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7 BEFORE THE BOARD OF ADMINISTRATION  
8 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
9

10  
11 In the Matter of the Appeal of the Denial of  
12 Pension Benefits to

13 DESI ALVAREZ and CHINO BASIN  
14 WATERMASTER,

15 Appellants.

CalPERS Case No.: 2013-1113  
OAH Case No: 2014080757

16 **RESPONDENT DESI ALVAREZ'S POST**  
17 **HEARING BRIEF**

Hearing Date: April 11, 12 and 13, 2016  
Location: CalPERS' Regional Office  
655 N. Central Avenue  
Suite 1400  
Glendale, CA 91203  
ALJ: Eric Sawyer

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20 Respondent Desi Alvarez files this Post Hearing Brief.  
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**INTRODUCTION**

**The legal questions are:**

(1) Is Desi Alvarez entitled to base his "final compensation" on the "payrate" that Chino Basin Watermaster ("Watermaster") paid him?

(2) Do the Watermaster's rules (as set by the San Bernardino County Superior Court) establish the applicable "publicly available" and "public meeting laws" rules that govern this case?

(3) Do the new "specific requirements" in new Regulation 570.5 apply retroactively to the Watermaster's pay schedules?

(4) Is Alvarez entitled to a full year of service credit if he was put on paid administrative leave for part of that year?

(5) Is Alvarez an independent contractor for the time when he was on paid administrative leave because he was on leave?

**The factual questions are:**

(1) Was Alvarez's position listed on a pay schedule document that was publicly available?

(2) Did Alvarez take the position at Watermaster in anticipation of retirement?

(3) Was Alvarez paid by biweekly payroll check, and otherwise under the "control" of Watermaster when on paid administrative leave?

**Summary:**

Alvarez was hired as CEO of Watermaster at \$228,000 without any intention of retiring in the near future. CalPERS wrongly determined that the payments were not made pursuant to a publicly available pay schedule only because CalPERS requested and based its determination on the pay schedule for 2012/2013, *not* the pay schedule for 2011/2012. (Exhibit 18.) Had CalPERS requested (and Watermaster provided) the correct pay schedule, this dispute may never have arisen. The testimony is clear that the pay schedules for 2011/2012 were publicly available.

CalPERS compounded the original error by wrongly determining that Alvarez was terminated when placed on paid administrative leave, when in fact Alvarez remained an

1 employee under the control of Watermaster until May 2012.

2 As the facts and law are compliant with the PERL, Alvarez is entitled to CalPERS  
3 calculating his final compensation on \$228,000 per year, the salary he earned at Watermaster,  
4 including the full service credit that Alvarez earned during his full year of employment at  
5 Watermaster.

6 **FACTS**

7 **Desi Alvarez's Professional Career:**

8 1. Alvarez first commenced CalPERS-covered employment as an Assistant  
9 Professor in 1977. He then worked for the City of Santa Monica as City Engineer from  
10 approximately June 1986 to April 1990 (*Testimony of Desi Alvarez, 4/13, 114:13-19*), then for  
11 the East Bay Municipal District (*Alvarez, 114:21-24*), for the City of Redondo Beach as Director  
12 of Public Works/City Engineer from January 1992 through April 1996 (*Alvarez, 114:25-115:6*),  
13 and then moved to the City of Glendale where he worked as City Engineer. (*Alvarez, 115:6-18.*)

14 2. Alvarez worked for the City of Downey as Director of Public Works and then as  
15 Deputy City Manager, accruing 13 more years of service credit and also purchasing 5.0 years of  
16 airtime. (*Alvarez, 115:21-116:9.*)

17 3. Anthony La, first employed as the principal Engineer for the City of Downey,  
18 knew Alvarez at Downey. (*Testimony of Anthony La, 4/13/16, 9:11-24*). La knew Alvarez's good  
19 reputation. "He's very competent. He's well-regarded, especially in the water industry and very  
20 hardworking." (*La, 10:16-19.*)

21 4. Meredith Perkins was a Downey city councilperson from 1998 to 2006.  
22 (*Testimony of Meredith Perkins, 4/13/16, 14:8-10.*) Perkins knew Alvarez was "regarded very  
23 highly". (*Perkins, 14:20.*) The whole city council thought highly of Alvarez. (*Perkins, 16:6-7.*)

24 5. As Deputy City Manager for the City of Downey, Alvarez's salary was \$15,860  
25 per month. Downey also paid Alvarez's eight percent (8%) share of monthly contributions to  
26 CalPERS for PERSible compensation of \$17,128.80 per month, or \$205,545.60 annually.  
27 CalPERS accepted and acknowledged said contributions and reports. Downey had a one-year  
28 final compensation period. (*Alvarez, 131:23-132:1.*)

1           6.     La knew why Alvarez left Downey. (*La*, 12:2.) "Mr. Alvarez has, over the years,  
2 had a strong interest in groundwater issues. During my tenure in Downey, he was very involved,  
3 dealing issues in the central and west basin, which is the groundwater basin in the area. After I  
4 [La] left Downey, I moved to the Inland Empire area. I worked for another agency, which is also  
5 involved in the Chino Basin area. When the job opening came up, I remember Mr. Alvarez  
6 expresses strong interest, just because it involved a lot of groundwater issues." (*La*, 12:2-11.)

7           7.     Perkins was surprised that Alvarez left. (*Perkins* 16:11.) He thought Alvarez  
8 would have had an ongoing position at Downey if he wanted to stay. (*Perkins*, 14:24-15:2.)

9           8.     Alvarez was 57 years old in early 2011 and planning to work another 5-10 years.  
10 (*Alvarez*, 130:9-10.) He began contemplating a resignation of his position at City of Downey to  
11 take a position as CEO of Watermaster. Increasing his retirement allowance was not a significant  
12 reason why he sought work at Watermaster.<sup>1</sup> (*Alvarez*, 130:12-19.) Alvarez was interested in the  
13 Watermaster position because one facet of the Basin was that it allowed for water storage and  
14 had a more comprehensive view of water management. (*Alvarez*, 131: 2-9.) Alvarez's entire  
15 career had been focused on water-related engineering. It was a goal of his to eventually become  
16 the General Manager of a water agency, and he had in fact applied for such positions elsewhere  
17 during his final years at Downey.

18 **Watermaster CEO Recruitment:**

19           9.     Watermaster's CEO recruitment process took place in the spring of 2011. (Exhibit  
20 G; *Testimony of Joe Joswiak*, 4/13/16, 7:2-8; *Alvarez*, 116:11-25.) Watermaster received  
21 numerous responses. (*Joswiak*, 4/13/16, 7:2-8; Exhibits 203, 204.) Alvarez applied based on the  
22 public notice (*Alvarez*, 116:25-117:8) and submitted his qualifications (*Alvarez*, 117:11-25;  
23 Exhibits 205, 206.) At least 3 or 4 interviews were held at the Watermaster office by the Board.  
24 (*Joswiak*, 74:4-15.) It was an arm's length recruitment. (*Alvarez*, 132:6-16.)

25 **Establishment of Watermaster:**

26           10.    The Watermaster was an entity created by the Court "when it ruled in 1978 on the

27 \_\_\_\_\_  
28 <sup>1</sup> La said he never heard Alvarez indicate that he was taking the Watermaster position to  
increase his CalPERS pension. (*La*, 12:12-15.)



1 Chino Basin groundwater rights." (*Testimony of Peter Kavounas, 4/13/16, 35:12-15.*) The  
2 Watermaster is an extension of the court. (*Kavounas, 4/13/1669:1.*) Kavounas is general manager  
3 in charge of the day-to-day operations.

4 11. On January 27, 1978, the Superior Court adopted a Judgment which established  
5 the Chino Basin Municipal Water District as "Watermaster" to oversee the implementation of the  
6 Judgment on an on-going basis. In 1998, the Court appointed the Chino Basin Watermaster to  
7 the position and established the Watermaster Board to run Watermaster pursuant to the Superior  
8 Court's ruling. (Exhibit 200, Exhibit B.) On December 21, 2007, the Court restated the Judgment  
9 and incorporated any changes to the original Judgment that were made from the beginning until  
10 2012. (Exhibits P, Q.) The Court's Order in Exhibit B required the Watermaster to retain the  
11 rights of employees to their status as employees of the Watermaster while maintaining all the  
12 employment credits and benefit programs, including CalPERS benefits.

13 12. **Watermaster's Legal Existence.** Watermaster's legal existence and enumerated  
14 powers originate within and arise from the Judgment. It is not a public agency or private entity  
15 that has been formed under some general or special law. Its duty is to administer and enforce the  
16 provisions of this Judgment and any subsequent instructions or orders of the Court thereunder.  
17 As with all special masters, Watermaster operates as an extension of the Court and to meet the  
18 needs of the Court in carrying out its Judgment in Article 10, Section 2, of 17 the California  
19 Constitution. (Exhibit P.)

20 13. The Judgment also empowered Watermaster to "make and adopt, after public  
21 hearing, appropriate Rules and Regulations for conduct of Watermaster affairs." (Exhibit 201,  
22 Exhibit D, Section V., subsection B.18, "Rules and Regulations".) The Superior Court also  
23 approved rules and regulations that were later memorialized and approved as the "Chino Basin  
24 Watermaster Rules and Regulations, June 2001". (Exhibit 201, Exhibit D.)

25 14. **Watermaster's Role.** The role of the Watermaster is to enforce provisions of the  
26 Judgment. That role later expanded to include the implementation of the optimum Basin  
27 Management Program. (*Kavounas, 35:19-22.*) Watermaster is not the water utility and does not  
28 sell water. (*Kavounas, 42:5-7.*) Members of the public are not specifically parties to the

1 Judgment. (*Kavounas*, 4/13/16, 42:10-13.)

2 15. **Court's Continuing Jurisdiction.** The Judgment mandated that the Superior  
3 Court have continuing supervision over Watermaster. (Exhibit 200, Exhibit A, Section 17.) The  
4 Court approved Watermaster's Rules and Regulations governing Watermaster's affairs, including  
5 meeting schedules and procedures. (Exhibit 201, Exhibit D, Section 18.) Watermaster was  
6 required to maintain records only for the purposes of allocating the costs of administration and  
7 personnel between the "pools". (Exhibit 200, Exhibit A, Section 20.) Watermaster is accountable  
8 to the judge (*Kavounas*, 44:6) who has continuing jurisdiction over the Watermaster.

9 16. **Review by Court of Watermaster Action.** All actions, decisions, or rules of  
10 Watermaster shall be subject to review by the Superior Court on its own motion or on timely  
11 motion by any party, the Watermaster (in case of mandated action), the Advisory Committee, or  
12 pool committee. (Exhibit 200, Exhibit A Section 31.)

13 17. **Parties.** "The parties to the judgment are entities that were producing  
14 groundwater at the time the judgment was entered into and, through the judgment, were found to  
15 have a continuing right. In addition to that, parties to the judgment could be successors to the  
16 original water right holders." (*Kavounas*, 41:9:14.)

17 18. **Notice Provisions.** Watermaster's Rules and Regulations that were enacted to  
18 implement the Judgment specifically call for certain Notice provisions. Notice is only to be given  
19 to "active parties" and each person who has requested notice in writing. (Original Section 2.07,  
20 as revised in Section 2.7; *Kavounas*, 62:21-24.) No other notice provisions are required.

21 19. **Any Party Can Seek Review.** Any party can seek review of the Watermaster's  
22 actions. A party can do so individually. So can any of the pools or the advisory committee, and  
23 the judge himself may seek review. (*Kavounas*, 45:13-17.)

24 20. **CalPERS is Not a Party Under the Judgment, and Does Not Have Standing**  
25 **to Challenge Watermaster's Compensation Arrangements.** As CalPERS is not a party or  
26 other person with standing under the Judgment, CalPERS cannot challenge the compensation of  
27 Watermaster employees, even before the Superior Court. CalPERS must accept Watermaster's  
28 determination and pay the higher pension. CalPERS can increase the contributions required by

1 Watermaster, but may not intercede in Watermaster's decisions or jurisdiction.

2 **Watermaster Notice Policy and Provisions:**

3 21. Watermaster was created as an arm of the court. Watermaster is not subject to  
4 open meeting laws because it was not created by a legislative body. (See generally, *Epstein v.*  
5 *Hollywood Entertainment Dist. II Business Improvement Dist.*, (2001) 87 Cal.App.4th 862, 870;  
6 *Government Code*, §§54952, *et seq.*)

7 22. The Rules and Regulations (Exhibit 201, Exhibit D) explicitly provide for notice,  
8 meeting, and hearing records and other requirements. The requirement and rules in the Judgment  
9 are the guiding law. They do not require compliance with the notice provisions, Brown Act, or  
10 other public meeting law that CalPERS seeks to apply to it.

11 23. Although the meetings are required to be open to the public for attendance, the  
12 Rules and Regulations do not incorporate the open meeting law. As long as meeting is open for  
13 the public to attend in person, the Rules and Regulations are satisfied. The open meeting law is  
14 simply a policy guideline. Watermaster provides information to anyone that may request it.  
15 Anyone may use the Request for Information Form on Watermaster's website and will get the  
16 information they request unless it's involved in litigation. (*Kavounas*, 47:8-13.)

17 24. **Watermaster Meetings and Notice.** The Watermaster Board meets monthly.  
18 (*Kavounas*, 47:19-20.) There are requirements for noticing Watermaster Board regular meetings.  
19 (*Kavounas*, 47:23-24, Exhibit D, E.) Section 2.7 of the Rules and Regulations pertains to giving  
20 notice for meetings of the board. (*Kavounas*, 49:1-3.) Watermaster adheres to the requirements  
21 of Section 2.7. (*Kavounas*, 49:6-7.) The rules are available to the public and posted on the  
22 Watermaster's website. (*Ibid.*) The Rules allow the Board to hold confidential sessions. Section  
23 2.6 of Exhibit D is labeled "Confidential Sessions." Section 2.6 provides for the discussion of  
24 personnel matters of Watermaster employees involving individual employees in closed session.

25 25. **Information is Available to the Parties and to the Public.** Information  
26 regarding Watermaster activities and expenditures is available to the parties to the Judgment and  
27 to the public (*Kavounas*, 50:7-13.) According to the binding Rules and Regulations,  
28 Watermaster's documents, notice, and minutes are only required to be made available to each

1 "Active Party" and each person who has requested a copy of the minutes and notice. (Exhibit  
2 201, Exhibit D, Section 2.11.) Information is provided to the parties as part of agenda packages  
3 and then posted on the Watermaster website and publicly accessible. (*Kavounas*, 50:16-22.)

4 26. Section 2.1 of the Rules and Regulations, Exhibit D says: "Copies of other records  
5 may be obtained on the payment of the duplication cost, thereof, and pursuant to Watermaster  
6 policy." Exhibit N is resolution 01-03, adopting procedures, guidelines, and the fee schedule for  
7 release of information and documents. Exhibit O is Watermaster's form to request information  
8 posted on the website. (*Kavounas*, 52:5-11.) The form is available for anyone, whether member  
9 of the public or a party, to request information. (*Kavounas*, 52:13-14.) Watermaster's staff tries  
10 to respond to written requests for copies of documents within 10 working days.

11 27. Watermaster's website contains legal documents; filings with or orders of the  
12 Court; information related to the budget; and annual audits of Watermaster. It contains notices of  
13 meetings, and agendas for all the meetings of the three pools, the advisory committee, and the  
14 Board. It contains the minutes after they're approved and the recordings of each meeting, as well  
15 as any handouts and presentations that are handed out at any meeting. (*Kavounas* 54:4-14.) The  
16 website contains employment information and links to the parties and other 19 agencies.

17 **Watermaster Maintained a Publicly Available Pay Schedule:**

18 28. Watermaster maintained a publicly available pay schedule showing Alvarez's  
19 position and salary. (*Alvarez*, 148:17-149:22.) Exhibit S was the 2011/2012 salary schedule.  
20 (*Joswiak*, 102:19-21.) Exhibit S shows a \$228,000 annual salary for the CEO position, (*Joswiak*,  
21 103:3-4.)<sup>2</sup> The effective date would have been July 1, 2011, through June 30, 2012. (*Joswiak*,  
22 104:5-7.) The pay schedule was compliant with the PERL.

23 29. Salary schedules and salary matrices maintained by Watermaster were available  
24 to anyone from the public who requested them. (*Joswiak*, 78:18-19.) The salary information is

25 \_\_\_\_\_  
26 <sup>2</sup> Exhibit 211-214. Exhibit 12 says "Salary Matrix" The Matrix was used in the budget  
27 process. The salary matrix was adopted by the Board in public session. (*Joswiak*, 102:3-7.) At  
28 the time this was adopted, it was no longer fiscal year 2011/2012. (*Ibid.*) The Chief Executive  
Officer and its salary of \$228,000 was listed on both. (*Joswiak*, 95:6-19, 101:20-24.)

1 available on the website. (*Kavounas*, 71:15-16.) If any member of the public had requested the  
2 schedules, Watermaster would have provided them. (*Joswiak*, 78:21-23.) The request form was  
3 available the whole time of Alvarez's employment. (*Joswiak*, 79:2-15; Exhibit O.)

4 30. As examples of public availability, Watermaster provided Tracy Tracy at Monte  
5 Vista Water District with Watermaster employees' salary ranges that listed Alvarez as the CEO at  
6 \$228,000 and the salary schedule for 2011-12. (Exhibit S; *Joswiak*, 79:16-81:14.) Watermaster  
7 provided James R. Koren of the Inland Valley Daily Bulletin with a copy of the employment  
8 agreement for the then-current CEO. (*Joswiak*, 82:1-10.)

9 **Alvarez's Hiring as Watermaster Chief Executive Officer:**

10 31. On March 31, 2011, the Watermaster Board held a closed session conference call  
11 Special Confidential Watermaster Board Meeting to discuss the Watermaster CEO position.  
12 During that closed session, the Board authorized Watermaster's legal counsel to extend a binding  
13 term sheet to hire Alvarez as CEO and prepare a binding contract for execution by Watermaster's  
14 Board Chair.

15 32. Watermaster's hiring of Alvarez was reported out in open session by attorney  
16 Scott Slater. (*Joswiak*, 4/11/16, 75:1-12; 4/13/16, 53:23-54:3.) The facts of Alvarez's  
17 employment were thereafter available to the public. (*Joswiak*, 4/13, 75:1-12.) Watermaster  
18 signed an Employment Agreement to retain Alvarez as Watermaster's CEO beginning May 3,  
19 2011. (Exhibit 207, Exhibit L.)

20 33. On April 28, 2011, the Watermaster Board held a public meeting where it  
21 approved the minutes of the Special Confidential Watermaster Board Meeting held on March 31,  
22 2011. (Exhibit 222, Exhibit K.) The holding of a confidential session on March 31, 2011, and the  
23 adoption of the minutes (of that confidential session) in open session on April 28, 2011, were  
24 done pursuant to the Superior Court-approved Rules and Regulations that set forth the  
25 administrative procedures of Watermaster. (Exhibit 201, Exhibit D.)

26 **Alvarez's Hiring as CEO Was Pursuant to Watermaster Rules and Regulations:**

27 34. Watermaster hired and employed Alvarez pursuant to an employment contract  
28 which was approved and consistent with its Rules and Regulations and also compliant with the

1 PERL. In Joswiak's opinion, the Watermaster correctly followed all the Rules and Regulations  
2 applicable to Watermaster. (*Joswiak*, 83:9-13.) They specifically provide for Records (Section  
3 2.1), Regular Meetings (Section 2.2), Special Meetings (Section 2.3), Public Meetings/Hearings  
4 (Section 2.5), Confidential Sessions (Section 2.6), Notice (Section 2.7), Voting Procedures  
5 (Section 2.9), Minutes (Section 2.11), Rules of Order (Section 2.12), Compensation (Section  
6 2.13), Employment of Experts and Agents (Section 2.14), and Contracts (Section 2.18).

7 35. Rules and Regulations Section 2.6, "Confidential Sessions", mandates that

8 (1) The Watermaster Board may hold confidential sessions authorized by this  
9 Rule. A confidential session may be held by the Watermaster Board and, at a  
10 minimum, the chairs of the three Pools (Appropriative, Agricultural and Non-  
11 Agricultural) to, in a manner consistent with the Judgment:

- 12 ...  
13 (ii) discuss personnel matters of Watermaster employees involving individual  
14 employees; or  
15 (iii) discuss contract negotiations involving Watermaster.

16 36. Thereafter, Watermaster made Alvarez's Employment Contract available to  
17 anyone from the general public who wished to examine it or obtain a copy. Joswiak said all CEO  
18 employment contracts are posted on Watermaster's website. (*Joswiak*, 4/11/16, 61:19-21.)  
19 Joswiak provided a copy of Alvarez's salary and the salary schedule to the Monte Vista Water  
20 District upon request. (*Joswiak*, 4/11/16, 62:3-4.)

21 **Pay Schedule and Amount Were Publicly Available Throughout Alvarez's Employment:**

22 37. Alvarez was aware the Watermaster maintained a publicly available pay schedule  
23 that listed his salary and his position. (*Alvarez*, 148:17-149:22; Exhibit S.) Salary schedules  
24 maintained by Watermaster were available to the public. (*Joswiak*, 78:18-19.) Alvarez testified  
25 that the document provided to the public would have been the salary schedule, Exhibit S.  
26 (*Alvarez*, 167:22-168:1.) If any member of the public had requested the schedules, Watermaster  
27 would have provided them. (*Joswiak* 78:21-23.)

28 38. Watermaster provided salary information to members of the public. For example,  
29 Exhibit R is two pages of a September 15, 2011 email chain from Joswiak to Tracy at Monte  
30 Vista Water District, attaching the employees' salary ranges listing Alvarez and the CEO at

1 \$228,000. (*Joswiak*, 79:16-25.) Exhibit S, the Watermaster salary schedule for 2011-2012, was  
2 also sent to Tracy. (*Ibid.*) Joswiak responded with the salary information 5 days after receiving a  
3 request. (*Joswiak*, 79:16-81:14.)<sup>3</sup>

4 39. Exhibit F is an October 22, 2010 letter that Joswiak drafted to James R. Koren of  
5 the Inland Valley Daily Bulletin in San Bernardino, regarding a public information request.  
6 Joswiak provided a copy of the then current employment agreement for the then CEO. (*Joswiak*,  
7 82:1-10.) CalPERS employee Nicole Horning asked Joswiak for documents that were sent to the  
8 newspaper as part of Horning's inquiry into whether a pay schedule was publicly available.  
9 (*Testimony of Nicole Horning*, 4/13/16, 176:21-24.)

10 40. Further, Watermaster listed the position of CEO on its Chino Basin Watermaster  
11 Salary Matrix showing five salary steps available to the individual hired as CEO, with the  
12 highest Step E specifying an annual salary of \$228,000. (Exhibit 212, Exhibit 16.) This Salary  
13 Matrix was always available to anyone from the general public who wished to examine it or  
14 obtain a copy. Pursuant to CalPERS employee Horning's request, the salary matrix for 2011 and  
15 2012 was approved by Watermaster in open session. (*Joswiak* 4/11/16, 92:4-8.)

16 41. CalPERS employee Angel Gutierrez wrote that it was up to the agency to  
17 determine how to make the pay schedules publicly available. (Exhibit 259.) "There's a  
18 requirement that salary information be publicly available. How you go about doing that is up to  
19 the agency." (*Horning*, 188:15-18.)

20 42. Horning testified that an agency has multiple options to make it publicly  
21 available. (*Horning*, 188:24.) CalPERS' regulation 570.5 was not effective at the time that  
22 Alvarez was hired or when the 2011/2012 pay schedules went into effect.

23 **Alvarez's Work at Watermaster:**

24  
25 <sup>3</sup> The original email that Joswiak sent to Angel Gutierrez at CalPERS in response to  
26 CalPERS' request for the 2012/2013 salary matrix included the position of General Manger, not  
27 CEO, because the title of the position had changed between 2011 and 2012. (*Joswiak*, 4/11/16,  
28 89:14-90:24.) The CEO position was always part of the matrix, but it was not filled after May  
2012, so Joswiak did not print those rows and did not provide it. (*Joswiak*, 4/11/16, 90:22.) The  
"pay matrix" was part of the budgeting process. (*Joswiak*, 4/11/16, 36:5-37:10.)

1           43.     Alvarez started as CEO on May 3rd, 2011. (*Joswiak, 75:17-18.*) Alvarez's salary  
2 was \$228,000. Joswiak saw Alvarez in the office on a daily basis. (*Joswiak, 75:17-18.*) The CEO  
3 does not have normally set business hours. (*Joswiak, 70:17-25.*) Alvarez was paid in bi-weekly  
4 payroll, at \$19,000 a month. (*Joswiak, 76:1-3.*) Watermaster made CalPERS contributions  
5 biweekly on Mr. Alvarez' paid salary. (*Ibid.*) Alvarez regularly performed all of the initially  
6 described duties of CEO for Watermaster from May 2011 at least through November 2011.  
7 (*Exhibits 223-235, 237- 251.*) After November 9, 2011, Watermaster continued to pay Mr.  
8 Alvarez' salary according to regular payroll procedures until May 3, 2012. (*Joswiak, 76:18-25.*)  
9 Joswiak reported to Alvarez. (*Joswiak, 4/11/16, 30:22-24.*)

10           44.     Alvarez's employment status changed to paid administrative leave in 2011, but he  
11 remained an employee of Watermaster. At his six-month evaluation, Alvarez was told of a  
12 change in his day-to-day responsibilities. (*Alvarez, 133:2-7.*) Scott Slater, counsel for  
13 Watermaster, told Alvarez that Watermaster placed Alvarez on administrative leave. (*Alvarez,*  
14 *133:13-23.*) After November 9, 2011, Alvarez still considered himself an employee of the  
15 Watermaster. (*Alvarez, 135:21-136:22.*)

16           45.     Ken Jeske became the interim chief. (*Joswiak, 4/11/16, 32:14-16.*) Alvarez  
17 remained available at the pleasure of the Board and had conversations with various board  
18 members during that period of time to address some of their questions. Bob Kuhn, a member of  
19 the Board, said he communicated with Alvarez during the transition period about matters of  
20 interest to Watermaster. (*Testimony of Kuhn, 4/11/15, 180:11-23, 194:23-25.*) "I also had some  
21 conversations with Mr. Jeske, who was – became the day-to-day active, interim CEO. (*Alvarez,*  
22 *136:16-22.*)

23           46.     Alvarez had initiated a large \$20 million effort to buy water for Watermaster that  
24 had not yet closed on November 2011. Alvarez was one of the few people who was familiar with  
25 the "loose ends" of the water deal after November. (*Alvarez, 137:18- 138:20.*) Board members  
26 called Alvarez for his expertise when he was on paid administrative leave, after November and  
27 before May. (*Alvarez, 139:1-13* Alvarez was still an employee who was, in effect, transitioning  
28 his knowledge to the next CEO from November 2011 to May 2012. (*Alvarez, 140:9-12.*)



1           47.     Alvarez was not severed from employment in November. (*Alvarez*, 141:16-23.)  
2 Watermaster explicitly stated that he continued as a Watermaster employee "through May 2012  
3 when Alvarez's employment terminated". (Watermaster Appeal, pg 5, second to last paragraph.)<sup>4</sup>

4           48.     The legal effect of Alvarez's Separation Agreement was to change his  
5 responsibilities at Watermaster. (*Alvarez*, 143:13-14.) When Alvarez signed the Separation  
6 Agreement, his understanding was that they were basically documenting that his responsibilities  
7 are being modified effective on November 9th, 2011, as the agreement states. (*Alvarez*, 157:10-  
8 15.) The separation agreement reads: "And the employment agreement is hereby modified,  
9 effective as of that date." The word "changed" was being used interchangeably with the word  
10 "modified". (*Alvarez*, 158:17-20.)

11           49.     After the separation and administrative leave, Alvarez was still an employee, but  
12 he was no longer responsible for the day-to-day responsibilities. Day-to-day responsibilities are  
13 things like budgeting, personnel and other functions of that nature, preparing for correspondence,  
14 and actively representing Watermaster before its Board and the pools. (*Alvarez*, 143:17-24). But  
15 Alvarez felt he had a legal obligation to continue to assist Watermaster until May 3, 2012.  
16 (*Alvarez*, 144:14-15). He was still responsible for duties as assigned by the Board. This is part of  
17 the description of the job duties, which includes, "Otherwise carryout policies by the Board."  
18 Alvarez was available and did as the Board directed during that period of time. (*Alvarez*, 144:7-  
19 8, 162:2-7.)

20           50.     Joswiak understood that after November 2011, Alvarez reported to the Board.  
21 (*Joswiak*, 4/11/16, 71:4-10.) After November, Joswiak knew that Alvarez was still acting as a  
22 representative of Watermaster. The CEO reports to the Board. (*Joswiak*, 4/11/16, 71:25-72:4.)  
23 Joswiak implied that Alvarez was still a CEO after November. (*Ibid.*) Alvarez maintained his  
24 title as CEO after November 9, 2100 while on administrative leave. (*Alvarez*, 156:12-15.) He  
25 was never assigned any other title. (*Ibid.*) Technically, the Watermaster had an interim CEO and  
26 a CEO at other times. (*Alvarez*, 159:6-8.)

27 \_\_\_\_\_  
28           <sup>4</sup> While Watermaster *could* have chosen to terminate Alvarez in November 2011, it  
instead chose to place him on paid leave while remaining a Watermaster employee.

1           51.     While the organization chart did not reflect the presence of an interim CEO and a  
2 CEO on administrative leave, the were produced for each year (Exhibit 13) and the chart was not  
3 updated nor did it change within a year. Alvarez's administrative leave beginning in November  
4 2011 was expected to end in May 2012, before the start of a new fiscal year.

5           52.     Watermaster had the right to control what Alvarez did after November 2011 until  
6 May 2012. (*Alvarez*, 140:23-25.) Alvarez did not work full time for anyone else. (*Ibid.*)

7           53.     Watermaster had a Watermaster email address for Alvarez and maintained it  
8 during the transition period. (*Joswiak*, 4/13/16, 77:22-23.) Watermaster recognized that Alvarez  
9 was an employee until May 3, 2012 when it then stopped his email. (*Joswiak*, 4/11/19, 82:11-  
10 14.) While Alvarez also had access to his email (*Joswiak*, 4/11/16 84:11-15), Sherri Molino,  
11 Watermaster administrative assistant, also forwarded the emails to Alvarez until May. (*Joswiak*,  
12 4/11/16 83:7-84:15.)

13           54.     Watermaster did not report to CalPERS that Alvarez was no longer an employee  
14 of Watermaster. (*Joswiak*, 4/13/16, 77:6-7.) Instead, Watermaster made CalPERS contributions  
15 for Alvarez throughout the period from May 3, 2011 until May 3, 2012, including during the  
16 period when Watermaster placed Alvarez on paid administrative leave.

17 **Search for Other Employment After Watermaster:**

18           55.     After May 3, 2012, there were a couple of positions that came to Alvarez's  
19 attention. He recognized that his Watermaster employment was coming to an end and that it  
20 takes time to go through the process of applying for a new position. (*Alvarez*, 145:15-18; Exhibit  
21 265.) At that point, Alvarez was not intending to retire. (*Alvarez*, 146:14-15.)

22           56.     After pursuing these two positions and not being invited for an interview with  
23 either one, it became clear to Alvarez that because of what happened at Watermaster, he would  
24 have difficulty finding other employment. He was not interested in a lower-level position. He  
25 wanted to be General Manager or that level. "And so it was like, yeah, writing's on the wall right  
26 now. So I said, I probably ought to go ahead and retire." (*Alvarez*, 146:18-147:21.)

27 **Alvarez's Submittal of a Retirement Application:**

28           57.     Alvarez was then almost 59 years of age and had accrued a total of approximately

1 31.277 years of CalPERS service credit, making him eligible for service retirement from  
2 CalPERS.

3 58. On or about May 2, 2012, Alvarez submitted a Service Retirement Election  
4 Application designating retirement on May 5, 2012. Several weeks later, Alvarez requested that  
5 CalPERS change the retirement date to July 1, 2012. His retirement was effective July 2, 2012.

6 **CalPERS' Errors:**

7 59. **Errors Re New Regulation 570.5 Re Publicly Available Pay Schedules.** As a  
8 Manager I at CalPERS, Nicole Horning oversaw Angel Gutierrez and was in charge of reviewing  
9 Alvarez's file in CalPERS' Compensation Review Unit. (*Horning*, 170:16-171:15.)

10 60. CalPERS' Circular Letter announcing the new Regulation 570.5 says that the new  
11 regulation's purpose was to clarify "and make more specific" the requirements related to publicly  
12 available pay schedules. Horning, however, omitted the words "and make more specific" from  
13 her interpretation of the new requirements of Regulation 570.5. (*Horning*, 178:16-179:6.)

14 61. **Errors In Requesting the Wrong Pay Schedule.** In the emails in Exhibit 218  
15 with some additional information (pages 5-10) added during the hearing, Horning said that she  
16 would want to ask Watermaster for pay schedules for 2011/2012, but in fact neither Horning nor  
17 Gutierrez requested pay schedules for that time period. (*Horning* 182:4; Exhibit 199.)

18 62. Instead, in her emails to Watermaster in February and March 2013, Horning  
19 requested the pay schedule for 2012/2013. (*Horning*, 183:23-184:20.) "Joe, thanks so much for  
20 the information. Do you have any meeting agendas and minutes and attachments available from  
21 the last time your pay schedule was approved?" (*Horning*, 183:1-5, Exhibit 199.)

22 63. Horning was seeking information relevant to Alvarez, but asked for the incorrect  
23 information and the incorrect dates. (*Horning* 183:23-184:20.) In response to CalPERS' request,  
24 Watermaster supplied the information that CalPERS asked for, i.e. the 2012/2013 period, which  
25 was not related to Alvarez. (Exhibit 18, p. 6; Exhibits 197, 198; *Horning*, 183:23-184:20.)

26 64. Horning testified that she relied on the documentation in Exhibit 18. (*Horning*  
27 186:20-22.) But this was for the wrong time period. Nevertheless, CalPERS then used the  
28 incorrect information, based on CalPERS' request for the wrong time period, to deny Alvarez his

1 correct pension.

2 **LAW AND ARGUMENT**

3 **I. Law of Jurisdiction**

4 **A. No Jurisdiction**

5 CalPERS and the OAH have no jurisdiction to hear or to decide any issue that is relevant  
6 to Alvarez's employment which ignores or attempts to circumvent the authority of the Superior  
7 Court to oversee and regulate the operations of Watermaster.

8 **B. Superior Court Has Exclusive Original Jurisdiction**

9 Specifically, the Judgment entered by the San Bernardino County Superior Court (Exhibit  
10 200, Exhibit A) gives the Superior Court sole and exclusive authority to approve or regulate the  
11 decisions and actions of Watermaster. (Exhibit 200, Exhibit A, Section V., subsection B.17.)

12 As an integral part of that, the Judgment sets forth procedures for any party to challenge  
13 the actions, decisions, or rules of Watermaster and requires that this be done by timely noticed  
14 motion to the Superior Court. (Exhibit 200, Exhibit A, Section 31.) If CalPERS wishes to  
15 challenge the manner in which Watermaster approved Alvarez's Employment Agreement  
16 (Exhibit 207, Exhibit L) and adopted the Salary Matrix listing his base salary (Exhibit 212,  
17 Exhibit 16), it must do so pursuant to the Superior Court procedures set forth in the Judgment.

18 **C. No Waiver of Jurisdiction, No Consent**

19 Alvarez does not waive or consent to jurisdiction. Although jurisdiction can be conferred  
20 by consent, Alvarez does not consent.

21 **D. Public Meeting Laws Do Not Apply**

22 CalPERS seeks to incorporate public meeting requirements into the Watermaster Rules  
23 and Regulations. California has passed two major pieces of legislation designed to ensure that  
24 legislative decisions are conducted in open, public meetings where the public has the right to  
25 attend and participate. The Bagley Keene Open Meeting Act, originally enacted in 1967, governs  
26 open meetings of state agencies, boards and commissions. The Ralph M. Brown Act, first passed  
27 in 1953, governs open meetings for the legislative bodies of local agencies.

28 Watermaster fits into neither category. It is not a legislative body or an agency, board or

1 commission established by one or more legislative bodies. Instead, it is an entity appointed by  
2 the San Bernardino County Superior Court to oversee implementation of a Judgment (Exhibit  
3 200, Exhibit A) which was approved by the Superior Court in 1978 to resolve disputes over  
4 water rights in the Chino Water Basin. Simply put, Watermaster has no legislative role. It is an  
5 administrative entity composed of an appointed Board made up of representatives of various  
6 governmental and private entities who have interests in the acquisition, distribution, and use of  
7 water in the Chino Water Basin area. The defined "Active Parties" are the parties entitled to  
8 notice.

9 Furthermore, Watermaster was established by order of the Superior Court as an entity  
10 answerable to the Superior Court for all of its actions and activities. The Superior Court is not  
11 subject to the open meeting laws of either the Bagley-Keene Act or the Brown Act, nor is  
12 Watermaster as an entity which operates, in effect, as the agent of the Superior Court.

13 The Judgment also specifically states that review of any Watermaster action shall be by  
14 noticed motion of the Superior Court or any party. (Exhibit 200, Exhibit A, Section 31.)

15 **E. Operation and Applicable Rules of Watermaster**

16 Watermaster continues to operate under Superior Court oversight and direction. (Exhibits  
17 200, 263.) Watermaster's operations are governed by an extensive set of specific Rules and  
18 Regulations that were formally adopted by the Court. (Exhibit 201, 202.) The Rules and  
19 Regulations explicitly provide for notice, meeting, and hearing records and other requirements.  
20 The requirement and rules in the Judgment are the guiding law. They do not require compliance  
21 with the notice provisions, Brown Act, or other public meeting laws CalPERS seeks to apply.  
22 Although the meetings are required to be open to the public for attendance, the Rules and  
23 Regulations do not incorporate the open meeting law nor require public notice beyond that called  
24 for in the Rules and Regulations. As long as meeting is open for the public to attend in person,  
25 the Rules and Regulations are satisfied.

26 CalPERS cannot apply the public meeting laws or rules to Watermaster *contrary to the*  
27 *terms of the Superior Court orders* (when the Judgment explicitly says that the Rules and  
28 Regulations override the open meeting law when there is a conflict).

1           **F. Conduct of Watermaster Meetings, Notice Provisions**

2           The Rules and Regulations adopted pursuant to that authority give the Watermaster  
3 Board the right to conduct meetings to discuss personnel matters involving individual employees  
4 and contract negotiations involving Watermaster in confidential session. (Exhibit 201, Exhibit D,  
5 Section 2.6(1).) Regarding Notice, original Section 2.07, as revised in Section 2.7, requires that  
6 Notice is only to be given to "Active Parties" and each person who has requested notice in  
7 writing. No other notice provisions are required. Pursuant to Rules and Regulations Section 2.6,  
8 "Confidential Sessions", mandates that

9           (1) The Watermaster Board may hold confidential sessions authorized by this  
10 Rule. A confidential session may be held by the Watermaster Board and, at a  
11 minimum, the chairs of the three Pools (Appropriative, Agricultural and Non-  
Agricultural) to, in a manner consistent with the Judgment:

- 12           ...  
13           (ii) discuss personnel matters of Watermaster employees involving individual  
14 employees; or  
15           (iii) discuss contract negotiations involving Watermaster.

16           Watermaster's discussion of hiring of Alvarez as CEO was performed pursuant to the  
17 Rules and Regulations and thus pursuant to Superior Court order and authority.

18           On March 31, 2011, the Watermaster Board held a closed session conference call Special  
19 Confidential Watermaster Board Meeting to discuss the CEO position. During that closed  
20 session, the Board authorized Watermaster's legal counsel to extend a binding term sheet to hire  
21 Mr. Alvarez as CEO and prepare a binding contract for execution by Watermaster's Board Chair.  
It was reported out in open session. The terms were thereafter publicly available.

22           All of the Watermaster's rules were followed appropriately. On April 28, 2011, the Board  
23 held a public meeting where it approved the minutes of the Special Confidential Watermaster  
24 Board Meeting, and Alvarez and Watermaster executed an Employment Agreement to employ  
25 Alvarez as Watermaster's CEO beginning May 3, 2011. All of these acts were in compliance  
26 with and pursuant to the Watermaster Rules and Regulations approved by the Superior Court,  
27 and thus fully in compliance with all public meeting laws applicable to Watermaster, and this  
28 should also satisfy CalPERS' rules and regulations and the PERL, as then in effect.

1           **G. Public Availability of Alvarez's Employment Contract and Salary**

2           Although Watermaster is not subject to the Public Records Act because it is a creature of  
3 the Superior Court, Watermaster officials testified that Alvarez's contract, pay schedule, and  
4 salary were always available to the public.

5           Watermaster maintained a Salary Schedule specifying an annual salary of \$228,000 for  
6 the CEO, the salary earned by Alvarez, that was available and provided to the public satisfying  
7 the publicly available pay schedule requirement then in existence.

8           **II. Alvarez Satisfies the Public Employees Retirement Law**

9           The Public Employees' Retirement Law ("PERL") sets forth the conditions for CalPERS  
10 membership, accrual of service credit, and the calculation of retirement benefits to which such an  
11 individual might be entitled. Alvarez meets all such terms and is entitled to a retirement pension  
12 calculated on the basis of his highest earnings, i.e., his \$228,000 Watermaster annual salary.

13           **A. Employment with a Contracting Agency**

14           Watermaster has contracted with CalPERS to provide pension rights and benefits to its  
15 employees, including the individuals hired as CEO. That contract was entered into some years  
16 prior to Alvarez's employment at Watermaster.

17           Pursuant to those contractual arrangements, Alvarez continued in CalPERS membership  
18 beginning with his first day of work at Watermaster. He is a vested member of CalPERS entitled  
19 to the rights and benefits associated with such membership.

20           **B. Employment Contract Provided for CalPERS Membership and Benefits**

21           Alvarez's Employment Agreement with Watermaster (Exhibit 207, Exhibit L) states that  
22 he was being hired to fill the position of Watermaster CEO. This entitled him to continuing  
23 CalPERS membership and related pension rights and benefits.

24           The Employment Agreement further states that Watermaster would pay Alvarez's  
25 CalPERS member contributions as part of his base salary. (Exhibit 207, Exhibit L, Section 5.a.)

26           **C. Alvarez's Payrate Meets CalPERS Requirements**

27           Alvarez's Employment Agreement indicates that he would receive a base salary of  
28 \$228,000 per year as Watermaster CEO (Exhibit 207, Exhibit L, Section 5.a.), that he was

1 expected to devote his full-time efforts to the job (Exhibit 207, Exhibit L, Section 3.b.), and that  
2 his work hours were expected to vary but would normally begin at 8:00 am, Monday through  
3 Friday (Exhibit 207, Exhibit L, Section 4.).

4 Alvarez's salary thus qualifies as "compensation earnable" pursuant to *Government Code*  
5 section 20636 – he received an annual salary which could be converted to a monthly rate of pay,  
6 and he was paid for performing services on a full-time basis during normal working hours. The  
7 only issue CalPERS raises about Alvarez's salary is whether it was paid pursuant to a publicly  
8 available pay schedule.

9 **III. CalPERS' Rationale for Disallowing Alvarez's Payrate As Watermaster CEO**

10 The heart of CalPERS' reasons for refusing to calculate Alvarez's pension based on his  
11 highest earnings at Watermaster are two claims:

12 (i) That Alvarez's Employment Agreement hiring him as Watermaster CEO at an  
13 annual salary of \$228,000 was approved in a confidential session of the Watermaster Board,  
14 rather than in what CalPERS deems to be a public meeting, and

15 (ii) That the Watermaster salary matrix for the time period Alvarez worked as CEO  
16 either did not contain a listing of \$228,000 annual salary for the CEO position and/or was  
17 approved in a confidential session of the Watermaster Board.

18 CalPERS is (a) insisting on definitions, including of "public availability", that distort the  
19 applicable law and intrude on Watermaster's judicial integrity (and overstep the intent of the  
20 PERL and *Regulations*); (b) considering individual statutes and regulations in isolation from  
21 each other and in a piecemeal fashion, thereby failing to construct the prevailing law  
22 (Watermaster, PERL and *Regulations*) as an integral whole; (c) misinterpreting prevailing law  
23 (Watermaster, PERL and *Regulations*) inappropriately in order to reach a pre-determined  
24 outcome; (d) attempting to use new regulatory authority (*California Code of Regulations*,  
25 §570.5) that did not yet exist at the time Alvarez's compensation at Watermaster was approved  
26 and he began working as CEO, thereby attempting to subject him to statutory conditions  
27 retroactively though there are no provisions for doing so in the regulatory language; (e) ignoring  
28 the fact that Watermaster is an independent creation of the Superior Court that has its own rules.



1 **IV. Alvarez's Compensation Satisfies Requirements of "Compensation Earnable"**

2 A CalPERS member's pension is calculated based on the following formula: service  
3 credit (the number of credited years in CalPERS employment) x benefit factor (a factor  
4 combining the formula of the CalPERS contract covering the employee and his or her age at  
5 retirement) x final compensation. For Alvarez and other CalPERS members covered by  
6 Watermaster's contract with CalPERS, final compensation is the highest consecutive one-year  
7 period of earnings in the employee's CalPERS membership.

8 Final compensation is limited to "compensation earnable", described in detail in the  
9 following relevant sections of *Government Code* section 20636:

10 (a) "Compensation earnable" by a member means the payrate and  
11 special compensation of the member, as defined by subdivisions  
(b), (c), and (g), and as limited by Section 21752.5.

12 (b) (1) "Payrate" means the normal monthly rate of pay or base  
13 pay of the member paid in cash to similarly situated members of  
14 the same group or class of employment for services rendered on a  
15 full-time basis during normal working hours, pursuant to publicly  
16 available pay schedules. "Payrate," for a member who is not in a  
17 group or class, means the monthly rate of pay or base pay of the  
member, paid in cash and pursuant to publicly available pay  
schedules, for services rendered on a full-time basis during normal  
working hours, subject to the limitations of paragraph (2) of  
subdivision (e).

18 There is no question that Alvarez received a "monthly rate of pay or base pay" that was  
19 "paid in cash" and was "for services rendered on a full-time basis during normal working hours".  
20 The only dispute CalPERS appears to have is whether his compensation was paid "pursuant to  
21 publicly available pay schedules".

22 **A. Purpose Behind "Publicly Available Pay Schedules"**

23 CalPERS has argued that employees be paid pursuant to "publicly available pay  
24 schedules" to help insure that the pay rate is properly authorized and available. Watermaster's  
25 adoption of Alvarez's salary, its payment of that salary to him, the Superior Court supervision of  
26 the salary, and Watermaster's general policies of "openness" make sure that the salary is properly  
27 authorized and available.

28 Alvarez's Employment Agreement was adopted in compliance with the procedures

1 mandated by the San Bernardino County Superior Court. Watermaster operates under Superior  
2 Court oversight and control, pursuant to its court-ordered rules and regulations. The San  
3 Bernardino County Superior Court represents and informs the public interest, satisfying the point  
4 of the public availability provisions.

5 Further, the only parties with an interest in Watermaster actions and standing to challenge  
6 any such actions are the parties to the Judgment enacted by the Superior Court (Exhibit 200,  
7 Exhibit A). All such parties received notice (or had opted out of receiving notice) of Alvarez's  
8 Employment Agreement and thus the contract was authorized and compliant with Watermaster  
9 and its Board.

10 **B. Watermaster Freely Provided Public Information About Alvarez's Salary**

11 Although it only has a duty to notify "Active Parties", Watermaster voluntarily  
12 additionally complied with the purposes of "public availability" of the salaries of its employees,  
13 by making the pay and salary "publicly available", including the salary earned by Alvarez. It  
14 made no efforts to hide Alvarez's salary from the general public. Watermaster freely provided  
15 salary information to anyone from the general public who requested it.

16 **C. CalPERS Wrongly Retroactively Applies New Regulations**

17 CalPERS argues in its February 20, 2013 denial letter that Alvarez's Employment  
18 Agreement and Watermaster's Salary Matrix do not meet the criteria for "publicly available pay  
19 schedules" as set forth in *California Code of Regulations*, section 570.5.

20 Section 570.5 did not take effect until August 10, 2011. Alvarez's Employment  
21 Agreement, however, was approved on March 31, 2011, and he began his employment as CEO  
22 on May 3, 2011, well *before* Section 570.5 took effect. Alvarez was fully vested in the rights and  
23 benefits flowing from such employment at the time Section 570.5 took effect. There is nothing in  
24 Section 570.5 which provides CalPERS with authority to apply the regulation retroactively.

25 CalPERS' efforts to apply the provisions of Section 570.5 to Alvarez's employment and  
26 the PERSibility of his Watermaster salary unconstitutionally violate his due process rights by  
27 subjecting him to procedural requirements that neither existed at the time he contracted for  
28 Watermaster employment nor contain any provisions allowing for retroactive application.

1           **D. CalPERS Also Wrongly Interprets the Language of Section 570.5**

2           CalPERS also wrongly interprets Regulation 570.5, even if it *had* been in effect when  
3 Alvarez was hired. The Circular Letter clearly indicates that the Regulation both clarifies  
4 existing law and adds specific new requirements. (Exhibit 266.) CalPERS' Nicole Horning chose  
5 to ignore that the Regulation added new specific requirements.

6           Section 570.5 says that in determining 'compensation earnable', an employee's payrate  
7 shall be limited to the amount listed on a pay schedule that meets all of the following  
8 requirements:

9           **"(1) Has been duly approved and adopted by the employer's governing body in**  
10 **accordance with requirements of applicable public meetings laws."** Alvarez's salary was  
11 approved and adopted by the Watermaster Board, its governing body. Further, it was approved in  
12 accordance with the requirements of *applicable* meetings laws in that approval was given  
13 pursuant to the Rules and Regulations established by the Superior Court. Section 2.2 of those  
14 Rules and Regulations specifies that "Watermaster shall generally operate in accordance with the  
15 provisions of the California Open Meetings Law (Brown Act). However, in the event of conflict,  
16 the procedures set forth in these Rules and Regulations shall control."

17           Watermaster provides specifically for meeting, notice, and other rules that trump any  
18 other statute. The Watermaster Rules and Regulations say that "All meetings, whether regular or  
19 special, shall be open to the public unless they are properly designated as a confidential session"  
20 (Section 2.5) and "The Watermaster Board may hold confidential sessions authorized by this  
21 Rule. A confidential session may be held ... to, in a manner consistent with the Judgment, ... (ii)  
22 discuss personnel matters of Watermaster employees involving individual employees; or (iii)  
23 discuss contract negotiations involving Watermaster" (Section 2.6). Watermaster's discussion  
24 and adoption of Alvarez's Employment Agreement and of the applicable Salary Matrix met all of  
25 the terms of the *applicable* meeting laws.

26           **"(2) Identifies the position title for every employee position."** Alvarez's Employment  
27 Agreement identifies his position as CEO. The Salary Matrix and Salary Schedule (Exhibit S)  
28 covering the period of his employment lists the CEO position.

1           **"(3) Shows the payrate for each identified position, which may be stated as a single**  
2 **amount or as multiple amounts within a range."** The Salary Matrix and Salary Schedule  
3 (Exhibit S) covering the period of Alvarez's employment list the available salary range for an  
4 individual holding the position of CEO.

5           **"(4) Indicates the time base, including, but not limited to, whether the time base is**  
6 **hourly, daily, bi-weekly, monthly, bi-monthly, or annually."** Alvarez's Employment  
7 Agreement indicates he shall be paid \$228,000 in annual salary. The Salary Matrix and Salary  
8 Schedule (Exhibit S) contain the same information.

9           **"(5) Is posted at the office of the employer or immediately accessible and available**  
10 **for public review from the employer during normal business hours or posted on the**  
11 **employer's internet website."** Watermaster's policy was to make the Salary Matrix and Salary  
12 Schedule (Exhibit S) information fully available to anyone from the general public who  
13 requested it. Watermaster also had a policy to make Alvarez's Employment Agreement fully  
14 available to anyone from the general public who requested it.

15           **"(6) Indicates an effective date and date of any revisions."** The Employment  
16 Agreement lists the date covered by the employment contract, and the Salary Matrix and Salary  
17 Schedule (Exhibit S) listed the time period covered by the matrix.

18           **"(7) Is retained by the employer and available for public inspection for not less than**  
19 **five years."** Both the Employment Agreement and the Salary Schedule (Exhibit S) are  
20 maintained by Watermaster and will be so maintained as legally required.

21           **"(8) Does not reference another document in lieu of disclosing the payrate."**  
22 Alvarez's salary is clearly disclosed in both the Employment Agreement and the Salary Schedule  
23 (Exhibit S). There is no need to look to another document to find this information.

24 **V. CalPERS' Disallowance of Alvarez's Watermaster Salary and Portions of His**  
25 **Watermaster Service Credit**

26           CalPERS denies Alvarez his earned and vested pension benefits based on CalPERS'  
27 misreading of the fact that Alvarez was placed on administrative leave and given new duties  
28 mid-way through his first year as CEO, even though he remained a Watermaster employee

1 during that time.

2 **A. Legal Standards Applied To Period of Paid Administrative Leave**

3 CalPERS misconstrues the legal standard and evidence on the period of his paid  
4 administrative leave, wrongly finding that he was no longer a common law employee but an  
5 independent contractor.

6 In fact, the evidence and law relied upon by CalPERS demonstrates that (i) Alvarez  
7 continued to be employed by Watermaster through May 3, 2012, (ii) Alvarez's compensation was  
8 not "final settlement pay" but rather the continuation of the same qualified compensation he  
9 received during his earlier employment at Watermaster (a period of time that CalPERS freely  
10 admits constituted common law employment), and (iii) Alvarez's employment at Watermaster  
11 from November 9, 2011 through May 3, 2012 fully met the terms of common law employment.  
12 Therefore Alvarez is entitled to earn service credit and CalPERS benefits pursuant to each  
13 standard.

14 **B. Precedential Decisions: *Neidengard*, 05-01, and *Koolish*, 09-01**

15 CalPERS maintain a precedential decision index that contains decisions adopted by its  
16 Board. In 2005, the CalPERS Board decided *Neidengard v. Tri-Counties Regional Center* (2005)  
17 Case No. 6099, OAH Case No. L-2003100580. The Board found that the terminology used in  
18 agreements was not conclusive. The agreements must be examined in light of the circumstances.  
19 Despite the appearance of factors indicating an independent contractor status, the Board  
20 determined that Mr. Neidengard was an employee for CalPERS purposes based common law  
21 factors. (*Neidengard, supra*, at pages 11-12.)

22 In 2009, the Board decided *Koolish v. San Diego State University* (2009) Case No 7857,  
23 OAH Case No. L-2008070277. The decision allows CalPERS service credit for sabbatical leave.  
24 (*Koolish, supra*, at Exhibit 1.)

25 **C. Changes in Watermaster's Plans and Expectations: Alvarez Was a Common**  
26 **Law Employee Throughout his Watermaster Employment**

27 Alvarez was an employee of Watermaster, not an independent contractor. He was initially  
28 hired under a two-year contract, as he wanted some initial security as he changed jobs. Both

1 parties fully expected Alvarez would remain as CEO into the future, beyond the first term.

2       Approximately mid-way through Alvarez's first year, however, Watermaster decided that  
3 Alvarez was not the appropriate person to continue as CEO. Watermaster placed Alvarez on paid  
4 administrative leave for six months and assigned him different duties.

5       Importantly, Watermaster did not terminate Alvarez, but instead placed Alvarez on  
6 administrative leave beginning November 9, 2011. Alvarez continued to operate under  
7 Watermaster's direction and control, he was available for (and participated in) consultation or  
8 assignment, Watermaster paid him his full compensation by regular payroll check like all other  
9 employees through the end of his year contract, and he accrued vacation time as he had before.

10       Watermaster ended Alvarez's employment on May 3, 2012, but he remained a common  
11 law employee of Watermaster throughout his year there. He was neither "terminated" on  
12 November 9, 2011 nor converted into an independent contractor.

13       **D. Full Service Credit, Even When on Administrative Leave**

14       Under *Government Code* section 20898, Alvarez is entitled to service credit for the time  
15 spent on administrative leave:

16       In computing, the service with which a member is entitled to be credited under  
17 this part, time during which the member is excused from working because of  
18 holidays, sick leave, vacation, or leave of absence, with compensation, shall be  
19 included.

20       Additionally, under *Government Code* section 21008, *et seq.*, and the reasoning of the  
21 *Koolish* precedential decision, Alvarez is entitled to full service credit even for the time when he  
22 was placed on administrative leave. (See *In the Matter of the Application for Full-Time Service  
23 Credit for Sabbatical Leave of Lynda Koolish*, PERS Precedential Decision 09-01, 11/19/09.)

24       Time during which a member is excused from performance of his or her duties,  
25 whether or not he or she is required to perform any portion of those duties during  
26 that time, and for which he or she receives compensation, but in an amount less  
27 than the full compensation earnable by him or her while performing his or her  
28 duties when not so excused, such as sabbatical leave, shall be credited as service  
in the proportion that the compensation paid to the member bears to the full  
compensation that would be earnable by him or her while performing his or her  
duties on a full-time basis. However, the member shall receive full-time credit for  
the time if after returning to the employment from which he or she was excused

1 and at any time prior to retirement he or she elects to, and does, make the  
2 contributions as specified in Sections 21050 and 21052.

3 **E. CalPERS Wrongly Equates "Administrative Leave" with "Termination"**

4 Termination means that an employee is no longer working for the employer.

5 Administrative leave, by contrast, represents something short of termination. The employee put  
6 on leave remains on the payroll, though the employer does not expect him or her to undertake  
7 normal work-related duties while on administrative leave.

8 There is a further distinction between *paid* administrative leave and *unpaid*  
9 administrative leave. In the case of paid administrative leave, the employee not only remains  
10 listed on the payroll as an employee, but continues to draw his or her full salary for the time. To  
11 Alvarez's knowledge, CalPERS members placed on paid administrative leave (such as police  
12 officers put on leave while allegations against them are investigated) receive full CalPERS  
13 service credit for that time when on administrative leave, and CalPERS expects to receive full  
14 employer and employee contributions associated with the pay during that time. CalPERS service  
15 credit and other benefits continue unless and until the employee is formally terminated.

16 Those on unpaid administrative leave are sent home without pay, but they too still remain  
17 as employees. Unpaid administrative leave is often a precursor to formal termination (e.g.  
18 employees accused of some criminal violation related to their work may be placed on unpaid  
19 administrative leave while the employer affords them the opportunity to contest the allegations).  
20 But inherent in the unpaid administrative leave scenario is the possibility that the employee will  
21 prevail and disprove the allegations, leading to full return to work and resumption of all  
22 associated financial compensation, including resumption of the accumulation of CalPERS  
23 service credit for compensated employment.

24 In the case of *In the Matter of the Appeal by Connie J. Armstead*, appellant Armstead  
25 claimed that when the California Highway Patrol's put her on paid administrative leave prior to  
26 notifying her of its intention to apply for disability retirement on her behalf (with the consequent  
27 rights afforded her to contest the disability retirement), the administrative leave constituted  
28 constructive medical termination or suspension. The State Personnel Board found:

1 While CHP could have done a better job of notifying appellant of its actions and  
2 her options and inviting her to engage with them in an interactive process,  
3 because it did not cut off her pay before it gave her notice and an opportunity to  
4 respond and filed for disability retirement on her behalf pursuant to Government  
5 Code § 19253.5(i), it did not constructively medically terminate or suspend her  
6 when it placed her on paid leave pending a fitness for duty examination and a  
7 final determination on how it would proceed.  
8 (In the Matter 2003 WL 21510832, 6)

6 **F. Alvarez's Paid Administrative Leave is Wholly Dissimilar to "Termination"**

7 The situation with Alvarez's employment and later termination from Watermaster is  
8 analogous to the situation in *Armstead*. Alvarez was placed on paid administrative leave on  
9 November 9, 2011 and continued receiving his contractual salary of \$228,000 per year as  
10 Watermaster's CEO. The fact that he was *later* terminated effective May 4, 2012 does nothing to  
11 convert his administrative leave into constructive termination as CalPERS asserts.

12 **G. Alvarez Was Paid Regularly, Remained an Employee of Watermaster**

13 Watermaster regularly paid Alvarez and made contributions to CalPERS during the  
14 period under question. Alvarez remained an employee of Watermaster during this period, and  
15 was subject to the control of Watermaster to the extent that Watermaster wished to exercise its  
16 control. Watermaster remained the employer of Alvarez until termination.

17 **H. CalPERS' Improper Reading of Alvarez's Employment Contract**

18 CalPERS cites the fact that Alvarez's employment contract provides for payment of his  
19 contractual salary for his first year of service, even if he was terminated without cause prior to  
20 completion of the year. But then it illogically concludes that Watermaster's decision to put  
21 Alvarez on administrative leave through the end of the first year of employment is constructively  
22 the same as a decision to terminate him mid-way through his first year and pay him out pursuant  
23 to the contract's severance provisions.

24 Again, the *Armstead* case is apropos: The fact that Ms. Armstead's paid administrative  
25 leave was later followed by her forced disability retirement was not evidence that the leave was  
26 constructively *the same as* or even a *causal precursor* to her later termination and forced  
27 retirement. Similarly, the fact that Watermaster kept Alvarez on as an employee and continued  
28 paying him his contractual salary and then *later* terminated him is not evidence of a causal



1 connection between them.<sup>5</sup>

2 **I. No Termination, Only Administrative Leave**

3 CalPERS has no statutory or regulatory authority to make hiring and firing decisions. It is  
4 ministerially required to simply take the decisions of contracting agencies and then apply the  
5 PERL to those decisions—not the decisions CalPERS decides the agency *meant* to make.

6 **VI. Alvarez Complies with the Public Employees' Retirement Law**

7 Contrary to CalPERS' arguments about the application of the pension statutes to the  
8 calculation of Alvarez's benefits, the law and case law require CalPERS to utilize the service  
9 credit and compensation that Alvarez accrued on paid administrative leave for Watermaster in  
10 the computation of his pension.

11 *Government Code* section 20630 defines "compensation" as "remuneration paid out of  
12 funds controlled by the employer in payment for the member's services performed during  
13 normal working hours or for time during which the member is excused from work because of  
14 ... (6) leave of absence." Alvarez's compensation while on "leave of absence" therefore remains  
15 PERSible compensation. Even if it was paid while he was on administrative leave, is  
16 compensation under Section 20630.

17 **VII. Alvarez Remained Eligible for CalPERS Benefits Even While on Paid Leave**

18 The decision by Watermaster to put Alvarez on paid administrative leave beginning  
19 November 9, 2011 does not impact his right to receive CalPERS benefits for that time.  
20 Moreover, satisfying any subpart of section 20305(a) qualifies an employee for CalPERS  
21 benefits.

22 **A. Alvarez Satisfies Section 20305(a)(1) On CalPERS Membership**

23 Alvarez was already enrolled in CalPERS before joining Watermaster.

24 **B. Alvarez Meets the Part-Time Employee Requirements of Section 20305(a)(2)**

25

26 <sup>5</sup> If Watermaster had terminated Alvarez on November 9, 2011 and then paid him the  
27 equivalent of his salary for the remainder of what would have been a year of employment, one  
28 would expect Watermaster to have documented such action or memorialized it in some type of  
contract amendment or severance agreement. Nothing of the sort occurred.

1 Alvarez worked an average of at least 20 hours a week or the equivalent of at least 20  
2 hours per week for the year period when he was under the control of Watermaster.

3 **C. Alvarez Satisfies California Government Code §20305(a) (3) (B)**

4 A part-time employee or an employee serving less than full time receives annualized  
5 CalPERS benefits if:

6 (a) (3): His or her employment is, in the opinion of the board, on a seasonal,  
7 limited term, on call, emergency, intermittent, substitute, or other irregular basis,  
8 and is compensated and meets one of the following conditions:

9 ...  
10 (B) The person completes 125 days, if employed on a per diem basis or, if  
11 employed on other than a per diem basis, completes 1,000 hours within the fiscal  
12 year, in which case, membership shall be effective not later than the first day of  
13 the first pay period of the month following the month in which 125 days or 1,000  
14 hours of service were completed. For purposes of this subdivision, "day" means  
15 each eight-hour period of employment worked by an employee paid on a per diem  
16 basis so that membership is effective after he or she has completed 1,000 hours of  
17 compensated service in a fiscal year.

18 **VIII. Common Law Employment**

19 The California Supreme Court has held that since the PERL does not define "independent  
20 contractor," or "employees" of a contracting agency with greater particularity, these terms must  
21 be defined with reference to California common law. (*Metropolitan Water Dist. v. Superior*  
22 *Court (Cargill)* (2004) 32 Cal.4th 491.)

23 "In determining whether one who performs services for another is an employee or an  
24 independent contractor, the most important factor is the right to control the manner and means of  
25 accomplishing the result desired. If the employer has the authority to exercise complete control,  
26 whether or not that right is exercised with respect to all details, an employer-employee  
27 relationship exists." (*Tieberg v. Unemployment Ins. Bd.* (1970) 2 Cal.3d 943, 949, quoting  
28 *Empire Star Mines v. California Employment Com.* (1946) 28 Cal.2d 33.)

In California, the "right to control" is the most important, and likely conclusive,  
employer-employee test. However, in this case, CalPERS wrongly confuses the "right to control"  
with the exercise of control.

The existence of such right of control, and not the extent of its exercise, gives rise  
to the employer-employee relationship. [Citations.] (*Borello, supra*, at pp. 366-

1 367, 256 Cal.Rptr. 543, 769 P.2d 399 (dis. opn. of Kaufman, J.), citing *S.A.*  
2 *Gerrard Co. v. Industrial Acc. Com.* (1941) 17 Cal.2d 411, 413-414, 110 P.2d  
3 377.) See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989)  
4 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (*Borello*)

5 Alvarez and Watermaster both maintain that Watermaster had the authority to exercise  
6 complete control over Alvarez's work performance throughout his tenure at Watermaster. In  
7 addition, the only document which CalPERS cites in support of its contrary position—the  
8 January 23, 2012 "Confidential Separation Agreement" between Alvarez and Watermaster  
(Exhibit 254, Exhibit M, Exhibit 12)—fully supports that conclusion.

9 **IX. CalPERS Bears the Burden of Proof on "Common Law Employee" Status**

10 "Any person rendering service for another, other than as an independent contractor, or  
11 unless expressly excluded herein, is presumed to be an employee." (*Labor Code*, 3357.) As the  
12 court in *Pacific Employers' Ins. Co. v. Industrial Acc. Commission of Cal.* (1926) 79  
13 Cal.App.195 noted nearly a century ago, since "any person rendering service for another other  
14 than as an independent contractor or one expressly excluded by the [Workmen's Compensation  
15 Act (Stats. 1917, pp. 831, 835)] 'is presumed to be an employee within the meaning of this act,'  
16 the burden of proof is on the party asserting it to show that one rendering service for another is  
17 not an employee within the meaning of the act." (*Pacific Employers' Ins. Co., supra*, at 197-198.)

18 Alvarez and Watermaster agree that Alvarez was an employee. It is CalPERS that seeks  
19 to avoid the liability of paying Alvarez a pension based on his entire Watermaster employment,  
20 and it is CalPERS that bears the burden of proving that its assertion is correct.

21 **X. Alvarez Was Not "Terminated" on November 9, 2011, But Continued as a**  
22 **Watermaster Employee**

23 CalPERS argues that Alvarez was terminated on November 9, 2011 and points to the  
24 "Confidential Separation Agreement" (Exhibit 254, Exhibit M, Exhibit 12) as authority for this.  
25 The Separation Agreement<sup>6</sup> says precisely the opposite. First, the Separation Agreement

26 <sup>6</sup> CalPERS makes much of the fact that the Separation Agreement contains the word  
27 "Separation" in the title, while Alvarez's initial employment agreement uses the word  
28 "Employment". CalPERS further points to the fact that the compensation and benefits in the  
Separation Agreement are referred to as "Severance Compensation" and that the employment

1 explicitly states that it is an amendment to the employment agreement and that Watermaster  
2 seeks only to modify Alvarez's employment and limit his duties. Second, the Separation  
3 Agreement makes clear that Alvarez *continues to be employed by Watermaster*, albeit with  
4 changed duties. See, for example, Section 2.A. which explicitly states that Alvarez "shall be  
5 continued to be employed with the Watermaster until May 3, 2012."

6 Third, when read in context, the use of the phrases "Severance Compensation" and  
7 "Transition Period" are nothing but definitional phrases. Section 2.C. of the Separation  
8 Agreement explicitly states that Alvarez

9 shall continue to receive his base salary, less applicable withholdings, at the rate  
10 in effect on November 9, 2011, paid in accordance with the Watermaster's normal  
11 payroll system. Executive [Alvarez] shall continue to accrue vacation at the rate  
12 of twenty (20) days per year, accruing pro rata on a bi-weekly basis. In addition,  
13 the Watermaster shall permit Executive to continue to participate as an employee  
14 in any insurance plans, deferred compensation plans, and retirement plans in  
15 which he was a participant prior to the Transition Period, on the same terms and  
16 conditions as under the Employment Agreement.

17 In other words, Alvarez continues to function under the compensation and benefit terms  
18 of the agreement he was hired under, and is treated just like any other Watermaster employee.

19 CalPERS misconstrues the revised employment terms to fit a self-constructed picture of  
20 "termination". For example, it states that the Separation Agreement "clearly states that you  
21 [Alvarez] have no authority and no duties within that transition period."

22 In actual fact, Section 2.B. of the Separation Agreement says that Alvarez has no  
23 authority "to act on behalf of the Watermaster or enter into any agreements on behalf of the  
24 Watermaster, and he shall not hold himself out as having any authority to act on behalf of the  
25 Watermaster." This is a far cry from stating he has "no authority"—it is simply a statement that  
26 he has no independent authority to act on behalf of Watermaster.

27 As for the statement that Alvarez "has no duties", the Separation Agreement actually says  
28 in Section 2.B. that Alvarez's duty during the final six months of employment "shall be to assist  
period of November 9, 2011 through May 3, 2012 is referred to as "Transition Period". (Exhibit  
254, Exhibit M, Exhibit 12, page 2.) What CalPERS ignores, however, is the *substance* of the  
two documents.

1 and provide information to the Watermaster as requested with respect to pending projects and the  
2 transition of his duties. Executive shall endeavor to respond promptly, fully, accurately and in a  
3 professional manner to inquiries and requests made by the Watermaster during the Transition  
4 Period." This may well be an alteration of previous duties, but is not even remotely stating that  
5 he has *no* duties as CalPERS asserts. Alvarez, in fact, complied, carrying out communication  
6 with Board members about Watermaster affairs and concerns. (Kuhn, 180:11-23, 194:23-25;  
7 *Joswiak*, 4/11/16, 32:14-16; *Alvarez*, 136:16-22.)<sup>7</sup>

8 Finally, CalPERS points to the fact that Alvarez was free to pursue other work during the  
9 final six months, provided it is not detrimental to Watermaster. Again, this is not an indication of  
10 termination—if it was, Watermaster would have *no authority whatsoever* to limit or constrain  
11 Alvarez's ability to look for other work since he would by definition no longer be employed and  
12 no longer under the direction and control of Watermaster.

13 It is true that the original expectation that Alvarez would continue as Watermaster's CEO  
14 for an indefinite period into the future changed after it "became clear to Watermaster that Mr.  
15 Alvarez was not the right person for the CEO position at Watermaster...." (Watermaster's April  
16 19, 2013 *Notice of Appeal*, page 2.) Thereafter the parties amended the initial employment  
17 agreement, keeping Alvarez on as a Watermaster employee until May 3, 2012 and providing him  
18 with the compensation and benefits he was promised in the initial employment agreement.  
19 However, the record is explicitly clear that Alvarez continued as a Watermaster employee  
20 throughout that period. CalPERS' efforts to distort the agreement and argue that it was a  
21 "termination" of employment is without basis or support.

22 **XI. Alvarez's Duties on Administrative Leave**

23 CalPERS cannot argue about how little, if any, Watermaster actually required Alvarez to  
24 perform the duties it established. "If the employer has the authority to exercise complete control,  
25 whether or not that right is exercised with respect to all details, an employer-employee  
26 relationship exists." (*Tieberg, supra*, at 949.) In the specific case under review, the Supreme

27 \_\_\_\_\_  
28 <sup>7</sup> This matches ne of *Tieberg's* secondary factors asking "whether or not the work is part  
of the regular business of the principal". (*Tieberg, supra*, at 949.)

1 Court discussed the held television writers who "worked on their own time, at their own expense,  
2 in their own way, with their own instrumentalities, and at a place of their own selection" were  
3 still common law employees because the "[television show] producer had the right to control"  
4 and the writers were required to use their talents and skills to the best of their ability at their own  
5 discretion to benefit the producer. (*Tieberg, supra*, at 948-949.)

6 Even CalPERS' argument that Alvarez was free to pursue other work during the final six  
7 months, provided it is not detrimental to Watermaster, establishes common law control. If not,  
8 then Watermaster would have no authority to limit or constrain Alvarez's ability to look for other  
9 work since he would by definition not be an employee and Watermaster would have no authority  
10 to exercise direction and control over him.

11 **XII. Not "Final Settlement Pay"**

12 Restrictions on "final settlement pay" are clearly designed to limit excess compensation  
13 received by employees *in anticipation* of leaving employment. CalPERS essentially argues that  
14 Alvarez's contract contemplated the possibility that he would be terminated less than a year into  
15 his employment, and that when he later ended that employment exactly a year into it, it somehow  
16 "proved" that the compensation he earned was paid to him "in connection with or in anticipation  
17 of a separation from employment". This is illogically taking two events occurring at different  
18 points in time and drawing the conclusion that one was premised on the other simply because  
19 they occurred in sequence.

20 *Government Code* section 20636(f) states: "As used in this part, 'final settlement pay'  
21 means pay or cash conversions of employee benefits that are in excess of compensation earnable,  
22 that are granted or awarded to a member in connection with, or in anticipation of, a separation  
23 from employment. The board shall promulgate regulations that delineate more specifically what  
24 constitutes final settlement pay."

25 *California Code of Regulations*, Section 570, "Final Settlement Pay", says:

26 "Final settlement pay" means any pay or cash conversions of employee benefits in  
27 excess of compensation earnable, that are granted or awarded to a member in  
28 connection with or in anticipation of a separation from employment. Final  
settlement pay is excluded from payroll reporting to PERS, in either payrate or  
compensation earnable.

1 Note that *C.C.R.* section 570 says nothing about denial of service credit.

2 Alvarez and Watermaster initially contemplated that Alvarez would be working for  
3 Watermaster for a lengthy period of time. There was no thought of retirement on Alvarez's part,  
4 and no contemplation of that in the initial employment agreement between the parties. Even in  
5 April 2012, Alvarez was still looking for work and had not yet wanted to retire.

6 **XIII. Equitable Estoppel Against CalPERS.**

7 All four elements of estoppel are satisfied here: (1) CalPERS knew or should have known  
8 that it promised pension benefits to Watermaster employees even though CalPERS would later  
9 claim it was unauthorized to provide those benefits because of the manner in which Watermaster  
10 approves the hiring of personnel; (2) CalPERS either intended this representation of pension  
11 benefits to be relied upon, or Alvarez had the right to believe it was so intended; (3) Alvarez was  
12 unaware of the fact that CalPERS would later disavow such representations; and (4) Alvarez  
13 relied upon the conduct of CalPERS in making his career plans to his injury. (See *Driscoll v.*  
14 *City of Los Angeles, supra.*)

15 The requisite elements for equitable estoppel are met in this case: (1) The party to be  
16 estopped (CalPERS) was apprised of the facts; (2) the party to be estopped (CalPERS) intended  
17 by its conduct to induce reliance by the other party (Alvarez) on the explicit and implicit  
18 promises that Alvarez could utilize his Watermaster salary in the calculation of his eventual  
19 pension (and acting in such a way as to cause Alvarez reasonably to believe reliance was  
20 intended); (3) the party asserting estoppel (Alvarez) was ignorant of the facts; and (4) the party  
21 asserting estoppel (Alvarez) suffered injury in reliance on CalPERS' conduct, to wit: he accepted  
22 employment at Watermaster believing that his Watermaster salary was PERSible and he then  
23 retired from CalPERS with this understanding and thereby ended his career, only to find that he  
24 would be receiving a far smaller pension allowance from CalPERS than he had been promised.

25 If those estoppel elements are established against the government, the court must then  
26 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the  
27 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,  
28 400-401.) As the doctrine of equitable estoppel states, justice and right require that CalPERS be

1 estopped from now disallowing use of Alvarez's Watermaster salary in the calculation of his  
2 retirement pension.

3 **XIV. CalPERS Breached Its Fiduciary Duties Owed to Alvarez**

4 Under California law, a breach of fiduciary duty includes (1) the existence of fiduciary  
5 relationship giving rise to fiduciary duty; (2) breach of that duty; and (3) damage proximately  
6 caused by the breach. (*Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.* (C.D. Cal. 2006) 436  
7 F.Supp.2d 1095.)

8 **XV. CalPERS Is Barred By Laches**

9 CalPERS has known since it first contracted with Watermaster to provide pension  
10 benefits to Watermaster's employees that Watermaster is a creation of the San Bernardino  
11 County Superior Court, and that Watermaster operates pursuant to rules and regulations  
12 established by the Superior Court. CalPERS had sufficient information in its possession from the  
13 outset to know that it might later disallow the use of Watermaster salaries approved in  
14 confidential session of the Watermaster Board pursuant to explicit Superior Court authorization  
15 to conduct meetings concerning personnel matters and Watermaster contracts in this manner.

16 **CONCLUSION**

17 Alvarez is entitled to the correct pension calculated based on his \$228,000 annual salary  
18 at Watermaster. He is also entitled to full service credit for the year of employment he served at  
19 Watermaster.

20 *Respectfully submitted,*

21 Dated: July 11, 2016

22 By: John Michael Jensen <sup>SS</sup>  
23 John Michael Jensen,  
24 Attorney for Respondent Desi Alvarez



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PROOF OF SERVICE

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 Law Offices of John Michael Jensen, 11500 West Olympic Blvd, Suite 550, Los Angeles, CA 90064-1524.

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

**Respondent Desi Alvarez's Post Hearing Brief**

By placing the document (s) listed above in a sealed envelope (s) and consigning it First Class Mail through the U.S. Postal Service to the address (es) set forth below:

Preet Kaur, Staff Attorney  
CalPERS Legal Office  
California Public Employee Retirement System  
P.O. Box 942707  
Sacramento, CA 94229-2707

Bradley J. Herrema  
Brownstein Hyatt Farber Schreck, LLP  
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Los Angeles, CA 90067

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 Los Angeles, California

  
Griselda Montes De Oca