

ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

1 BRIAN SPERBER (SBN 277050)

2 [Redacted]

3 Telephone: [Redacted]

4 Pro Se

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BOARD OF ADMINISTRATION

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CALIFORNIA PUBLIC EMPLOYEE’S RETIREMENT SYSTEM

10	In the Matter of the Appeal Regarding Public)	Agency Case No. 2019-0251
	Employees’ Pension Reform Act (PEPRA))	
11	Enrollment of,)	OAH No. 2019051161
)	
12	BRIAN C. SPERBER,)	RESPONDENT’S CLOSING BRIEF
)	
13)	Hearing Date: Dec. 9, 2019, at 9:00 AM
	Respondent.)	Hearing Location: Los Angeles, CA
14)	Prehearing Conf.: None Scheduled
)	Settlement Conf.: None Scheduled
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INTRODUCTION

18 This document responds to the California Public Employees’ Retirement System’s
19 (“CalPERS”) Closing Brief. As evidenced by CalPERS’ dearth of authority and abundance of
20 obfuscations, there is no legal or factual basis to prevent the Board of Administration of the
21 California Public Employee’s Retirement System (“Board”) from applying equitable estoppel.
22 Indeed, as demonstrated in my initial brief, which is incorporated by reference, all elements of
23 equitable estoppel are met here. The doctrine of equitable estoppel is ultimately about fairness;
24 through my reasonable reliance on the incorrect statements of the State, I started work one week later
25 than I would have. For this, my pension benefits have been severely diminished, potentially altering
26 the very nature of my retirement years. Fairness under the doctrine of equitable estoppel requires my
27 reinstatement as a classic member.

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FACTS

I incorporate by reference the facts section from my original filing entitled “Brief and Response to Statement of Issues.” I will use this section to briefly correct CalPERS’ numerous mischaracterizations from its closing brief’s facts section.

CalPERS’ Assertion	Fact
“Respondent testified that he did not personally contact CalPERS to request information with respect to PEPRA’s impact on his future retirement benefits. Prior to Respondent starting his job with DFEH, CalPERS did not provide him with erroneous advice or information regarding his membership classification.” (CalPERS’ Closing Brief, 2: 16-19.)	CalPERS and the Department of Fair Employment and Housing (DFEH) stand in privity with each other. Therefore, statements made by DFEH are CalPERS’ statements. DFEH provided incorrect information in early Fall 2012 upon which I relied to start on January 7, 2013, rather than any time in the three or four preceding months. Logic dictates that there is no reason to expect a new government employee to question their new employer’s advice regarding a law it dually administers with CalPERS. (Privity is more thoroughly discussed in the context of the first element of equitable estoppel below.)
“Due to a computer error, individuals who became new members between January 1, 2013 and June 30, 2013 were erroneously classified in CalPERS’ system as ‘classic’ members with a 2% at 60 retirement formula.”	CalPERS staff and the online portal conveyed to me that I was a member with a 2% at 55 retirement formula. I relied upon CalPERS’ statements to remain in my position at DFEH and elected to invest my retirement saving in



<p>1 (CalPERS' Closing Brief, 2: 22-24.)</p>	<p>the CalPERS system rather than a historical bull market.</p>
<p>2</p> <p>3 "...a member's classification, does not</p> <p>4 actually impact an individual's membership</p> <p>5 until a member retires. Consequently,</p> <p>6 CalPERS had no reason to know about the</p> <p>7 error, and did not become aware of the</p> <p>8 misclassification until a few years after the</p> <p>9 error took place." (CalPERS' Closing Brief, 3:</p> <p>10 1-4.)</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p>	<p>State employees, including myself, plan for retirement before they retire. CalPERS itself disseminated inaccurate information to me, upon which I relied to choose to remain in my position at DFEH and to elect to invest my retirement saving in the CalPERS system. CalPERS selectively cites to other information that was accurate and available online. It is unreasonable to expect CalPERS members to be able to discern between CalPERS information that is accurate and that which is "erroneous," i.e., false.</p>
<p>15 "Prior to CalPERS informing Respondent that</p> <p>16 he was enrolled in an incorrect retirement</p> <p>17 formula, it provided him with information with</p> <p>18 respect to his Alternate Retirement Program</p> <p>19 (ARP) options." (CalPERS' Closing Brief, 3:</p> <p>20 11-13,)</p> <p>21</p> <p>22</p> <p>23</p>	<p>That is correct but omits the fact that the ARP letter was dated January 1, 2015, meaning that I had already completed the requisite two years of service time with the State. Therefore, CalPERS itself was not using my start date of January 7, 2013, but instead using a date no later than December 31, 2012. CalPERS' own actions confirm its advice that I was a classic member.</p>
<p>24 "At this point, it is largely speculation as to</p> <p>25 whether Respondent's retirement formula will</p> <p>26 impact future retirement benefits." (CalPERS'</p> <p>27 Closing Brief, 3: 23.)</p> <p>28</p>	<p>CalPERS initiated this proceeding because it knows it will pay me higher retirement benefits under the classic retirement formula. There is no retirement scenario where PEPRA</p>



	retirement benefits meet or exceed the classic retirement benefits. (This is discussed in the context of the second element of equitable estoppel below.)
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ARGUMENT

I. My Case Presents Procedural Equitable Estoppel, which Courts Routinely Apply, because CalPERS has Discretion to Act—i.e. Classify Me as a Classic Member—and I would have been a Classic Member but for the State’s Wrong Advice.

According to the Rutter Guide: “Case law distinguishes between estoppel on procedural and substantive issues: If a party makes a procedural error because he or she was misled by wrong advice from an agency staff member, estoppel may be appropriate.” (D.Equitable Estoppel, California Practice Guide: Administrative Law Ch. 10-D; *see also Lentz v. McMahon* (1989) 49 Cal.3d 393, 398-402.) On the other hand, equitable estoppel on substantive issues is the situation where despite relying on a promise, one never could have expected the promise to come to fruition—there is an accompanying factual impossibility and categorical bar.

My position at DFEH is not categorically a PEPPRA or a classic position. Instead, pension classification is determined by start date (even though CalPERS’ original position was that hire date was determinative). Having been hired in early Fall 2012, I easily could have started work one week earlier in the year 2012 instead of January 7, 2013 had I known starting work in 2013 would have diminished my retirement benefits. In fact, I unquestionably would have started earlier but for the wrong advice of the State. (Respondent's Initial Brief, Exh. E – Declaration of Brian Sperber (“Sperber Decl.”), ¶ 7.) This earlier date would have precluded CalPERS from reclassifying me as a PEPPRA member and makes my case akin to those discussing procedural equitable estoppel rather than substantive equitable estoppel since there is not a factual impossibility here. Additionally, CalPERS engaged in pre-litigation negotiation, which is indicative of the fact that it believed some discretion did exist and that it was not bound by statute. But nevertheless, while it was not bound by a factual impossibility, CalPERS ultimately proceeded to initiate this action because of its proclaimed positive track record in OAH proceedings.



1 CalPERS only cites two cases in its closing brief and fails to apply them to the facts at hand.
2 This is because they are inapplicable. CalPERS cited *City of Oakland v. Oakland Police and Fire*
3 *Retirement System* (2014) 224 Cal.App.4th 210 regarding “statutory limitation” and selectively
4 quoted dicta and language peripheral to the holding. Moreover, the cases that the Court subsequently
5 mentioned in *City of Oakland* involve factual impossibilities (the “substantive” issues in equitable
6 estoppel) that are not analogous to my case: standby pay is by definition not pensionable
7 compensation and non-safety employees are by definition not safety employees. *Medina v. Board of*
8 *Retirement* (2003) 112 Cal.App.4th 864 is likewise inapposite and irrelevant to my case. It involved
9 categorical matters and is thus very different from my situation where CalPERS’ (mis)classification
10 and my start date are not prescribed by law.

11 On the contrary, *City of Oakland’s* reasoning as it relates to the court’s **holding** of the case is
12 pertinent to my case (and specifically the fifth estoppel element, *infra*):

13 In a matter as important to the welfare of a public employee as his pension rights, the
14 employing public agency “bears a more stringent duty” to desist from giving
15 misleading advice [*Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567,
16 582] ... Cases which have applied the doctrine of equitable estoppel in the area of
17 public employee pensions have emphasized the “unique importance” of pension rights
18 to the well-being of the holders of those rights (*Longshore v. County of*
19 *Ventura* (1979) 25 Cal.3d 14, 28) ... pursuant to article XVI of the California
20 Constitution, the duty of a public retirement board to its participants and their
21 beneficiaries “shall take precedence over any other duty,” including minimizing
22 employer contributions and defraying administrative costs. (Cal. Const., art. XVI, §
23 17, subd. (b).)

24 (*City of Oakland* 224 Cal.App.4th at 241-242.) Indeed, *City of Oakland* strongly weighs in
25 favor of applying equitable estoppel (i.e. “procedural” issues in equitable estoppel) in my
26 case. Whereas the dicta in *City of Oakland* referred to substantive issues in equitable
27 estoppel—e.g., the false notion that it would have been impossible under any circumstance for
28 me to be a classic member—the case’s holding was concerned with procedural issues in
equitable estoppel, as directly reflected in the circumstances of my case—e.g., I would have
been a classic member but for the State’s wrong advice.

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1 **II. The Board Should Apply Equitable Estoppel to My Case Because All Five Elements of**
2 **Equitable Estoppel are Satisfied.**

3 As the courts in the *Crumpler and Longshore* cases, *supra*, demonstrate, the five elements of
4 equitable estoppel are commonly satisfied in public retirement cases. They are plainly met in my case
5 here.

6 **A. The First Element of Equitable Estoppel is Met: CalPERS, the Party to be**
7 **Estopped, was Apprised at all Times of all Facts of this Case.**

8 The first element of equitable estoppel is that “the party to be estopped must be apprised of
9 the facts.” *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.

10 **1. CalPERS Stands in Privity with DFEH, who Told Me I would be a Classic**
11 **CalPERS Member in the Early Fall of 2012.**

12 CalPERS as the agency which solely administers the California state employee retirement
13 system was uniquely situated to determine my classic status. But strangely in its brief, pre-2013,
14 CalPERS relies on the fact that I did not directly interface with CalPERS itself as proof of its
15 supposed lack of culpability. CalPERS cites no case law because all public retirement cases
16 contradict CalPERS’ argument and hinge on privity. It is well established by the California Supreme
17 Court that agencies are equitably estopped by the actions of another agency when the two agencies
18 are in privity. (*Lusardi Const. Co. v. Aubry* (1992) 1 Cal.4th 976, 995.) Privity in the context of
19 equitable estoppel—i.e., binding one agency by the acts (or inaction) of another agency—has been
20 described as an “identity of interests.” (Ibid.) Thus, the acts of one entity cannot be attributed to
21 another entity when there is a conflict of interests between them. (Ibid.)

22 CalPERS and DFEH were unquestionably in privity when I was told in 2012 by DFEH that I
23 “beat” PEPPRA. As CalPERS repeatedly points out in its brief, it issues circular letters to CalPERS
24 employers, including DFEH, instructing them how to administer parts of the Public Employees’
25 Retirement Law (PERL). CalPERS defers its administration of the PERL to each department. In fact,
26 when I have called DFEH HR and CalPERS to discuss my pension, both suggest that I instead call
27 the other entity. Similarly, CalPERS knows of each employees’ start date because departments utilize
28 a shared computer system with CalPERS. CalPERS and DFEH are intrinsically “tied at the hip.”



1 Moreover, there is an identity of interests between CalPERS and DFEH as both strive to administer
2 the PERL efficiently. No conflicts of interest exist since both readily redirect inquiries to one another
3 and have no reason to administer the PERL differently.

4 **2. Once I Started Work, CalPERS had Access to Every Facet of my**
5 **Retirement.**

6 Post-2012, since its computer system tracks all hires, CalPERS was uniquely situated to know
7 of my hire date and pension classification and in fact was aware. Indeed, CalPERS' own exhibits at
8 the hearing demonstrated that its computer system tracks employees in several different manners and
9 clearly indicates their retirement tiers. CalPERS was necessarily apprised of the facts pertinent to my
10 employment (my hire date, my start date, and my pension classification) since the information existed
11 on CalPERS' own computers.

12 **3. CalPERS Misconstrues this Element of Equitable Estoppel and, without**
13 **Precedent, Proffers Subsequent Correction and Negligence as an Excuse.**

14 CalPERS points out in its closing brief that “[w]hen CalPERS became aware of the computer
15 error, it took steps to correct the error and inform Respondent of the error.” (CalPERS' Closing Brief,
16 5: 5-7.) This is both false and irrelevant to the first element of equitable estoppel. I spoke to several
17 CalPERS representatives prior to reclassification who provided technical assistance about my 2% at
18 55 (i.e. classic) membership. They had ample opportunity to flag the issue but never did, proceeding
19 to discuss my classic membership. Moreover, CalPERS misleadingly conflates the meaning of
20 “apprised” and “aware”; such that, it was immediately apprised of my hire, but allegedly only became
21 aware of its implications **5.5 years later**. There is no such distinction made in the law. CalPERS'
22 ignorance or negligence is not an excuse, and it does not prevent the application of estoppel where
23 warranted. Indeed, courts have held that, “[t]he fact that the advice may have been given in good faith
24 does not preclude the application of estoppel. Good faith conduct of a public officer or employee
25 does not excuse inaccurate information negligently given.” (*Crumpler v. Board of*
26 *Administration* (1973) 32 Cal.App.3d 567, 582.)

27 CalPERS further states in its closing brief that “CalPERS knew that individuals who were
28 brought into membership for the first time on or after January 1, 2013, were subject to PEPR.



1 CalPERS informed everyone of this fact through information on its website and circular letters.
2 CalPERS did not know that a computer error caused new members hired during a certain period to be
3 listed under an incorrect retirement formula.” (CalPERS’ Closing Brief, 5: 12-17.) Again, as courts
4 have held, ignorance is not an excuse. Contrary to CalPERS’ factually unsupported argument,
5 “everyone” was clearly not informed about PEPRA. CalPERS’ computers did not program
6 themselves, and the public-facing CalPERS customer services representatives were clearly ignorant
7 because for years they consistently treated me as a 2% at 55 employee. While CalPERS issued a
8 circular letter on December 3, 2012 (months after I agreed with the State to start work on January 7,
9 2013) to CalPERS employers about the implementation of PEPRA, the fact that the CalPERS
10 employees who issued that letter were more well-informed about PEPRA than CalPERS employees
11 programming the computers and CalPERS employees giving advice to members does not change the
12 fact that CalPERS represented that I was a 2% at 55 employee. Incidentally, to this day, CalPERS
13 still confuses start date and hire date.¹

14 **B. The Second Element of Equitable Estoppel is Met: CalPERS Intended that its**
15 **Conduct Would be Acted Upon, and I had the Right to Believe the State when it**
16 **Said I was a Classic Member.**

17 The second element of equitable estoppel is that one “must intend that his conduct shall be
18 acted upon, or must so act that the party asserting the estoppel had a right to believe it was so
19 intended.” *City of Long Beach* 3 Cal.3d at 489.

20 **1. Before My Employment Started and for 5.5 Years Thereafter,**
21 **CalPERS/DFEH Authoritatively Told Me that I was a Classic Member.**

22 As the exclusive administrator of the PERL, CalPERS’ members rely on CalPERS to interpret
23 its complicated laws and disseminate accurate information. CalPERS has a phone advice line,
24 organizes seminars, and publishes literature. It is absurd for CalPERS now to contend that CalPERS’
25 members do not rely upon it for pension-related information. Moreover, I, as the party asserting
26 estoppel, acted upon CalPERS’ adoption of DFEH’s position that I was a classic member (privity is
27 discussed in connection with the first element, *supra*). Attorneys working for the state of California

28 ¹ <https://www.calpers.ca.gov/page/employers/policies-and-procedures/pension-reform-impacts> (retrieved February 4, 2020).



1 are not compensated at market rates. An important incentive to retain attorneys is the excellent
2 retirement benefits. Being classified as a classic member for retirement purposes was an important
3 incentive to remain in my job. (Sperber Decl., ¶ 11.)

4 **2. CalPERS Fails to Address the Second Element of Estoppel in Its Brief.**

5 CalPERS contends it “did not provide Respondent with retirement estimates that were based
6 on his erroneous classification, which resulted in Respondent retiring and receiving a higher
7 retirement allowance than he would otherwise be entitled.” (CalPERS’ Closing Brief, 5-6: 25-2.) I
8 currently work for the state and never claimed to have retired; the second element of estoppel is
9 completely unrelated to that fact. Moreover, it is disingenuous to divorce knowledge of one’s
10 retirement tier from knowledge of one’s retirement estimates. CalPERS makes charts readily
11 available that anyone can look up to know their retirement benefits.² Accordingly, by virtue of
12 knowing that I was a classic member, I easily found the corresponding benefits and did not need
13 someone at CalPERS to send me this conspicuous information, even though it was discussed on the
14 phone and enumerated in the online portal.

15 CalPERS further asserts that “other than the mistake being listed on Respondent’s
16 myCalPERS account, there is no evidence that CalPERS actively communicated to Respondent that
17 he was a ‘classic’ member.” (CalPERS’ Closing Brief, 6: 4-7.) This statement is blatantly false. The
18 mistake at hand was omnipresent for 5.5 years; it was not an isolated incident and was reiterated by
19 CalPERS employees over the telephone. Also, the ARP election letter dated January 1, 2015 is
20 indicative of my classic membership because ARP election eligibility takes place two years from the
21 operative date that CalPERS uses to place members in retirement tiers, meaning that the latest date
22 used for pension tier calculation purposes could be December 31, 2012. (Respondent’s Initial Brief,
23 Exh. C – ARP Election Letter.) Because the letter was dated less than two years after my start date of
24 January 7, 2013, CalPERS did not at the time intend to use January 7, 2013, for the sake of my
25 retirement benefits.

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28 ² <https://www.calpers.ca.gov/docs/forms-publications/state-misc-industrial-benefits.pdf>;
<https://www.calpers.ca.gov/docs/forms-publications/local-misc-benefits.pdf> (retrieved February 4, 2020).



1 Finally, CalPERS attempts to distance itself from DFEH in its third footnote. (CalPERS’
2 Closing Brief, 6: 24-25.) This ignores both its own misconduct and the law of privity, discussed
3 above in connection with the first element (*supra*, Argument Section II(A)(1)).

4 **C. The Third Element Equitable Is Met: I was Ignorant of the True State of Facts—**
5 **the Use of Start Date Rather Than Hire Date and that I was Misclassified.**

6 The third element of equitable estoppel is that “the other party must be ignorant of the true
7 state of facts.” *City of Long Beach* 3 Cal.3d at 489.

8 **1. I was Completely Unaware of the Possibility and Criteria Used for**
9 **PEPRA Reclassification.**

10 I did not know that CalPERS misclassified me as a classic member and would later reclassify
11 me as a PEPRA member. (Sperber Decl., ¶ 13.) I did not know that the State uses start date rather
12 than hire date. (*Id.*) There was no reason to doubt CalPERS and my employer DFEH’s advice and
13 pension classification. (*Id.*) I testified under oath to my ignorance about this fact.

14 **2. CalPERS Incorrectly Applies a “Should Have Known” Standard Instead**
15 **of the Actual Knowledge Element.**

16 In its closing brief, CalPERS improperly applies the wrong “should have known” standard to
17 the third element of estoppel. (CalPERS’ Closing Brief, 6-7: 12-3.) This is a complete
18 misunderstanding of what the third element calls for and erroneously conflates unrelated tort law
19 doctrine with equitable estoppel. Nevertheless, for the sake of thoroughness, I will address the rest of
20 CalPERS’ unfounded argument. Significantly, CalPERS cites no law to support the incorrect
21 standard that it applies.

22 CalPERS states that it “issued a circular letter and provided information that
23 informed the public that PEPRA would impact individuals who became a CalPERS member after
24 January 1, 2013.” (CalPERS’ Closing Brief, 6: 15-17.) CalPERS presents zero evidence of what the
25 “information” was or that it reached me. Moreover, the circular letter was addressed to “CalPERS
26 employers,” not sent to employees or hires, and was issued on December 3, 2012, well after PEPRA
27 was signed into law and some employers made hiring decisions. My supervisor also was out of the
28 country when the circular letter was issued. (Sperber Decl., ¶ 6.) CalPERS has issued over 900



1 circular letters since 1996,³ and it is unreasonable and immaterial to the equitable estoppel element to
2 impute knowledge of them to employees or to hires, such as myself. CalPERS fails to establish that
3 any information it distributed regarding PEPRA reached DFEH or me, and that I (under the proper
4 legal standard) had “actual knowledge” of it.

5 Next, CalPERS contends that “at the hearing Respondent testified that he is aware of many
6 other state agencies that ensured that people who were hired around January 1, 2013 started in
7 December 2012 to void the consequences of PEPRA. Respondent testified that he took no effort to
8 contact CalPERS or seek additional information to understand the impact PEPRA would have on his
9 benefits.” (CalPERS’ Closing Brief, 6: 17-22.) This is patently false. CalPERS did not cite or even
10 order the hearing transcript. What I said at the hearing was that *after* I received the July 20, 2018,
11 reclassification letter, I learned from other departments that they ensured that their hiring processes
12 were completed before January 1, 2013. (Sperber Decl., ¶ 15.) In 2012, I did not seek additional
13 information from CalPERS because there was no reason to doubt what my employer told me about
14 “beating” PEPRA. In any case, CalPERS’ argument should be disregarded because it is based on the
15 wrong legal standard and thus, has no bearing on the third element of estoppel. CalPERS’ privity
16 with DFEH is discussed at length in connection with the first element of equitable estoppel. (*See*
17 *supra*, Argument Section II(A)(1).)

18 Finally, in a footnote, CalPERS postulates that “[r]espondent testified that he is an attorney
19 uniquely qualified to work on legislative and regulatory issues. Therefore, this is not a situation
20 where a lay person is being asked to read and understand statutes or regulations.” (CalPERS’ Closing
21 Brief, 7: 24-25.) This is a gratuitous and unfounded attack questioning my ability to read statutes and
22 regulations. Because CalPERS did not order the transcript, they are again misstating what I said. At
23 the hearing, I said that I, on December 9, 2019, was a legislative lawyer and unfamiliar with OAH
24 procedures. I was not a legislative attorney when I was hired in 2012 and there was no reason to
25 question my employer DFEH’s advice. Also, no one is being asked to read statutes or regulations—
26 this element of equitable estoppel is an *actual* knowledge standard.

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28 _____
³ <https://www.calpers.ca.gov/page/employers/policies-and-procedures/circular-letters> (retrieved February 4, 2020).



1 The third element is met here. I was manifestly unaware of the consequences of my start date.
2 (Sperber Decl., ¶ 4, 7.) Had I known the dire consequences to my retirement, I would have started
3 work in the intervening months from my hire date in early Fall 2012 and at least one week before my
4 actual start date of January 7, 2013.

5 **D. The Fourth Element of Equitable Estoppel is Met: I Relied on CalPERS**
6 **(Mis)Conduct to My Injury.**

7 The fourth element of equitable estoppel is that one “must rely upon the conduct to his
8 injury.” *City of Long Beach* 3 Cal.3d at 489.

9 **1. PEPRA Membership is Clearly Inferior to Classic Membership and the**
10 **Stock Market is a Better Alternative.**

11 It is undisputed that I relied upon CalPERS’ conduct to my detriment. I started work in 2013
12 rather than 2012 at the State’s advice. When CalPERS confirmed my classic member eligibility in
13 January of 2015, because of the benefits associated with this classification, I chose to enroll as a
14 classic member. (Sperber Decl., ¶ 11.) However, if I had instead been classified as a PEPRA-eligible
15 member, I would have declined that membership and invested my money in a retirement savings
16 account, a decision that would have paid off handsomely due to historical market gains. (Id.)
17 Moreover, as a PEPRA member, to collect the maximum benefit, I will have to work four years
18 longer than if I was a classic member and will still receive an appreciably smaller pension benefit.

19 **2. CalPERS Ignores the Well-Established Law of Privity and the**
20 **Significance of Sworn Testimony**

21 CalPERS splits its argument into pre-2013 and post-2013 pieces. This is an instructive
22 distinction. Pre-2013, CalPERS relies on the fact that I did not directly interface with it as dispositive
23 of its lack of culpability. (CalPERS’ Closing Brief, 7: 15-16.) This ignores the privity between
24 CalPERS and DFEH, which is discussed at length, *supra*, in the discussion of the first element. (See
25 Argument Section II(A)(1).) Moreover, CalPERS erroneously cites *City of Oakland* and improperly
26 relies on dicta. As stated above in Argument Section II(A)(1), the dicta in that case referred to
27 substantive issues in equitable estoppel—e.g., the false notion that it would have been impossible
28 under any circumstance for me to be a classic member—rather than procedural issues in equitable



1 estoppel—e.g., I would have been a classic member but for the State’s inaccurate advice. Procedural
2 equitable estoppel applies here. Briefly, CalPERS was in privity with DFEH in 2012 when DFEH
3 through my direct supervisor and the director told me expressly that I beat PEPR A.

4 Post-2013, CalPERS questions whether I would have invested the ARP money in the stock
5 market. This is insulting as I testified to that fact under oath. I do not believe this point deserves to be
6 dignified beyond two points. First, the point of PEPR A was to make CalPERS solvent for generations
7 to come. The reason CalPERS was in a financially precarious state in 2012 was largely because of the
8 generous benefits accompanying classic membership. Thus, by definition, PEPR A benefits are
9 significantly less generous than classic benefits. This is not speculation; CalPERS makes its
10 retirement charts readily available. Second, CalPERS dramatically overemphasizes the significance
11 of the fact that I do not regularly buy individual equities. It appears that the state public retirement
12 system does not know how private retirements operate. Private retirement vehicles are almost always
13 comprised of mutual funds or ETFs that are diversified and indexed to the entire stock market. And
14 significantly, the fact that I do not buy individual equities or track the amount of money in my
15 CalPERS account is persuasive evidence that I relied on CalPERS’ misinformation in 2013, 2014,
16 2015, 2016, 2017, and part of 2018 to my detriment. Indeed, the whole point of a defined benefit
17 pension is that one knows precisely what they will receive upon retirement, which obviates the need
18 to track the market for oneself. CalPERS’ own argument supports my position that I relied on
19 CalPERS’ misinformation to my detriment.

20 **E. The Fifth Element of Equitable Estoppel is Met: There is no Public Policy**
21 **Exception in this Case That Would Preclude the Application of Equitable**
22 **Estoppel.**

23 The final element of equitable estoppel is that “the injustice which would result from a failure
24 to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy
25 which would result from the raising of an estoppel.” *City of Long Beach*, 3 Cal.3d at 496-497. As
26 described above expressly in the holdings of *Crumpler and Longshore* (See Argument Section I) and
27 evinced by CalPERS’ failure to cite any legal authority, no case has ever found a public policy that
28 outweighs pension beneficiaries’ interests, even in cases involving millions of dollars or a whole



1 class of beneficiaries. Indeed, the California Constitution enshrines this in Art. XVI, § 17(b): “The
2 members of the retirement board of a public pension or retirement system shall discharge their duties
3 with respect to the system solely in the interest of, and for the exclusive purposes of providing
4 benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and
5 defraying reasonable expenses of administering the system. A retirement board’s duty to its
6 participants and their beneficiaries shall take precedence over any other duty.” CalPERS’ other points
7 from its closing brief are immaterial to this element of equitable estoppel and addressed above in the
8 appropriate sections. (See Argument Sections II(A)(1) and II(D)(2).) It is farcical to think that a
9 benefit that CalPERS describes as “speculative” could contravene an important public policy.

10 **CONCLUSION**

11 I was hired by DFEH, who stands in privity with CalPERS, in early Fall 2012 and told that I
12 would be a classic CalPERS member. After that, for 5.5 years, CalPERS reiterated classic
13 membership online and over the phone. I relied on those statements to plan my future employment
14 and retirement. Five and half years later, after CalPERS consistently reiterated my classic
15 membership, CalPERS told me that I was being reclassified as a PEPR member. As a result of
16 following the State’s instruction to start seven days later than I would have otherwise, my financial
17 future has been fundamentally disrupted to my detriment. As a textbook case where all five elements
18 of equitable estoppel are met, I respectfully request that the Board reinstate me to classic membership
19 in CalPERS or, alternatively, compensate me the value that I would have accrued if I instead chose a
20 market-based retirement plan.

21
22 Dated: February 10, 2020

Brian Sperber

Brian Sperber, Respondent



ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: 277050 NAME: Brian Sperber FIRM NAME: STREET ADDRESS: [REDACTED] CITY: [REDACTED] STATE: [REDACTED] ZIP CODE: [REDACTED] TELEPHONE NO.: [REDACTED] FAX NO.: [REDACTED] E-MAIL ADDRESS: [REDACTED] ATTORNEY FOR (name): (Pro Se)	<p style="text-align: center;"><i>FOR COURT USE ONLY</i></p>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: 320 West 4th Street #630 MAILING ADDRESS: 320 West 4th Street #630 CITY AND ZIP CODE: Los Angeles 90013 BRANCH NAME: OAH General Jurisdiction	
PLAINTIFF/PETITIONER: CalPERS DEFENDANT/RESPONDENT: Brian Sperber	CASE NUMBER: 2019051161
PROOF OF ELECTRONIC SERVICE	JUDICIAL OFFICER: Judge Howard Cohen
	DEPARTMENT: OAH General Jurisdiction

1. I am at least 18 years old.
- a. My residence or business address is (specify):

[REDACTED]

- b. My electronic service address is (specify):

[REDACTED]

2. I electronically served the following documents (exact titles):

Respondent's Closing Brief

The documents served are listed in an attachment. (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:

- a. Name of person served: John Shipley

On behalf of (name or names of parties represented, if person served is an attorney):
 CalPERS

- b. Electronic service address of person served :

john.shipley@calpers.ca.gov

- c. On (date): 02/10/2020

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: 02/10/2020

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

Brian Sperber
 (TYPE OR PRINT NAME OF DECLARANT)


 (SIGNATURE OF DECLARANT)