PAUL G. MAST (CA Bar No. 28390)
[redacted]
Telephone: [redacted]
Email: [redacted]

Respondent

**BOARD OF ADMINISTRATION**

**CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

| | |
|---|---|
| In the matter of the Amount of Proper Benefits Payable to<br><br>PAUL G. MAST, Judge, Ret. | AGENCY CASE NO. 2010-0825<br><br>OAH NO. 2015-030996<br><br>**RESPONDENT'S TRIAL BRIEF**<br><br>Hearing Date: November 30, 2015<br>Hearing Location: Los Angeles, CA |

## INTRODUCTION

The Declarations of Paul G. Mast and Marci G. Mast are attached hereto and incorporated herein as if fully set forth.

There are two primary issues to be decided at this hearing.

## FIRST ISSUE: RESPONDENT IS DEEMED TO HAVE RETIRED PURSUANT TO GOVERNMENT CODE §§75025 AND 75033.5 AND CLAIMS UNPAID RETIREMENT FOR THREE YEARS

Paul Mast (Respondent) qualified to retire on his 60th birthday pursuant to Government Code section 75025 (GC §75025)(Exhibit A), as provided for by Government Code section 75033.5 (GC §75033.5)(Exhibit B). Petitioner (JRS) began Respondent's deferred retirement benefits on his 63rd birthday.

The Supreme Court states: "When a retiree has a choice between retiring under one of two retirement plans, he/she must be given a clear informed choice before making a binding election." *Hittle v. Santa Barbara County Employees' Retirement Assn. (1985) 39 Cal.3d 374, 384, 216 Cal.Rptr. 733 (Hittle.)*

Petitioner was obligated to notify Respondent and to give him a clear informed choice of his right to receive deferred retirement benefits beginning on his 60th birthday; Petitioner failed to do so. Respondent is entitled to unpaid deferred retirement benefits for the three-year period from his 60th to his 63rd birthdays.

## SECOND ISSUE: RESPONDENT CLAIMS UNPAID DEFERRED RETIREMENT BENEFITS PURSUANT TO THE SETTLEMENT AGREEMENT

In 1995 Respondent claimed that he was entitled to cost-of-living adjustments (COLA) on his retirement benefits. Respondent filed a claim; Petitioner denied said claim; Respondent appealed the denial; and proceedings began before the Office of Administrative Hearings (OAH). During those proceedings, the parties settled all issues pursuant to The Settlement Agreement entered into between the parties. Petitioner has breached said Agreement by failing to apply the proper COLA throughout the years.

Respondent has not breached the Agreement. An unpaid amount of deferred retirement benefits is due to Respondent.

**INTEREST**

Interest is payable on all amounts due pursuant to both the First and Second Issues, in accordance with *Olson v. Cory, 35 Cal.3d 390 197 Cal.Rptr. 843 (1983) (Olson III)*. The rate of interest is 10 percent per annum compounded on a daily basis.

**STATUTE OF LIMITATIONS**

Pursuant to Government Code section 20164 (b)(2), (GC §20164 (b)(2)), no statute of limitations applies to these claims.

**RESPONDENT IS DEEMED TO HAVE RETIRED AT AGE 60, MAY 28, 1992 PURSUANT TO GOVERNMENT CODE §§75025 AND 75033.5. RESPONDENT CLAIMS UNPAID RETIREMENT FOR THREE YEARS**

Respondent's biographical data is undisputed: Respondent was born on [redacted]; began judicial service in November 1965 at age 33; his judicial service continued until he retired from active judicial service in January 1979. If he had remained on the bench, he would have served more than 20 years prior to his 60th birthday.

Pursuant to the California Constitution, article XVI, section 17, Petitioner owed Respondent a fiduciary duty. Said fiduciary duty included paying retirement benefits as required by law.

Pursuant to *Hittle,* Petitioner was required to give information to enable Respondent to make a clear informed choice prior to making a decision between retiring under one of two retirement plans. Respondent was not given information to enable him to make a clear informed choice that he could have begun receiving retirement benefits on his 60th birthday. (The fiduciary duty and the *Hittle* case are discussed fully, *infra.)*

**GOVERNMENT CODE §75033.5**

GC §75033.5 (Exhibit A) states (in part):

> **Notwithstanding any other provision of this chapter**, any judge with at least five years of service, may retire, and upon his or her application therefor to the Judges' Retirement System after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 **had he or she remained continuously in service** as a judge up to that age, receive a

> retirement allowance based upon the judicial service as a judge of a court of record, with which he or she is credited, in the same manner as other judges. . . . (Emphasis supplied.)

In addition to the portion of the statute above, GC §75033.5 permits a judge or justice who has less than 20 years of service to take a deferred retirement prior to reaching his or her 70th birthday, receiving benefits at 3.75 percent per year of service, with benefits to begin at age 63 or at time of retiring, if he or she retires after age 63.

**GOVERNMENT CODE §75025**

GC §75025 (Exhibit B) states, in part:

> Every judge who has the age and service qualifications specified in one of the following subdivisions, and who is not ineligible for retirement under Section 75026, shall be retired for service upon filing notice of retirement with the Judges' Retirement System, specifying the date upon which his or her retirement is to become effective: . . . (h) **Age 60, with an aggregate of 20 years of service as a judge.** (Emphasis supplied.)

In accordance with GC §75025 (Exhibit B), provided for in GC §75033.5 (Exhibit A), Respondent was eligible to begin receiving retirement benefits on his 60th birthday, May 28, 1992. Petitioner, however, did not begin paying retirement benefits to Respondent until his 63rd birthday, May 28, 1995.

As provided for by GC §75033.5, Respondent had more than five years of judicial service prior to the end of his judicial service in January 1979. If Respondent had remained continuously in judicial service after January 1979, in November 1985, at age 53, he would have qualified for retirement at age 60. Pursuant to its fiduciary duty to Respondent and pursuant to the *Hittle* case, *infra*, Petitioner had a duty to advise Respondent of his right to begin receiving retirement benefits on his 60th birthday. Petitioner failed to do so.

**LUI OUTLINE**

Justice Edmund Lui, Court of Appeal, Second Appellate District, prepared an *Outline of the Judges' Retirement System*. In the Cover Letter accompanying the Outline he stated that the Outline was "utilized at the California Judicial College in connection with the Retirement and Benefits Seminar I teach annually."

The Cover Letter and Page 11 of the *Outline of the Judges' Retirement System* are attached as Exhibit C. The entire *Outline of the Judges' Retirement System* including the Cover Letter will be presented at the hearing if desired.

In said Cover Letter Justice Lui also states: "I would like to acknowledge Sue Myers, the Manager of the Judges' Retirement System, for her assistance in editing this outline."

The relevant portion of Justice Lui's Outline appears on Page 11 as follows:

> PART SIX: EXAMPLES OF RETIREMENT ALLOWANCE COMPUTATION
>
> Fact Situation No. 1:
>
> Judge No. 1 assumes the bench for the first and only time at age 34 serving 12 continuous years. Judge No. 1 elects deferred retirement under § 75033.5 at age 46. Since the judge has not served 20 years, Judge No. 1 is not eligible to receive an allowance until the 63rd birthday which will be equal to 45% allowance.
>
> Under § 75033.5, Judge No. 1 may 'upon his application therefor to the Judges Retirement System after reaching the age which would have permitted him to retire for age and length of service under § 75025 had he remained continuous in service as a judge up to such age, receives a retirement allowance based upon the judicial service as a judge of a court of record, with which he is credited, the same manner as other judges . . . .' **Under this section, if Judge No. 1 had served as a judge for 20 years, Judge No. 1 would have retired with 20 years of service at age 54 and would have received the retirement allowance at age 60.** (Emphasis supplied.)

This part of Justice Lui's outline discusses GC §75033.5, the section relating to deferred retirement. A judge taking deferred retirement pursuant to GC §75033.5 generally cannot receive retirement benefits until his 63rd birthday (see the first paragraph above). However, an exception to the general rule as stated in the Fact Situation, *supra*, is stated more completely in the second paragraph of GC §75033.5, as follows:

> Notwithstanding any other provision of this chapter, any judge with at least five years of service, may retire, and upon his or her application therefor to the Judges' Retirement System after reaching the age

> which would have permitted him or her to retire for age and length of service under Section 75025 had he or she remained continuously in service as a judge up to that age, receive a retirement allowance based upon the judicial service as a judge of a court of record, with which he or she is credited, in the same manner as other judges. . . .

This is the subject of the second paragraph of Part Six, Fact Situation No. 1 of the Lui Outline wherein Justice Lui states, ". . . Judge No. 1 would have retired with 20 years of service at age 54 and would have received the retirement allowance at age 60."

This is the exact description of the retirement benefits Respondent should have received, in that he "would have retired with 20 years of service at age 53 and would have received the retirement allowance at age 60."

Respondent began receiving his retirement allowance at age 63. Petitioner should have advised Respondent that he had the option of receiving benefits at age 60 rather than at age 63. The benefit payments would have been the same in either case (49.4572%).

**LETTER OF NOVEMBER 16, 1978**

Respondent, while still a sitting judge, received a letter dated November 16, 1978 (Exhibit D page 1) from the Office of State Controller Kenneth Cory, the Administrator of the Judges' Retirement System, which stated (in part):

> §75033.5 provides that a judge with at least 5 years of service may retire and upon attaining the age at which he would have been eligible to retire for age and length of service under §75025, receive an allowance. The allowance is 3.75% multiplied by the number of years and fractions of years of service with which the retired judge is entitled to be credited at the time of his retirement.

This letter confirms the law that Respondent was entitled to the initiation of benefits at age 60. It does not constitute a notification of Respondent's rights as required by *Hittle, infra,* which states, in part, "When a retiree has a choice between retiring under one of two retirement plans, he/she must be given a clear informed choice before making a binding election."

This letter did not give Respondent a clear informed choice. The letter was written 14 years before retirement benefits should have begun; did not specify that the benefits should begin at age 60; did not include the phrase "had he or she remained

continuously in service as a judge up to that age;" only referred to the length of service under GC §75025; and did not state that if Respondent did nothing, his benefits would begin at age 63.

[The State Controller was the Administrator of the Judges' Retirement System until approximately 1979, at which time the administration was transferred to the Board of Directors of the California Public Employees' Retirement System.]

Included in the documents provided by Petitioner Judges' Retirement System, as part of the file of Respondent, is an undated, handwritten, computation worksheet (Exhibit E), which includes the following notations:

> §75025 5/28/92 (age 60)
>
> 75033.5
>
> calculations of percentage per year, resulting in a total retirement benefit of 49.4572%.
>
> Due 5/28/95 (age 63)

The entry "§75025 5/28/92 (age 60)" makes it clear that Petitioner knew of Respondent's right to have his benefits begin at age 60.

The calculation of the amount of retirement benefits is correct on the memo and is the same under either of the two code sections (3.75% per year = 49.4572%). This percent of benefits payable is agreed to by the parties and is not an issue in this matter.

This memo shows that Petitioner was aware of the option of Respondent to have his benefits begin at age 60 under GC §75025, but chose to ignore it and not advise Respondent that he had the "option" to begin receiving benefits at age 60. Petitioner began Respondent's retirement benefits at age 63.

Respondent uses the word "option," as that is the designation in the *Hittle* case. The choices are to begin receiving retirement benefits at 49.4572% on Respondent's 60th birthday or on Respondent's 63rd birthday. There would be no economic benefit to Respondent in delaying the receipt of benefits for three years.

**LETTER OF JUNE 16, 1994**

On June 16, 1994, approximately one year before Respondent's 63rd birthday and two years after his 60th birthday, Respondent received a letter (Exhibit F) from Jim Niehaus, Retirement Specialist II, Judges' Retirement System, which said in part,

"However, I want to assure you that you will receive the maximum benefits allowable under the retirement law."

The letter shows that Petitioner knew of its fiduciary duty to Respondent, and had a duty to investigate and determine all of Respondent's rights to retirement benefits.

**STATEMENT OF ISSUES**

Petitioner filed a Statement of Issues (Exhibit N page 1) in regard to a claim filed in 1996 by Respondent alleging that he was entitled to COLA retirement benefits (CASE NO.: [redacted] OAH No. L-9605311). This will be discussed *infra*. In said Statement of Issues, **Petitioner** cited GC 75033.5 (page 4, line 10) as follows:

> 75033.5. Not withstanding any other provisions of this chapter, any judge . . . may retire, . . . (and) after reaching the age which would have permitted him or her to retire for age and length of service under section 75025 . . . , receive a retirement allowance based upon the judicial service . . . , with which he or she is credited, in the same manner as other judges, . . . (and) the retirement allowance is an annual amount equal to 3.75 percent of the compensation payable, at the time payments of the allowance fall due, to the judge holding the office which the retired judge last held . . . ." (emphasis added.)[Emphasis was added by Petitioner in the Statement of Issues.]

In an apparent effort (which was successful) to mislead Respondent, the Petitioner extracted from the citation the following language wherever the citation had omissions (. . . ), which Respondent includes below (in bold type) as follows:

> 75033.5. Not withstanding any other provisions of this chapter, **any judge with at least five years of service,** may retire, **upon his or her application therefor to the Judges' Retirement System** (and) after reaching the age which would have permitted him or her to retire for age and length of service under section 75025 **had he or she remained continuously in service as a judge up to that age,** receive a retirement allowance based upon the judicial service **as a judge of a court of record,** with which he or she is credited, in the same manner as other judges, **except as otherwise provided by this section** (and) the retirement allowance is an annual amount equal to 3.75 percent of the compensation payable, at the time payments of the allowance fall due, to the judge holding the office which the retired judge last held **prior to his or her discontinuance of his or her service as judge,, multiplied by the number of years and fractions of years of service with which the retired judge is entitled to be credited at the time of his or her retirement, not to exceed 20 years.** (Emphasis added.)

The extractions by Petitioner could only have been made for the purpose of secreting from Respondent that his retirement benefits should have begun at the time of his 60th birthday instead of his 63rd birthday. This secretion was a clear violation of Petitioner's fiduciary duty to Respondent, as provided for by article XVI, section 17 of the California Constitution, *infra*, as well as contrary to *Hittle*.

**PROPER APPLICATION OF THE LAW**

Other judges who assumed office before their 40th birthday and retired with less than 20 years of service qualified for and received benefits on their 60th birthday.

**JUDGE ROBERT LONDON**

The information below was obtained from Judge London's file provided by JRS and, except for Judge London's birthday, was also provided under the Public Information Act.

Judge Robert London was born [redacted]. He assumed his first judicial office on October 7, 1971 and served until and retired on May 15, 1981 at total of over nine years. He began receiving retirement benefits on April 21, 1993, the day after his 60th birthday.

Judge London received a letter dated May 14, 1981 (Exhibit G) from Terry Kagiyama, Manager, Judges' Retirement System, advising him that he would begin receiving retirement benefits of "31.2259% of the rate of the level of judicial salary then in effect, [which] will commence on April 20, 1993 . . . ."

JRS prepared four internal calculation worksheets regarding Judge London (Exhibit H), one dated April 15, 1993, the others undated. All the worksheets calculated his retirement benefits at 31.2259% and all determined the date for the beginning of his benefits as April 20, 1993, his 60th birthday. One worksheet indicated that he was retiring pursuant to GC §75025 and another that he was retiring pursuant to GC § 75033.5.

## ACTUARIAL CONSIDERATION

The Legislature in enacting this provision of the retirement law followed valid actuarial considerations.

The provision of the retirement law that "any judge with at least five years of service, may retire, and upon his or her application therefor to the Judges' Retirement System after reaching the age which would have permitted him or her to retire for age and length of service under Section 75025 had he or she remained continuously in service as a judge up to that age, receive a retirement allowance based upon the judicial service as a judge of a court of record, with which he or she is credited, in the same manner as other judges" is based upon sound actuarial principles.

Pursuant to GC §75025 it has been actuarially determined that a judge who serves 20 years by his 60th birthday should receive full retirement benefits of 75% for life.

Under the above-quoted provision of the law it has been provided, and it has been actuarially determined, that a judge who serves 19 years on the bench by his 59th birthday is qualified to receive his pension of 71.25% benefits on his 20th birthday. In addition to his normal contributions for 19 years, ongoing interest is actuarially considered for all of his contributions including during the final year before his 60th birthday.

In the case of a judge taking the bench at age 39 and thereafter serving 12 years until he or she is 51 years old, in addition to his or her contributions into the retirement fund, his or her contributions earn interest for nine additional years until he or she is 60. His or her total pension benefit is 45% when the benefits start on his or her 60th birthday.

Respondent took the bench when he was 33 years old and served 13 plus years until he retired from the bench at age 46. For the next 13 plus additional years his contributions earned interest and at age 60 he qualified to retire at a benefit rate of 49.4572%. This was part of the actuarial determination when GC § 75025 and GC §75033.5 were initially enacted.

## PETITIONER IS A FIDUCIARY IN RESPECT TO RESPONDENT

The fiduciary relationship of Petitioner with Respondent is established in the California Constitution and confirmed by case law.

California Constitution article XVI, section 17 states (in part):

> b. The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. **A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.** (Emphasis supplied.)

*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29 [115 Cal. Rptr. 2d 151], states:

> (a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will [95 Cal. App. 4th 40] assure prompt delivery of benefits and related services to the participants and their beneficiaries. . . .

## RETIREE MUST BE GIVEN A CLEAR INFORMED CHOICE

When a retiree has a choice between retiring under one of two retirement plans, he or she must be given a clear informed choice before making a binding election. Respondent was not given a "clear informed choice." See the Declaration of Paul G. Mast, attached hereto.

*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 384, 216 Cal.Rptr. 733. states:

> Hittle contends that the trial court erred in finding that he knowingly waived his right to apply for disability retirement. The trial court's finding that Hittle was not ignorant of this right when he withdrew his retirement contributions was based on the court's determination that the handwritten notation on the second form letter Hittle received from SBCERA - which provided simply, 'If you have filed, or

> intend to file for disability retirement you should not withdraw the above contributions' - constituted 'specific notice' to him of his right to apply for disability retirement. We conclude that there is no substantial evidence to support the trial court's findings that SBCERA adequately informed Hittle of the existence of his right to apply for disability retirement and that Hittle was therefore apprised of this right when he withdrew his retirement contributions. Accordingly, we conclude that Hittle's withdrawal of his retirement contributions cannot be deemed to constitute a valid waiver of his right to apply for disability retirement. [*Id.* at 389]
>
> [I]t is settled law in California that a purported 'waiver' of a statutory right is not legally effective **unless it appears that the party executing it had been fully informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation.**' (Citations omitted.) '**The first requirement of any waiver of statutory or constitutional rights, of course, is that it be knowingly and intelligently made.**' (Citation omitted.) ['the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived']; and (Citation) ['One can waive only that of which he is aware and cannot waive that of which he is ignorant'].)
> '**The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.**' [Citation omitted.] **This is particularly apropos in cases in which the right in question is one that is 'favored' in the law....**' (Citation omitted.) **The right to a pension is among those rights clearly 'favored' by the law.** '[T]he rule [is] firmly established in this state that **pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved.** Pension provisions in our law are founded upon sound public policy and **with the objects of protecting, in a proper case, the pensioner and his dependents** against economic insecurity. ...' (Citations omitted.) [*Id.* at 389 – 390].

Petitioner did not give any notice, and certainly not an adequate notice, to Respondent advising Respondent of his right to receive retirement benefits at age 60. Respondent had not been fully informed of the existence of the right to receive benefits at age 60. Respondent at no time made a knowing and intelligent waiver. Pension rights are clearly favored in the law and must be liberally construed and applied so that

Respondent's rights to retirement benefits as a result of the legislation granting such rights may be achieved. *Hittle, supra.*

The *Hittle* case requires that Respondent be "fully informed of the existence of that right, its meaning, the effect of the 'waiver' presented to him, and his full understanding of the explanation." This clearly was not done.

The *Hittle* case is applicable to Respondent's election whether to retire at age 60 or to retire at age 63, pursuant to GC §75025 as provided by GC §75033.5. There was no notification to Respondent of his right to receive retirement benefits at age 60, and there could not have been an intelligent waiver. There was no waiver of statutory or constitutional rights knowingly and intelligently made.

If there is any doubt, ambiguity, or question whether there was a notice or a waiver, the burden is on the Petitioner "to prove . . . by clear and convincing evidence that does not leave the matter to speculation . . . .[D]oubtful cases will be decided against a waiver." (*Hittle, supra.)*

The amount of unpaid retirement benefits for the period May 28, 1992 to May 28, 1995, including interest is calculated on the attached Exhibit I. The amount due is $1,623,791.47 if paid by January 30, 2015 and thereafter (or before) as shown on Exhibit I. The amount due on December 1, 2015 is $1,597,536.58.

**WITHDRAWAL AND REPAYMENT IN THE RETIREMENT FUND**

Petitioner has noticed the intention of introducing a document into evidence showing that Respondent in 1975 withdrew his contributions to the retirement fund (which Respondent did). Respondent in 1979 re-deposited such funds, with interest for the time during which they were withdrawn. This is entirely immaterial and irrelevant to these proceedings; however, Respondent will reply to the apparent allegations of Petitioner. Petitioner's brings forth the erroneous trial court ruling in *Hittle,* which was reversed by the Supreme Court in *Hittle.*

Respondent was appointed to his first judicial office at the age of 33. If he had continued to serve in a judicial office until his 60th birthday, he would have contributed to the retirement fund for 26 years. Benefits would have only accrued during his first 20 years of service. As stated Respondent's letter of January 2, 1975 to the Judicial Council of California, the State Controller, and the Secretary of State of California (Exhibit D

page 3), the only way to correct this inequity was to withdraw the contributions made into the retirement fund before beginning a subsequent term. This was not an uncommon practice for judicial officers.

In response Respondent received a letter from the State Controller dated January 8, 1975 (Exhibit D page 5) which stated in part, "Section 75020.5, Government Code provides that after a judge has withdrawn his accumulated contributions . . . such service shall not count in the event he later becomes a judge again, until he pays into The Judges' Retirement Fund the amount of accumulated contributions withdrawn, plus interest . . . "

Upon retiring from judicial service Respondent received a letter dated November 16, 1978 from the State Controller (Exhibit D page 7), stating the amount of contributions and interest that Respondent would have to re-contribute to the retirement fund to qualify for retirement benefits. Respondent did as instructed in the letter.

A internal memo of JRS in regard to the calculations of repayment of the accumulated retirement benefits plus interest and a Receipt therefore is attached (Exhibit D page 7).

Government Code §20750 states:

> . . . a member may file an election with the board to redeposit in the retirement fund, in a lump sum or by installment payments, (1) an amount equal to the accumulated contributions that he or she has withdrawn . . . and (2) an amount equal to the interest that would have been credited to his or her account to the date of completion of payments had the contributions not been withdrawn . . . .

Government Code §20752 states:

> (a) A member of the Judges' Retirement System . . . (c) A member who elects to redeposit under this section shall have the same rights as a member who has elected pursuant to Section 20731 to leave his or her accumulated contributions on deposit in the fund.

Government Code §75028.5 states:

> After a judge has withdrawn his or her accumulated contributions upon discontinuance of his or her service, that service shall not count in the event he or she later becomes a judge again, until he or she pays into the Judges' Retirement Fund the amount of accumulated contributions withdrawn by him or her, plus interest thereon at the rate of interest then being required to be paid by members of the Public Employees' Retirement System under Section 20750 from the date of withdrawal to the date of his or her payment.

The withdrawal and repayment of the funds could not have been deemed to constitute an election not to qualify to receive deferred retirement benefits at age 60, *supra,* as there was no notification of clear informed choice, as stated in *Hittle, supra.*

The *Hittle* case states, *supra*:

> We conclude that there is no substantial evidence to support the trial court's findings that SBCERA adequately informed Hittle of the existence of his right to apply for disability retirement and that Hittle was therefore apprised of this right when he withdrew his retirement contributions. Accordingly, we conclude that Hittle's withdrawal of his retirement contributions cannot be deemed to constitute a valid waiver of his right to apply for disability retirement. [*Id.* at 389]

This is exactly the case at bar. Both cases involve withdrawing retirement contributions, although Respondent already repaid the funds, plus interest. The difference is only in substituting "the right to receive deferred retirement benefits at age 60" for "apply for disability retirement." This is no difference at all in that it merely states the result of the action, not the question of a valid waiver of a right without giving notice or informing the party of the facts to make a clear informed choice.

As shown herein, once withdrawn funds have been repaid, the benefits are the same as if the funds had never been withdrawn.

## JUDGE PHILIP SCHWAB'S LITIGATION

On December 18, 1986, Margaret J. Hoehn, Staff Counsel to the Judges' Retirement System, directed an "Addendum to the Legal Opinion Dated September 8, 1986" (attached to a partial Appeal/Request for Hearing) to JRS in regard to Judge

Philip Schwab (Exhibit D Page 9). Judge Schwab had withdrawn his accumulated retirement contributions in January 1985; if he had continued to serve in a judicial office until his 60th birthday, he would have contributed to the retirement fund for more than 20 years. There was no question that Judge Schwab had a right in 1986 to re-contribute to the retirement fund. The issue was the rate of interest. The opinion of the counsel for JRS confirmed in accord with *Marriage of Alarcon* and other cases cited in Judge Schwab's Appeal/Request for Hearing that, "The Alarcon court held that a judge's pension rights may not be reduced or altered at the commencement of a new term of office and further held that a judge's pension rights vest on the commencement of his service."

Respondent's pension rights vested, as did Judge Schwab's, at the commencement of his service and could not be reduced or altered by a withdrawal and a repayment of his retirement contributions to the retirement fund.

## CALCULATION OF UNPAID DEFERRED RETIREMENT BENEFITS FROM JANUARY 1, 1997 TO THE PRESENT IN ACCORD WITH THE SETTLEMENT AGREEMENT

Prior to his 63rd birthday Respondent advised Petitioner that he was entitled to cost-of-living adjustment (COLA) increases on his deferred retirement benefits (Exhibit W). Petitioner denied that Respondent was entitled to COLA increases on his deferred retirement benefits; Respondent filed a claim; Petitioner responded with a determination letter denying the claim; Respondent filed an appeal; and the matter was referred to the Office of Administrative Hearing for determination in 1996, CASE NO.: [redacted] OAH No. L-9605311.

In the 1996 Administrative Hearing JRS filed a Statement of Issues (Exhibit N page 1). Respondent filed a Response to Statement of Issues and Points and Authorities (Exhibit N page 8).

Respondent received a letter dated September 20, 1996 from Maureen Reilly, Senior Staff Counsel (Exhibit O page 1), which states (in part), "This is to confirm in writing, that the Judges' Retirement System (JRS) has accepted the terms of your

settlement offer as outlined in your letter of August 5, 1996. I will shortly draft a Settlement Agreement with a confidentiality clause, for your review and signature."

Respondent's letter of August 5, 1996 (Exhibit O page 2) states (in part):

> Judicial pensioners whose benefits are based on **judicial services terminating while section 68203 provided for unlimited cost-of-living increases in judicial salaries**, acquired a vested right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office **including the judge's or justice's unlimited cost-of-living increases.**

Ms. Reilly stated in her reply letter that the position of Respondent as stated in his brief and in the letter of August 4, 1996 was adopted. The parties agreed that COLA increases were to be paid to Respondent retroactive to the beginning of the time of his receiving deferred retirement benefits and thereafter, with regular benefits and increases paid monthly beginning January 1, 1997.

The parties entered into a written Settlement Agreement (Exhibit O, page 5), which was drafted entirely by Petitioner without consultation with Respondent.

Petitioner computed the COLA for the entire period from 1979 to January 1, 1997 without consultation or input from Respondent. Petitioner did not submit the calculations to Respondent for approval. Although Respondent never saw Petitioner's calculations, Respondent accepted the calculations, and they became an inherent part of the Settlement Agreement.

A retroactive payment was made for the balance of the COLA adjusted monthly benefits for the period after May 28, 1995 to December 31, 1996. Beginning January 1997 cost-of-living adjusted monthly benefits in accordance with the calculations of JRS were made. (Benefit payments for the month are paid on the last day of the month.) No interest was paid on the unpaid benefits between May 28, 1995 and the date of the retroactive payment of those benefits. In accordance with Civil Code §3290 interest for this retroactive payment has been waived.

The initial amount of deferred retirement benefits (January 1997) paid to Respondent was $5,893.83 (Exhibit P page 1). Page 1 of Exhibit P is a letter from Jim Niehaus of JRS states that for the first six months of 1997 the benefits were erroneously paid at $5,720.08 and that a catch up payment was being made to bring the amount of

the benefits paid for the period to $5,893.83 per month. This is confirmed by a schedule provided by Petitioner (Exhibit P page 2). The schedule lists all the benefits received by Respondent from May 1995 until April 2010. Respondent has confirmed that the schedule is correct. The schedule of benefits received (Exhibit P page 2) reveals that from January 1997 until the time JRS stopped making COLA to the benefits, *infra*, the COLA was made effective January of each year instead of September of each year as dictated by GC §68203.

**INITIAL COMPUTATION BY JRS PRIOR TO JANUARY 1, 1997**

As stated above, the initial payment for January 1997, $5,893.83 (Exhibit P), and the computation of JRS was incorporated into the Settlement Agreement, and must be the basis for further COLA adjustments. This is true even though the calculations may have been wrong. As stated in Exhibit L, JRS used the Consumer Price Index (CPI) Annual Average computation not the December-to-December computation. This resulted in a lower computation of benefits due and a lower starting point for the COLA benefit amounts. Respondent did not question the calculations and has accepted the starting point at all times. Respondent accepted the calculations. As they are an integral part of the Settlement Agreement Respondent does not claim that any such errors should be corrected.

JRS, through Pamela Montgomery, the Manager of The Judges' Retirement System, spent from 2006 through 2010 calculating and recalculating the benefits due Respondent. JRS recalculated using all different categories of CPI. JRS claims that their original 1996 calculations, which were part of the Settlement Agreement, should be recalculated.

If there were an error made by JRS in its original calculation of the amount of COLA benefits that were due and the initial January 1, 1997 benefit payment made, the error may no longer be considered, as pursuant to Government Code section 20164(b)(1) there is a three year statute of limitation for JRS during which JRS may correct errors. The three-year period has long-since passed.

## COMPUTATION OF BENEFITS DUE AFTER JANUARY 1, 1997

In order to properly compute the deficiency in the amount of deferred retirement benefits due Respondent after January 1, 1997, it is necessary to first determine when the adjustments must be made and to identify the proper CPI Index (schedule) to use.

*Olson v. Cory, I,* 27 Cal.3d, 636 P. 2d 532 (1980), (*Olson I*) states in its conclusion:

> However, salaries for judges and justices while serving a protected term will be increased above the 1976 base on 1 September each year beginning 1977, by the percentage increase in the CPI for the prior calendar year.

Government Code Section 68203 as amended in 1969 (GC §68203 1969 Amendment) provided for judicial salary increases (COLA adjustments) to be applied annually on September 1, based on the CPI index of the State of California for the previous year as follows:

> In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year.

Pursuant to GC §68203 1969 Amendment Respondent was and is entitled to have his deferred retirement benefits adjusted by the COLA for the period of his service from the date of his appointment to office until the end of the final term served which began before the first Monday in January 1977 (the protected period). This constitutes Respondent's entire service. As will be discussed below, COLA for the protected period is completely and irrevocably vested.

## 1976 AMENDMENT TO GOVERNMENT CODE SECTION 68203

Government Code Section 68203 (GC §68203 1976 Amendment) was amended in 1976, effective January 1, 1977 as follows:

> On July 1, 1978, and on July of each year thereafter the salary of each justice and judge named in sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%).

GC §68203 1976 Amendment provided for salary increases (COLA adjustments) to be applied annually on July 1 and placed a maximum COLA adjustment of 5% on judicial salaries and therefore on judicial pensions based upon judicial salaries that were vested after the protected term under GC §68203 1969 Amendment.

The Legislature has the ability to change the law in regard to judicial salaries and thus judicial pensions as long as it is not done to the detriment of the judicial pensioners and their heirs. Adjusting the effective date of the COLA adjustments is not to the detriment of judicial pensioners, and is thus a valid change in the law and is binding on Respondent and the Judges' Retirement System.

When part of a statute may be held unconstitutional as applied to a particular party, if the statute can be bifurcated, the balance of the statute must be applied.

The balance of the section is not material because it does not apply to the protected period in this case. The protected period will be discussed further below.

The 1976 Amendment to GC §68203 was held unconstitutional as to judicial pensioners who earned pension benefits during their protected period. The right to said COLA increases in pension benefits earned during the protected period were completely vested (*Olson I*).

GC §68203 1976 Amendment provided for the COLA to be effective on benefits for the period beginning in July of each year rather than September of each year as the prior law provided. If the 1976 Amendment were to be bifurcated and the July date applied to Respondent's benefits, it would be advantageous to Respondent. Respondent

does not make that claim. It is mentioned herein only as part of the cause for the confusion of JRS as to when and how COLA were to be made, as will be discussed *infra*.

Thus, GC §68203 1969 Amendment provides that the increase in benefits would take place each year on September 1 (the benefit payment made on the last day of the month). The increase would be for the percentage increase in the Consumer Price Increase (CCPI) "for the prior year."

It is now agreed between Respondent and Petitioner that "for the prior year" means the CCPI computation for December-to-December of each year. This has been a subject of confusion in the past.

This confusion at JRS existed as late as December 6, 2007, when Pamela Montgomery, who had been attempting to recalculate the benefits due Respondent in order to avoid paying Respondent the benefits owed, wrote an email to Respondent (Exhibit J) which said (in part), "That would be the annual CCPI for the previous calendar year, not the CCPI in September of the year of adjustment." After January 1, 1997, JRS had apparently used (without the knowledge of Respondent) the September-to-September CCPI, which was the wrong CCPI.

Ms. Montgomery was wrong, however, when she said the proper CPI would be the "annual CCPI." Although by normal use of language one would expect that the "annual CCPI" would be the yearly change in CPI, it is not. The "annual CCPI" is the average of the CCPI for 12 months of the particular year. The yearly CCPI is the change from December-to-December for each year. That the "annual CCPI" is an average of the months is shown on Exhibit K.

According to an internal memo of Petitioner, from Patrick Gale to Pamela Montgomery (Exhibit L page 1), the JLVFF, which was apparently the department of JRS that did the calculation, used the Annual calculation rather than the December-to-December calculation in making the calculations from 1977 thru 1996. Using the annual average change in the CCPI during any particular year rather than the December-to-December change would be to the detriment of Respondent, as in most years the annual average would be more consistent with the July-to-July change. Respondent, however, accepted the calculations of JRS subsequent to the Settlement Agreement and those calculations became an inherent part of the Settlement Agreement. Respondent does

not make any claim to additional benefits caused by the use of Annual CCPI in the calculations of JRS from May 28, 1995 to January 1, 1997, which became part of The Settlement Agreement. Respondent's calculations (Exhibit Q) of the retirement benefits that should have been paid for the period after January 1, 1997, uses the proper CCPI time category (December-to-December) and the proper CCPI-U Index (All Urban Consumers).

In January 25, 2008 emails to and from Patrick Gale and Frank Grace (both of JRS), referring to the initial calculations of COLA made by JRS during 1996, which became part of the Settlement Agreement (Exhibit R), the conclusion is, "I cannot confirm any of the indexes shown above by the Controller's office in 1980."

Part of the confusion in identifying whether the CCPI index used by the Controller in the 1970's was the All Urban Consumers CCPI-U or one of the Wage Earners and Clerical Workers CCPI-W Indexes is that prior to about 1983 the difference was minimal. (There were also CCPI-W indexes for San Francisco, Los Angeles, and San Diego.) Around 1983, which encompasses all the times relevant in this matter, and thereafter the Controller used CCPI-U, All Urban Consumers (Exhibit L, page 2). It is not relevant herein what CCPI the Controller used and whether it was correct or incorrect. The correct CCPI was that which was determined to be the correct CCPI by the Supreme Court in *Olson I, infra.*

In the years immediately following 1996 JRS was making adjustments on other timetables, sometimes in January and sometimes in July. Respondent never knew of or considered the time of adjustments. Respondent researched neither the proper time of adjustment nor whether the proper CCPI schedule was being used. Respondent trusted JRS to do it correctly. Any errors that JRS made after January 1, 1997 are automatically corrected in the accounting presented by Respondent (Exhibit Q).

The confusion of JRS is understandable. The 1976 Amendment to GC §68203 stated that the adjustments for judicial salaries should be made in July. Members of the Legislature also received COLA; however, their COLA was effective in January. Personnel at JRS apparently were confused by these laws and from time to time applied the wrong adjustment dates. Respondent was unaware of any of the confusion.

The Supreme Court in *Olson I* stated:

In amending section 68203 the Legislature attempted in effect first to maintain judicial salaries at the 1 September 1976 level for 22 months, and then to limit prospective increases beginning on 1 July 1978 to 5 percent regardless of the actual increase in the California Consumer Price Index (hereinafter CPI). (See fn. 1, *ante*.) Without the amendment judges would have been entitled to a 5.327 percent increase beginning on 1 September 1977. *Olson v. Cory* I, at p. 537.

Footnote 1 states:

Prior to amendment in 1976 Government Code section 68203 provided in pertinent part: '... on September 1 of each year ... the salary of each justice and judge ... shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year.' (Stats. 1969, ch. 1507, § 1.)

Section 68203, effective 1 January 1977, provides in pertinent part: 'On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge ... shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge ... by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%).' (Stats. 1976, ch. 1183, § 4.)

## THE SUPREME COURT RULED THAT THE PROPER CONSUMER PRICE INDEX TO USE WAS CCPI-U, ALL URBAN CONSUMERS

California Consumer Price Indexes (CCPI) for 1975 and 1976 (Exhibit K page 2):

| | | CCPI-U | YEARLY CHANGE | CCPI-W | YEARLY CHANGE |
|---|---|---|---|---|---|
| 1976 | Annual | 55.6 | 6.3% | 55.9 | 6.3% |
| 1976 | Dec. | 57.1 | 5.4% | 57.5 | 5.5% |
| 1975 | Annual | 52.3 | | 52.6 | |
| 1975 | Dec. | 54.2 | | 54.5 | |

The above schedule shows the yearly change for the Annual Average and December changes from 1975 to 1976 in both the CCPI-U and CCPI-W Indexes.

A reference by the Supreme Court to the 5.327 percent increase shows that the Court was referring to the CCPI (U) of December 1976 (December 1975-to-December 1976). The December figure is to be distinguished from the "Annual" percentage. The "Annual" percentage is the average of the monthly totals for the year; it is not the amount of increase for the prior calendar year.

On the above Schedule the numbers are reported to one decimal place. The yearly change for CCPI-U December 1976 is reported as 5.4 percent (rounded to one decimal place). However, if a manual calculation is made from the original figures of the CPI (above), the result is 5.350554 percent. The opinion of the Supreme Court states 5.327 percent. [The slight discrepancy between the Supreme Court's 5.327 percent and the manually calculated 5.350554 percent is caused by the Supreme Court calculations being based on more accurate figures (the index being carried out to more decimal points) than are available to Respondent.] The yearly change for CCPI-W, manually calculated is 5.5 percent.

According to the records of the JRS, the monthly salary of a municipal court judge in 1976 was $3,769.58. Increasing that salary by the Supreme Court percentage (5.327%), the September 1, 1977 salary would be $3,971.27, whereas if it were adjusted by the manually calculated increase (5.350554%), the September 1, 1977 salary would be $3,970.39. The difference between the two calculated increases is 88 cents. [If the CCPI-W yearly change of 5.5 % (which is also the manually computed percentage of change) were used to calculate the change, the monthly salary would be $3976.90, a difference of $5.64.] The Supreme Court, therefore, determined that the Legislature meant when it said "California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year" was CCPI-U, All Urban Consumers, for December of each year.

CCPI-U, All Urban Consumers, is all-inclusive for all urban residents of California. Wage Earners and Clerical Workers is a sub-class of residents. Judges and justices are clearly not within that subclass.

As stated on Exhibit L page 1, "Both JLVFF and Judge Mast used the California

CPI-U index table." JLVFF (JRS) computed the benefits that should have been paid to Respondent prior January 1, 1997 using All Urban Consumers (CCPI-U). Respondent uses the CPI for All Urban Consumers (CCPI-U) in the accounting of unpaid retirement benefits due after January 1, 1997 (Exhibit Q).

In regard to the Legislators' COLA, in the 1970's the State Controller apparently used an average of Wage Earners and Clerical Workers for Los Angeles and for San Francisco (Exhibit L page 2). (San Diego was apparently left out.) Exhibit L page 2 shows that during most of the time the Controller was using those CPI indexes, there was no material difference between those indexes and the index for All Urban Consumers (CCPI-U). Exhibit L page 2 also shows that in 1984 and at all times thereafter the Controller used the index for All Urban Consumers (CCPI-U) in regard to Legislators' COLA.

Petitioner in "recalculations" multiple times during 2006 to 2010 at the direction of Pamela Montgomery, Manager of JRS, calculated using all of the various CPIs and now advocates using Wage Earners and Clerical Workers. This is wrong.

The records of JRS reveal that at some unknown date, probably in the late 1990's, a large typed memo (Exhibit M) was generated that said "REMINDER! Subsequent to Court Ruling, Judge Paul Mast receives the same COLA application as the LRS members." This was not correct, as the adjustment dates differed between Respondent and Legislators. This accounts for part of the confusion in the office of JRS.

## THE INITIAL COMPUTATION BY JRS IS BINDING ON BOTH PARTIES

Respondent's Notice of Appeal in 2011, leading to this proceeding, as well as the Statement of Issues filed by Petitioner, and the Response to the Statement of Issues filed by Respondent, all show that the computation of JRS during 1996 leading up to the payment of arrearages before January 1, 1997 and the initial benefit payment in January 1, 1997 were an inherent part of the Settlement Agreement and binding on both parties.

In Respondent's Notice of Appeal, dated May 31, 2011 (Exhibit V page 1 ff.), he stated the following, which is still true and correct:

JRS calculated according to the Settlement Agreement. Mast has never

seen an actual worksheet. Mast has not been able to obtain a chart of the three salary classes paid at the time of retirement. Mast was not informed of any numbers, charts, or worksheets used in calculating the recalculated retirement allowance. Mast was only informed of the calculated amount . .

The parties relied on the 1996 Settlement Agreement as fully settling their dispute. Mast relied on the Settlement Agreement. JRS relied on the Settlement Agreement. JRS continued to rely on it in subsequent years. JRS had sole responsibility for calculation of the recalculated retirement allowance. Mast was not contacted or consulted. Mast did not offer input. The JRS worksheets were not provided to Mast . . .

When JRS computed the recalculated retirement allowance and accrued arrearages, JRS presented its conclusions to Mast prior to the Settlement Agreement. The JRS calculations were used as the basis for the Settlement Agreement. The amounts were acceptable to both JRS and Mast . . .

Demand was made by JRS during the negotiations that Mast waive the accrued arrearages. Mast declined to waive the accrued arrearages, and the accrued arrearages were paid at or about the time of the signing of the Settlement Agreement. JRS and/or its attorneys drafted the entire Settlement Agreement . . .

Mast specifically remembers this because he was asked to waive the arrearages in a specific amount. [This sentence is from page 4 of the Notice of Appeal.]

Civil Code Section 1523 provides:

> Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction.

Said attempt by JRS to recalculate ab initio the monthly benefits [benefits] which were recalculated by JRS prior to creation of the 1996 Settlement Agreement is unlawful in that the agreed upon amounts and subsequent Settlement Agreement were an Accord and Satisfaction; any such recalculation is barred on the grounds of the rules governing rescission of agreements, laches, and estoppel. .

A party wishing to rescind an agreement must use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability. . . .

A portion of California Civil Code Section 1691 addresses the issue of timeliness as follows: ... to effect a rescission a party to the contract must,

promptly [emphasis added] upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind...

The Court in Gestad v. Ellichman (124 Cal.App.2d 831, 269 P.2d 661, April 29, 1954) said:

Section 1691, Civil Code, requires the party who wishes to rescind an agreement to use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability. In such a suit acting promptly is a condition of his right to rescind, Victor Oil Co. v. Drum, 184 Cal. 226, 243, 193 P. 243;Neff v. Engler, 205 Cal. 484, 488, 271 P. 744, and therefore diligence must be shown by the actor whereas in other actions laches is an affirmative defense to be alleged by the defending party. Absence of explanation of delay may even cause a complaint for rescission to be demurable. Bancroft v. Woodward, 183 Cal. 99, 109, 190 P. 445. A delay of more than one month in serving notice of rescission requires explanation. Campbell v. Title Guarantee Etc. Co., 121 Cal.App. 374, 377, 9 P.2d 264. The diligence is required throughout and it applies as well to the time a person will be held aware of his right to rescind as to the time he will be held to have discovered the facts on which that right is based. Bancroft v. Woodward, supra, 183 Cal. 99, 108, 190 P. 445; First Nat. Bk. v. Thompson, 212 Cal. 388, 401, 298 P. 808. In the instant matter JRS had full knowledge of the facts, had full knowledge of the appropriate CPI, had full knowledge of the law, and had the ability at any time to recalculate the retirement benefits. The failure to do so for fifteen years clearly precludes their ability to rescind or attack the Settlement Agreement. As stated above the Settlement Agreement incorporated the calculations of the retirement benefits and arrearages that were integral to the Settlement Agreement....

Changing the Settlement Agreement is Barred by Laches

The principle of laches is an equitable doctrine that recognizes the necessity of the finality and sanctity of agreements. The courts have held uniformly that even relatively short delays in seeking to rescind or change an agreement is barred by laches. In the case of Fabian (infra), following, three years after the agreement and one and one-half years after the party was put on 'inquiry' the party attempted to rescind, the Court held that rescission was barred by laches. The Mast 1996 Settlement Agreement was created fifteen years ago. Ms. Montgomery would argue that she does not want to rescind the agreement; she wants recalculate the amount due under the Settlement Agreement. She would be wrong. The calculation done by JRS in 1996 was both part and parcel of the Settlement Agreement and the underlying factor of the entire Settlement Agreement. To recalculate is to destroy the essence of the Settlement Agreement. It is therefore an attempt to rescind the Settlement Agreement. Further, as shown in Fabian, it is not

material and should not be considered whether Mast was prejudiced by the fifteen-year delay. 'To bar an action for rescission on the ground of laches it is unnecessary to show that the defendants were prejudiced by the delay.' Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779, 781. In this case the complaint dated and filed July 9, 1951, alleges that plaintiff disavows and rescinds the agreement 'hereby' which causes the rescission to be nearly three years after the agreement and more than one and one-half years after she had shown by her letter to have been put on inquiry. Gestad v. Ellichman et al, supra. In conclusion, Mast Retirement Benefits were annually adjusted (although not always in a timely manner) in accordance with the Settlement Agreement until approximately 2000. . . .

Attacking the Settlement Agreement is Barred by Estoppel.

The California Evidence Code Section 623 states:
'Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.'

In the instant case, during the conduct of the discussion prior to the Settlement Agreement JRS led Mast to believe that the calculations that were the basis for Settlement Agreement were true and correct. This constitutes statements and conduct as stated in the Code Section. As such, JRS is now estopped from claiming that the calculations of the Retirement Benefits were incorrect. This includes those calculations that are part and parcel of and incorporated into the Settlement Agreement as well as those calculations that occurred in subsequent years. JRS is not permitted to change or contradict the Settlement Agreement, or the calculations that were the basis of it because estoppel applies. . . .

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

## CALIFORNIA GOVERNMENT CODE SECTION 20160 PRECLUDES CHANGES IN THE 1996 SETTLEMENT AGREEMENT AND IN ANY PRIOR CALCULATIONS

California Government Code Section 20160 provides in pertinent parts:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:
> (1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months [emphasis added] after discovery of this right. . . (b) . . .board shall correct all actions taken as a result of errors or omissions of . . . this system.

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

Ms. Montgomery cites Government Code Section 20160 as her basis for attacking the Settlement Agreement and recalculating the benefits ab initio. Nothing in this section would give JRS the right or ability to overrule, attack, abandon, or recalculate a settlement agreement. In the instant case, if there is any reason to look at Government Code Section 20160, there is no reason to look beyond (a)(1). Even if there were any calculation errors as Ms. Montgomery contends, no changes may be made.

At times thereafter, due to failure to make the adjustments or lack of understanding of the proper time to make adjustments, some adjustments were not made on time, but were made with retroactive catch-up payments, see Exhibit S, consisting of 3 letters from JRS confirming the late payments.

Respondent did not take part in the calculations of the amount of the COLA or in the timing of when the adjustments were made. Respondent relied on The Judges' Retirement System to have knowledge of the manner and timing of the COLA. In retrospect, it appears that JRS was applying the proper CPI index (CCPI-U–All Urban

Consumers), but using the wrong adjustment dates. The correct period of adjustment is December-to-December of each year (not some other month's data and not the Annual data, see *infra*).

As to the timing of the adjustments, pursuant to GC §68203, the adjustments were to be made on September 1 (payment date of September 30th) of each year. The attached schedule of benefits paid to Respondent (Exhibit Q), provided by JRS, indicates adjustments were at times made in July (consistent with the 1976 Amendment to GC §68203) or in January (consistent with adjustments made to COLA of Legislators' retirement benefits, see *infra*).

Respondent had no personal knowledge of the proper periods of adjustments and completely relied and accepted what JRS was doing.

However, whatever errors there were, either favorable or detrimental to Respondent, is **rendered completely moot** by the calculations of the amount due Respondent herein (Exhibit Q). The calculations therein use the amount actually received by Respondent in accord with Respondent's records of benefits paid; with the proposed exhibits of Petitioner to be filed herein showing the amount of benefits paid; and with the records of JRS Respondent received from JRS (Exhibit P page 2). The calculations also include the amount of benefits that should have been paid to Respondent. All errors, plus or minus, are thereby accounted for in the calculations of amount due provided by Respondent (Exhibit Q).

[The CPI Calculator provided by the Department of Industrial Relations can be found at http:// www.dir.ca.gov/oprl/ CAPriceIndex.htm.]

## ANALYSIS OF EXHIBIT Q EXCEL SPREADSHEETS SHOWING AMOUNT OF RETIREMENT BENEFITS THAT SHOULD HAVE BEEN PAID AND THE AMOUNT THAT WAS PAID

On January 1, 1997, pursuant to the Settlement Agreement, JRS paid Retirement Benefits of $5,720.08. On July 7, 1997, Jim Niehaus of JRS wrote to Respondent (Exhibit P page 1) advising him that the initial amount of benefits should have been $5,893.93, and that the unpaid amount was being paid.

Exhibit Q shows the following:

The beginning retirement benefit, as calculated by Petitioner, was therefore $5,893.93 per month.

On September 1, 1997, the deferred retirement benefit should have been raised to $6,035.98. It was not raised until April 1998 and a partial arrearage payment was made.

Thereafter no increases were made until August 1999. Thereafter, no increases were made in September of any year. Increases and partial back payments were made subsequent to January 1 of each year until January 1, 2002 when no increase either in September 2001 or January 2002 was made.

In December 2002 a benefit increase and a partial arrearage payment was made.

The above failure to make increases in the deferred retirement benefits as required by the Settlement Agreement constituted a breach of the Agreement.

Thereafter, until April 2005, there were neither benefit increases nor arrearage payments, except for a partial arrearage payment in December 2003. The failure to make any benefit increases from December 2002 through April 2005 was a breach of the Settlement Agreement.

Respondent did not receive a 2.9% increase in his deferred retirement benefits in 2003.

[Petitioner has served notice in these proceedings that it would be introducing a letter of October 24, 2003, from Anne Woodward, Manager of the Judges' Retirement System, addressed [not to Respondent individually] to Retirees and Annuitants of the Judges' Retirement System, informing them that there would be a 2.9% salary increase for active judges and that retirees would receive a comparable increase in retirement benefits. Respondent does not know if he received this letter, but it is clear that Respondent did not receive this increase. Respondent's gross retirement benefits from January 1, 2003 until April 30, 2005 was static at $6,652.93. There was one additional amount paid on December 31, 2003. Respondent did not receive, and **should not have received** the 2.9% increase as he was to receive COLA, not enhancements when sitting judicial officer's salaries were increased. Said October 24, 2003 letter is therefore irrelevant to these proceedings.]

From April 2005 until August 2010 there were neither benefit increases nor arrearage payments. This was intentional and at the direction of the manager of JRS, Pamela Montgomery, as discussed elsewhere in this brief. This intentional failure to abide by the Settlement Agreement was a complete intentional breach of the Settlement Agreement.

After August 2010, benefit increases were made based on September 1 of each year, but not in a timely manner, and partial arrearage payments were made.

The benefit increases made by Petitioner initially seem to have been based on CCPI-U All Urban Consumers (although not using the correct time periods). Subsequent to 2010 the benefit increases were made pursuant to CCPI-W, Wage Earners and Clerical Workers. This is the wrong index, as discussed elsewhere in this brief. The unilateral change in the CCPI used for cost-of-living adjustments was a further breach of the Settlement Agreement and was contrary to the decision of the Supreme Court in *Olson I,* as stated *supra.*

Beginning about the year 2000, apparently because of a change of personnel, adjustments were late because of a lack of understanding by Petitioner's personnel as to what needed to be done. (See the Declaration of Marci G. Mast, incorporated herein as if fully set forth).

Beginning in 2003 the adjustments were partially stopped, and beginning 2007 were totally stopped by Pamela Montgomery, the then manager of Petitioner, who ordered that no further adjustments should be made. On January 27, 2009, after COLA had not been made to Respondent's retirement benefits for several years, Mark Chiu of JRS sent an email to Pamela Montgomery (Exhibit T) stating, "For our records, am I correct to assume that we do not make COLA adjustments for Paul Mast (JRS) until notification from you? Please advise." Pamela Montgomery replied on the same day, (Exhibit T) "At this time do not make a COLA adjustment for Paul Mast." These emails, together with the fact that no COLA was made to Respondent's deferred retirement benefits either in 2007, 2008, or 2009 (Exhibit Y4), clearly indicate that Pamela Montgomery had ordered that no adjustments to the deferred retirement benefits be made. This is conclusive proof of a breach of the Settlement Agreement entered into in 1996 between Respondent and Petitioner.

Summarizing, Exhibit Q shows that the cost-of-living adjustments were made late in 2002, 2003, 2005, and 2006. No COLAs were made in 2004, 2007, 2008, or 2009. In 2010 JRS presented an incorrect accounting and made an arrearage payment. As Exhibit Q shows, the amounts of arrearages was in error, and the amounts of deferred retirement benefits for 2010 and the succeeding years were and have been miscalculated and are in error.

As stated *supra,* the individual calculation of all the errors that Petitioner made throughout the years, whether advantageous or disadvantageous to Respondent, need not individually be considered in this proceeding. The accounting of deferred retirement benefits and interest due presented by Respondent (Exhibit Q) uses the proper periods (December-to-December) for the proper CCPI-U (All Urban Consumers) and the proper effective date (September 1 of each year) of the COLA of deferred retirement benefits for the calculations of the amount due (column entitled "Total Benefit Due"); and uses a schedule of actual payments made to Respondent, as prepared by Petitioner, *supra,* (column entitled "Benefit Paid") as the amount input into the accounting to show the actual amount paid.

As such, Exhibit Q shows the amount that should have been paid, the amount that was paid, and the balance due. Overpayments and underpayments are automatically accounted for.

The total amount due (Exhibit Q), is $289,450 if paid by December 31, 2015, $293,067 if paid by January 1, 2016, and $295,456 if paid by January 31, 2016, and with monthly deferred retirement benefits of $9,368.84.

The latter amount is comprised of $152,335 retirement benefits due and $143,120 interest due.

**BREACH OF SETTLEMENT AGREEMENT BY PETITIONER**

The Settlement Agreement was breached by the failure of JRS to abide by the Agreement in failing to make COLA to the benefits as stated *supra.*

Pamela Montgomery, Manager of JRS, stopped the COLA to Respondent's deferred retirement benefits about 2006. Ms. Montgomery directed her staff not to make Cost of Living Adjustments to Respondent's benefits (Exhibit T). Respondent

wrote a multitude of emails and letters to Ms. Montgomery from 2006 to 2010, requesting the benefits be adjusted and asking for information as to what was happening.

Petitioner is still breaching the Settlement Agreement as shown in a letter dated September 18, 2015 (Exhibit V page 17) advising Respondent of a COLA increase based on "the California Consumer Price Index, Urban Wage Earners and Clerical Workers (CCPl-W), December 2013 to December 2014."

Ms. Montgomery during all or part of the period from 2006 to 2010 recalculated the CPI many times, including recalculating the calculations done by JLVFF prior to January 1, 1997. (JLVFF is the part of JRS that calculated the benefits due Respondent.) Ms. Montgomery found a CPI category which was not used by JLVFF, not used by the Controller's Office, not used by Respondent, and which was an improper category to use. She then created an accounting in August 2010, claiming that JLVFF had made an error in its initial calculations, and that all the CPI calculations had been made in error. She stated that an amount was due to Respondent, and had that amount, $10,880, sent to Respondent's account, as reflected in Exhibit Q.

Petitioner's statement that an amount was due for unpaid deferred retirement benefits in August 2010 was a clear admission that JRS had breached the Settlement Agreement prior to August 2010.

Respondent rejected this accounting entirely, and so advised Ms. Montgomery. Respondent advised Ms. Montgomery, as well as the State Controller, and each and every member of the Board of the California Public Employees' Retirement System (copies of these letters dated September 1, 2010 are attached as Exhibit U), that if the COLAs were not corrected immediately that Respondent would be forced to engage an attorney to represent him. Respondent waited another nine months before contacting an attorney on May 16, 2011.

## RESPONDENT DID NOT BREACH THE SETTLEMENT AGREEMENT AS ALLEGED BY RESPONDENT

Petitioner breached the Settlement Agreement multiple times between 2003 and 2010 by failing to abide by the Agreement by not increasing Respondent's retirement

benefits. Petitioner continues to breach the Settlement Agreement by not calculating current increases pursuant to CCPI-U (All Urban Consumers). Respondent has not breached the non-disclosure clause in the Settlement Agreement. Anything Petitioner is alleging as a breach by Respondent would have occurred subsequent to the breach of the Agreement by Petitioner.

Petitioner's attorney stated during the Meet and Confer telephone conference on November 6, 2015 that began at 10:05 a.m. that the phrase in the Settlement Agreement, "Each party will keep the terms of this agreement confidential" is invalid as against public policy. In addition he stated all of the documents relating to the matter are of public record and are available to anyone.

Respondent did not understand or know this in 1996. Respondent entered into the Settlement Agreement in good faith and thereafter abided by the confidentiality clause in good faith. If it is in fact an invalid provision, it would be bifurcated out of the Settlement agreement, and the terms of the Settlement Agreement would still be binding on the parties.

Respondent did not reveal the terms of the Settlement Agreement to anyone until he consulted with an attorney, nine months after the letters of September 1, 2010.

It is not possible to violate the terms of an invalid confidentiality provision.

Nevertheless, Petitioner has alleged that Respondent breached the confidentiality clause in the Settlement Agreement by consulting an attorney in 2011, after the claim in this matter was denied. Said allegation is completely false.

The confidentiality clause states that the "Terms of the Agreement" would not be disclosed. Respondent never has disclosed the terms of the agreement to anyone. Non-disclosure agreements must be strictly construed. Consulting an attorney in regard to a breach of the agreement cannot be construed as a breach of the confidentiality provision, if there were such a valid provision.

In re *Marriage of Williams* 29 Cal. App. 3d 369 states:

> Where the parties question the interpretation of critical language in an instrument, the language will generally be held to be ambiguous (see Collins v. Home Savings & Loan Assn. (1962) 205 Cal. App. 2d 86, 97 [22 Cal.Rptr. 817]), and where ambiguity or uncertainty in the terms of a

> written instrument cannot otherwise be reconciled, the agreement must be construed most strictly against the party whose agent prepared the instrument or the ambiguous portion thereof. (Civ. Code, § 1654; Coutin v. Nessanbaum (1971) 17 Cal. App. 3d 156, 162 [94 Cal. Rptr. 453]; Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399 [81 Cal. Rptr. 140].)

"Terms of the Agreement" means only what the terms of the agreement were. It does not preclude discussing the law or the rights of other retirees pursuant to *Olson I.* Respondent, however, did not discuss the law with anyone except for his attorney.

Prior to consulting an attorney, Respondent communicated by letter dated September 1, 2010 with Pamela Montgomery, Manager of JRS (Exhibit U page 1). On the same day, September 1, 2010, Respondent also communicated by letters mailed to John Chiang, the State Controller, and each and every member of the Board of Directors of the California Public Employees' Retirement System (CalPERS) (Exhibit U page 7 ff.). Respondent outlined the breach of JRS, and as an attachment to the letter sent a copy of the letter dated September 1, 2010, which was sent to Pamela Montgomery on the same day. Respondent requested their assistance in curing the problem, and gave notice of Respondent's intent to consult an attorney. Respondent received no reply from anyone.

Respondent delayed nine months before consulting with an Attorney on May 16, 2011.

Petitioner, the State Controller, and the Board of Directors of CalPERS were all put on notice of Respondent's intent to engage an attorney, and the probable effects thereon in regard to other judicial pensioners making claims for unpaid retirement benefits. They all elected not to take any action.

When Respondent consulted an attorney, and at all times thereafter, Respondent did not discuss or reveal the "Terms" of the Settlement Agreement even though the Settlement Agreement had already been breached by Petitioner.

## PURSUANT TO GOVERNMENT CODE §20164 (b)(2) THE CLAIMS OF RESPONDENT MUST BE PAID IN FULL AND ARE NOT BARRED BY ANY OTHER SECTIONS OF THE CODE OF CIVIL PROCEDURE

### GOVERNMENT CODE § 20164 (b)(2)

Government Code §20164(b)(2) (GC §20164(b)(2)) states that there is no period of limitation where the Judges' Retirement System owes money to a member or a beneficiary:

> (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

This was discussed by *Staniforth v. Judges' Retirement System* (2014) 226 Cal. App. 4th 978, at 994 :

> The final ground for the trial court's denial of the motion was that all of JRS's obligations to these 10 claimants were extinguished under section 20164, subdivision (a). Although that subdivision specifies the obligations of the system continues 'throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged,' it contains no explicit statute of limitations for accrued but unpaid pension payments that might form a chose in action that the decedent's estate or trust might be entitled to assert. Instead, the only *explicit* statute of limitations described in section 20164 is the three-year limitations period provided in subdivision (b) '[f]or the purposes of payments into or out of the retirement fund for adjustment of errors or omissions,' which provides three-year limitation on the *system's* right to collect for erroneous payments out of the system (*id.* at subds. (b)(1) & (b)(3)), but that subdivision also specifies that **'[i]n cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.**' [Emphasis supplied.]

See also *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 [115 Cal.Rptr.2d 151] (*Oakland)* which ruled:

> The City further argues that this action is subject to a three-year statute of limitation because it essentially seeks to enforce a statutory
>
> The statute of limitations contained in Government Code section 20164(b) applies to erroneous payments into or out of the retirement fund, [95 Cal. App. 4th 36] not to reclassifications. The

> three year statute of limitations in the Code of Civil Procedure is also inapplicable. Government Code section 20164(a) provides that **CalPERS' obligations to its members 'continue throughout their respective memberships' and its obligations to retired members continue throughout the lives of the retired members, and thereafter until all obligations to their respective beneficiaries, if any, have been discharged'** [emphasis supplied]. To the extent that the two statutes conflict, the more specific language in the retirement statute should govern. **CalPERS also notes that section 20164 is a substantive statute creating an ongoing duty to properly discharge its obligations. The procedural statute of limitations does not appear to override this duty.** [Emphasis supplied.]

Thus, Petitioner has no Statute of Limitations defense.

In GC 20164 (b)(2), as compared to Government Code §20164 (b)(l) (GC §20164 (b)(l)), the Legislature recognized and applied the settled principle of law that in a case where a fiduciary relationship is present, there shall be no period of limitation on the duty of the fiduciary to pay monies owed to the beneficiary. If there is a liability situation, rather than a fiduciary obligation, where an overpayment was made to a beneficiary (establishing the liability), a period of limitation (therein three years) applies (GC §20164 (b)(l).

There is no final judgment that would have triggered the commencement of any statute of limitations. This Administrative Proceeding is not a civil action to which the Code of Civil Procedure could apply.

*Oakland* states: "Pursuant to Code of Civil Procedure § 312, the statutes of limitations in the Code of Civil Procedure apply only to civil action and civil special proceedings..."

*Oakland* began as an administrative proceeding before PERS and came to the courts of law for judicial review of PERS actions. Accordingly, the court there applied

the rule that:

> [a]n administrative proceeding is neither a 'civil action' (Code Civ. Proc. section 22,312) nor a special proceeding of a 'civil nature' (id., section 23,363)..."Id. At 48, I l5 Cal. Rptr. 2d at 165. Therefore no statute of limitations in the Code of Civil Procedure could be applied in City of Oakland.

This case is an administrative proceeding before JRS, a unit of CalPERS, seeking payment of arrearages owed to Respondent. JRS wrote a determination letter rejecting all of the claim. Thus, the procedural posture of the case at bar is the same as in *Oakland* for purposes of applicability of the Code of Civil Procedure. This case is an administrative action subject to review in the courts, not a civil action. The statutes of limitations of the Code of Civil Procedure do not apply.

Government Code section 20164(b)(1) provides a the three-year limitations period for the adjustment of errors or omissions made by the Judges' Retirement System, or where the Judges' Retirement System makes an erroneous payment to a member or beneficiary, as follows:

> (b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows: (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

Thus, if JRS made any errors in calculating the COLA or the initial amount of benefits due in January 1997, JRS had three years to correct any such errors. Three years has long since passed.

In GC §20164 (b)(2), as compared to GC §20164 (b)(1), the Legislature recognized and applied the settled principle of law that in a case where a fiduciary

relationship is present, there shall be no period of limitations on the duty of the fiduciary to pay monies owed to the beneficiary.

**INTEREST IS PAYABLE FROM THE DAY EACH RETIREMENT BENEFIT PAYMENT IS DUE AT 10 PERCENT PER ANNUM COMPOUNDED DAILY**

Pursuant to *Olson v. Cory III*, (1983) 35 Cal.3d 390 [197 Cal.Rptr. 843, 673 P.2d 720], at p. 395. (*Olson III*), interest compounded on a daily basis should be added to the amount of accrued retirement benefits due to Respondent. Respondent is entitled to interest compounded on a daily basis on the unpaid benefits from the dates that the benefits should have been paid to him. The interest due is provided by Civil Code section 3287 (CC §3287) and the amount of the interest is proscribed by the California Constitution, article XV, section 1, which states (in part):

> (1) For any loan or forbearance of any money, goods, or things in action, if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum....

Civil Code section 3289 (CC §3289) states that the amount of interest shall be 10 percent per annum. Ten percent has been the interest rate at all relevant times.

In *Olson III* the California Supreme Court opinion states:

> CERTAINTY REQUIREMENTS OF CIVIL CODE SECTION 3287, SUBDIVISION (a)
>
> Plaintiffs base their claims to interest on Civil Code section 3287, subdivision (a). It provides: 'Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political

> subdivision of the state.' Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions. (citations) Interest is recoverable on each salary or pension payment from the date it fell due. (citation). . . .
>
> Plaintiff judges and judicial pensioners claim interest on the salary and pension increases to which this court held them entitled in *Olson* v. *Cory* (1980) 27 Cal.3d 532 [178 Cal.Rptr. 568, 636 P.2d 532] (*Olson v. Cory I*). [*Olson v. Cory III, supra*, at p. 395].
> The state is therefore the debtor; moreover, it is subject to claims of interest under Civil Code section 3287, subdivision (a), which states that it 'is applicable to recovery of damages and interest from any such debtor, including the state, or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.' *Id.*, at p.403.
>
> An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a). *Id.*, at p. 404.
>
> Nothing in the wording of Civil Code section 3287 suggests that the right to recover interest from the state varies in accordance with the particular fund out of which the underlying obligation was payable. As explained, we have concluded that even the right to interest on salary increases payable out of the state's general fund is not nullified or diminished by any obligation that the Controller may have to refrain from paying apparent debts of the state that are clouded by legal uncertainties until those uncertainties are removed. Thus, the existence of such an obligation with respect to the Judges' Retirement Fund, relied on in *Jorgensen*, does not establish any difference between the right to interest on debts payable out of that fund and the right to interest on debts payable out of the state's general fund. Accordingly, plaintiffs are entitled to interest on judicial pension payments adjudged in *Olson v. Cory I*. Statements to the contrary in *Jorgensen v. Cranston, supra*, 211 Cal.App.2d 292, 300-302, *Willens v. Cory, supra*, 53 Cal.App.3d 104,and *Gibbons & Reed Co. v. Dept. of Motor Vehicles* (1963) 220 Cal.App.2d 277, 289 [33 Cal.Rptr. 688], are disapproved. *Id.*, at p. 406.

Such interest is compound interest. *Westbrook v. Fairchild*, 7 Cal.App.4th 889, 9 Cal.Rptr.2d 277, at pp. 894-895 discusses compound interest:

> The only exception to the rule that interest on interest (i.e. compound interest) [emphasis added] may not be recovered is in situations in which interest is included in a judgment which then bears interest at the legal rate. (45 Am.Jur 2d, Interest and Usury, § 78, p. 71.).

Interest is to be computed on a daily basis. In *Olson III*, the opinion states: "Interest is recoverable on each salary or pension payment from the date it fell due." *Olson III, supra,* at p. 402.

The compounding of interest in the claims made herein follows the procedures and practices adopted by the California Franchise Tax Board. Revenue and Taxation Code sections 13550, 19104, and 19521 all specify that interest shall be compounded on a daily basis. In addition, four sections in the Administrative Code dealing with the Teachers' Retirement System call for compounding daily: see 5 Cal Admin Code §§ 27003(a) and (c), 27004 (a) and (c), 27007 and 27008. Also calling for compounding daily but not dealing with retirement law is 2 Cal Admin Code § 1138.72.

All specify that interest shall be compounded on a daily basis.

The Excel Spreadsheets, attached as Exhibits I and Q, calculate interest on a daily interest, compounded monthly.

## CONCLUSION

The Court should render its decision that:

The Petitioner Judges' Retirement System should pay to Respondent the amount of unpaid deferred retirement benefits for the period May 28, 1992 to May 28, 1995, including interest is calculated on the attached Exhibit I. The amount due is $1,623,791.47 if paid by January 30, 2015 and thereafter (or before) as shown on Exhibit I. The amount due on December 1, 2015 is $1,597,536.58.

The Petitioner Judges' Retirement System should pay to Respondent the amount of unpaid deferred retirement benefits for the period after January 1, 1997. The total amount due (Exhibit Q), is $289,450 if paid by December 1, 2015, $293,067 if paid by January 1, 2016, and $295,456 if paid by January 31, 2016, and with monthly deferred retirement benefits of $9,368.84, until the next COLA adjustment on September 1, 2016.

Respectfully submitted,

November 20, 2015

Paul G Mast

Paul G. Mast

PROOF OF SERVICE

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

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

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

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

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

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

**By email to JRieger@ReedSmith.com**

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

Marci G. Mast