No. S203561

IN THE SUPREME COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN RE THE MARRIAGE OF JULIE R. GREEN

and TIMOTHY P. GREEN.

SUPREME COURT
FILED

OCT 24 2012

Frank A. McGuire Clerk

Deputy

JULIE R. GREEN,

Petitioner/Appellant,

vs.

TIMOTHY P. GREEN,

Respondent/Respondent.

MOTION FOR JUDICIAL NOTICE

On Appeal from the Contra Costa County Superior Court, Case no. DR 41290, Hon. Charles B. Burch, Presiding, following an Opinion of the First District Court of Appeal, Division Four, Case no. A129436

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Attorneys for **TIMOTHY P. GREEN**

MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452, 453, and 459; and California Rules of Court, rule 8.252(a) and 8.520(g); Timothy Green, Respondent at trial and in the Court of Appeal (hereinafter 'Husband'), hereby requests that this Court take judicial notice of the following documents, attached as Exhibits 1 through 3:

1. The portion of the 1988-1989 State of California Controller's "Annual Report of Financial Transactions: Public Retirement Systems" showing the retirement benefit formula for the Dougherty Regional Fire Authority.
2. The relevant portion of the State of California Controller's "Public Retirement Systems Annual Report: Fiscal Year 2008-09," showing the retirement benefit formula for the Alameda County Fire Department (which had merged with the Dougherty Regional Fire Authority on July 1, 1997 [see AA p. 143]).
3. A complete copy of a report published by the California Public Employees' Retirement System (hereinafter 'CalPERS'), dated July 2011 entitled "Vested Rights of CalPERS Members."

This motion for judicial notice is based on the accompanying Memorandum of Points and Authorities, Declaration of Robert A. Roth, and proposed Order.

Respectfully Submitted,
TARKINGTON, O'NEILL, BARRACK & CHONG

Date: October 18, 2012

By: ROBERT A. ROTH
Attorneys for Timothy Green

MEMORANDUM OF POINTS & AUTHORITIES

STATEMENT OF FACTS

At issue in this appeal is the proper allocation of separate property and community property interests in Husband's CalPERS service credits that Husband was eligible to purchase prior to marriage on account of his premarital military service, but which in fact were purchased by payroll deductions that began during marriage and continued after separation. The service credit purchase is being made through 15 years of installment payroll deductions that total $33,278.40. The marital community paid $11,462 of the installments. It is undisputed that the retirement benefits resulting from the service credit purchase are substantially more valuable than the amount paid for them. (AA 105, 115-116, 143-144; RT 10-

11. See also Amicus Curiae Brief of the American Academy of Matrimonial Lawyers (10/7/11) pp. 4 fn. 1, 8-9.)

Attached hereto as Exhibit 1 and Exhibit 2 are copies of relevant portions of Annual Reports prepared by the California Controller providing information regarding retirement benefits offered by Husband's government employer for fiscal years 1988-1989 and 2008-2009. Attached as Exhibit 3 is a complete copy of a report published by the CalPERS, dated July 2011, which is entitled "Vested Rights of CalPERS Members." As explained below, these materials will assist this Court in analyzing the issues in controversy here.

LEGAL DISCUSSION

Pursuant to Evidence Code section 452, this Court can take judicial notice of the "[o]fficial acts of the ... executive departments ... of any state," as well as "[f]acts ... that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." This request is in compliance with California Rules of Court, rules 8.252(a) and 8.520(g).

Exhibits 1 and Two

Exhibits 1 and 2 request judicial notice of relevant portions of two Annual Reports on Public Retirement Systems, which were prepared by the California State Controller. Courts may take judicial notice of such reports. (See *Ordlock v. Franchise Tax Board* (2006) 38 Cal.4th 897, 912 fn. 8; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1254 fn. 15; *Michels v. Watson* (1964) 229 Cal.App.2d 404, 407.) Judicial notice of Exhibits 1 and 2 is relevant because it will assist this Court in understanding the source and nature of the "substantial subsidy" to the CalPERS service credits at issue, which lie at the core of the controversy here. (ACB pp. 4 fn. 1, 8-9.)

The Exhibit 1 and Exhibit 2 reports document that the retirement benefit formula in effect at the time Husband was hired was '2% at 50,' and that by the time of trial the formula had increased to '3% at 50.' Under Government Code section 21051, subd. (a)(1), service credits are purchased based on rates existing at the time the employee was **hired**, but benefits are paid based on rates existing at the time of **retirement**. The change in the retirement formula rendered public service credits based on Husband's premarital military service substantially more valuable than the cost of purchasing them from CalPERS. (See Husband's Request for Judicial Notice (11/29/11) p. 2.)

Exhibits 1 and 2 existed at the time of trial, but judicial notice was not requested in that proceeding. Husband did request judicial notice of Exhibits 1 and 2 in the Court of Appeal, but that request was denied. (Opinion at p. 8, fn. 5.) This Court may properly grant a judicial notice request that is renewed in this Court by separate motion, even if the Court of Appeal denied such request. (*United Teachers of Los Angeles v. Los Angeles Unified School District* (2012) 54 Cal.4th 504, 528.) Judicial notice of Exhibits 1 and 2 will assist the Court in determining the merits of this action, and should be granted.

Exhibit 3

Exhibit 3 is a report published by the California Public Employees' Retirement System in July 2011 entitled "Vested Rights of CalPERS Members." Reports of administrative agencies are official acts that are a proper subject for judicial notice. (*Ordlock, supra,* 38 Cal.4th at 912 fn. 8; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.) Exhibit 3 is relevant because the Court of Appeal based its decision largely on its determination that although Husband was eligible to purchase the military service credits before marriage, his property interest in the credits purportedly did not accrue prior to marriage and was not vested until the time the credits were actually purchased from CalPERS. Accordingly, the appellate court determined that characterization of the military service credits as community or separate property should be determined as of the time of purchase. (Opinion at pp. 8-16.)

The Exhibit 3 Report will assist this Court's analysis by providing CalPERS' own interpretation of the applicable statues, finding that "members have vested rights to … [p]urchase service credits … if the member satisfies all eligibility requirements." (Exhibit 3, p. 13.) This statement of CalPERS' own view regarding when the right to service credits accrues is entitled to great weight, and is a proper subject of judicial notice. (See *Western Oil and Gas Association v. Monterey Bay Unified Air Pollution Control District* (1989) 49 Cal.3d 408, 425; *Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1565 [CalPERS' interpretation of governing statutes entitled to great weight].)

Exhibit 3 did not exist at the time of trial, and thus judicial notice was not requested in that proceeding. Nor did Exhibit 3 exist at the time Husband's Respondent's Brief was filed in the Court of Appeal. Husband did bring the Exhibit 3 report to the attention of the Court of Appeal in his Petition for Rehearing. (Petition for Rehearing p. 5.) Judicial notice of Exhibit 3 will assist this Court in construing the applicable statutes, and should be granted.

CONCLUSION

For the reasons stated herein, Timothy Green respectfully requests that the Court grant judicial notice of Exhibits 1 through 3 accompanying this motion, and grant such other relief as may be appropriate.

Respectfully Submitted,
TARKINGTON, O'NEILL, BARRACK & CHONG

Date: October 18, 2012

By: ROBERT A. ROTH
Attorney for Timothy Green

DECLARATION OF ROBERT A. ROTH

I, Robert A. Roth, declare as follows:

1. I am a member of the State Bar of California, and appellate counsel for respondent Timothy Green. I am certified by the State Bar as an appellate specialist.

2. I am familiar with the facts represented herein, and declare that they are true and correct.

3. Attached hereto as Exhibit 1 is a true and accurate copy of the portion of the 1988-1989 State of California Controller's "Annual Report of Financial Transactions: Public Retirement Systems" showing the retirement benefit

formula for the Dougherty Regional Fire Authority.

4. Attached hereto as Exhibit 2 is a true and accurate copy of the relevant portion of the 2008-2009 State of California Controller's "Public Retirement Systems Annual Report: Fiscal Year 2008-09," showing the retirement benefit formula for the Alameda County Fire Department (which had merged with the Dougherty Regional Fire Authority on July 1, 1997 [see AA p. 143]).

5. Attached hereto as Exhibit 3 is a true and accurate complete copy of a report published by the California Public Employees' Retirement System in July 2011 entitled "Vested Rights of CalPERS Members."

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

Date: October 18, 2012

Robert A Roth

By: ROBERT A. ROTH

(Proposed) Order

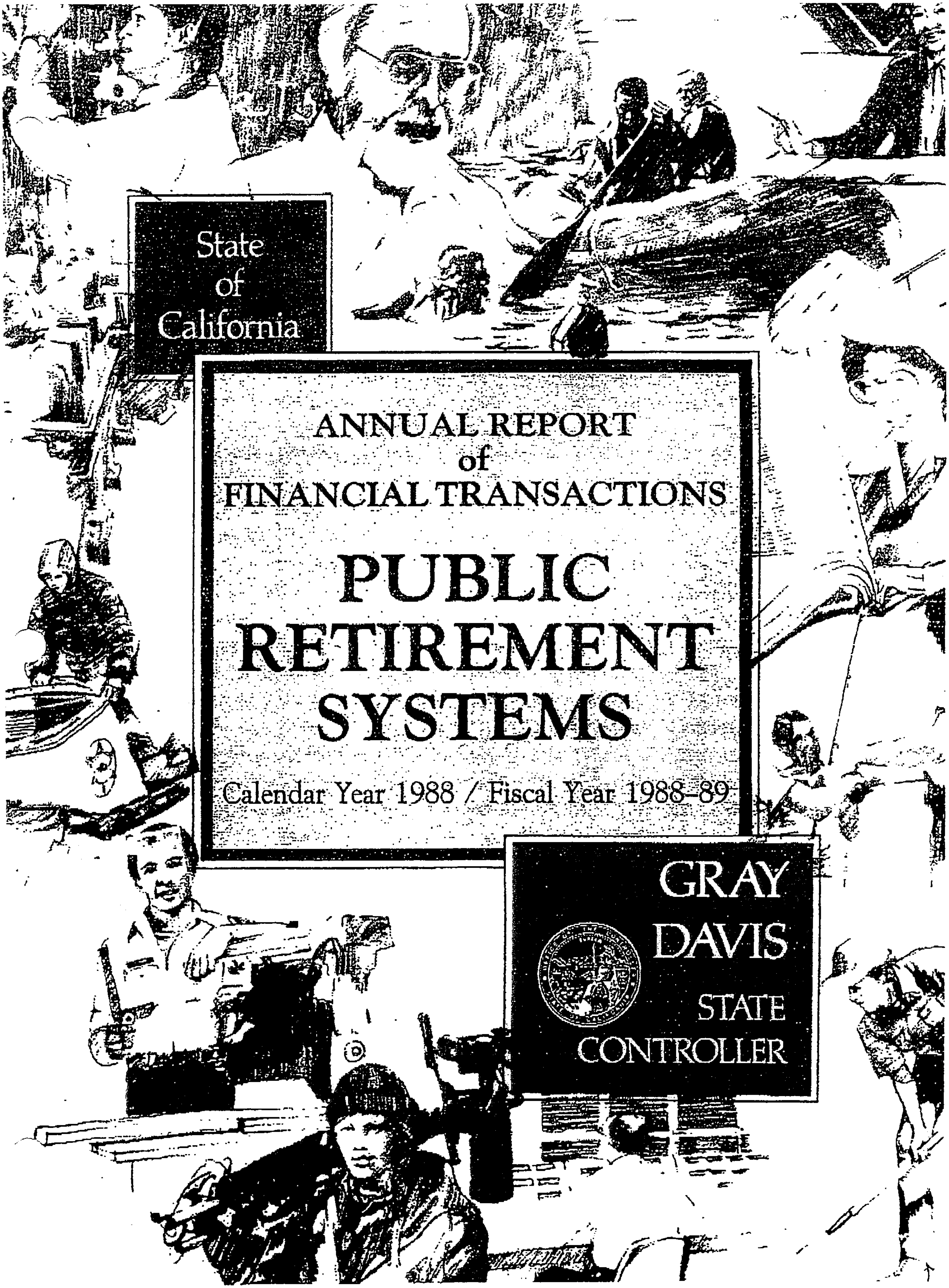
This matter came before the Court on Timothy Green's Motion for Judicial Notice, pursuant to Evidence Code sections 452, 453 and 459; and California Rules of Court, rule 8.252 and 8.520. Good cause appearing, the Court takes judicial notice of Exhibits 1 through 3 attached to said motion for judicial notice.

IT IS SO ORDERED:

Date:

JUSTICE OF THE CALIFORNIA SUPREME COURT

EXHIBIT 1



State of California

ANNUAL REPORT of FINANCIAL TRANSACTIONS

PUBLIC RETIREMENT SYSTEMS

Calendar Year 1988 / Fiscal Year 1988–89

GRAY DAVIS
STATE CONTROLLER

	BENEFIT FORMULA	SOCIAL SECURITY COVERAGE	FINAL SALARY	COLA	AGE 50 DISCOUNT ALLOWED	SICK LEAVE CREDIT	SURVIVOR BENEFIT CONTINUED	ORDINARY DISABILITY INCREASE	1959 SURVIVOR BENEFIT	CONTRIBUTION RATE MEMBER	CONTRIBUTION RATE EMPLOYER
DESERT WATER AGENCY											
MISC 70001	1/50TH	Y	1	2%	-	Y	Y	Y	-	7.00%	7.332%
MISC 70002	1/50TH	N	1	2%	-	Y	Y	Y	-	7.00%	7.332%
DIAMOND SPRINGS/EL DORADO FIRE PROTECTION DISTRICT											
MISC 70001	1/50TH	S	3	2%	-	Y	-	-	-	7.00%	2.936%
FIRE 74001	2% @ 50	Y	3	2%	-	Y	-	-	-	9.00%	19.459%
DINUBA CITY OF											
MISC 70001	1/50TH	T	3	2%	-	-	-	-	-	7.00%	7.344%
MISC 70002	1/50TH	N	3	2%	-	-	-	-	2	7.00%	7.344%
FIRE 74001	1/2 @ 55	T	3	2%	Y	-	-	-	2	VARIES	10.062%
POLICE 75001	1/2 @ 55	T	3	2%	Y	-	-	-	2	VARIES	10.062%
DIXON CITY OF											
MISC 70001	1/50TH	N	3	2%	-	Y	-	-	1	7.00%	6.110%
MISC 70002	1/50TH	T	3	2%	-	Y	-	-	-	7.00%	6.110%
FIRE 74001	1/2 @ 55	N	3	2%	Y	Y	-	-	1	VARIES	13.878%
FIRE 74002	1/2 @ 55	T	3	2%	-	-	-	-	-	VARIES	13.878%
POLICE 75001	1/2 @ 55	N	3	2%	Y	Y	-	-	1	VARIES	13.878%
POLICE 75002	1/2 @ 55	T	3	2%	-	-	-	-	-	VARIES	13.878%
DIXON UNIFIED SCHOOL DISTRICT LIBRARY DISTRICT											
MISC 70001	1/50TH	Y	1	5%	-	Y	-	-	-	7.00%	11.579%
MISC 70002	1/50TH	N	1	5%	-	Y	-	-	-	7.00%	11.579%
DOMINGUEZ HILLS FOUNDATION, CALIFORNIA STATE UNIVERSITY											
MISC 70001	1/50TH	Y	3	2%	-	Y	-	-	-	5.00%	7.663%
DOS PALOS CITY OF											
MISC 70001	1/50TH	Y	3	2%	-	-	-	-	-	7.00%	5.718%
MISC 70002	1/50TH	N	3	2%	-	-	-	-	-	7.00%	5.718%
POLICE 75001	2% @ 55	Y	3	2%	Y	-	-	-	-	7.00%	14.718%
DOUGHERTY REGIONAL FIRE AUTHORITY											
MISC 70001	1/50TH	N	3	2%	-	-	-	-	3	7.00%	10.545%
MISC 70401	1/50TH	Y	3	2%	-	Y	-	-	-	7.00%	10.545%
FIRE 74001	2% @ 50	N	3	2%	-	-	-	-	3	9.00%	21.582%
FIRE 74401	2% @ 50	Y	3	2%	Y	-	-	-	-	9.00%	21.582%
DOWNEY CITY OF											
MISC 70001	1/50TH	N	1	2%	-	-	-	-	1	7.00%	7.138%
MISC 70002	1/50TH	T	1	2%	-	-	-	-	-	7.00%	7.138%
FIRE 74001	2% @ 50	N	1	2%	-	-	Y	-	1	9.00%	15.661%
POLICE 75001	2% @ 50	N	1	2%	-	-	Y	-	1	9.00%	15.661%
DUARTE CITY OF											
MISC 70001	1/50TH	N	3	2%	-	-	Y	-	1	7.00%	6.396%
DUBLIN SAN RAMON SERVICES DISTRICT											
MISC 70001	1/50TH	Y	3	2%	-	Y	-	-	-	7.00%	6.009%
MISC 70002	1/50TH	N	3	2%	-	Y	-	-	-	7.00%	6.009%
FIRE 74001	2% @ 50	Y	3	2%	Y	-	-	-	-	9.00%	17.251%
POLICE 75001	1/2 @ 55	Y	3	2%	Y	-	-	-	-	VARIES	17.251%
DUBLIN, CITY OF											
MISC 70001	1/50TH	N	3	2%	-	-	-	-	3	7.00%	5.466%
DUNSMUIR CITY OF											
MISC 70001	1/50TH	Y	3	2%	-	Y	-	-	-	7.00%	9.413%
FIRE 74001	2% @ 50	Y	3	2%	-	Y	-	-	-	9.00%	23.409%
POLICE 75001	2% @ 50	Y	3	2%	-	Y	-	-	-	9.00%	23.409%
EAST BAY DISCHARGERS AUTHORITY											
MISC 70001	1/50TH	N	1	2%	-	Y	-	-	-	7.00%	8.973%
EAST CONTRA COSTA IRRIGATION DISTRICT											
MISC 70001	1/50TH	N	3	2%	-	-	-	-	1	7.00%	11.756%
EAST KERN AIRPORT DISTRICT											
MISC 70001	1/50TH	N	1	2%	-	-	-	Y	3	7.00%	8.127%
FIRE 74001	2% @ 55	N	3	2%	Y	-	-	-	3	7.00%	47.734%
EAST ORANGE COUNTY WATER DISTRICT											
MISC 70001	1/50TH	S	3	2%	-	-	-	-	-	7.00%	9.196%
EAST PALO ALTO SANITARY DISTRICT											
MISC 70001	1/50TH	N	3	2%	-	-	-	-	-	7.00%	7.532%
EAST SAN GABRIEL VALLEY HUMAN SERVICES CONSORTIUM											
MISC 70001	1/50TH	N	3	2%	-	-	-	-	1	7.00%	5.814%
EAST VALLEY WATER DISTRICT											
MISC 70001	1/50TH	N	3	2%	-	Y	-	-	1	7.00%	9.863%
MISC 70002	1/50TH	T	3	2%	-	Y	-	-	-	7.00%	9.863%
EASTERN MUNICIPAL WATER DISTRICT											
MISC 70001	1/50TH	N	1	2%	-	-	-	-	2	7.00%	10.929%

EXHIBIT 2

State of California

Public Retirement Systems Annual Report

Fiscal Year 2008-09

Controller *John Chiang*

California State Controller's Office

5. CalPERS Supplement - Summary of Contracting Agency Benefits - (Continued)

Employer Name	Benefit Formula	Final Compensation Offset	Final Compensation Period	COLA	Pre-Retirement Option 2	Sick Leave Credit	Post Retirement Survivor Allowance	Ordinary Disability Increase	1959 Survivor Benefit	Contribution Ra Member	Empl
Academic Senate for California Community Colleges											
Misc 70001	2% @ 60		3	2%	Y	Y			4	7.00	9.
Access Services Incorporated											
Misc 70001	2% @ 60		3	2%	Y	Y			3	7.00	8.
Adelanto, City of											
Misc 70001	2% @ 60		3	2%					4	7.00	6.
Police 75001	2% @ 55		3	2%	Y	Y			3	7.00	0.
Agoura Hills and Calabasas Community Center											
Misc 70001	2% @ 55		3	2%	Y	Y			3	7.00	8.
Agoura Hills, City of											
Misc 70001	2% @ 55		3	2%	Y	Y			3	7.00	19.
Alameda Alliance for Health											
Misc 70001	2% @ 60		3	2%					3	7.00	6.
Alameda Corridor Transportation Authority											
Misc 70001	2% @ 55		1	2%	Y	Y			3	7.00	12.
Alameda County Congestion Management Agency											
Misc 70001	2% @ 55		1	2%	Y	Y			4	7.00	11.
Misc 70002	2.5% @ 55		1	2%	Y	Y			4	8.00	11.
Alameda County Fire Department											
Misc 70001	2% @ 55		1	2%	Y	Y			3	7.00	9
Misc 70401	2% @ 55		1	2%	Y	Y			3	7.00	9
Misc 70402	2% @ 55		1	2%	Y	Y			3	7.00	9
Fire 74001	3% @ 50		1	2%		Y			3	9.00	21
Fire 74401	3% @ 50		1	2%					1	9.00	21
Fire 74402	3% @ 50		1	2%					1	9.00	21
Fire 74404	3% @ 50		1	2%		Y			3	9.00	21
Alameda County Law Library											
Misc 70001	2% @ 60		3	2%	Y	Y				7.00	1
Alameda County Mosquito Abatement District											
Misc 70001	2% @ 55		1	2%	Y	Y	Y		3	7.00	21
Alameda County Schools Insurance Group											
Misc 70001	2% @ 55		1	2%	Y	Y			4	7.00	17
Misc 70002	2.5% @ 55		1	2%	Y	Y			4	8.00	17
Alameda County Transportation Improvement Authority											
Misc 70001	2% @ 55		1	2%	Y	Y			4	7.00	1
Misc 70002	2.5% @ 55		1	2%	Y	Y			4	8.00	1
Misc 70401	2% @ 55		1	2%	Y	Y			4	7.00	1
Misc 70402	2.5% @ 55		1	2%	Y	Y			4	8.00	1
Alameda County Waste Management Authority											
Misc 70001	2% @ 55		1	2%	Y	Y			4	7.00	1
Misc 70002	2.5% @ 55		1	2%	Y	Y			4	8.00	1
Alameda County Water District											
Misc 70001	2% @ 55		1	3%		Y	Y		4	7.00	2
Misc 70002	2% @ 55	Y	1	3%		Y	Y			7.00	2
Misc 70003	2.5% @ 55		1	3%	Y	Y	Y		4	8.00	2
Misc 70004	2.5% @ 55	Y	1	3%		Y	Y			8.00	2
Alameda, City of											
Misc 70001	2% @ 55		1	2%		Y	Y		3	7.00	1
Misc 70002	2% @ 55	Y	1	2%		Y	Y			7.00	1
Misc 70401	2% @ 55	Y	1	2%		Y	Y			7.00	1
Fire 74001	3% @ 50		1	2%		Y	Y		3	9.00	3
Police 75001	3% @ 50		1	2%		Y	Y		3	9.00	3
Albany Municipal Services Joint Powers Authority											
Misc 70001	2% @ 55		3	2%	Y	Y			4	7.00	1
Misc 70002	2.5% @ 55		3	2%	Y	Y			4	8.00	1
Misc 70401	2% @ 55		3	2%	Y	Y				7.00	1

EXHIBIT 3

Vested Rights of CalPERS Members

Protecting the pension promises made to public employees

July 2011

CalPERS

CalPERS Profile

The California Public Employees' Retirement System (CalPERS) is the nation's largest public pension fund with assets of approximately $240 billion.

Headquartered in Sacramento, CalPERS provides retirement and health benefit services to more than 1.6 million members and 3,033 school and public employers. The System also operates eight Regional Offices located in Fresno, Glendale, Orange, Sacramento, San Diego, San Bernardino, San Jose, and Walnut Creek. Led by a 13-member Board of Administration, consisting of member-elected, appointed, and ex officio members, CalPERS membership consists of approximately 1.1 million active and inactive members and more than 500,000 retirees, beneficiaries, and survivors from State, school and public agencies.

Established by legislation in 1931, the System became operational in 1932 for the purpose of providing a secure retirement to State employees who dedicate their careers to public service. In 1939, new legislation allowed public agency and classified school employees to join the System for retirement benefits. CalPERS began administering health benefits for State employees in 1962, and five years later, public agencies joined the Health Program on a contract basis.

A defined benefit retirement plan, CalPERS provides benefits based on a member's years of service, age, and highest compensation. In addition, benefits are provided for disability and death.

Today CalPERS offers additional programs, including a deferred compensation retirement savings plan, member education services, and an employer trust for post-retirement benefits. Learn more at our website at **www.calpers.ca.gov**.

Contents

I. Introduction

Recent economic crises affecting the world's governments and markets have brought fiscal pressures on state and local budgets in California. Budgetary constraints have focused attention on the cost of providing public services, and no cost has received more attention than the compensation and benefits earned by our public employees. Commissions, political leaders and private citizens all have weighed in on the subject, each proposing wide-ranging "reforms" aimed at reducing the retirement benefits earned by public servants. Proposals have included, for example: moving to less advantageous benefit formulas, imposing caps on pensionable compensation, changing the definition of pensionable compensation to exclude items that are currently included, lengthening the "final compensation" period on which benefits are calculated, restricting employees' rights to purchase additional service credit, lengthening eligibility periods, increasing employee contributions and eliminating employer paid member contributions. Many of these proposals seek to apply these "reforms" to currently active employees as well as those who may be hired in the future.

Understandably, this attention on the compensation and benefits of members of the California Public Employees' Retirement System ("CalPERS") has raised concerns as to the level of assurance the law provides that promised pensions will be available upon retirement.

CalPERS has prepared this paper for two purposes:

- To articulate the current state of California law regarding the nature of its members' pension rights and the extent to which such rights have become "vested" and may not be impaired; and

- To explain the role of CalPERS in ensuring that its members' vested rights are honored.

This paper is not intended to respond to any particular proposed legislation or initiative. Rather, it is intended to present CalPERS' institutional views in the broader context of its primary governing laws: the California Public Employees' Retirement Law (Gov't Code §§ 20000, et seq.) (the "PERL") and the California and United States Constitutions. The merits and enforceability of any new proposal must be analyzed on its own unique terms and conditions.

Finally, although some of the general principles and authorities discussed in this paper may be relevant to plans CalPERS administers other than the Public Employee Retirement Fund defined benefit plan, this paper is not intended to address any issues related to the CalPERS' health benefits plans, defined contribution plans, the Legislators' Retirement System or the Judges' Retirement Systems (I and II).

II. Overview: Member Benefits And Contributions

California law clearly establishes that public employee retirement benefits are a form of deferred compensation and part of the employment contract. Rights to this deferred compensation are earned when the employee provides service to the public employer.

By statute and contract, public employers, not CalPERS, decide how much of an employee's compensation will be paid currently and how much will be deferred and paid in the future. Simply put, employers grant the benefits owed to CalPERS' members. CalPERS in turn serves as the trustee of the trust created to fund these benefits, through the prudent administration and investment of the retirement fund.

The rights of all CalPERS members are established by statute. In the case of local agencies, members' rights are also governed by the contract between the agency and CalPERS. When contracting with CalPERS, local agencies may choose from a menu of options. Benefits for CalPERS members are often the product of collective bargaining.

This section provides a general overview of the core benefits earned by CalPERS members. It is not intended to be a comprehensive description of all benefits and rights of all CalPERS members.

A. Service Retirement Allowance

Each CalPERS member earns service credit towards a lifetime retirement allowance after employment, calculated under a formula which accounts for the member's years of credited service, the member's "final compensation" and the member's age at retirement. Each benefit formula is commonly referred to as a specified percentage of a member's "final compensation" for each year of service, based on a particular age at retirement. For example, under a "2% at 55" benefit formula, a member receives 2% of his or her "final compensation" per year of credited service, if that member retires at age 55. If the member retires earlier or later than age 55, the member receives a lower or higher percentage of "final compensation," according to a statutory table. For example, under the "State 2% at 55" table, a member retiring at age 50 receives 1.1% of "final compensation" per year of credited service. A member retiring at age 63 or older receives 2.5% of "final compensation" per year of credited service.

As noted, each formula applies a multiplier to a member's "final compensation." For some members, "final compensation" means the highest one-year average pensionable "compensation earnable" that they earn during their careers. For other members, the highest annualized three-year average "compensation earnable" that they earn during their careers is used. In general terms, "compensation earnable" includes the member's "payrate" (essentially base salary) and certain items of "special compensation," which are established as pensionable by law or regulation. "Compensation earnable" generally does not include items such as overtime pay and amounts that are not available to employees in the same group or class of public employment.

B. Disability Retirement Allowance

If a member has an injury or illness that prevents the member from performing the customary duties of his or her regular position, the member may be eligible for a disability retirement. If a member's disability is the result of a job-related illness or injury, and the member is a school, local or State safety, State peace officer/firefighter, State industrial, or State patrol member, the member may be entitled to an industrial disability retirement. Local miscellaneous members also may be eligible if their employer contracts with CalPERS to provide for an industrial disability retirement.

A member who is granted a disability retirement receives the greater of the service retirement allowance (if eligible) or an allowance based on a specified formula applicable to that member. A member who is granted an industrial disability retirement allowance receives the greater of his or her service retirement allowance (if eligible) or a specified percentage of the member's "final compensation" (usually 50%, but 60% for some members), plus an annuity purchased with his or her accumulated additional contributions.

"California law clearly establishes that public employee retirement benefits are a form of deferred compensation and part of the employment contract."

C. Purchase of Service Credit

If they meet eligibility requirements, active members are entitled to purchase additional retirement service credit, which increases their retirement allowance. Additionally, where eligible, members can purchase service credit for prior public service, military service and certain other types of service. The member's cost to purchase additional service credit is set by statute and is based on actuarial assumptions and methodologies determined by the Board of Administration ("Board").

D. Death and Survivor Benefits

CalPERS provides benefits to the beneficiaries of active and retired members upon the member's death. Benefits and eligible recipients vary based on whether the member was still working at the time of death or was retired, and by the member's employer, occupation and the specific provisions in the contract between CalPERS and the employer. Additionally, a member may opt to have his or her retirement allowance reduced in order to increase the benefits that will become payable to the member's beneficiaries after the member's death.

E. Cost of Living Adjustments

A member's (or beneficiary's) initial allowance is subject to annual cost-of-living adjustments ("COLAs") that account for changes in the applicable cost of living index each year. Members and beneficiaries also may receive additional "Purchasing Power Protection" when annual COLAs have been substantially eroded by inflation over time.

F. Member Contribution Rates

Members generally contribute portions of their paychecks towards the cost of their future retirement benefits. These member contributions are established in various ways, including among other by statute, ordinance and memorandum of understanding, and they vary widely based on such things as the member's employer, occupation and bargaining unit, if any. In general, member contribution rates are established as a percentage of the member's monthly compensation. With respect to member contributions established by statute under the PERL: "The Legislature reserves the right to increase or otherwise adjust the rates of [member] contribution … in amounts and in a manner it may from time to time find appropriate." Some member contribution rates also are expressly subject to collective bargaining.

Some employers may choose to pay a portion or all of the retirement contributions otherwise required of their employees. These payments typically are negotiated during collective bargaining and the law provides that the employer may "periodically increase, reduce, or eliminate" such payments.

G. Reciprocity

The "reciprocity" provisions of the PERL (and related provisions in the retirement laws governing other California public retirement system) provide for certain reciprocal retirement benefits for a person who works for two or more public employers during his or her career, with membership in two or more California public retirement systems.

The primary purpose of reciprocity is to "eliminate[] the adverse consequences a member might otherwise suffer when moving from one retirement system to another." Reciprocity provisions accomplish this in a number a ways, including, for example, allowing a member to use his or her highest compensation in any reciprocal system to determine the compensation used to calculate benefits from all such systems.

III. Overview: Employer Funding Obligations

The California Supreme Court long ago established that a promise of a pension made by a public employer to its employees is a promise the employer must keep. In other words, public employers in California are legally required to honor promises to current and former employees regardless of how much money they have set aside for that purpose.

In order to ensure that their promises are kept, the law requires California's public employers to pre-fund the benefits they owe by making contributions to CalPERS along with the contributions of their employees. By investing the combined contributions of members and employers, CalPERS is able to pay all of the benefits as they come due.

To successfully fund all promised benefits, the law requires the Board to maintain an actuarially sound retirement fund. As one court explained: "Actuarial soundness of [CalPERS] is necessarily implied in the total contractual commitment, because a contrary conclusion would lead to express impairment of employees' pension rights." Further, employees have a vested right to statutorily required employer contributions, even where those contributions are not linked to providing an "actuarially sound" retirement system.

> "...a promise of a pension made by a public employer... is a promise the employer must keep. In other words, public employers in California are legally required to honor promises to current and former employees..."

The California Constitution provides that the Board "shall [] have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries" and "consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." The Board has authority to determine an actuarially sound rate of contributions that, together with investment earnings, will "assure the competency of the assets" of CalPERS such that all promised benefits are paid now and in the future. It is the Board's exclusive responsibility to determine the contributions that will be required of the participating employers and the participating employers then have a mandatory "ministerial" duty to pay the contributions that the Board determines are necessary. This obligation will be quickly enforced by the courts, by writ of mandate, if an employer fails to meet it.

As stated by the United States Supreme Court, a defined benefit plan "is one where the employee, upon retirement, is entitled to a fixed periodic payment. The asset pool [available to pay benefits] may be funded by employer or employee contributions, or a combination of both. But the employer typically bears the entire investment risk and … must cover any underfunding as the result of a shortfall that may occur from the plan's investments."

IV. California Contract Clause as Applied to Public Employees' Retirement Benefit Rights

A "vested" benefit is one that has matured into an irrevocable contractual right, which cannot be taken away or otherwise impaired without the member's consent, except in extremely limited circumstances. A "non-vested" benefit, on the other hand, is one that has been promised conditionally. It is generally alterable or completely revocable by the appropriate authority (usually the Legislature or the employer) without the member's consent. A public employee's right to the retirement benefits earned during employment is generally a vested right.

California has a strong public policy, enunciated through published legal decisions over the past half century, establishing that public employee retirement benefits are contractual obligations entitled to the protection of the "Contract Clause" of the State Constitution. That clause, found at Article I, section 9 of the California Constitution provides: "A ... law impairing the obligation of contracts may not be passed." (Article I, section 10 of the United States Constitution similarly prohibits a state from impairing the obligation of contracts.) This means that an employee's vested pension rights may not be impaired except under extremely limited circumstances.

The fundamental doctrine protecting California public employee pension rights is succinctly stated: "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity."

This doctrine has been applied and refined by dozens of California appellate cases since the 1940s. Several general rules have emerged through this jurisprudence:

RULE 1:

Employees Are Entitled To Benefits In Place During Their Employment

Public employees obtain a vested right to the provisions of the applicable retirement law that exist during the course of their public employment. Promised benefits may be increased during employment, but not decreased, absent the employees' consent.

These rules apply to all active CalPERS members, whether or not they have yet performed the requirements necessary to qualify for certain benefits that are part of the applicable retirement law. For example, even if a member has not yet satisfied the five year minimum service prerequisite to receiving most service and disability benefits, the member's right to qualify for those benefits upon completion of five years of service vests as soon as the member starts work.

The courts have established that this rule prevents not only a reduction in the benefits that have already been earned, but also a reduction in the benefits that a member is eligible to earn during **future** service. For example, a ballot proposition that purported to eliminate future benefit accruals for legislators was held unconstitutional because legislators were entitled to continue earning benefits under the law in place when they were first elected.

RULE 2:

Employees Are Entitled Only to Amounts Reasonably Expected from the Contract

Vested rights protection does not extend to unreasonable or unanticipated windfalls. In other words, the Contract Clause only protects the benefits that are reasonably expected from the contract, and does not protect "unforeseen advantages."

RULE 3:

Only Lawful Contracts with Mutual Consideration Are Protected by the Contract Clause

"The contract clause does not protect expectations that are based upon contracts that are invalid, unenforceable, or which arise without the giving of consideration. Nor does the contract clause protect expectations which are based upon legal theories other than contract, such as quasi-contract or estoppel."

For this reason, it is not an "impairment of contract" for CalPERS to correct an error by a member, the member's employer or CalPERS' staff that may have resulted in more favorable treatment to the member than the law allows. The PERL specifically authorizes CalPERS to correct such errors.

RULE 4:

Future Employees Have No Vested Rights to the Current Statutory Scheme

Employees to be hired in the future do not have vested rights to any particular retirement benefits because they have not yet entered into public employment. Thus, there is no constitutional impediment to unilaterally reducing (or even eliminating) retirement benefits for new hires of public employers, even if the public employers historically have provided such benefits to their employees as part of past employment contracts.

RULE 5:

Retired and Inactive Members Have Vested Rights to the Benefits Promised to Them When They Worked

Like active employees, retirees and inactive members have a vested right to the benefits that were in place when they were employed. However, retirees and inactive members generally do not have vested rights to beneficial changes created **after** their employment terminates. This is because a "member whose employment terminated before enactment of a statute offering additional benefits does not exchange services for the right to the benefits." An exception to the general rule that benefits granted after retirement are not vested arises when the retiree or inactive member gives up another right acquired during employment in exchange for the right to receive post-employment improvements. In that case, the right to a post-employment improvement is generally a vested right.

RULE 6:

Active Employees' Vested Rights May Be Unilaterally Modified Only Under Extremely Limited Circumstances

Active public employees have a vested right to a substantial pension, but, under limited circumstances, the terms of their retirement rights may be modified before they retire. The California Supreme Court has explained: "[V]ested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. Nonetheless, such modifications must be reasonable, and to be sustained as such, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. Further, it is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured."

There are numerous California published decisions that discuss the circumstances under which modifications to the vested rights of active employees may be permitted. There are four primary steps for determining whether a modification is permissible:

(a) The first step in determining whether a modification is permissible is to determine if the unmodified right is in fact vested, meaning neither the employer nor the Legislature reserved the right to change the benefit. This is because the applicable retirement laws often contemplate changes. Indeed, the laws sometimes expressly reserve to the employer or the Legislature the right to modify or eliminate certain benefits. A member's vested right is only to the law as it is written at the time of employment, including all of its conditions.

(b) If a vested right exists, the next step is to determine whether that vested right has been changed in a way that is disadvantageous to the member.

(c) If it is determined that a vested right has been changed in a way that is disadvantageous to a member, the next step is to determine whether the change has a "material relation to the theory of a pension system and its successful operation." If it does not, then the modification is not permissible. Case law is clear that "changes made to effect economies and save the employer money do bear some material relation to the theory of a pension system and its successful operation," but, as discussed immediately below, this finding alone is not sufficient to justify a disadvantageous change to a member's vested rights.

(d) If the change bears a "material relation to the theory of a pension system and its successful operation," the final step is to determine whether the disadvantaged employees will receive a "comparable new advantage." When a court conducts this analysis, it looks specifically at what may be taken from and provided to the individually impacted employees. This member-by-member analysis, however, does not necessarily take into account each member's unique personal circumstances. Thus, a member does not get to pick and choose which advantages or disadvantages will apply to him, and then argue that his vested rights have been unconstitutionally impaired.

RULE 7:
The State's "Emergency" Powers Are Extremely Limited and Cannot Be Used to Reduce the Benefits that Have Been Promised

The courts have carved out one narrow exception to the constitutional prohibition against the impairment of contracts, although there is no case where a court has actually applied that exception in a way that has reduced the long term costs of public retirement benefits in California. Both the California and United States Supreme Courts have held that "a substantial impairment may be constitutional if it is "reasonable and necessary to serve an important public interest" during an emergency. The courts pay little heed, however, to the "legislative assessment of reasonable and necessary," because "the State's self-interest is at stake [and a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." Thus, the courts apply a rigorous four-prong test when determining if this limited exception applies: (a) the legislative enactment must serve to protect "basic interests of society;" (b) there must be an "emergency justification for the enactment," (c) the enactment must be "appropriate for the emergency;" and (d) the enactment must be "designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the temporary deferment."

Thus, even if vested pension rights may be temporarily impaired in a true emergency situation, it is clear that the State's emergency powers do **not** enable it to solve its budgetary problems by eliminating or reducing the long term benefit promises it has made.

V. Federal Contract Clause as Applied to Public Employees' Rights in California

As stated above, it is clear that the "Contract Clause" of the California Constitution provides broad protections of the vested pension rights of California's public employees. Some current "reform" proposals suggest changing the State Constitution to reduce or eliminate public employee retirement benefits, in some instances even amending the Contract Clause itself. Presumably, proponents of these measures assume that by amending the State Constitution, they can avoid a constitutional challenge to their proposed impairment of vested retirement benefits. The assumption is misplaced, for two reasons:

First, if a proposed pension reform were to be enacted in the form of a constitutional amendment, it would still have to pass muster under the Contract Clause of the State Constitution. In other words, any new provision of the State Constitution would still be subject to the requirement that it not impair the obligation of contracts. Absent actually eliminating the entire Contract Clause, the fact that a pension reform measure may be adopted by way of a constitutional amendment would not assure its validity.

"Some current 'reform' proposals suggest changing the State Constitution to reduce or eliminate public employee retirement benefits...Presumably, proponents of these measures assume that by amending the State Constitution, they can avoid a constitutional challenge to their proposed impairment of vested retirement benefits. The assumption is misplaced..."

Second, even if a proposed amendment eliminated the State Constitution's Contract Clause in its entirety, *the Contract Clause in the United States Constitution would give rise to the same protection of vested pension rights* as the State Constitution. Most of the published California cases that have analyzed the constitutionality of modifying vested pension rights of public employees have not meaningfully distinguished between the Contract Clause in the California Constitution and the Contract Clause in the United States Constitution. In 1991, the California Supreme Court removed any doubt that the United States Constitution protects public employee pension rights in California to the same extent as the California Constitution, by explaining that prior case law had "never rejected the federal clause as a source of protection" and "in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply 'too late' to retreat from the clear implication of those holdings."

Therefore, amending the California Constitution likely would not open the way to lawfully impairing vested pension rights. All of the rules discussed in Section IV above likely would still apply, no matter how the California Constitution may be amended, so long as the Contract Clause of the United States Constitution remains unchanged.

VI. CalPERS Members' Rights

Based on the legal analysis set forth above, CalPERS here articulates its understanding of the current state of vested rights law in California, as it applies to CalPERS members' benefits. Analyzing any particular member's vested rights, however, must be done on a case-by-case basis. Thus, nothing in this section is intended to express a view on any individual member's rights or any specific legislative or constitutional proposal. Further, the discussion in this section is not intended to be exhaustive, but rather to provide a general overview of our members' primary rights.

A. Vested Rights

In general, CalPERS members have vested rights to:

- Have their service retirement allowance determined based on the benefit formula that existed in the law when they provided service, if they satisfy all eligibility requirements.
- Have their retirement allowance based upon all service credit that they accrued by providing service or by purchasing service credit.
- Have their retirement allowance calculated using the definition of "final compensation" that existed in the law when they provided service.
- Have their "final compensation" determined according to the definition of "compensation earnable" that existed in the law when they provided service.
- Receive a disability allowance or an industrial disability allowance determined in accordance with the law that existed when they provided service, if the member satisfies all eligibility requirements.
- Purchase service credit under the terms that existed in the law when they provided service, if the member satisfies all eligibility requirements.
- Receive cost of living adjustments to their retirement allowance under the terms that existed in the law when they provided service. This includes "Purchasing Power Protection."
- Have their beneficiaries receive death and survivor benefits provided under the terms that existed in the law when the member provided service.
- Receive the benefits of reciprocity that existed in the law when they provided service, if they satisfy all eligibility requirements.
- Withdraw their contributions, plus accrued interest, upon separation from employment, when eligible for such a withdrawal.
- Have an actuarially sound retirement fund, which requires (a) that the CalPERS Board establish employer contribution rates sufficient to maintain the actuarial soundness of the system so that the competency of its assets is assured, and (b) that the employers timely pay those rates.

Because the above rights of CalPERS members are vested, they may only be modified if such modifications are "reasonable, and to be sustained as such, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."

Finally, there remains a question as to whether vested rights may be consensually modified through collective bargaining without offending the Contracts Clause.

B. Non-Vested Rights

In general, CalPERS members do not have vested rights to:

» Benefit improvements that are granted to them after they have terminated employment (e.g., the "ad hoc" cost of living improvements granted to retirees based upon retirement date), unless such benefit improvements have been granted in exchange for a vested right that the retired members gave up voluntarily.

» Windfall benefits that arise out of circumstances that were never contemplated to be part of the employment contract.

» Payments in excess of those authorized by law, or arising from an error by the member, the member's employer or CalPERS.

» Perpetuation of the Board's discretionary actions affecting contributions and benefits. For example, the Board may change its actuarial assumptions and methodologies for calculating the cost for purchasing service credit, or for determining actuarial equivalency (for a variety of purposes). The Board has full authority to change actuarial assumptions and methodologies in the sound exercise of its discretion, and doing so does not impair any vested right, even if a change does not appear favorable to CalPERS members.

» Continuation of a benefit or contribution rate where the benefit or contribution rate is subject to change under the terms of the applicable statute, memorandum of understanding or employment contract.

» Continued employment with their employer or the continuation of the historical compensation practices of that employer, even if those practices impact the calculation of members' "compensation earnable" and "final compensation." For example, an employer may have historically paid certain premium amounts that qualify as pensionable "compensation earnable." While the member has a vested right to have such amounts included in "compensation earnable" when paid, the member does not have a vested right to continue to be paid those amounts.

Because the above rights are not "vested" under the Contract Clauses of the California and United States Constitutions, there is no constitutional impediment to the Legislature or a member's public employer (or the Board, in the case of its own discretionary acts) from unilaterally altering those rights. Unless and until such alterations are made, however, members of course have a right to receive all benefits provided to them under law. Further, other laws may limit the ability to make such alterations. For example, although specific employment practices may not be vested in perpetuity, the terms of a collective bargaining agreement must be honored during the period of that agreement's applicability.

VII. The Role of CalPERS in Protecting Members' Vested Rights

Under the State Constitution and the PERL, the Board (which is the 13-member governing body of CalPERS) has the exclusive and plenary authority and fiduciary duty to administer CalPERS in a manner that will assure prompt delivery of benefits and related services to the members and beneficiaries of the system. Board members are either elected by members of the system, appointed by State elected officials or sit ex officio.

One court explained the fiduciary duties of members of a public retirement board thusly: "[A] trustee's primary duty of loyalty is to the beneficiaries of the trust. The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. The trustee must not be guided by the interest of any third person. This unwavering duty of complete loyalty to the beneficiary of the trust must be to the exclusion of the interest of all other parties. Under the rule against divided loyalties, a fiduciary cannot contend that although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."

The California Constitution provides: "A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty." The California Supreme Court has explained: "[P]ension plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits and the trustees must exercise their **fiduciary trust** in good faith and must deal fairly with the pensioners-beneficiaries."

The Board will act consistently with these principles. With respect to legislative and constitutional proposals that may impact its members' vested rights, the Board will exercise its best judgment and act appropriately under all existing circumstances. In doing so, the Board will observe certain general guidelines, including:

» CalPERS will make reasonable efforts to keep its members and beneficiaries apprised of changes or potential changes to the law that may impact their rights and responsibilities.

» CalPERS will ensure that funds spent in any process relating to potential changes in funding or benefit structures are appropriate expenditures of trust funds under Article XVI, section 17 of the California Constitution and other applicable law.

» CalPERS' actions will be carried out in a manner that implements the law. In the event CalPERS questions whether changes in the PERL or other applicable law may cause an unconstitutional impairment of its members' vested rights, CalPERS will exercise its best judgment, based on all existing circumstances, as to whether to initiate or participate in judicial challenges to such changes.

VIII. Conclusion

CalPERS is dedicated to administering the system in a manner that will ensure that the promises made to CalPERS' members and beneficiaries will be kept. CalPERS acknowledges the budgetary challenges that the State and other public agencies throughout California are presently facing, and will play an appropriate role in the addressing these challenges. In this process, it will be vitally important for all interested parties to heed the legal rules protecting the vested rights of CalPERS' members, which have developed over the course of many decades. Without due consideration of these rules, well-intentioned proposals may not achieve the purposes for which they are designed; indeed, they may lead only to additional litigation and administrative costs, which can only increase the long term cost of delivering the benefits that have been promised to CalPERS members. It is the hope of CalPERS that this paper will provide guidance to all parties as they address these challenges.

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PROOF OF SERVICE

I declare that I am a citizen of the United States, that I have attained the age of majority, and that I am not a party to this action. My business address is 2711 Alcatraz Avenue, Suite 3, Berkeley, CA 94705-2726. I am familiar with this firm's practice of collection and processing of correspondence to be deposited for delivery via the U.S. Postal Service as well as other methods used for delivery of correspondence. On the below stated date, in the manner indicated, I caused the within document(s) entitled:

- MOTION FOR JUDICIAL NOTICE

To be served on the parties or their attorneys of record in this action:

[x] Via Mail: I cause each envelope (with postage affixed thereto) to be placed in the U.S. mail at Berkeley, California.

[ ] Via Personal Service: I instructed each envelope to be hand-delivered via professional messenger service to the address listed below.

[ ] Via Overnight Courier: I caused each envelope to be delivered via professional overnight delivery service.

[ ] Via Facsimile: I instructed such to be transmitted via facsimile to the office(s) of the addressee(s).

addressed as follows

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

Date: October 22, 2012

Robert A. Roth