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7

8 BOARD OF ADMINISTRATION

9 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10
11 In re the Matter of the Recalculation of Benefits
of

12 PAUL G. MAST,

13 Respondent.
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AGENCY CASE NO. 2010-0825

OAH NO. 2015030996

**BRIEF OF THE JUDGES' RETIREMENT
SYSTEM ON REMAND**

Hearing Date/Time: August 19, 2016, 1:30 p.m.
Hearing Location: Los Angeles, CA

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1 **I. INTRODUCTION**

2 In its February 10, 2016 proposed decision (“Proposed Decision”), this Court held that the
3 settlement agreement between Paul Mast (“Mast”) and the Judges’ Retirement System (“JRS”) was
4 not enforceable and, therefore, Mast’s retirement allowance should be based on the Judges’
5 Retirement Law. The Court also held, however, that the JRS should not recover any overpayments
6 the JRS made to Mast.

7 The CalPERS Board of Administration (“Board”) has broad discretion regarding the JRS’
8 recovery of overpayments. Accordingly, when the Proposed Decision was before the Board for
9 consideration, the JRS argued that the Board should exercise its discretion to either: (1) adopt this
10 Court’s Proposed Decision as its own, or (2) hold a hearing before itself to determine whether the
11 JRS should recover some or all of the overpayments that it made to Mast.

12 The Board agreed with the Proposed Decision’s recommendation that Mast’s retirement
13 allowance should comply with the Judges’ Retirement Law prospectively, but disagreed with the
14 Proposed Decision’s recommendation that the JRS should not recover any past overpayments from
15 Mast. The Board therefore remanded the matter back to this Court to take further evidence and
16 argument on that issue.

17 The JRS believes that this Court already has considered almost all of the evidence that is
18 relevant to the issue on remand. The JRS is therefore willing to submit this matter for the Court’s
19 consideration, based on this brief and the limited additional evidence submitted with the
20 accompanying Declaration of Jeffrey R. Rieger (“Rieger Declaration”) and Declaration of Pamela
21 Montgomery (“Montgomery Declaration”).

22 **II. ARGUMENT**

23 **A. A Three-Year Statute of Limitations Would Prevent The JRS From Collecting Only**
24 **Those Overpayments That The JRS Made To Mast Before April 6, 2009**

25 For the reasons stated in its prior briefing, the JRS believes that there is no statute of
26 limitations that applies to the JRS’ implementation of offsets to Mast’s benefits to recover improper
27 overpayments that the JRS previously made to him. This is because implementing such offsets is
28 not an “action” as that term is used in Government Code section 20164(b). *See City of Oakland v.*

1 *Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 50-51 (referring to the limitations
2 periods under Government Code section 20164, in particular: "These limitation periods for 'actions'
3 do not apply to administrative proceedings, for the reasons already explained.") But, even if a three-
4 year limitations period applies in this circumstance, it should not prevent the JRS from recovering
5 overpayments that it made to Mast after April 6, 2009.

6 On page 28 of the Proposed Decision, the Court stated that "the JRS is barred from obtaining
7 overpayment of any retirement allowances made prior to March 25, 2012" based on the March 25,
8 2015 filing date of the Statement of Issues. When the Court prepared its Proposed Decision,
9 however, it may not have known that Mast and the JRS had agreed to stay this administrative
10 proceeding while the parties litigated *Staniforth v. JRS*. A true and correct copy of an April 6, 2012
11 email exchange documenting that agreement is attached to the Rieger Declaration, as Exhibit "A."
12 The parties' voluntary agreement to stay this administrative proceeding should result in an equitable
13 tolling of any applicable limitations period.

14 The California Supreme Court has explained: "Application of the doctrine of equitable
15 tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith
16 conduct on the part of the plaintiff." *Addison v. State of California* (1978) 21 Cal.3d 313, 319.
17 Equitable tolling is "designed to prevent unjust and technical forfeitures of the right to a trial on the
18 merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's
19 claims—has been satisfied. Where applicable, the doctrine will suspend or extend a statute of
20 limitations as necessary to ensure fundamental practicality and fairness." *McDonald v. Antelope*
21 *Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (internal marks and citations omitted). A
22 recently published opinion held that equitable tolling applied under circumstances similar to those
23 present here. *See San Pablo Bay Pipeline Co., LLC v. Public Utilities Com.* (2015) 243 Cal.App.4th
24 295, 316-17 (delayed filing due to a bifurcation order that was made for judicial economy).

25 Mast was aware, since December 29, 2011, that the JRS intended to recover the
26 overpayments he received from the JRS. *See* Statement of Issues, Exhibit "C." The JRS could have
27 proceeded in this matter long before it did, but held off due to an agreement with Mast.
28 It was in all parties' interests, and the interests of judicial economy, to wait on the resolution of

1 *Staniforth v. JRS*, before proceeding with Mast's case, because the parties knew the resolution of
2 *Staniforth v. JRS* would impact Mast's case. Under these circumstances, the JRS meets the
3 requirements for equitable tolling.

4 **B. Mast Cannot Establish The Elements Of Estoppel For Any Overpayments He Received**
5 **After December 29, 2011**

6 For the reasons stated in the JRS' prior briefing, the JRS contends that equitable estoppel
7 should not apply here at all. But, even if equitable estoppel applies to some payments, it cannot
8 possibly apply to overpayments that the JRS made to Mast after December 29, 2011.

9 As the Court explains on page 30 of its Proposed Decision: "In order to apply the doctrine of
10 equitable estoppel, four elements must be present: (1) the party being estopped must be apprised of
11 the facts; (2) the party must intend or reasonable believe that its conduct will be acted upon; (3) the
12 party asserting estoppel must be ignorant of the true state of facts; and (4) the party asserting the
13 estoppel must actually rely upon the other parties conduct to their detriment." Mast cannot possibly
14 establish the second, third or fourth elements of equitable estoppel, with respect to overpayments he
15 received from the JRS after the JRS informed him of its intent to recover all overpayments from him.
16 In its December 29, 2011 letter (*see* Statement of Issues, Exhibit "C"), the JRS explained why the
17 1996 settlement agreement was never enforceable and also explained:

18 Pending resolution of all issues in Judge Mast's administrative appeal, JRS will
19 not make any adjustment to the methodology it has been using to calculate Judge
20 Mast's retirement allowance (in error) ever since the parties entered into the
21 settlement agreement. In this proceeding, however, JRS will be seeking a
22 reduction in Judge Mast's retirement allowance to bring it into compliance with
23 *Olson v. Cory*. Further, JRS reserve its rights to seek repayment of all amounts
24 that it can lawfully recover from Judge Mast in the event that the Board of
25 Administration and the courts find that JRS has paid Judge Mast amounts in
26 excess of what is allowed "pursuant to *Olson v. Cory* (1980) 27 Cal.3d 532."

26 On November 30, 2012, in *Staniforth v. JRS* the San Diego Superior Court rejected Mast's
27 theory of *Olson v. Cory*. *See* Rieger Declaration Exhibit "B." After making other rulings against
28 the Plaintiffs in *Staniforth v. JRS*, that court entered a judgment that rejected Mast's theory of

1 *Olson v. Cory* on April 11, 2013. *Id.* The administrative proceedings regarding Mast's benefits
2 were then further delayed because the plaintiffs in *Staniforth v. JRS* (Mast's clients) appealed from
3 that Judgment. After losing that appeal on May 19, 2014, the plaintiffs also petitioned for review
4 by the California Supreme Court. The Supreme Court denied that petition on September 10, 2014.

5 In sum, the JRS had informed Mast that it intended to recover the overpayments made to
6 him under his *Olson v. Cory* theory on December 29, 2011; the JRS had been actively opposing his
7 *Olson v. Cory* theory since March 2012 in a court case that Mast filed as counsel; and every level
8 of the California court system ruled against Mast's *Olson v. Cory* theory between November 2012
9 through September 2014. Mast cannot reasonably claim that the JRS intended him to believe that
10 he was entitled to keep the overpayments he was receiving over that time period (second element).
11 He also cannot reasonable claim that he was ignorant of the true state of facts (third element). And,
12 he also cannot reasonably claim that he relied upon the JRS' conduct to his detriment (fourth
13 element). Thus, Mast cannot meet three of the four elements of equitable estoppel for any
14 payments made after December 29, 2011.

15 **C. Recovering Overpayments Made To Mast Is Equitable**

16 It is equitable for the JRS to recover at least some of the overpayments that it made to Mast.
17 On page 22, the Proposed Decision explains: "JRS knew that [Mast's] interpretation of *Olson* was
18 wrong, but affirmatively chose to draft and execute the settlement agreement to avoid litigation." It
19 might be true that the JRS attorney who negotiated the settlement agreement in 1996 knew that
20 Mast's interpretation of *Olson v. Cory* was wrong, but for some reason did not want to try the case.
21 Or, perhaps that attorney was almost certain that Mast's interpretation of *Olson v. Cory* was wrong,
22 but Mast convinced her of the merits of settling his case to avoid any possibility of a \$400 million
23 liability. *See* Exhibit 7 at 1055 and Exhibit 8 at 1098. Or, perhaps that attorney believed that Mast's
24 interpretation of *Olson v. Cory* was correct and she was willing to deprive every other judge and
25 justice in California of the amounts to which they were legally entitled. None of these rationales are
26 acceptable, because there is no acceptable rationale to sustain a settlement agreement that Mast
27 himself has branded "immoral." Exhibit 11, at 462.

28 Whatever the JRS attorney was thinking in 1996, the point here is that the JRS is a public

1 trust fund and the law is settled that the taxpayers of California should not have to fund benefits in
2 excess of those provided by law. Mast should not have received any more than any other similarly
3 situated retired judge, and certainly should not have received more as the result of an agreement that
4 even he acknowledges was “immoral.”

5 Further, if the JRS “knew” Mast’s theory was wrong, then Mast, who was a retired judge,
6 also should have known his theory was wrong. Thus, he could not have reasonably relied on any
7 representation by the JRS. Mast’s theory might have been a reasonable theory to pursue in the late
8 1970s, when the plaintiff class pursued that same theory in *Olson v. Cory*, but it was a frivolous
9 theory to pursue after the California Supreme Court expressly rejected it in *Olson v. Cory*. Further,
10 it was Mast, not the JRS, who initiated the claim that *Olson v. Cory* said something it did not, and
11 then pressured the JRS to settle that claim with him alone to avoid potentially massive liabilities.

12 As the JRS explained in its previous briefing, the CalPERS Board has broad discretion with
13 respect to the recovery of overpayments from Mast. *See City of Oakland v. Oakland Police & Fire*
14 *Retirement System* (2014) 224 Cal.App.4th 210, 244-45. The Board has indicated that it believes
15 overpayments should be recovered from Mast. The JRS submits that, based on the new evidence
16 and arguments discussed above, the court should issue another proposed decision holding that the
17 JRS should at least be permitted to recover all overpayments that the JRS made to Mast since either
18 April 6, 2009 or December 29, 2011, plus simple interest at 7% per annum.¹ As set forth in the
19 Montgomery Declaration, such a proposed decision would result in a repayment obligation of either:

- 20 • From April 6, 2009: \$26,961.11 (\$22,499.16 principal and \$4,461.95 interest); or
- 21 • From December 29, 2011: \$20,670.58 (\$17,911.57 principal and \$2,759.01 interest).²

24 ¹ That interest rate is consistent with the Board’s newly adopted Regulation 555.5, which applies when the JRS
25 underpays a member. Regulation 555.5 became effective April 1, 2016. Although it does not apply to overpayments
26 made to members, the JRS submits that would be fair to use the same interest rate in both circumstances. The interest
calculations in the figures presented herein are based on interest that runs through August 31, 2016, based on our
estimation of when this Court may be issuing a proposed decision. After August 31, 2016, interest should continue to
accrue on the principal until paid.

27 ² The JRS contends that the Board has authority to order recovery of more than the amounts proposed above and
28 reserves its rights to argue for a greater recovery if the Board decides to hold a hearing before itself.

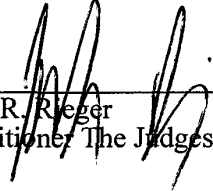
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III. CONCLUSION

By remanding to this Court, the Board was seeking guidance to help it determine a reasonable amount to recover from Mast. The JRS respectfully submits that its proposals above constitute the minimum recovery that would be appropriate under all existing circumstances.

DATED: June 8, 2016.

REED SMITH LLP

By  _____
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For Petitioner The Judges' Retirement System