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CONFORMED COPY
ORIGINAL FILED
Superior Court Of California
County Of Los Angeles

OCT 29 2013

6 Attorneys for Plaintiffs Mary Kesterson,
7 Hon. Marcel Poché (ret.), Michael Gilmore,
8 The Estate of Robert Seymore, Gerald
9 Dominguez, Jeffrey Walter, Brad Heinz,
10 Christopher Cervelli and James Steed,
11 individually and on behalf of a class of
12 others similarly situated

Sherri R. Carter, Executive Officer/Clerk
By: Deborah McKinney, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

12 MARY KESTERSON, an individual;
13 MARCEL POCHÉ, an individual; MICHAEL
14 GILMORE, an individual; THE ESTATE OF
15 ROBERT SEYMORE (by his Personal
16 Representative); GERALD DOMINGUEZ, an
17 individual; JEFFREY WALTER, an
18 individual; BRAD HEINZ, an individual;
19 CHRISTOPHER CERVELLI, an individual;
20 JAMES STEED, an individual; and on behalf
21 of a class of others similarly situated,

22 Plaintiffs,

23 vs.

24 CALIFORNIA PUBLIC EMPLOYEES'
25 RETIREMENT SYSTEM (CalPERS),
26 BOARD OF ADMINISTRATION OF
27 CALIFORNIA PUBLIC EMPLOYEES'
28 RETIREMENT SYSTEM,

Defendants.

Case No.: BC 502628

CLASS ACTION

(Assigned for all purposes to the Hon. John Shepard Wiley, Department 311)

**NOTICE AND MOTION TO REQUEST
FOR JUDICIAL NOTICE IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO
CALPERS' DEMURRER TO FIRST
AMENDED COMPLAINT**

**[FILED CONCURRENTLY WITH
OPPOSITION AND EXHIBITS 1-6]**

Date: November 15, 2013
Time: 9:00 am
Place: Department 311

Trial Date: None
Complaint Filed: March 8, 2013

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

Plaintiffs submit this *Request for Judicial Notice* in support of their *Opposition* to

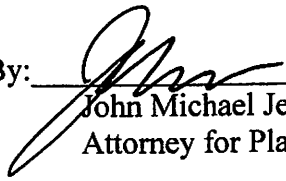
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CalPERS' *Demurrer to First Amended Complaint* under *Evidence Code* sections 450, 451, and 452, *et seq.*

True and complete copies of the documents for which judicial notice is being sought are concurrently filed as **Exhibits 1 through 6**. They are authenticated in the accompanying *Declaration of John Michael Jensen*, and also referred to in the *Opposition to Demurrer to First Amended Complaint*.

This *Request for Judicial Notice* also incorporates the *Opposition* filed concurrently. This *Request for Judicial Notice* is based on this filing and the other filings in this matter.

Dated: October 29, 2013

By:  _____
John Michael Jensen,
Attorney for Plaintiffs

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 **I. INTRODUCTION**

4 Plaintiffs file this *Request for Judicial Notice* in support of their *Opposition* to CalPERS'
5 *Demurrer to First Amended Complaint*.

6 Plaintiffs seek for the Court to recognize and accept for use by the trier of fact or by the
7 Court of the existence of various matters of law or fact. (*Evidence Code*, §§450, *et seq*; *People v.*
8 *Rowland* (1992) 4 Cal.4th 238, 268.)

9 Plaintiffs request Judicial Notice of the acts, records, and documents of the California
10 Public Employees' Retirement System ("CalPERS") and of the Office of Administrative
11 Hearings ("OAH")

12 True and complete copies of the documents are concurrently and separately filed as
13 **Exhibits 1 through 6**. They are also authenticated in the accompanying Declaration of John
14 Michael Jensen.

15 **II. DOCUMENTS**

16 1. **EXHIBIT 1** is an official record and official act of CalPERS. It is a copy of a
17 document titled "Facts at a Glance". The current October 2013 version is located on the
18 CalPERS website at <http://www.calpers.ca.gov/index.jsp?bc=/about/facts/home.xml>. Page 5 of
19 the document, beginning with the title "Total Returns", is attached to the *First Amended*
20 *Complaint* filed herein as Exhibit 1. The copy of **Exhibit 1** was downloaded from the CalPERS
21 website on Friday, October 25, 2013. Page 5 of **Exhibit 1** references the investment returns
22 earned by CalPERS on its invested assets for the period covering June 30, 1999 through June 30,
23 2013.

24 2. **EXHIBIT 2** is an official record and official act of CalPERS. It is a copy of
25 "Christopher A. Cervelli's Post Hearing Reply Brief" filed in the administrative proceedings
26 bearing CalPERS Case No. 2010-1216, Office of Administrative Hearings Case No.
27 2011040779. **Exhibit 2** is contained in the administrative record of that proceeding conducted
28 before the OAH and is an official record of both CalPERS which initiated the proceedings (and

1 was responsible for the administrative record) and of the OAH (which presided over the
2 proceedings). Cervelli was represented by John Michael Jensen, counsel for Plaintiffs herein, in
3 that proceeding and Cervelli is a named Plaintiff in the instant action. On page 13, lines 15-22,
4 Cervelli asked that if the ALJ awarded CalPERS the right to disallow any portion of the service
5 credit purchased by Cervelli (which was the primary issue in the proceedings), that CalPERS be
6 required to return the monies that Cervelli paid for that service credit plus interest earned on the
7 monies.

8 3. **EXHIBIT 3** is an official record and official act of CalPERS. It is a copy of
9 CalPERS' "Decision" in the above-described administrative proceeding involving respondent
10 Cervelli whereby CalPERS announced that it had officially adopted the *Proposed Decision*
11 issued by Administrative Law Judge Perry O. Johnson. A copy of **Exhibit 3** is attached to the
12 *FAC* as Exhibit 10.

13 4. **Exhibit 3** is contained in the administrative record of that proceeding conducted
14 before the OAH and is an official record of both CalPERS which initiated the proceedings (and
15 was responsible for the administrative record) and of the OAH (which presided over the
16 proceedings). Legal Conclusion No. 6 in the *Proposed Decision* states, "Respondent Cervelli
17 argues that in the event the service credit purchased by him is expunged, CalPERS should made
18 [sic] payment of interest on any partial refund, or damages as prescribed in the Civil Code.
19 Respondent cited no legal authority that would give an administrative law judge authority to
20 determine such a remedy. Notwithstanding the factual findings above, *this administrative matter*
21 *is not the proper forum for resolution of this issue.* (Emphasis added.) CalPERS formally
22 adopted the *Proposed Decision* as its own on April 18, 2012. In doing so, CalPERS also adopted
23 Legal Conclusion No. 6.

24 5. **EXHIBIT 4** is an official record and official act of CalPERS. It is a document
25 entitled "Interim Orders" issued by Administrative Law Judge Ann Elizabeth Sarli of the OAH
26 on January 17, 2006. A copy of **Exhibit 4** is attached to the *FAC* as Exhibit 14.

27 6. As discussed in the attached Declaration of John Michael Jensen, **Exhibit 4** is a
28 record in CalPERS Case No. 6636, OAH Case No. N2005060412, in an administrative

1 proceeding involving a demand by Appellants that CalPERS pay them interest on retroactive
2 pension benefits awarded to them by CalPERS. As explained in the Jensen Declaration, **Exhibit**
3 **4** is an official record of both CalPERS which initiated the proceedings (and was responsible for
4 the administrative record) and of the OAH (which presided over the proceedings). It indicates
5 that ALJ Sarli awarded interest to appellants. Mr. Jensen was the attorney of record for one of
6 the appellants. As stated in the Jensen Declaration, it is Mr. Jensen's best recollection that
7 CalPERS eventually reached a settlement and paid the interest awarded by Judge Sarli, but never
8 formally acted to adopt or reject the Interim Orders.

9 7. **EXHIBIT 5** is an official record and official act of CalPERS. It is a copy of a
10 "Settlement Agreement" between Jeffrey Walter, the City of Cotati and CalPERS concerning an
11 administrative proceeding in CalPERS Case No. 2010-0142, OAH Case No. 2011030977.

12 **Exhibit 5** is contained in the administrative record of that proceeding conducted before the OAH
13 and is an official record of both CalPERS which initiated the proceedings (and was responsible
14 for the administrative record) and of the OAH (which presided over the proceedings). Walter is a
15 named Plaintiff in the instant action. Paragraph no. 1 of the Settlement Agreement says, "The
16 only issue before the Office of Administrative Hearing in the above-captioned matter is whether
17 Respondent, Walter, qualified for CalPERS membership through the City of Cotati during the
18 period of January 13, 1981 to December 31, 2007.

19 20 **LAW AND ARGUMENT**

21 **I. Introduction**

22 Plaintiffs seek for the Court to recognize and accept for use by the trier of fact or by the
23 Court of the existence of various matters of law or fact. (*Evidence Code*, §§450, *et seq*; *People v.*
24 *Rowland* (1992) 4 Cal.4th 238, 268.)

25 Plaintiffs seek judicial notice of:

26 (1) *CalPERS' Official Acts*. "Official acts" of legislative, executive and
27 judicial departments of the federal or any state government. (*Evidence Code*, §452(c);
28 *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471.) The court may take

1 notice of official acts of any state, county or federal legislative, executive or judicial
2 department. (*Evidence Code*, §452(c); see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746,
3 1750 [court can take judicial notice of records and files of state administrative agencies];
4 *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 [licenses issued by
5 state agency].)

6 (2) *CalPERS' Official Records and Reports.* Judicial notice may be taken of
7 *official reports and publications* by government agencies. (*Arce v. Kaiser Found. Health*
8 *Plan, Inc., supra*, at 484.) Under *Evidence Code*, §452(c), the trial court may take judicial
9 notice of the records and files of a state administrative board. (*Fowler v. Howell, supra*,
10 at 1750.) To the degree that the filings in defendants' request for judicial notice are the
11 "official acts" of the agency, they are noticeable. (*Stevens v. Superior Court* (1999) 75
12 Cal.App.4th 594, 607-608.)

13 (3) *OAH's Official Acts.* "Official acts" of legislative, executive and judicial
14 departments of the federal or any state government. (*Evidence Code*, §452(c); *Arce v.*
15 *Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471.) The court may take notice
16 of official acts of any state, county or federal legislative, executive or judicial department.
17 (*Evidence Code*, §452(c); see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750 [court
18 can take judicial notice of records and files of state administrative agencies]; *C.R. v.*
19 *Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 [licenses issued by state
20 agency].)

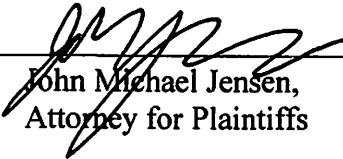
21 (4) *OAH's Official Records and Reports.* Judicial notice may be taken of
22 *official reports and publications* by government agencies. (*Arce v. Kaiser Found. Health*
23 *Plan, Inc., supra*, at 484.) Under *Evidence Code*, §452(c), the trial court may take judicial
24 notice of the records and files of a state administrative board. (*Fowler v. Howell, supra*,
25 at 1750.) To the degree that the filings in defendants' request for judicial notice are the
26 "official acts" of the agency, they are noticeable. (*Stevens v. Superior Court* (1999) 75
27 Cal.App.4th 594, 607-608.)

28 (5) *Administrative Records, Notice of Determination.* Court of Appeal would

1 take judicial notice of a staff report, hearing transcript, draft minutes, and notice of
2 determination from the California Coastal Commission regarding application for coastal
3 development permit for the park, in objector's appeal from trial court judgment denying
4 writ of mandate challenging city's certification of environmental impact report (EIR) for
5 park. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th
6 1209, 2012.)

7
8 Dated: October 29, 2013

By: _____


John Michael Jensen,
Attorney for Plaintiffs

DECLARATION OF JOHN MICHAEL JENSEN

1
2
3 I, JOHN MICHAEL JENSEN, declare as follows:

4 1. The statements herein are based upon my personal knowledge and if called to
5 testify under oath in court I could and would so testify.

6 2. I am over 18 years old.

7 3. I have been counsel of record for Plaintiffs since this action was filed.

8 4. I make this declaration in support of the Opposition to Demurrer and a request for
9 Judicial Notice in Opposition to CalPERS' *Demurrer to First Amended Complaint*.

10 5. The remainder of this Declaration refers to the concurrently and separately filed
11 **Exhibits 1 through 6**.

12 6. **EXHIBIT 1** is a true and correct copy of a document entitled ""Facts at a
13 Glance". **Exhibit 1** was downloaded from the CalPERS website at
14 <http://www.calpers.ca.gov/index.jsp?bc=/about/facts/home.xml> on Friday, October 25, 2013.

15 7. **Exhibit 1** provides CalPERS' investment returns.

16 8. Page 5 of **Exhibit 1**, beginning with the title "Total Returns", is attached to the
17 First Amended Complaint filed herein as Exhibit 1. Page 5 of **Exhibit 1** references the
18 investment returns earned by CalPERS on its invested assets for the period covering June 30,
19 1999 through June 30, 2013.

20 9. I represented Chris Cervelli in a prior administrative process before CalPERS that
21 sought interest. **EXHIBIT 2** is a true and correct copy of a document entitled "Christopher A.
22 Cervelli's Post Hearing Reply Brief". We filed Exhibit 2 in the administrative proceedings
23 bearing CalPERS Case No. 2010-1216, Office of Administrative Hearings Case No.
24 2011040779.

25 10. I was the attorney of record for Mr. Cervelli in those proceedings. Mr. Cervelli is
26 also a named Plaintiff in the instant action. I filed **Exhibit 2** with the OAH and served on
27 CalPERS as part of the post-hearing briefing. Cervelli's administrative proceedings involved
28 CalPERS' efforts to disallow service credit previously purchased by Mr. Cervelli years earlier.

1 11. As noted on page 13, lines 15-22, of **Exhibit 2**, we requested civil code interest
2 on the funds on deposit if the service credit purchase was not allowed. I asked the ALJ to grant
3 interest under Civil Code Section 3287 on Mr. Cervelli's funds that were held by CalPERS for
4 many years. I requested that, if the Administrative Law Judge granted CalPERS the right to
5 disallow any portion of the service credit purchased by Cervelli, then CalPERS should be
6 required to return the monies that Cervelli paid for that service credit plus interest, including
7 interest payable under the Civil code or interest earned on the monies.

8 12. We explicitly sought interest under the authority of Civil Code 3287.

9 13. The ALJ granted CalPERS the right to disallow the service credit purchase.

10 14. The ALJ ruled that ALJ had no authority to award interest under the Civil Code.

11 15. The ALJ ruled that the OAH was not the correct venue or jurisdiction to hear
12 claims for interest under the Civil Code.

13 16. **EXHIBIT 3** is a true and correct copy of a packet sent to me by CalPERS on or
14 about April 23, 2012. **Exhibit 3** contains a copy of the *Proposed Decision* issued by ALJ Perry
15 O. Johnson, as well as CalPERS' *Decision* adopting the *Proposed Decision*. **Exhibit 3** is
16 contained in the administrative record of that proceeding conducted before the OAH. A copy of
17 **Exhibit 3** is attached to the *First Amended* Complaint as Exhibit 10.

18 17. Legal Conclusion No. 6 in the *Proposed Decision* states, "Respondent Cervelli
19 argues that in the event the service credit purchased by him is expunged, CalPERS should made
20 [sic] payment of interest on any partial refund, or damages as prescribed in the Civil Code.
21 Respondent cited no legal authority that would give an administrative law judge authority to
22 determine such a remedy. Notwithstanding the factual findings above, *this administrative matter*
23 *is not the proper forum for resolution of this issue.* (Emphasis added.)

24 18. CalPERS formally adopted the *Proposed Decision* as its own on April 18, 2012.
25 In doing so, I understand that CalPERS also adopted Legal Conclusion No. 6.

26 19. **EXHIBIT 4** is a true and correct copy of a document entitled "Interim Orders"
27 issued by Administrative Law Judge Ann Elizabeth Sarli of the OAH on January 17, 2006. A
28 copy of **Exhibit 4** is attached to the FAC as Exhibit 14.

1 20. The "Interim Orders" was issued as part of an administrative proceeding in
2 CalPERS Case No. 6636, OAH Case No. N2005060412, involving a demand by Appellants,
3 various former and current Legislators in the California Senate and Assembly, that CalPERS pay
4 them interest on retroactive pension benefits awarded to them by CalPERS. **Exhibit 4** is
5 contained in the administrative record of that proceeding conducted before the OAH.

6 21. I was attorney of record for one of the appellants and was served with a copy of
7 the "Interim Orders". The document indicates that ALJ Sarli awarded interest to appellants.

8 22. It is my best recollection that CalPERS did not formally adopt the Proposed
9 **Decision in Exhibit 4.**

10 23. It is my best recollection that CalPERS reached a settlement and paid the interest
11 awarded to appellants by Judge Sarli.

12 24. It is my best recollection that CalPERS never formally acted to adopt or reject the
13 **Interim Orders.**

14 25. It is my best recollection that CalPERS paid the interest to the Appellants.

15 26. I included the **Exhibit 4** to demonstrate an equal protection violation.

16 27. Regarding Plaintiff Walter, I was not his attorney in the administrative process,
17 but I became his attorney for this representative action after the conclusion of the administrative
18 process.

19 28. **EXHIBIT 5** is a true and correct copy of a "Settlement Agreement" between
20 Jeffrey Walter, the City of Cotati and CalPERS concerning an administrative proceeding in
21 CalPERS Case No. 2010-0142, OAH Case No. 2011030977.

22 29. Walter's Settlement Agreement explicitly contemplates that Walter's interest
23 claims can be brought in a judicial forum.

24 30. I was given a copy of **Exhibit 5** by Mr. Walter in connection with his decision to
25 serve as a named Plaintiff in the instant action.

26 31. Based on my understanding of the inability of CalPERS to award interest
27 damages pursuant to *Civil Code* section 3287(a) especially in class actions and CalPERS'
28 adoption of the *Proposed Decision* in the above-described administrative proceeding involving

1 Christopher Cervelli, I do not believe that Mr. Walter had any legal grounds to assert a claim in
2 CalPERS administrative process for interest.

3 32. Walter had no obligation to file an administrative action for Civil Code interest.

4 33. Walter had no obligation or legal right to file a *Petition for Writ of Administrative*
5 *Mandamus* to challenge CalPERS' lack of jurisdiction and/or failure to award him interest in
6 connection with its return of \$469,005.25 as described in the Settlement Agreement.

7 34. The deadline for filing a claim under the Government Tort Claims Act with the
8 Victims Compensation and Tort Claims Board is one year after accrual of the cause of action in
9 contract matters. The six-month deadline applies only to physical injury or death, which was not
10 involved in Walter's claims.

11 35. Walter timely filed a VCGCB claim within one year of the accrual of his cause of
12 action for interest, and therefore is not time barred.

13 36. **EXHIBIT 6** is a sample of information recently received from CalPERS about 13
14 years of late paid "lump sums". The information contains about 55,000 lump sum payments
15 made for the years 2000 to 2013, for a total of about 715,000 lump sums.

16 37. I conducted an analysis of the data contained in the material provided by
17 CalPERS and concluded that CalPERS pays an average of 55,000 Members annually, with
18 payments that are on average 130 days late.

19 38. I included several pages in **Exhibit 6** that provide a summary or the last page of
20 the analysis for years 2009 to 2013.

21 39. The consistent average of 130 days late over many years shows that CalPERS has
22 an institutional practice to delay that is common to Plaintiffs.

23 Under penalty of perjury, I hereby declare that all statements made herein of my own
24 knowledge are true and that all statements made on information and belief are believed to be
25 true.

26 DATED: October 29, 2013

27 
John Michael Jensen