood
that JRS was in a fiduciary relationship with him pursuant to article XVI section 17 of
the California Constitution.

1 Declarant had complete faith and trust that JRS and all its employees were
2 acting in the best interest of Declarant and providing Declarant with all of the benefits
3 he was entitled to (as indicated in Jim Niehaus' letter in 1995), pursuant to their
4 fiduciary duty as provided by law. JRS at all times exhibited a cooperative attitude when
5 communicating with Declarant including: all of his judicial service; his receipt of the
6 letter of November 16th, 1978; the communications that declarant had with Jim Niehaus
7 and other members of JRS; throughout the proceedings before OAH, including the
8 communications leading up to the Settlement Agreement; throughout the calculations
9 by JRS of the underpayment of COLA retirement benefits including the calculations of
10 CPI increases up until January 1, 1997, and thereafter, even though errors were made;
11 up and until the time that Pamela Montgomery became manager of JRS around 2006.

12 When examining Declarant's JRS file, Declarant discovered an undated
13 memorandum, apparently produced in 1995, attached as exhibit E to the Trial Brief,
14 which has the notation "§ 75025 5/28/92 (age 60)." This notation makes it clear that
15 JRS knew in 1995 that Declarant should have had his deferred retirement benefits
16 begin, or at least had an option to have them begin, on May 28, 1992. This knowledge,
17 and the successful attempt to mislead and obscure from Declarant, all in violation of its
18 fiduciary duty, the fact that Declarant had the right (or the option) to start receiving
19 benefits at age 60, is further exhibited by the deletions from the quotation from GC
20 §75033-5, as it was presented by Declarant in Petitioner's Statement of Issues, (Exhibit
21 N, page 4, line 10 attached to the Trial Brief), in the 1996 proceeding before the OAH.
22 When the full text is presented, without the omissions, as Declarant has shown in his
23 Trial Brief, it is clear that Declarant was entitled to have his deferred retirement benefits
24 begin on May 28, 1992; that petitioner knew that the deferred retirement benefits
25 should have begun on that date; and that by omitting those parts of GC §75033.5 the
26 clear intent of Petitioner was to hide the fact, in violation of its fiduciary duty to
27 Declarant.

28 Declarant and Judge Philip Schwab, who became a judge three months after
Declarant, recognized that retirement benefits were earned by contributions into the
retirement fund over 20 years, however contributions were made into the retirement
fund for the entire service of the judicial officer even if it extended more than 20 years.

1 He and I understood that by the time we served until age 60 we would have been made
2 contributions into the retirement fund for more than 20 years. Since this was
3 inequitable we decided that at the appropriate time during our service we would
4 withdraw contributions from the retirement fund. Later, we each did so separately.

5 As shown in Exhibit D page 9 ff. to the Trial Brief, when Judge Schwab repaid
6 into the retirement fund the funds he had earlier withdrawn, an issue was raised as to
7 the amount of interest he should pay. The interest rate had been 3% at the time that he
8 began judicial service. The interest rate had been changed to 8.5% at the time he repaid
9 the funds. In her Memorandum (Exhibit D page 9) to JRS dated December 19, 1986,
10 Margaret Hoehn, staff counsel to JRS, stated to Sue Myers, Manager, Judges'
11 Retirement System, that ". . . a judge's pension rights may not be reduced or altered at
12 the commencement of a new term of office and further held that a judges pension rights
13 vest on the commencement of his service." Ms. Hoehn's conclusion was that JRS could
14 only assess 3% interest.

15 When Declarant withdrew funds from the retirement fund in 1975 he received
16 \$21,081.54. When Declarant paid funds back into the retirement fund in 1979, he paid
17 \$26,056.86, which included interest at 6% rather than 3%, which was the law when
18 Declarant assumed office and was the correct amount of interest that should have been
19 applied, as stated by Ms. Hoehn in Judge Schwab's case. Declarant did not know of this
20 discrepancy and it is not before the court in these proceedings.

21 **CALCULATION OF UNPAID RETIREMENT BENEFITS**

22 Before his 63rd birthday, Declarant advised Petitioner that he was entitled to cost-
23 of-living adjustment increases to his deferred retirement benefits. Petitioner disputed
24 this; a claim was filed; it was denied; and the matter was referred the Office of
25 Administrative Hearings as indicated in the Trial Brief. The issues had been stated in a
26 letter of May 1, 1995 addressed to Jim Niehaus at JRS (exhibit W to the Trial Brief). The
27 issues are further stated in Declarant's Response to Statement of Issues and Points and
28 Authorities (Exhibit N, Page 8).

1 The parties entered into a Settlement Agreement (exhibit O, Page 5). The
2 Settlement Agreement was drafted entirely by JRS without any consultation with
3 Declarant. Pursuant to the Settlement Agreement JRS is required to make additional
4 cost-of-living adjustment payments in accordance with the Consumer Price index, as
5 provided for by Government Code Section 68203 as amended in 1969 and as in *Olson I*,
6 for the retroactive period and to make such cost-of-living adjustments to the retirement
7 benefits of Declarant thereafter. At the time the Settlement Agreement was entered into
8 and thereafter, until Pamela Montgomery of JRS breached the Settlement Agreement
9 many years later, Declarant had not researched and was uninformed and ignorant of the
10 proper method of making the cost-of-living adjustments. Declarant relied on the good
11 intentions, as well as the fiduciary duty, of JRS to properly make said adjustments. This
12 included the proper Consumer Price Index that should be used; the Index for the time
13 period during the year that was proper to use for yearly adjustments; and the time
14 during the year in which adjustments would be made.

14 In retrospect, relying on JRS to properly make such calculations without input
15 from Declarant would seem to have been very naïve. As stated above, however,
16 Declarant had absolute trust at that time in JRS.

17
18 JRS completed the calculations prior to January 1, 1997, paid Declarant the
19 arrearages that they calculated, and started paying Declarant cost-of-living adjusted
20 retirement benefits beginning January 1, 1997, in accordance with their calculations
21 (\$5,893.83 per month Exhibit P Page 1). Their calculations became an inherent part of
22 the Settlement Agreement, and were accepted as such by both parties to the Settlement
23 Agreement. They thereby became binding on both parties.

24 JRS in this proceeding attempts to allege that their calculations prior to January
25 1, 1997 were in error. Declarant does not agree that the calculations were in error. It is
26 virtually impossible for either JRS or Declarant to determine at this time what JRS did
27 when making the calculations prior to January 1, 1997. In addition to the fact that both
28 parties accepted the calculations of JRS leading up to January 1, 1997, it is clear and

1 undisputed that a statute of limitations applies to JRS' ability to now attack or question
2 the calculations that it made, under Government Code §20164 (b)(1) which states that:
3 in case of an error or omission, or an overpayment to a retiree, JRS has a limit of three
4 years to correct an error or omission, or to make a claim for such overpayment.

5 The calculations of JRS prior to January 1, 1997, for the period May 28, 1995 to
6 January 1, 1997, including the deferred retirement benefits and the amount of deferred
7 retirement benefits calculated to begin January 1, 1997, cannot be changed.

8 In regard to the calculations after January 1, 1997, any errors or omissions can be
9 recalculated at this time, although the three year period of recouping errors or
10 overpayments would still apply, if there were any. The Excel Spreadsheet presented by
11 Declarant as exhibit Q to the Trial Brief, corrects any such errors or omissions. As stated
12 in the Trial Brief, the Spreadsheet properly calculates all cost-of-living adjustments that
13 should have been made, starting with January 1, 1997, and states what benefits should
14 have been paid. It also states what benefits were actually paid. In doing so the
15 Spreadsheet corrects any and all errors or omissions that were made during the years.
16 The spreadsheet also properly calculates interest that is due at 10% per annum,
17 compounded monthly (although compounding daily seems to be authorized) as decreed
18 by *Olson III*, the other cases and authorities cited in the Trial Brief, Civil Code §§ 3287
19 and 3289, and the California Constitution, article XV, section 1.

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BREACH OF THE SETTLEMENT AGREEMENT

As shown on the Excel spreadsheet, subsequent to January 1, 1997, JRS made many errors or late payments. All of these were breaches of the Settlement Agreement. In 1999 and 2002 cost-of-living adjustments were not made and were not corrected. These were breaches. In 2003 and 2004 no cost-of-living adjustments were made, although an additional amount was paid in December 2003. The failure to make cost-of-living adjustments in these years also was a breach of the Settlement Agreement.

A cost-of-living adjustment was made in July 2006. No further cost-of-living adjustments were made after July 2006 until August 2010. This failure to abide by the Settlement Agreement for four years was a substantial and complete major breach of the

1 Settlement Agreement. The cause of this intentional breach was the direction of the new
2 manager of the Judges' Retirement System, Pamela Montgomery, who directed her staff
3 not to make any further cost-of-living adjustments to Declarant's deferred retirement
4 benefits. This is clearly shown by the internal emails between Mark Chiu and Pamela
5 Montgomery on January 27, 2009 (Exhibit T to the Trial Brief).

6 In August 2010, at the time that adjustment was made to Declarant's retirement
7 benefits, a lump sum payment of approximately \$10,880 was made to Declarant by JRS.
8 Although this lump sum payment of the purported amount of unpaid deferred
9 retirement benefits made was in a lesser amount than was due at that time, the fact that
10 JRS made this payment of unpaid deferred retirement benefits was a clear admission by
11 JRS that they had substantially breached the Settlement Agreement in the years
12 between 2006 and 2010. In addition, JRS sent a letter to Declarant dated September 18
13 2015 (Exhibit V to the Trial Brief) stating, a cost-of-living adjustment was being made to
14 Declarant's retirement benefits, "based on the California Consumer Price Index, Urban
15 Wage Earners and Clerical Workers (CCPI-W), December 2013 to December 2014."
16 This is further evidence of a substantial breach of the Settlement Agreement entered
17 into in 1996. As stated in the Trial Brief and as decreed by *Olson I*, cost-of-living
18 adjustments were to be made in accordance with the Consumer Price Index, All Urban
19 Consumers (CCPI-U). In addition, this was the CPI used not only by JRS in its
20 calculations prior to January 1, 1997, but also by JRS in all of its adjustments to
21 Declarant's deferred retirement benefits prior to 2006, as indicated in the Trial Brief
22 and in Exhibit Q to the Trial Brief.

23 Declarant decided that he had to take further action to solve the problem
24 after receiving the communication from Pamela Montgomery in August 2010 regarding
25 her failure to allow adjustments pursuant to the Settlement Agreement in Defendant's
26 deferred retirement benefits during the period from 2006 to 2010; receiving the partial
27 payment of unpaid retirement benefits; knowing that the calculations produced by
28 Pamela Montgomery were wrong; and realizing that all of Declarant's discussions and
communications with Pamela Montgomery from 2006 to 2010 were fruitless. Declarant,
therefore, wrote a letter dated September 1, 2010 to the Judges' Retirement System and

1 Pamela Montgomery. In addition, Declarant wrote letters to John Chiang, the Controller
2 of the State of California, and to each and every member of the Board of Directors of the
3 California Public Employees' Retirement System. Copies of these letters are attached as
4 Exhibit U to the Trial Brief. In those letters Declarant referred to the Settlement
5 Agreement and advised the recipients of the letters that he was obligated under the
6 Settlement Agreement not to reveal the Terms of the Agreement and that he had never
7 done so, despite the fact that JRS had breached the Settlement Agreement. Declarant
8 further advised them that he had no intention of breaching the Settlement Agreement by
9 revealing the terms of the Settlement Agreement even though that commitment was no
10 longer binding because of the previous breaches by JRS. Declarant implored them to
11 assist him. He stated to them that he had not yet spoken to any attorney to assist him in
12 solving or litigating the problems with JRS, however he did intend to seek the help of an
13 attorney. Declarant advised them that if he did engage an attorney, no matter who that
14 attorney was, that attorney would realize that for decades JRS had failed to follow the
15 mandate of *Olson I* in regard to other retired judicial officers and could be expected to
16 undertake to represent other retired judicial officers.

17 Declarant received no reply to any of his letters. Nevertheless, he continued to
18 wait for approximately 9 months, hoping that the situation would be rectified, before
19 consulting an attorney. In May 2011 he did engage the services of an attorney.
20 Subsequent thereto and before, Declarant never revealed the terms of the Settlement
21 Agreement to any person, other than to the attorney, and in particular did not reveal the
22 terms of the Settlement Agreement to any judicial retiree. Subsequent to hiring the
23 attorney Declarant did assist him in preparing pleadings and briefs when the attorney
24 was not able to do so himself.

25 Declarant has never breached the confidentiality clause of the Settlement
26 Agreement by discussing or revealing the "Terms of the Agreement" with anyone.
27 (Respondent's attorney read the Settlement Agreement.)

28 Petitioner's attorney, Jeffrey Rieger, 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

1 the matter are of public record and are available to anyone. If Petitioner included in the
2 Settlement Agreement a confidentiality clause that was against public policy, it does not
3 cancel the Settlement Agreement and cannot be held against the Respondent.
4 Respondent entered into the Settlement Agreement in good faith and thereafter abided
5 by the confidentiality clause in good faith. If it is in fact an invalid provision, it would be
6 bifurcated out of the Settlement agreement, and the terms of the Settlement Agreement
7 would still be binding on the parties.

8 It is not possible for Respondent to have violated the terms of an invalid
9 confidentiality provision.

10 **THE PROPER CONSUMER PRICE INDEX TO USE IS ALL URBAN**
11 **CONSUMERS (CCP I-U)**

12 The California Supreme Court stated that the increase for the year 1976 was
13 5.327%. They were referring to the increase from December 1975 to December 1976. By
14 referring to the Consumer Price Index for this period, it is obvious that the Supreme
15 Court was referencing the California Consumer Price Index for All Urban Consumers
16 (CCPI-U) and not the California Consumer Price Index for Wage Earners and Clerical
17 Workers (CCPI-W).

18 In the Trial Brief Declarant has put forth the portion of the Consumer Price Index
19 of the State of California for the years 1975 and 1976. The change in the index for CCPI-
20 U is stated to be 5.4%. The change in the index for CCPI-W is stated to be 5.5%.
21 Declarant has manually computed the increases. The manual calculation of the amount
22 of increase indicates that the change for CCPI-W is accurate at 5.5%. The manual
23 calculation of the amount of increase for CCPI-U, however, indicates that the more exact
24 calculation of the increase is 5.350554%. The Supreme Court stated the increase was
25 5.327%. The difference between the manually calculated percentage and the Supreme
26 Court stated percentage is 0.023554%, which is minimal.

27 According to the records of the JRS, the salary of a municipal court judge in 1976
28 was \$3,769.58. 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

1 manually calculated increase (5.350554%), the September 1, 1977 salary would be
2 \$3,970.39. The difference between the two calculated increases is 88 cents.

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

10 Declarant spoke by telephone with a representative of the California Department
11 of Industrial Relations who handles the Consumer Price Index, requesting the data for
12 these periods carried out to more decimal points. The individual Declarant spoke to
13 researched the question and phoned Declarant back and advised him that the
14 information is no longer available.

15 I declare under penalty of perjury under the laws of the State of California that
16 the above is true and correct.

17 Executed on November 20, 2015 at Irvine, CA.

18 Paul G Mast

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PROOF OF SERVICE

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

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

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


RESPONDENT'S TRIAL BRIEF, RESPONDENT'S EXHIBITS TO TRIAL BRIEF, DECLARATION OF PAUL G. MAST, DECLARATION OF MARCI MAST,

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

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

By email to JRieger@ReedSmith.com

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



Marci G. Mast