PAUL G. MAST (CA Bar No. 28390)
[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 REPLY BRIEF** Hearing Date: August 19, 2016, 1:30 P.M. Hearing Location: Los Angeles, CA

INTRODUCTION

This case has been remanded from the Board of CalPERS for the limited purpose of "whether staff may recover or recoup any overpayments that may have been made to the member," as stated on pages 29-32 of the transcript of the CalPERS Board proceedings of April 20, 2016 (Exhibit A). This is the sole issue on remand. Other issues raised by Petitioner are not properly before this Court.

Petitioner's Brief incorrectly states:

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

That statement in the Brief is untrue, inaccurate, and misleading.

The Board stated on remand the question, "whether staff may recover or recoup any overpayments that may have been made to the member." The Board asked the question as to whether any overpayments may be recovered or recouped. The intentional misstatement of the Attorney for Petitioner is an obvious attempt by said attorney to change the nature of these proceedings.

NO RECOVERY OR RECOUPMENT OF OVERPAYMENTS IS PROPER

This Court in its Proposed Order recognizes that the parties entered into a written Settlement Agreement (Exhibit B):

> 15(a). According to the settlement agreement, JRS would calculate

> Respondent's retirement allowance using the formula set forth in Government Code section 75033.5, except that the multiplier (3.75 x years of judicial service) would be applied to a different benchmark salary than that specified in section 75033.5. The benchmark salary specified in the settlement agreement was the hypothetical salary to which Respondent would have been entitled had he continued serving on the bench until May of 1995, with no cap on annual cost of living increases. The starting salary to which the annual cost of living increases were applied in order to reach the benchmark was the salary to which Respondent was entitled, under *Olson,* on January 15, 1979. Thus, the formula for calculating Respondent's retirement allowance was (3.75 percent x 13 years, 2 months, 8 days of judicial service) x (Respondent's required salary on January 15, 1979, increased annually by California CPI cost of living percentage).
>
> 15(b). As set forth in the settlement agreement, the cost of living increases were to be determined under former Government Code section 68203 (prior to the 1976 amendment). That statute provided, in pertinent part:
>
> (O]n September 1 of each year thereafter the salary of each justice and judge . . . 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.
>
> 15(c). Essentially, the settlement agreement obligated JRS to pay Respondent a retirement allowance calculated according to Respondent's interpretation of *Olson*.

This Court continues in its Proposed Order stating that Respondent's interpretation of *Olson v. Cory I,* 27 Cal.3d 532, 636 P.2d 532, 178 Cal.Rptr. 568, is incorrect, which may or may not be true. Respondent's position is that his interpretation is correct. What is true and undisputed is that Respondent and the Judges' Retirement Service entered into a valid and binding Settlement Agreement based on Respondent's interpretation of *Olson*. That Settlement Agreement is still

in full force and effect. It has never been rescinded and no proceedings have been instituted to rescind it. See the Section *infra* on Rescission. There are no precedents to support Petitioner's allegations that a decision of an appellate court, 20 years after the Settlement Agreement was entered into, would cancel that Settlement Agreement. That is clearly not the law. Except by following the proper legal procedures *infra*, the Settlement Agreement may not be canceled by any other means or for any other reason, such as the belief of Petitioner's Attorney that it is "against public policy," or that "Respondent should not be paid more or in a different manner than other judges," or because a new manager of the Judges' Retirement System decides that she does not approve of the fact that Respondent was receiving his retirement benefits on a different basis than other retired judges.

As this Court correctly states in Paragraph 1 of its Legal Conclusions in the Proposed Decision:

> If CalPERS (or in this case, the JRS administered by CalPERS) initiates the process to take away a person's right or benefit (e.g. involuntarily discontinuing disability retirement), an Accusation should be filed, and CalPERS has the burden of proving the propriety of eliminating that right or benefit.

This Court incorrectly stated in Paragraph 3 that JRS determined that it "could modify Respondent's agreed upon retirement allowance by asserting that their Settlement Agreement was void. Respondent appealed that determination . . ." This was an incorrect conclusion. Prior to 2015 JRS never claimed that the Settlement Agreement was void. Respondent's claims were for failure to pay properly computed retirement benefits and failure to make payments pursuant to the Settlement Agreement. This was what was denied by JRS.

Even if JRS had claimed that the Settlement Agreement was void, that would have been immaterial. The proper procedure, and the only procedure legally

viable, was to file an Accusation to rescind the Settlement Agreement. This has never been done. A party to a settlement agreement, even the State, cannot unilaterally decide that a settlement agreement is void and take action on its unilateral decision. This is what the Attorney for Petitioner has been attempting to do rather than following the proper procedure.

This Court was correct in Paragraph 3 stating, "Respondent did establish that JRS should be estopped from further adjusting Respondent's future retirement allowances . . ." to recoup overpayments.

In Paragraph 6 (a) this Court found:

> Contrary to JRS's assertion, the settlement agreement was not 'given by mistake or obtained through duress, menace, fraud or undue influence.' (Exhibit 33, p. 8, lines 22-24.) JRS's attempts to now characterize Respondent as threating JRS to settle the prior OAH case is overreaching. JRS knew that Respondent's interpretation of *Olson* was wrong [See the Declaration of Paul G. Mast, attached hereto, wherein this is discussed], but affirmatively chose to draft and execute the settlement agreement to avoid litigation. The agreement was not formed through duress, menace or undue influence by Respondent, but was negotiated by Respondent zealously advocating his position and by JRS, (with its decision-making resources including legal counsel at its disposal) determining that it could and would enter into the settlement agreement.

This Court stated that Respondent did not breach the Settlement Agreement:

> . . . given the JRS's delays in providing cost of living adjustments, and in some years determining not to provide any cost of living adjustment, the JRS breached the settlement agreement well prior to Respondent speaking to other judges about his *Olson* interpretation. The totality of the evidence demonstrated that Respondent did not breach the settlement agreement, and that any disclosure of his *Olson* theory occurred after JRS had breached the settlement agreement.

LACK OF RESCISSION AND EQUITABLE ESTOPPEL

The first consideration is the lack of rescission or attempt to rescind the Settlement Agreement entered into between the parties (Exhibit B) in 1996, twenty years ago, which is still in full force and effect. The Settlement Agreement cannot be abrogated in any manner unless it is properly rescinded. It has not been. The time period in which it could be rescinded has long since passed, *Gedstad v. Ellichman*, 124 Cal.App.2d 831, 269 P.2d 661 (1954).

Although it is not material to this proceeding this Court was in error when it said that the Judges' Retirement System knew that the law was contrary to what was indicated in the Agreement. There was and is no evidence of this. The Declaration of Paul G. Mast, attached hereto, provides the evidence to the contrary. Both parties agreed that the benefits Respondent claimed were authorized pursuant to *Olson v. Cory*.

Should the Petitioners determine that there was any reason that the Settlement Agreement should be negated, for any purpose, the only procedure that is available, and which must be followed, is to attempt to rescind the agreement. The procedure available is to begin by filing an Accusation and proceed with a hearing before the Office of Administrative Hearings.

In addition to filing an Accusation the procedure that **must** be followed to rescind an agreement is set forth in *Gedstad, supra*, wherein it states:

> 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. . . . A delay of more than one month in serving notice of rescission requires explanation. *835 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. '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 v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413. 415, 130 P.2d 779. 781.

There is no other way that the Judges' Retirement System could be excused from its obligations pursuant to the Settlement Agreement.

Equitable estoppel has already been decided by this Court in its Proposed Decision and it is outside of the issue of the case that was remanded by the Board of CalPERS.

Nevertheless, Respondent will respond again to the question of equitable estoppel raised by Petitioner.

There is absolutely no basis for Petitioner's claim that the doctrine of estoppel applies in this case.

The context of the time period in which the claim was presented to the Judges' Retirement System is as follows:

A claim was presented to the Judges' Retirement System on September 10, 2010 (Exhibit C) (previously submitted as Ex. T).

Nothing was said in the Claim about any recoupment of funds previously paid to Respondent.

On May 4, 2011 after the passage of approximately eight months a Denial was issued by JRS (Exhibit D) (previously submitted as Ex. X).

Nothing was said in the Denial about any recoupment of funds previously paid to Respondent.

On May 31, 2011, Respondent filed an Appeal (Exhibit E)(previously submitted as Ex. V).

Nothing was said in the Appeal about any recoupment of funds previously paid to Respondent.

Thereafter, nothing was done by JRS for seven months. On December 29, 2011, JRS represented that they expected to serve a Statement of Issues in 40 days. Nothing happened in 40 days, and no contact was made with Respondent in regard to the Statement of Issues until April 6, 2012 at which time the Attorney for Petitioner emailed Respondent, *infra*.

In the last paragraph of the 4-page letter on December 29, 2011, to Jorn Rossi, Petitioner states that JRS reserves its rights to seek repayment of all amounts it can lawfully recover from Judge Mast. Said phrase in a letter is not sufficient to establish equitable estoppel, *infra*. A unilateral statement that a party "reserves its rights" does not under any theory of law or precedent serve to toll a statute of limitations or activate any theory of equitable estoppel. Further, Petitioner did not file a Statement of Issue in 40 days. This is no more than a statement in an injury case, within the statutory period, that "I am going to sue you" or "you are going to pay for my damages" or "I reserve the right to sue you for my damages." None of these would cause the statute of limitations for injury cases to be tolled by the principles of equitable estoppel.

After that letter of December 29, 2011, nothing further was communicated in regard to the filing of the Statement of issues for over three months until the following emails of April 6, 2012. This was one year and eight months after the filing of the Claim on September 10, 2010, and eleven months after the filing of the Appeal of the Denial on May 29, 2011.

Petitioner has attached three emails dated April 6, 2012 (Exhibit A to The Declaration of Jeffrey Rieger). These emails are misleading as Petitioner's attorney has altered the context of the discussion in the emails by altering the order in which the emails were sent. The time indication of the emails indicates that the email last in order in the exhibit came first. This alters the context and therefore the meaning of what was said.

First email at 1:47 p.m.:

Mr Rieger first states why he has not filed a Statement of Issues in the matter.

Next Mr. Rieger states that there are two choices, (1) Staying the administrative appeal, or (2) Respondent joining the pending Superior Court case as a Petitioner.

Respondent is then inferentially asked to choose between the two choices. Nothing was said about any recoupment of funds previously paid to Respondent.

Second email at 2:24 p.m.

Respondent replied to Mr. Rieger as follows:

> I am not a Petitioner in the Superior Court case as the issues in my matter are entirely different and unrelated to those of the Petitioners in that case.
>
> It was my intention to allow my claim to remain on hold until the

> resolution of the Petitioners claims. That is still satisfactory with me.
>
> I know you have an overwhelming amount of work to do and may not have fully analyzed my claim. With all respect, I will point out what is in issue there.
>
> Regarding the right to cola benefits as provided for in Olson v. Cory, 1, that is not in issue. That was decided and resolved in 1996. From the date of the resolution (the Settlement Agreement) until 2002, there was no problem. In 2002 the annual adjustment was not made. The reason for this was solely a change in personnel at JRS who did not know what to do. The result was that no adjustments were made, despite my requests for a number of years. When Ms. Montgomery became Manager of JRS, she took a different approach and tried to find reasons to avoid the requirements of the Settlement Agreement altogether. Eventually she agreed that she had to follow the Settlement Agreement, but then undertook calculations that I do not agree with. . . .
>
> The principal area of disagreement is that Ms. Montgomery claimed that in 1996, JRS in applying the Settlement Agreement, made a mistake in the calculations of the cola percentages to be applied. I took no part in the calculations of the cola percentages, and had no knowledge of this possibility until she told me in approximately 2010. . . .
>
> My position is that the Settlement Agreement is binding and cannot be changed. That the calculations as applied are an integral part of the Settlement Agreement. It should be noted that I did not draft the Settlement Agreement, nor did I take part in any of the calculations. . . .
>
> If you wish to research and brief the issue of the binding nature of a settlement agreement, I would then prepare a response brief, and if we did not agree, we could discuss and perhaps resolve the issue. . . .

Respondent's motivation was in part that the claim had been filed one year and eight months earlier, and that a new claim should properly be filed to update the claim.

The claim filed by Respondent on September 10, 1910 did not involve any recoupment of any funds by JRS. The subject of recoupment was neither brought up nor a consideration in any of the email discussion on April 6, 2011.

Third email at 3:19 p.m.

Mr. Rieger stated:

> Based on your statement below that it is your intention to allow your claim to remain on hold until the resolution of the Petitioners' claims, I will not serve any statement of issues to commence your administrative appeal, at least for the time being. . . .

Nothing was said about any recoupment of funds previously paid to Respondent.

The Attorney for Petitioner states in Petitioner's Brief that "Mast and the JRS had agreed to stay this administrative proceeding while the parties litigated *Staniforth v. JRS*." This is misleading. The statement was that it was Respondent's "intention to allow your claim to remain on hold." There was no agreement in regard to any recoupment of funds. In addition there was, in Mr. Rieger's interpretation of the prior email, an intention to allow Respondent's claim to remain on hold, but Mr. Rieger stated he would not serve the Statement of Issues, " at least for the time being. . . ." Since Mr. Rieger reserved for himself the right to proceed at any time, there was no agreement.

In order to proceed to claim a recoupment of funds previously paid pursuant to the Settlement Agreement, JRS would have had to file an "Accusation" pursuant to Government Code sections 11500-11529. Petitioner has not done so.

Accusation:

> 11503. (a) A hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned shall be initiated by filing an accusation or District Statement of Reduction in Force. The accusation or District Statement of Reduction in Force shall be a written statement of charges that shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his or her defense. It shall specify the statutes and rules that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of those statutes and rules.

> 11505. (a) Upon the filing of the accusation or District Statement of Reduction in Force the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation or District Statement of Reduction in Force any information that it deems appropriate, but it shall include a postcard or other form entitled Notice of Defense, or, as applicable, Notice of Participation, that, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation or District Statement of Reduction in Force and constitute a notice of defense, or, as applicable, notice of participation, under Section 11506.

EQUITABLE ESTOPPEL

Petitioner claims that the doctrine of equitable estoppel applies in this matter. It does not. Petitioner cites three cases to support his claim. Not only do these cases not support Petitioner's position, but they show that Petitioners theory is wrong. The cases cited show clearly that equitable estoppel does not support Petitioner's claim that at this time Petitioner may recoup payments previously made to Respondent.

Petitioner takes phrases out of context and places a meaning on phrases opposite to the meaning in the decisions of the cases and contrary to the law of the cases.

The first cited case is *Addison v. State of California* (1978) 21 Cal.3d 313, 319. Petitioner states that *Addison* says, "Application of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff."

This is not what *Addison* holds. Petitioner is avoiding the context and facts of *Addison*, and presents a single sentence from the case as representing the meaning of the case and inventing a precedent which is not there. What *Addison* states is:

> Plaintiffs originally filed a tort action against defendants, the State of California and the County of Santa Clara, in federal court, alleging violations of both state and federal law. After defendants moved to [21 Cal.3d 313, 316] dismiss the federal action for lack of jurisdiction and after the expiration of the six-month period provided in section 945.6, plaintiffs filed the present action in the Santa Clara County Superior Court. Upon defendants' motion, the federal suit was dismissed shortly thereafter, without prejudice to the prosecution of the superior court proceeding. The superior court then sustained defendants' subsequent demurrer to the Santa Clara County action because of the late filing of the complaint presently before us and notwithstanding the fact, which all parties acknowledge, that plaintiffs had filed the federal action in timely fashion. . . .
>
> We will apply the well established doctrine of "equitable tolling." The six months' limitation period on suits against public entities having been suspended during the period in which plaintiffs' claims were pending in the federal tribunal, plaintiffs' present action in state court is deemed timely filed. . . .
>
> "The prescribed statutes of limitations for commencement of actions against the state 'are mandatory and must be strictly complied with ....' [Citations.]" (Chase v. State of California (1977) 67 Cal.App.3d 808, 812 [136 Cal.Rptr. 833].) [2a] As will appear, however, occasionally and in special situations, the foregoing statutory procedure does not preclude application of the equitable tolling doctrine. . . .
>
> . . . . in Elkins v. Derby (1974) 12 Cal.3d 410 [115 Cal.Rptr. 641, 525 P.2d 81, 71 A.L.R.3d 839], we unanimously held that the statute of

> limitations on a personal injury action is tolled while plaintiff asserts a workers' compensation remedy against **defendant** [emphasis supplied]. . . .
>
> As demonstrated by Bollinger and Elkins, application of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.
>
> **The [tolling] doctrine's application, on the other hand, should not substantially undermine the policy of prompt resolution of claims.** [emphasis supplied]

The statement at the end of the December 29, 2011 letter that "JRS reserves the right" does not meet the test and law as stated in *Addison*.

In the second cited case JRS states: "*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, ... A recently published opinion held that equitable tolling applied under circumstances similar to those present here." JRS is wrong.

This is not what *McDonald* holds. Again Petitioner avoids the context, facts, and meaning of a case and invents a precedent which is not there. This is in no way similar to the "reserving a right" statement the December 29th letter in the instant case.

Plaintiffs John McDonald, Sylvia Brown, and Sallie Stryker filed suit against defendant Antelope Valley Community College District (the District) alleging racial harassment, racial discrimination, and retaliation.

McDonald stated:

> In October 2001, Brown complained of discrimination in a letter to the Vice Chancellor of Human Resources at the California Community Colleges Chancellor's Office (Chancellor's Office). She followed up by filing a formal discrimination complaint with the Chancellor's Office in early November 2001. The Chancellor's Office forwarded her complaint to the District for it to investigate and "urge[d] [Brown] to

> work with the [D]istrict to resolve this matter." The Chancellor's Office further advised Brown the District would have until January 31, 2002, to resolve the complaint, and Brown thereafter would have a right to appeal to the local board of trustees and, in some cases, to the Chancellor's Office. Finally, the Chancellor's Office advised Brown she could file a FEHA complaint with the Department of Fair Employment and Housing (DFEH) at any time. . . .
>
> **Broadly speaking, the doctrine applies " '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.' "** (*Elkins v. Derby*, *supra*, 12 Cal.3d at p. 414, quoting *Myers v. County of Orange* (1970) 6 Cal.App.3d 626, 634.) Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. (See *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 923.)

The statement at the end of the December 29, 1911 letter that "JRS reserves the right" does not meet the test and law as stated in *McDonald*.

In the final case cited Petitioner states in its brief, "*See San Pablo Bay Pipeline Co., LLC v. Public Utilities Com.* (2015) 243 Cal.App.4th 295, 316-17 (delayed filing due to a bifurcation order that was made for judicial economy)." This likewise is untrue.

San Pablo was a proceeding before the Public Utilities Commission, which lasted from 2005 to approximately 2013, concerning a dispute among Shell Oil, Chevron, and three other oil companies regarding the use of a pipeline used to transport oil to refineries.

San Pablo stated:

> The initial petition also asserted that the Commission erroneously resolved issues involving the statute of limitations. On October 31, 2013, we granted the Commission's motion to dismiss the statute of

> limitations issues on the ground that its analysis of those issues had been vacated and, therefore, those issues were not yet ripe for consideration by this court.
>
> Our examination of the Commission's authority to prevent the restarting of the statute of limitations takes the same basic steps as our analysis of its authority to bifurcate a proceeding into two phases.
>
> First, the parties have not cited, and we have not located, any constitutional provision, statute or published authority that explicitly addresses the power of the Commission to control the statute of limitations during the course of a bifurcated proceeding. Second, in the absence of specific authority, we turn to the sources of the Commission's general authority. The California Constitution provides the Commission with the authority to establish its own procedure and section 701 states the Commission "may do all things . . . necessary and convenient in the exercise of [its] power" to supervise and regulate public utilities. This statutory authority is expansive and should be liberally construed. To bifurcate a proceeding into two phases.

This case is not authority for the untenable position of Petitioner that a simple, unanswered statement, at the end of a letter served to eliminate the statute of limitations that applies to the Petitioner.

Petitioner makes a number of untrue and incorrect statements in its Brief.

First: "Mast was aware, since December 29, 2011, that the JRS intended to recover the overpayments he received from JRS."

Respondent was not made aware of this by anything in the December 29, 2011 letter or by any other communication. The only thing stated was that the attorney for Petitioner "reserves the right" to claim over-payments. The only over-payments ever referred to up to that time was for payments made pursuant to the Consumer Price Index, CCPI-U instead of the CCPI-W. (See the Declaration of Paul G. Mast attached hereto.) Adjustments had been made pursuant to CCPI-W for many years. Prior to the Statement of Issues there was no allegation that adjustments should not have been paid or that recoupment of payments was owed.

Second: JRS states:

> The JRS could have proceeded in this matter long before it did, but held off due to an agreement with Mast.
>
> It was in all parties' interests, and the interests of judicial economy, to wait on the resolution of *Staniforth v. JRS,* before proceeding with Mast's case, because the parties knew the resolution of *Staniforth v. JRS* would impact Mast's case. Under these circumstances, the JRS meets the requirements for equitable tolling.

There was no such agreement with Respondent. Petitioner is apparently referring to the three emails of April 6, 2012. The only thing in these emails was a statement by Respondent that the Claim of Respondent, which had already languished for one and one-half years, could remain on hold for the immediate time. Neither in Respondent's Claim, in Petitioner's Denial, nor in Respondent's Appeal was anything said, nor was the issue ever raised, that Petitioner was asserting any claim for the recoupment of any over-payments from Petitioner. This Court has previously ruled on this issue:

> In this case, JRS sent its supplemental denial letter on December 29, 2011, stating that "reserve[s] its rights to seek repayment of all amounts that it can lawfully recover from [Respondent] in the event that the Board of Administration and the courts find that JRS has paid [Respondent] amounts in excess of what is allowed." (Exhibit 27.) JRS did not file its Statement of issues seeking an order to recover any overpayments until March 25, 2015. Consequently, its action seeking to collect its overpayment commenced on March 25, 2015, and JRS is barred from obtaining overpayment of any retirement allowances made prior to March 25, 2012.

Respectfully, the Court is partially wrong. Since no Accusation has been filed seeking Rescission, no over-payments of retirement allowances can be made.

Third: Petitioner's Brief says that this Court in its Proposed Decision stated "JRS knew that [Mast's] interpretation of *Olson* was wrong, but affirmatively chose to draft and execute the settlement agreement to avoid litigation." The quote is

accurate; the statement is contrary to the facts. As shown in The Declaration of Paul G. Mast, attached hereto, the attorney for JRS, conducted independent research and agreed with Respondent's view of *Olson*. Thereafter, the Settlement Agreement was drafted by JRS, approved by the Manager of JRS, and executed by the parties. There is no evidence to the contrary.

In this Court's Proposed Opinion, it was opined that Respondent's "theory" of the ruling in Olson v Cory, I, was wrong, but Respondent continued to allege that his "theory" was correct.

That is Respondent's position. The interpretation of *Olson* in the *Staniforth* case was an aberration caused by the attorney for Petitioner citing three words: vested or not. By extracting "vested or not" from the one paragraph, out of context, without citing the remainder of the paragraph, the interpretation reversed the meaning of the three cited words. Respondent will refer to the entire paragraph (set forth, *infra*) and discuss the meaning of the paragraph and the context in which the paragraph was written.

The paragraph from *Olson (Olson I* at 543) is:

> **Judicial pensioners whose benefits are based on judicial services terminating before the effective date of applicable law [the first Monday in January, 1970] 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.
[emphasis added]

The first sentence states the subject matter of the paragraph, which is the retirement benefits due to judicial retirees who retired prior to January 1, 1970 (who do not have vested cost of living adjustments to their retirement benefits). The paragraph does not pertain to the vested rights of pensioners who had some service during the "protected period" and who are entitled to **unlimited cost of living increases** for the period of time of service to the end of the judicial officers protected period, [for a judicial officer with service during the protected period, any service prior to and subsequent to the first Monday in January, 1970, until the end of any term that started before January 1, 1977].

The paragraph continues with: ". . . . it is not necessary **for our purposes** to determine a judicial pensioner's right as being vested". The attorney for JRS ignored the "purposes" of the Supreme Court The Supreme Court decision was dated March, 1980. Their "purpose" was to determine what retirement benefits were due pensioners for the time from January 1, 1977 (the effective date of the 1976 Amendment to GC 68203) and the date of the Supreme Court decision. The Supreme Court stated that during this period, the retirement benefits for the unvested judges (retired prior to 1970) and those who had retired after the beginning of 1970 (who had "vested rights") were the same. The attorney for JRS claimed wrongly that the paragraph stated that there was no difference in the retirement benefits due to vested judges and unvested judges at any time.

The fact that judges and justices who had retired after the beginning of 1970, during their protected periods, were entitled to vested COLA retirement benefits for their entire retirement periods is confirmed in the last sentence of the paragraph: ". . . . judges or justices who enter upon a new or unexpired term of a predecessor judge after 31 December 1976 [the end of the 'protected period'],

benefits of judicial pensioners based on the salaries of such judges will be governed by the 1976 amendment."

Such judicial officers would have their benefits for the period of service after the "protected period" calculated in accordance with the 1976 Amendment to GC §68203 (no cost of living adjustments).

The paragraph therefore states that there were three categories of judges and justices for retirement benefit purposes:

1) Those who had retired prior the effective dated of the 1969 Amendment to GC §68203, who have no vested rights to COLA adjusted pension benefits.

2) Those who had service after the effective date of the 1969 Amendment to GC §68203, and who therefore had vested and protected rights to COLA pension benefits accruing up to the end of their protected period.

3) Those who began a new or unexpired term after the effective date of the 1976 Amendment to GC §68203, who did not accrue any rights to vested COLA pension benefits for service during this period. By necessity, this would require, for a judge or justice who had vested service followed by non-vested service, that there would be a pro-ration for retirement benefit purposes between the vested and non-vested portions of their service.

This was confirmed by the Supreme Court whose decision affirmed "in part" the Superior Court judgment as to judicial pensioners. The decision of the Superior Court was that all judicial pensioners, regardless of their dates of service or retirement, were entitled to COLA retirement benefits for their entire service to continue for their entire retirement period.

There were, as stated above, three groups of retirees. By stating "in part",

Olson clearly did not mean the first group, those whose service ended before the beginning of 1970. It also did not mean those in the third group, those who had no service prior to the beginning of 1977, or for those judicial officers who started a new term after the beginning of 1977, for that period of their judicial service occurring after their "protected period."

The remaining group, second above, those who had service after the beginning of 1970, for the judicial period of service to the end of his or her "protected period" were those referred to in the decision by the words "in part." Their vested COLA retirement benefits for the entire period of their retirement was decreed by the Supreme Court.

The Supreme Court procedure at the time of *Olson v. Cory* was that upon accepting a case, the Appellate Court decision and proceedings were a nullity. The appeal was considered to be from the Superior Court.

Despite this, in *Staniforth*, the attorney for JRS quoted from the nullified decision of the Appellate Court, in clear violation of the rules and procedure of the Supreme Court, which further confused the proceedings in the *Staniforth* case.

See the analysis of *Olson* attached hereto as Exhibit F.

PURSUANT TO *OLSON* COLA ADJUSTED JUDICIAL RETIREMENT BENEFITS HAVE BEEN DE-COUPLED FROM THE SALARIES OF SITTING JUDGES

GC § 75033.5 states, in part: ". . .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 . . . ." Petitioner's attorney has alleged that pursuant to this phrase, retirement benefits are unalterably linked to a sitting judge's salary. This was partially true when the Supreme Court stated "for our purpose," and compensated retirement benefits based upon the salaries of sitting judges or

justices until the last sitting judge or justice completed his or her "protected term" (January 1, 1981 for judges and January 1, 1987 for justices). After January 1, 1977, judges and justices were paid different amounts, depending whether they were serving in a "protected term" or had started a new term, After the January 1, 1981, for judges and January 1, 1987 for justices, when no judge or justice was serving during a "protected period" the ruling of *Olson* was that COLA judicial retirement benefits were permanently vested, and that the 1976 Amendment, so far as it sought to take away those vested rights, was in violation of the United States Constitution (which takes precedence over that phrase in GC §75033.5).

RESPONDENT NEVER SAID OR BELIEVED THE SETTLEMENT AGREEMENT WAS IMMORAL

Contrary to the statement in Petitioner's Brief, Respondent did not think and did not at any time state that the Settlement Agreement was immoral. Some ten or more years later in a letter to JRS, Respondent stated that he felt that he personally was immoral in entering into the confidentiality clause. The Agreement itself followed the law and was completely moral.

JRS CALCULATIONS

There are other cases, according to the Request to the Appellate Court in *Staniforth* to publish the Opinion, Petitioner's attorney said, that there are or will be other cases filed in regard to the *Olson* issues.

The recoupment amounts stated on page 5 of Petitioner's Brief are not valid or material, but Respondent will refer to them. Initially, the date, April 6, 2009, appears to be mistaken. The only date of April 6, *supra*, is in 2012.

As to the amounts, even if they were warranted, the amounts are erroneous.

Government Code 68203 passed in 1981, and still current states:

> 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. (d) On January 1, 2001, the salary of the justices and judges named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the salary of each justice and judge as of December 31, 2000, by 81/2 percent.

The failure of the State to adjust judicial salaries from 2008 to the present has been litigated in the case of *Mallano v. Chiang*. The Judgment in this case is attached hereto as Exhibit G. The Judgment is not yet final.

Petitioner in its calculations has not adjusted the salaries of sitting judges pursuant to GC § 68203 in computing what it believes are Respondent's benefits.

CURRENT BENEFITS

After the remand to this Court, Petitioner's Attorney directed The Judge's Retirement System to reduce the retirement benefits of Respondent and to begin to re-coup "over payments" at once. See the letter to Respondent from Jennifer Watson (JRS), attached hereto as Exhibit H.

There is no order by the Board of CalPERS in this matter. Even if there were, said order would not be final until a final ruling by a Superior Court, if the matter were taken before a Superior Court for judicial review.

The action of Petitioner's Attorney is improper and unethical, and is an abusive action taken by him either to punish Respondent or to force Respondent to settle this matter. Respondent requests this Court to take action in regard to this, or to recommend to the Board that they take appropriate action.

Respectfully submitted,

July 11, 2016

Paul G Mast

Paul G. Mast

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

RESPONDENT'S REPLY BRIEF

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 JULY 11 2016 at Irvine, CA.

Marci G. Mast

EXHIBIT A

CalPERS BOARD TRANSCRIPT PAGES 29-32

Mr. Costigan.

BOARD MEMBER COSTIGAN: Again, I just note that I'm not voting on this pending the State Personnel Board. Thank you.

PRESIDENT FECKNER: Very good. Seeing no other requests for questions.

All in favor say aye?

(Ayes.)

PRESIDENT FECKNER: Opposed say no?

Motion passes. Thank you.

Item 9, Mr. Jones.

VICE PRESIDENT JONES: Item --

PRESIDENT FECKNER: Oh, 8m, I'm sorry.

VICE PRESIDENT JONES: 8m, yeah.

Okay. I move to schedule Item 8m for a full Board hearing on the limited question of whether staff may recover or recoup any overpayments that may have been made to the member.

PRESIDENT FECKNER: Is there a second?

BOARD MEMBER LIND: Second.

PRESIDENT FECKNER: Motion by Jones, seconded by Lind.

Any discussion on the motion?

Mr. Jelincic.

BOARD MEMBER JELINCIC: Yeah, I would -- since

this is largely a technical issues, and I think the lawyers and the administrative law judge probably are more informed and better able to deal with it, so I would actually encourage us to, rather than schedule for Board hearing, send it back for additional testimony and hearing on just that issue.

PRESIDENT FECKNER: All right. Are you putting that in the form of a motion?

BOARD MEMBER JELINCIC: Well, if -- sure, at least to get it dealt with.

BOARD MEMBER MATHUR: Second.

PRESIDENT FECKNER: It's been moved by Jelincic, seconded by Mathur.

Any discussion on the motion?

BOARD MEMBER JELINCIC: Can we ask Shah what he thinks?

PRESIDENT FECKNER: Mr. Shah, can you weigh-in, please?

MR. SHAH: Yes. Good morning Mr. President and members of the Board.

PRESIDENT FECKNER: Good morning.

MR. SHAH: My recommendation is to schedule this for a full Board hearing, because it's my view that most of the material facts have been developed, and there aren't really a lot of factual disputes that the

administrative law judge could take evidence on. For that reason, I'm recommending a full Board hearing. Of course, the Board has the discretion to remand the matter for taking more evidence than what's been taken so far on this specific question.

So I don't have an objection to that, but my recommendation, of course, is to schedule it for a full Board hearing, considering all the material facts that have been developed in this case.

PRESIDENT FECKNER: All right. Motion being before you. All in favor of the motion say aye?

(Ayes.)

PRESIDENT FECKNER: Opposed say, no?

Motion carries.

PRESIDENT FECKNER: Mr. Jones.

VICE PRESIDENT JONES: I move to deny the petition for reconsideration at Agenda Item 9a.

PRESIDENT FECKNER: Second?

BOARD MEMBER LIND: Second.

PRESIDENT FECKNER: Seconded by -- motion by Jones, seconded Lind.

Seeing no requests to speak.

All in favor say aye?

(Ayes.)

PRESIDENT FECKNER: Opposed say no?

Motion carries.

All right. That brings us to Agenda Item 11, State Legislative Update. Ms. Ashley.

LEGISLATIVE AFFAIRS DIVISION CHIEF ASHLEY: Good morning, President Feckner and members of the Board. Mary Anne Ashley, CalPERS staff.

Included in your Board materials is the updated Legislative summary that notes CalPERS sponsored measures, as well as several other measures that would potentially impact CalPERS. This is a very busy time at the legislature as bills are being amended and moving to and from policy committees. April 22nd is the last day for policy committees to hear and report fiscal bills to the fiscal committees for those bills introduced in the house of origin. And May 3rd is the last day for policy committees to hear and report non-fiscal bills to the floor. June 3rd is the last day for bills to be passed from their house of origin.

CalPERS two sponsored measures are being heard -- are actually on the consent calendar for today's Assembly PERS Committee hearing. That would be AB 2404, which is the retirement option simplification bill, and AB 2375, which is our annual technical housekeeping bill.

Several other bills that staff is currently monitoring and analyzing are also being heard in the

EXHIBIT B

SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

between

JUDGES RETIREMENT SYSTEM and PAUL G. MAST

The parties to this agreement, the Judges Retirement System (JRS) and Paul G. Mast (Mast), hereby fully settle their dispute over his request to re-calculate his retirement allowance. The parties agree to the following terms:

1. It is not disputed that JRS must follow the formula for deferred retirements in Government Code section 75033.5

2. Using that formula, JRS will re-calculate Mast's allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975,the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to Olson v. Cory, (1980), 27 Ca. 3d. 532.

3. Said recalculated retirement allowance shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995.

4. Mast expressly waives his right to appeal this matter further to JRS or any other competent jurisdiction.

5. Each party will keep the terms of this agreement confidential.

6. Each party will bear their own costs in negotiating the terms of this agreement.

In settling, the parties do not admit any wrongdoing or breach of contractual obligations. The parties are settling this matter solely to avoid the expense and uncertainty of litigation.

By the signatures below, JRS and Mast agree to enter this settlement agreement as a legally binding contract on the date signed by the last party to sign.

Date: 10/22/96

MICHAEL PRIEBE, Manager
Judges' Retirement System

Date: 10-8-96

PAUL G. MAST
SSN [redacted]

EX-B

EXHIBIT C

CLAIM – SEPTEMBER 1, 2010

Paul Mast, Judge (Ret.)
[redacted]
[redacted]

DDC - 5

September 1, 2010

Pamela Montgomery
Judges and Legislators Retirement System
Box 942705
Sacramento, CA 94229-2705

Re: Unpaid retirement benefits for Paul Mast

Dear Ms. Montgomery:

I have your letter of August 9, 2010 written in response to my many communications with you. Again your calculations are erroneous. In 2010 as in 2006 you proceeded on the wrong premise and therefore came up with a completely wrong conclusion. The current calculations are very much the same as the calculations you came up with in 2006.

In 2006 I explained the errors in a letter to you. You have ignored the law and the facts as stated in that letter and as they exist. You have stalled for four additional years while making one excuse after another. During that time the underpayment and therefore the problem has increased exponentially.

Computation of my retirement benefits was resolved in 1996 when The Judges Retirement System (JRS) and I entered into a Settlement Agreement.

As you did in 2006, you have again insisted in recalculating the retirement increases from 1979. As I did in my letter of 2006, I will again explain why recalculating the retirement increases from 1979 is not legal and is not acceptable.

I have submitted the calculation to my accountant, using your figures for the COLA adjustments as well as your figures for the amounts that have been paid. The summary of those calculations is attached. 1

Brief history of Settlement Agreement

When I became eligible to receive retirement benefits in May 1995, your office began the payments incorrectly. You applied the law as it applied to retirees in 1995. The law that should have been applied was the law that prevailed when I retired in January 1979. That law provided that the amount to be paid be adjusted annually from the date of my retirement, in accordance with the COLA for the respective time periods. When I objected to application of the incorrect law, and when discussion was to no avail, I filed for an Administrative Proceeding.

The attorney representing your office in that proceeding was Maureen Reilly, Senior Staff Counsel of the Board of Administration of the Public Employees' Retirement System. I represented myself.

During that proceeding, after the case was briefed on each side and before a hearing, it was determined by your office, with the advice of counsel, that I was correct, and that I was entitled to my benefits being adjusted for COLA from the date of my retirement, January 1979. This was pursuant to the three *Olson v. Cory* cases, particularly, *Olson v. Cory*, (1980) 27 Cal 3d. 532.

The administrative matter was fully resolved by the Settlement Agreement dated October 22, 1996 between JRS and me, a copy of which is attached.

Recalculating the retirement from 1979 is not legal and is not acceptable.

First: Government Code Section 20160 (b) does not apply

No error was made. You are making the error in your calculations.

However, even if an error had been made, it would not be a clerical error to which the Code Section refers. The amount due is based upon a settlement of litigation and a written Settlement Agreement.

Second: Settlement Agreement
You have proceeded on the wrong premise when you completely ignored the Settlement Agreement. I direct your attention particularly to paragraphs 2 and 3.

Paragraph 2 of the Agreement states:

> Using that formula, JRS will re-calculate Mast's allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975, the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to *Olson v. Cory*, (1980), 27 Cal. 3d 532.

Paragraph 3 of the Agreement states, in part: "Said recalculated retirement allowance . . . ."

"Said recalculated retirement allowance" are the key words showing you are in error in attempting to recalculate the amount of the retirement allowance *ab initio*.

When the Settlement Agreement says "Said recalculated retirement allowance" it is referring to Paragraph 2. It is not a qualified statement. It does not say, "if that calculation is correct." It does not say that the calculation made may be modified in the future by another calculation. It says that the calculation made by JRS at that time is that which will be used as the basis for the retirement allowance.

It should also be noted that I took no part in the calculation. I was not contacted or consulted and had no input into it. I relied on JRS to do it correctly and they did. I was not privy to the worksheets. They were never furnished to me.

The computed amount corresponded to the amount I expected to receive. If there was any miscalculation, the amount of the error was not significant enough to put me on notice that an error was made. If there was any miscalculation, the amount of the error was not significant enough to put anyone in your office on notice that the computed amount was unreasonable and therefore incorrect. The calculated amount is the recalculated retirement allowance as called for in paragraph 3 of the Settlement Agreement.

The Settlement Agreement was drafted by JRS, either by staff or by counsel. I took no part in its drafting or preparation. Although I do not see any ambiguities, any such that there may be would be construed in my favor and against yours, according to law.

The validity or finality of the Settlement Agreement is not affected by any subsequent dissatisfaction you may have with how it was drafted. The law favors settlements. The finality of a settlement must be honored. If there is any ambiguity in a settlement statement due to deficient drafting, the ambiguity must

be resolved in favor of the non-drafting party. The best indicator of the meaning of the Settlement Agreement is the behavior of JRS immediately after entering into the Agreement. You are estopped from changing the Agreement. Further, laches applies. The original calculation was made by your office in 1998. Even if it could be changed, it is too late to do so now.

What the Agreement says can best be determined by reading the Agreement itself. I realize that this Settlement Agreement was entered into before you were in the office. You cannot as a staff member review, revise, or otherwise alter the Agreement or the calculations.

Calculation of Benefits and Arrearages

I have submitted the calculation to my accountant, using your figures for the COLA adjustments as well as your figures for the amounts that have been paid. The summary of those calculations is attached.

I presented the question of my underpayment to my accountant for a correct determination of the amount due. I did not in any way speak to him ahead of time about what I thought was owed. He used the CPI table given to me by the Judges Retirement System, and took as correct the amount of the monthly payment for the last period that a proper adjustment and calculation was made. The first new adjustment being effective 9/1/99, the time your office stopped making proper adjustments.

The amounts determined to be unpaid and therefore due through October 2010 total $152,269, consisting of unpaid retirement allowance of $101,219 and interest of $51,050.

The amount of the monthly pension, beginning September 2010, is $8,550.59. A copy of the calculation is attached.

My accountant was not given your letter, and did not consider the additional payments JRS is making pursuant to that letter. Thus from the accountant's calculated amount must be deducted the following: $10,088.90 in unpaid retirement allowance that JRS is making on 9/1/10, the $317.85, adjustment for 9/1/10, and the $509.16 adjustment to be made 10/1/10. In addition, $86.33

interest must be deducted for the amount that has been paid and adjusted on 9/1/10.

The current unpaid amount due totals $141,775.55, consisting of unpaid retirement allowance of $90,812.25 and interest of $50,963.30. In addition the monthly pension must be adjusted to $8,550.59.

Confidentiality

I now direct your attention to Paragraph 5 of the Agreement, which states: "Each party will keep the terms of this agreement confidential."
I have not paid attention to the wording of Paragraph 5 until now, as I knew what the concerns of JRS were.

At the time of the settlement I was the only Retired Judge to have called this error to the attention of your office, and thus I am the only Retired Judge to have ever been paid in accordance with this law as far as I know.

I asked during the final discussion of the settlement why JRS wanted a confidentiality agreement. I was told that no retired judge was paid in accordance with the dictates of *Olson v. Cory*; that some 1,000 to 1,500 retired judges had been receiving retirement pay in violation of the dictates of that case; and that if JRS had to adjust the amounts previously paid, JRS would be paying out about four hundred million dollars. This discussion was held in 1996. Since then these retirees have accrued additional amounts they are owed. In addition, 15 additional years of interest has also accrued.

I have been writing to you and your predecessor for ten years to have you calculate my retirement benefits correctly. The time is up. If the Retirement System does not pay the amount due and adjust the amount payable each month by the October 1 payment, I will submit it to an attorney. I cannot wait another four years for another response. I also cannot wait indefinitely and allow this problem to outlive me.

As you well know, I have out of my respect for the State of California, not taken my underpayment issue to an attorney previously, as I believe that doing so would have a disastrous effect on the State. I believe that your office is well aware of the consequences of my seeking legal assistance.

After Michael Priebe left your office, his successor Steve Benitez did not know what to do. For three years Mr. Benitez delayed the question and did nothing, despite my repeated requests and directions. Then you came into the office. Since then you have repeatedly delayed the resolution of the matter and diverted the resolution by coming up with various claims and positions.

I urge you to resolve this matter now.

I am sending a copy of this letter to the Members of the Board of the Public Employees Retirement Board and separately to John Chiang, the Controller of the State of California (who is also a Member of the Board).

The best way to contact me is by email at [redacted]

I will be moving from my temporary residence in La Quinta to a permanent residence in Laguna Woods by the end of September.

Thank you for your consideration.

Respectfully,

/s/
Paul Mast, Judge (Ret.)

Enclosures as stated

Copies as stated

EXHIBIT D

DENIAL – MAY 4, 2011

12 03 05

California Public Employees' Retirement System
Judges' Retirement System
P O Box 942705
Sacramento, CA 94229-2705
TTY (916) 795-3240
(916) 795-3688 phone (916) 795-1500 fax
www calpers ca gov

[redacted]

May 4, 2011

3397

CERTIFIED MAIL – Return Receipt Requested
The Honorable Paul Mast (Ret)
[redacted]

Dear Judge Mast

This is in response to your letter of September 1, 2010, in which you continue to disagree with our calculations of your retirement allowance

The Settlement Agreement you signed on October 8, 1996, provided for the Judges' Retirement System (JRS) to calculate your allowance based on the definition in former Government Code (GC) section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to Olson v Cory (1980), 27 Cal 3d 532 We have complied with the terms of the Settlement Agreement and have calculated your retirement allowance based on the following

1 The salary of a Municipal Court Judge as of January 15, 1979, under GC section 68203, prior to the amendment on January 1, 1977, which was $51,193, or a monthly salary of $4,266 08 We previously provided documentation that confirmed that this was the judicial salary of a Municipal Court Judge under GC section 68203, prior to the amendment on January 1, 1977, using the full CPI increase This salary does reflect the higher of the two salaries that were paid to Municipal Court judges as of January 15, 1979

2 Cost-of-living adjustments (COLA) have been applied to your current allowance consistent with the full CPI increase applied to judicial salaries prior to January 1, 1977 We confirmed that all COLA increases to judicial salaries prior to the amendment in GG section 68203 on January 1, 1977, were based upon the California Consumer Price Index, Urban Wage Earners (CCPI-W) The change to the index was measured from December to December and the increase was applied the following September 1st

When you received your first retirement allowance effective May 28, 1995, you were paid a percentage of the active judicial salary in effect at that time In October 1996, the Settlement Agreement was signed and JRS staff recalculated your allowance However, there was a substantial error made during that calculation and the amount paid to you was incorrect

JUDGES

EX-D-PG. 1

In calculating the COLA for September 1987, JRS staff inadvertently applied a 9% COLA to the salary, instead of the actual 1 9% COLA[1], resulting in a 7% increase to salary that should not have been applied Over the years, this error resulted in an overpayment to you totaling approximately $94,304 19

Your current monthly allowance of $7,438 09 is correct based on the terms of the 1996 Settlement Agreement GC section 20160 (b) requires that we correct all errors made by the System JRS cannot pay you based on an erroneous amount calculated in error by JRS staff in 1996 Therefore, we are denying your request for additional increases to your monthly allowance and your request for a lump sum payment of unpaid retirement allowance and interest

You have the right to file an appeal of this determination An appeal, if filed, must be sent in writing to the above address within 30 days of the mailing of this letter in accordance with sections 555-555 4, Title 2, California Code of Regulations (enclosed) The appeal should set forth the factual basis and the legal authorities for such appeal

If you file an appeal, the CalPERS Legal Office will contact you and handle all further requests for information

Sincerely,

Pamela Montgomery, Manager
Judges' Retirement System

EX-D-PG. 2

JUDGES

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

EXHIBIT E

APPEAL – MAY 31, 2011

Paul G. Mast, Judge (Ret.)
[redacted]
[redacted]

May 31, 2011

California Public Employees Retirement System
Judges' Retirement System
400 Q Street
Sacramento, CA 95811

FEDEX Tracking Number 8741 6952 0932

And submitted electronically to Pamela Montgomery
Pamela_Montgomery@CalPERS.CA.GOV

Re: Appeal from Determination in Letter Dated May 4, 2011
By Pamela Montgomery, Manager, Judges' Retirement System
Denial of My Request for Additional Increases to Monthly Allowance
And My Request for a Lump Sum Payment of Unpaid Retirement
Allowance and Interest

Ladies and Gentlemen:

I Paul G. Mast ("Mast") hereby give Notice of Appeal from the denial in the May 4, 2011 letter to me by Pamela Montgomery, Manager, ("Ms. Montgomery") Judges' Retirement System ("JRS") of my request for additional increases to monthly allowance and my request for a lump sum payment of unpaid retirement allowance and interest contained in my previous letter dated September 1, 2010.

Mast's retirement computation was previously the subject of a proceeding before the Board of Administration, Public Employees' Retirement System:

Case No. [redacted]
OAH No. L-9605311
In the Matter of the Application for Retirement from JRS
PAUL G. MAST, Respondent, and
JUDICIAL COUNCIL OF CALIFORNIA, Respondent ("Proceeding")

Mast hereby incorporates herein by reference the following:

1. The entire file Proceeding file, including:

   A. Respondent Mast's Response to Statement of Issues and Points and Authorities dated August 16, 1996 ("Response") and

   B. Settlement Agreement between Judges' Retirement System and Paul G. Mast dated October 22, 1996 ("Settlement Agreement").

2. All letters from Mast to JRS, including those dated December 2, 2002; August 1, 2003; September 16, 2003; November 10, 2003; March 11, 2004; June 7, 2004; November 8, 2006; and September 1, 2010.

3. The entire file of JRS ("JRS file"). JRS is in possession of the JRS file, including charts, indexes, worksheets, calculations, identification of personnel working on file, and whatever else is contained therein. Mast has requested a copy of the JRS file, but it has not been received to this date.

The Judges' Retirement System ("JRS") and Paul G. Mast ("Mast") **fully settled** [emphasis added] their dispute over his request to recalculate his retirement allowance in the Settlement Agreement dated October 22, 1996.

In the determination letter dated May 4, 2011 ("Determination"), Ms. Montgomery fails to mention the Proceeding and Settlement.

Prior to entering into the Settlement Agreement, JRS calculated the amount of retirement allowance to which Mast was entitled pursuant to *Olson v. Cory*, (1980), 27 Cal. 3d. 532.

The following were agreed upon between Mast and JRS before the parties entered into the Settlement:

1. The amount of the retirement allowance then payable to Mast ("recalculated retirement allowance");

2. The amount of the accrued arrearages due to Mast ("accrued arrearages");

3. The fact that the retirement allowance then payable to Mast would be annually adjusted in accordance with the requisite Cost of Living Adjustment ("COLA") as stated in the Statute.

The parties entered into the Settlement Agreement and the dispute was fully settled.

Mast received monthly payment of recalculated retirement allowance; Mast received accrued arrearages; and JRS applied the annual COLA to the recalculated retirement allowance each January.

During the settlement negotiations it was Mast's understanding that the annual COLA adjustment was based upon the September CPI and applied the following January. Mast's understanding was based upon JRS statements made during discussions with JRS.

In any year in which the annual calculation for the COLA was not completed in time for the January payment, arrearages accrued. When the annual calculation was completed, any accrued arrearages for months beginning in January were paid. Mast's recalculated retirement allowance was adjusted annually until approximately the year 2000.

JRS calculated the annual COLA according to the Settlement Agreement. Mast has never seen any actual worksheet. Mast has not been able to obtain a chart of the **three** salary classes paid at that time. Mast was not informed of the numbers, indexes, or calculations used. Mast was only informed of the amounts calculated for the recalculated retirement allowance and the accrued arrearages.

On May 28, 1995 Mast was paid on the same basis as all other judges. JRS computed the recalculated retirement allowance and determined the accrued arrearages **before** the Settlement was signed. **During the settlement negotiations** the discussion included the amount of monthly retirement

allowance and the amount of arrearages. **Mast specifically remembers this because he was asked to waive the arrearages in a specific amount.**

Since the time that JRS stopped performing the annual calculations based upon the annual COLA, Mast has written many letters to JRS.

There have been personnel changes at JRS including changes in the Manager. In 1996 Michael Priebe signed the Settlement Agreement as Manager. After Mr. Priebe, Steve Benitez served as JRS Manager. After Mr. Benitez, Ms. Montgomery began serving as JRS Manager. Mast was told that the personnel changes caused administrative difficulties in calculation and application of the annual COLA because the Mast calculation was unique for JRS.

There never was an issue regarding overpayment. The issues were getting the annual COLA calculated (JRS was late) and knowing how to do the calculation (JRS needed someone more informed to work on the unique case).

The parties knew the meaning and intent of the Settlement Agreement. The written agreement, prepared by JRS, memorialized the agreement between the parties. No figures, calculations, percentages, or other numbers were used. No CPI Index was mentioned by name.

However, 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.

As stated above, JRS is in possession of the JRS file, including charts, indexes, worksheets, calculations, identification of personnel working on file, and whatever else is contained therein. Mast has requested a copy of the entire JRS file, but has not yet received it.

JRS had sole responsibility for calculation of the recalculated retirement allowance. Mast discusses this in the letter dated September 1, 2010 to JRS.

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. The JRS calculations were used as the **basis** for the Settlement Agreement. The amounts were acceptable to both JRS and Mast.

Counsel represented JRS at the time of the Settlement Agreement. The Settlement Agreement document was drafted either by JRS staff or by its counsel. Mast did not participate in the drafting.

In the JRS letter dated May 4, 2011 Ms. Montgomery states, in part:

> The Settlement Agreement you signed on October 8, 1996, provided for the Judges' Retirement System (JRS) **to calculate** [emphasis added] your allowance based on the definition in former Government Code (GC) section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to Olson v. Cory (1980), 27 Cal. 3d. 532.

The language of the paragraph purports to present the gist of the Settlement Agreement. The Settlement Agreement best speaks for itself and can be read in its entirety. Any change in wording is a change in meaning. The above portion of the May 4, 2011 letter is a rewriting of paragraph 2 of the Settlement. The first critical difference is that the actual Settlement Agreement says that JRS **will re-calculate;** it does **not** say **to calculate**.

The second critical difference is that the actual Settlement Agreement uses paragraph 2 as a definition for paragraph 3:

> **Said recalculated retirement allowance** shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995.

In Ms. Montgomery's letter dated May 4, 2011 paragraph 3 is entirely omitted.

///

What is the meaning of the Settlement Agreement?

The Settlement Agreement needs to be read in whole. There were settlement negotiations prior to the creation of the Settlement Agreement. Then there were actions of JRS based on the Settlement Agreement. These actions included payment of the **recalculated retirement allowance, accrued arrearages, and annual COLA** for years subsequent to the Settlement Agreement. Mast received the payments that he expected to receive pursuant to the Settlement Agreement.

When personnel changes at JRS made it difficult for JRS to timely calculate the annual COLA, there was the beginning of what eventually was more than the previous annual delay measured in months and reflected in the arrearages paid when the annual COLA calculation was completed. While JRS was under the management of Mr. Benitez communications were exchanged but no calculations were completed because of clerical difficulties.

Subsequently JRS management changed. Ms. Montgomery and Mast exchanged various communications prior to the May 4, 2011 letter. By some time in 2009 Ms. Montgomery said that she had some questions about the legal agreement and was waiting for word from her attorneys. Ms. Montgomery was speaking about the 1996 Settlement Agreement and wondering about legal issues. Her guess was that legal had not looked at the case yet. By August 9, 2010 Ms. Montgomery was writing a letter to Mast, followed by the letter dated May 4, 2011.

The Settlement Agreement is an Accord and Satisfaction

The California Civil Code defines accord and satisfaction.

Section 1521 provides:
An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

Section 1523 provides:
Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction.

JRS, prior to May 28, 1995, calculated what they said would be Mast's retirement allowance. In Mast's Response, Mast formally presented legal authority from three *Olson v. Cory* cases. Initially Mast, familiar with Olson v. Cory, *supra*, advised JRS that they were in error in their calculations. JRS responded that they were not wrong, and later stated that they were not aware of *Olson v. Cory* and had never applied any holdings in that case to any retirement allowance.

A dispute thereby existed, and the matter was set before the Board of Administrative Hearings (Proceeding, *supra*). Points and Authorities were filed by JRS. Points and Authorities were then filed by Mast. After the attorneys for JRS examined Mast's Points and Authorities, they and their client JRS concluded that Mast was correct in his claim. Discussions resulted in the Settlement Agreement.

During those negotiations, the recalculation of the retirement benefits was accomplished leading up to both the initial monthly allowance (recalculated retirement allowance) and calculation of the arrearages that had accrued after May 1995 (accrued arrearages).

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.

Thereafter, the retirement benefits were adjusted each January, based upon the previous September CPI. These were the dates JRS stated were proper and Mast did not question that. Mast felt at this time that JRS was forthright; he did not question any calculations. The calculations were made honestly by JRS, and both parties relied upon them.

Mast now finds that in fact the COLA calculations should have been made, and the adjustments applied in July of each year (see Government Code Section 68203, *infra*). Mast is not asking for recalculation of retirement benefits based upon the proper COLA adjustments for the time prior to the failure of JRS to abide by the Settlement Agreement in about the year 2000, even though a recalculation would result in additional benefits owed to Mast. Mast recognizes

that the sanctity of the Settlement Agreement precludes this just as it precludes JRS from recalculating the benefits on the basis of alleged errors in calculations.

Said attempt by JRS to recalculate *ab initio* the monthly benefits [benefits] which were recalculated by JRS prior to creation of the1996 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.

Rescission Requires Reasonable Diligence

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 1691addresses the issue of timeliness as follows:

> ... to effect a rescission a party to the contract must, **promptly** [emphasis added] 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 demurrable. 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.

In the instant matter JRS had full knowledge of the facts, had full knowledge of the appropriate 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 **fifteen years** clearly precludes their ability to rescind or attack the Settlement Agreement. As stated above the Settlement Agreement incorporated the calculations of the retirement benefits and arrearages that were integral to the Settlement Agreement.

Changing 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 ageement is barred by laches.

In the case of *Fabian (infra*), following, 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 Mast 1996 Settlement Agreement was created **fifteen years** ago.

Ms. Montgomery would argue that she does not want to rescind the agreement; she wants recalculate the amount due under the Settlement Agreement. She would be wrong. The calculation done by JRS in 1996 was both

part and parcel 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.

Further, as shown in *Fabian*, it is not material and should not be considered whether Mast was prejudiced by the fifteen-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 v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779, 781. In this case 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.*

In conclusion, Mast Retirement Benefits were annually adjusted (although not always in a timely manner) in accordance with the Settlement Agreement until approximately 2000.

Thereafter the personnel at JRS changed. The new personnel did not understand what was necessary for them to do, would not follow directions from Mast, and would not seek assistance elsewhere to determine what they should do. (Mast believes that the Manager Steve Benitez was in good faith, but did not understand what had to be done).

In approximately 2005, the personnel at JRS changed, as did their attitude. Thereafter, they no longer tried to determine what they were obligated to do under the Settlement. Over a period of about six years they refused to do anything and came up with one invalid reason after another to avoid paying the amount due. The May 4, 2011 Determination is a continuation of that avoidance.

Any attempt at this late date to recalculate the amount due or revisit the Settlement Agreement is prohibited by the principles of laches.

Attacking the Settlement Agreement is Barred by Estoppel.

The 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 Mast to believe that the calculations that were the basis for Settlement Agreement were true and correct. 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 part and parcel of and incorporated into the Settlement Agreement as well as those calculations that occurred in subsequent years.

JRS is not permitted to change or contradict the Settlement Agreement, or the calculations that were the basis of it because estoppel applies.

Other: Starting Salary

In view of the above, the amount of starting salary used by JRS in the calculations is not material. However, Mast does not agree that the starting salary referred to in the May 4, 2011 Determination is correct, as Mast has not been provided with any documentation to so indicate. The starting salary was determined by JRS in 1996, as part of the calculation of the retirement benefits leading up to the Settlement Agreement.

Mast does not know, and was not advised by JRS of what starting salary was used for the calculations. Whatever it was, Mast and JRS are bound by the amount used by JRS in 1996 during the settlement negotiations and Settlement Agreement for all of the reasons previously stated.

California Government Code Section 68203 Sets Adjustment Dates

There are questions of application of COLA both when the change to the index is measured and when the increase is applied.

The proper adjustment periods are presented in Government Code section 68203, and are clear on the face of that section.

California Government Code Section 68203 was amended in 1969 to state:

> 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 and 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.

California Government Code Section 68203 was amended in 1976 to state:

> On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 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, but not to exceed five percent (5%).

The Legislature may change contractual benefits if they give something of equal, similar, or greater value in exchange. (*Olson v. Cory*, *supra*.) Changing the adjustment and increase dates from September to July would be such a change as something of equal, similar, or greater value is given.

Neither the current Government Code Section 68203 nor the 1981 amendment is relevant to the issues herein, as no changes in the relevant portions of the Statute has been made.

The May 4, 2011 Determination states at the end of item 2:

> The change to the index was measured from December to December and the increase was applied the following September 1st.

This is not correct.

Mast does not know why or how JRS used an adjustment period of January based upon the prior September CPI during the periods adjustments were made, ending in about 2000. However, Mast does not challenge or ask to recalculate the adjustments made up to about 2000 for the above-stated reasons.

The date of the COLA calculation that applies in this matter is July 1. The COLA is from July 1 of the preceding year to July 1 of the current year. The increase is effective on July 1st of each year.

California Government Code Section 20160 Precludes Changes in the 1996 Settlement Agreement and in Any Prior Calculations

California Government Code Section 20160 provides in pertinent parts:

(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** [emphasis added] after discovery of this right. . .

(b) . . .board shall correct all actions taken as a result of errors or omissions of . . . this system.

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In the May 4, 2011 letter Ms. Montgomery states, "GC Section 20160 (b) requires that we correct all errors made by the System." She overlooked that GC Section 20160 (a)(1) precludes any such correction under any circumstances at this time.

Ms. Montgomery cites 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 a 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.

California Government Code Section 20164 Provides Periods of Limitation of Actions

California Government Code Section 20164 provides in pertinent parts of subdivision (b):

> For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions . . . pursuant to Section 20160 . . . 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.

In the Determination Ms. Montgomery states, "Over the years, this error resulted in an overpayment to you totaling approximately $94,304.19."

For the reasons *supra* Mast states that no error occurred and that if it did, the finality of the Settlement Agreement precludes any changes.

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Ms. Montgomery fails to mention Government Code Section 20164(b)(1) even though in a prior letter dated August 9, 2010, Ms. Montgomery clearly states:

> GC section 20164(b)(1) provides that where this System makes an erroneous payment to the member, our right to collect expires three years from the date of payment. Because we are only authorized to collect any overpayment that occurred during the past three years, we will not collect the $95,449.88 you were overpaid.

ACCOUNTING

Mast submitted a letter dated August 9, 2010 and included an accounting prepared by his accountant showing the amount of arrearages due to that date and the amount the Retirement Benefits should be each month.

The submitted accounting assumed as correct the dates of adjustment stated by JRS, *supra.* These dates involved using the CPI period of December to December with the COLA being applied the subsequent September. Mast now finds that such dates were incorrect. Refer to California Government Code Section 68203 for the correct dates.

Mast will provide an updated accounting, using the calculation and adjustment dates set forth in Government Code Section 68203. If there will be a formal hearing before the Board of Administrative Hearings, the updated accounting will be submitted with the Points and Authorities. If no hearing is applied for, then the updated accounting will be submitted to JRS through the CalPERS Legal Office.

Respectfully submitted,

Paul G. Mast

EXHIBIT F

ANALYSIS OF *OLSON V. CORY, I*

OLSON I HELD THST T HE 1976 AMENDMENT TO GC §68203 IMPAIRED VESTED RIGHTS TO COLA INCREASES FOR JUSTICES AND JUDGES IN VIOLATION TO THE CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION

Government Code §68203 was changed with Amendments in 1969, 1976, and 1981.

The 1969 Amendment, effective the first Monday in January, 1970 established unlimited Cost of Living Adjustments for Judges and Justices (including judicial pensioners as per *Olson v. Cory, I*).

The 1976 Amendment, effective the first Monday in January, 1977, placed a 5% cap on Cost of Living Adjustments for Judges and Justices.

It should be noted that in Note 7 of *Olson*, discussed *infra* when the phrase "fluctuating" judges salaries is referenced, it is referring to the "fluctuations" of sitting judges pursuant to the 1976 Amendment. It is not referring to increases in retirement benefits pursuant to the 1969 Amendment.

The 1981 Amendment, effective the middle of 1981 as an emergency measure, stated that increases in judicial salaries would be the average of other employees of the State of California. See the *Mallano* case, Exhibit G, herein.

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

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 Respondent. 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 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."

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 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 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* "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.

Petitioner 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, Petitioner suggests 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. As part of retirement benefits attributable to service during the protected period and before, COLA increases vested for their entire retirement.

Each Respondent who retired during their protected period 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 Petitioner 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.

Resondent 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 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 Petitioner 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 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 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

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, AllUrban 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.

EXHIBIT G

JUDGMENT – MALLANO V. CHIANG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROBERT M. MALLANO, INDIVIDUALLY, and ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS,

Plaintiff,

v.

JOHN CHIANG, CONTROLLER OF THE STATE OF CALIFORNIA, THE JUDGES' RETIREMENT SYSTEM, ADMINISTERED BY THE BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA, THE JUDGES' RETIREMENT SYSTEM II, ADMINISTERED BY THE BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA, and DOES 1 THROUGH 100, INCLUSIVE,

Defendants.

LASC Case No: BC 533770

JUDGMENT

EX-G

This matter came to trial on September 30, 2015, before the Honorable Elihu M. Berle, Judge presiding in Department 323 of the Superior Court. Plaintiff appeared by Raoul D. Kennedy of Skadden, Arps, Slate, Meagher & Flom, LLP, and Defendants appeared by Jonathan E. Rich, Deputy Attorney General of the State of California.

On December 16, 2015, the Court issued its Statement of Decision pursuant to Code of Civil Procedure, section 632 and California Rules of Court, rule 3.1590. No objections to the Statement of Decision were filed.

Having considered all the filings, pleadings, and evidence; and good cause appearing therefor,

IT IS HEREBY ORDERED, DECREED AND ADJUDGED:

1. That declaratory judgment be entered in favor of Plaintiff Robert M. Mallano, individually and on behalf of a certified class composed of:

> All California State justices and judges who were active justices and judges since the commencement of fiscal year 2008-2009; all persons who are receiving, or any time since the commencement of fiscal year 2008-2009 have received benefits from the Judges Retirement System ("JRS I"); and all persons who are receiving, or have received benefits from the Judges Retirement System II ("JRS II") based on a final compensation that includes salary paid at any time since the commencement of fiscal year 2008-2009

against Defendants, Controller of the State of California[1]; the Judges' Retirement System (Administered by the Board of Administration of the Public Employees

[1] John Chiang was the elected Controller when this action was commenced. He has since been succeeded in office by Betty Yee.

Retirement System of the State of California); and the Judges' Retirement System II (Administered by the Board of Administration of the Public Employees Retirement System of the State of California).

2. a. Based on the statutory formula set forth in Government Code, Section 68203, and the average 0.97% salary increase granted to California state employees during fiscal 2008-2009, a judicial salary increase of 0.97% was mandated for California judicial officers for fiscal 2008-2009.

b. Based on the statutory formula set forth in Government Code, Section 68203, and the average 0.10% salary increase granted to California state employees during fiscal 2009-2010, a judicial salary increase of 0.10% above the adjusted judicial salary (as set forth in paragraph 2a.) was mandated for California Judicial Officers for fiscal 2009-2010.

c. Based on the statutory formula set forth in Government Code, Section 68203, and the average 0.11% salary increase granted to California state employees during fiscal 2010-2011, a judicial salary increase of 0.11% above the adjusted judicial salary (as set forth in paragraphs 2a. and 2b.) was mandated for California judicial officers for fiscal 2010-2011.

d. Based on the statutory formula set forth in Government Code, Section 68203, and the average 0.22% salary increase granted to California state employees during fiscal 2013-2014, a judicial salary increase of 0.22% above the adjusted judicial salary (as set forth in paragraphs 2a., 2b., and 2c.) was mandated for California judicial officers for fiscal 2013-2014.

e. Based on the statutory formula set forth in Government Code, Section 68203, and the average 1.83% salary increase

granted to California state employees during fiscal 2014-2015, a judicial salary increase of 1.83% above the adjusted judicial salary (as set forth in paragraphs 2a., 2b., 2c., and 2d.) was mandated for California judicial officers, for fiscal 2014-2015.

f. Based on the statutory formula set forth in Government Code, Section 68203, and the average 2.4% salary increase granted to California state employees during fiscal 2015-2016, a judicial salary increase of 2.4% above the adjusted judicial salary (as set forth in paragraphs 2a., 2b., 2c., 2d., and 2e.) was mandated for California judicial officers for fiscal 2015-2016.

3. In accordance with the mandated judicial salary increases set forth above, class members were entitled to payments and benefits based on the following salaries:

a. Judicial Salaries for fiscal year 2008-2009

i.	Chief Justice of the Supreme Court	$ 231,076.00
ii.	Associate Justice of the Supreme Court	$ 220,354.00
iii.	Justice, Court of Appeal	$ 206,584.00
iv.	Judge, Superior Court	$ 180,523.00

b. Judicial Salaries for fiscal year 2009-2010

i.	Chief Justice of the Supreme Court	$ 231,307.00
ii.	Associate Justice of the Supreme Court	$ 220,574.00
iii.	Justice, Court of Appeal	$ 206,791.00
iv.	Judge, Superior Court	$ 180,704.00

c. Judicial Salaries for fiscal year 2010-2011

i.	Chief Justice of the Supreme Court	$ 231,561.00
ii.	Associate Justice of the Supreme Court	$ 220,817.00
iii.	Justice, Court of Appeal	$ 207,018.00
iv.	Judge, Superior Court	$ 180,903.00

d. Judicial Salaries for fiscal year 2011-2012

i.	Chief Justice of the Supreme Court	$ 231,561.00
ii.	Associate Justice of the Supreme Court	$ 220,817.00
iii.	Justice, Court of Appeal	$ 207,018.00
iv.	Judge, Superior Court	$ 180,903.00

e. Judicial Salaries for fiscal year 2012-2013

i.	Chief Justice of the Supreme Court	$ 231,561.00
ii.	Associate Justice of the Supreme Court	$ 220,817.00
iii.	Justice, Court of Appeal	$ 207,018.00
iv.	Judge, Superior Court	$ 180,903.00

f. Judicial Salaries for fiscal year 2013-2014

i.	Chief Justice of the Supreme Court	$ 232,070.00
ii.	Associate Justice of the Supreme Court	$ 221,303.00
iii.	Justice, Court of Appeal	$ 207,473.00
iv.	Judge, Superior Court	$ 181,301.00

g. Judicial Salaries for fiscal year 2014-2015

i.	Chief Justice of the Supreme Court	$ 236,317.00
ii.	Associate Justice of the Supreme Court	$ 225,353.00
iii.	Justice, Court of Appeal	$ 211,270.00
iv.	Judge, Superior Court	$ 184,619.00

h. Judicial Salaries for fiscal year 2015-2016

i.	Chief Justice of the Supreme Court	$ 241,989.00
ii.	Associate Justice of the Supreme Court	$ 230,761.00
iii.	Justice, Court of Appeal	$ 216,340.00
iv.	Judge, Superior Court	$ 189,050.00

4. Class members who are receiving, or since fiscal year 2008-2009 have received, benefits from JRS I or JRS II are entitled to receive benefits based on the judicial salaries set forth above.

5. Plaintiff class members are entitled to interest, at 10% per annum, on the unpaid salaries and judicial retiree benefits, from the dates on which such sums vested until such increases and benefits are paid.

6. Plaintiffs are entitled to recover their costs of suit and attorney fees.

7. The Court retains jurisdiction to enforce the terms of the judgment entered in this case.

DATED: March 10, 2016

ELIHU M. BERLE

HONORABLE ELIHU M. BERLE
JUDGE OF THE SUPERIOR COURT

MALLANO v. CHIANG, ET AL **Case No: BC533770**

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 525 University Avenue, Suite 1400, Palo Alto, CA 94301; and my email address is marilyn.garibaldi@skadden.com.

On March 10, 2016, I caused to be served the following document(s) described as:

NOTICE OF ENTRY OF JUDGMENT IN FAVOR OF PLAINTIFFS

on the interested parties in this action by transmitting a true copy via electronic mail, as follows:

KAMALA D. HARRIS, Attorney General of California
JENNIFER M. KIM, Supervising Deputy Attorney General
JONATHAN RICH, Deputy Attorney General
JON F. WORM, Deputy Attorney General
Richard Waldow, Deputy Attorney General
California Department of Justice
Office of the Attorney General
300 South Spring Street
Los Angeles, California 90013-1230

Office: (213) 897-2000
Fax: (213) 897-2805
E-Mail: Jonathan.Rich@doj.ca.gov
Jon.Worm@doj.ca.gov
Richard.Waldow@doj.ca.gov

Attorneys for Defendants State Controller John Chiang, The Judges' Retirement System and The Judges' Retirement System II, Administered by the Board of Administration of the Public Employees Retirement System of the State of California

/_X_/ (BY CASE ANYWHERE) I am readily familiar with the firm's practice of email transmission; on this date, I caused the above-referenced document(s) to be transmitted by email as noted above and that the transmission was reported as complete and without error.

/x/ (STATE/FEDERAL) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 10, 2016, at Palo Alto, California.

Marilyn Garibaldi

MARILYN GARIBALDI

EX-G

EXHIBIT H

LETTER FROM JENNIFER WATSON (JRS) MAY 24, 2016

P.O. Box 942705 Sacramento, CA 94229-2705
916-795-3688
TTY: (877) 249-7442 | Fax: 916-795-1500
www.calpers.ca.gov

Judges' Retirement System

May 24, 2016

Paul G. Mast
[redacted]

CID [redacted]

Dear Judge Mast:

At its meeting on April 20, 2016, the CalPERS Board of Administration agreed with the enclosed proposed decision's recommendation that your retirement allowance should be calculated in accordance with the Judges' Retirement Law. The Board also remanded your administrative appeal back to the Office of Administrative Hearings, for the taking of additional evidence and argument regarding the issue of whether the JRS should recover any overpayments that it made to you prior to April 20, 2016.

Beginning with your June 30, 2016, warrant; your monthly allowance will be 49.4572% of superior court judge's salary, as required by the Judges' Retirement Law. The current monthly salary of a superior court judges' is $15,753.41, so your monthly retirement allowance will be $7,791.20 (before your Medicare Reimbursement).

Additionally, the JRS will recover the $318.90 overpayments made to you in April and May 2016. The JRS will deduct $318.90 from your June 30, 2016, and July 31, 2016, warrants to recover these overpayments.

All future increases to your retirement allowance will be based on statutory increases to the judicial salaries of superior court judges, as required by the Judges' Retirement Law.

Any questions regarding this letter or the remanded proceedings in the Office of Administrative Hearings should be directed to Jeff Rieger, at Reed Smith, LLP, who may be reached at 415.659.4883.

Sincerely,

Jennifer Watson

JENNIFER WATSON
Assistant Chief
Judges' Retirement System

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

RESPONDENT'S REPLY BRIEF

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 JULY 11 2016 at Irvine, CA.

Marci G. Mast