including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] . . their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes (sic) this section applicable in the county.

(Howard Jarvis Taxpayers' Assn. v. Board of Supervisors (1996) 41 Cal.App.4th 1363, 1367.) The first paragraph of section 31460.1 apparently became operative in Orange County on January 1, 1991, after the Board of Supervisors adopted a resolution making the statute applicable.

By its terms, former Government Code section 31460.1 was applicable only to employees who had "elected to participate in" a flexible benefits program such as OBP. Under the master plan documents governing the optional benefit plans of various Orange County agencies such as the Superior Court during the pertinent time period, OBP benefits were provided annually to all "OBP Elegible Employees" as defined (sections 1.29 and 4.7 -- AR 498, 510, 536, 549), without any requirement or opportunity for such employees to elect whether or not to participate in the plan. Although new employees hired mid-year (section 4.5 -- AR 506, 545) and "Eligible Employees" (sections 1.15 and 4.7 -- AR 496, 510, 534, 549) were able to elect not to participate in the OBP, as an "OBP Eligible Employee" applicant was automatically deemed to have elected to receive the full \$3,500.00 as taxable cash in the year following any year he failed to make an allocation of OBP funds during the open enrollment period. (Sections 4.3 and 4.7 -- AR 506, 510, 545, 549.) The Optional Benefit Plan was thus "optional" only with regard to the allocation of the \$3500.00 benefit, not with regard to its provision, and the only election available to applicant consisted of

the ability to allocate some or all of the \$3,500.00 annual benefit among a handful of designated uses, and if no such allocation was made during the open enrollment period in any year, the full \$3,500.00 was automatically paid as taxable cash.

In addition, former section 31460.1 was by its terms applicable only to flexible benefit plans which provided payments in excess of employees' normal compensation ("amounts that exceed[] . . . their . . . salaries"). Under the County master plan document, the OBP benefits received by Court attorneys were not in excess of their salary, since the each annual OBP benefit was fully offset by a corresponding salary reduction ("salary redirection"): "his or her Compensation will be reduced in an amount equal to the amount of contributions elected " (Section 3.1 -- AR 503, 542.) "Salary Redirection Agreement means an agreement set forth in the Enrollment Documentation between the Participant and the Employer under Section 3.1 of the Plan where the Participant agrees to reduce his or her Compensation and to have such amounts contributed by the Employer to the Plan on the Participant's behalf." (Section 1.38 --AR 498, 536.) In effect, the OBP program simply permits participants to utilize \$3,500.00 of their ordinary salary compensation to pay for certain types of expenses on a pre-tax basis in accordance with IRS regulations. Throughout applicant's period of employment, the OBP was accordingly treated by Court management as an integral part of the overall compensation package provided to research attorneys at the Superior Court.

THE REPEAL OF GOVERNMENT CODE SECTION 31460.1 RENDERED THE STATUTE INOPERATIVE IN GRANGE COUNTY

Even if section 31460.1 were otherwise applicable, the operative language contained in the first paragraph of the statute became ineffective when it was repealed without reenactment on May 11, 1992, via S.B. 193. (Cf. Government Code section 20636(g)(4)(K), which continues to govern calculation of "compensation earnable" for State employees under the Public Employees' Retirement System.) Resolution No. 98-001 reflected the view of respondent's counsel that exclusion of flexible plan benefits was unaffected by the 1992 repeal of Government Code section 31460.1 because the statute had become "grandfathered" into law for Orange County when it was made effective by the Board of Supervisors in June 1991. (AR 300, 308, 312, 334-335.) In repealing section 31460.1, S.B. 193 provided, "Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act." (Section 2, Stats.1992, c. 45 -- AR 138.) However, construing "action taken" to refer to the Board of Supervisors's adoption of the December 1990 resolution which made former section 31460.1 operative is statutorily problematic, since any continued validity of the resolution itself became legally inconsequential when the operative provisions of former section 31460.1 were repealed. (See Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568, holding that an assessment exemption adopted by municipal ordinance pursuant to statutory authorization was abrogated by the subsequent repeal of the authorizing statute -- "the legislative repeal of section 20 of the Vrooman Act operated to repeal the power conferred upon the city of San Jose in the matter . . . [W]hen in

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its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end"; Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App. 150, 152-153, rejecting the contention that the continued validity of the ordinance gave continuing legal effect to the exemption notwithstanding the statutory repeal; cf. Ransome-Crummey Co. v. Fikes (1921) 53 Cal.App. 180, 182-183, giving effect to the exemption with regard to work completed prior to the repeal.) "It is usual for legislative bodies to use the word 'repealed,' and, when used, the act referred to is abrogated, -- done away with." (Thomason v. Ruggles (1886) 69 Cal. 465, 470; see Government Code section 9606.) "[I]t is the general rule that one legislature cannot enact irrepealable legislation or limit or restrict its own power or the power of its successors as to the repeal of statutes." (United Milk Producers of Cal. v. Cecil (1941) 47 Cal.App.2d 758, 764.) The second paragraph of former section 31460.1 thus did not permit the Board of Supervisors to render the first paragraph permanently operative regardless of any subsequent action by the Legislature. (See, e.g., Government Code section 31658(h), whereby the Legislature effectively terminated operation of section 31658 in 2013 notwithstanding any such prior adoption by the board of supervisors; also Government Code section 31462.1(b).) The Legislature merely utilized a commonly employed "trigger" for operation of the first paragraph, which was not self-executing and remained inoperative in any county "until" it was activated by the board of supervisors (cf., e.g., Government Code sections 31453(b) (2), 31454(b)(2), 31458.4(b), 31462.3(c), 31469.4, 31469.8(c), 31470.12, 31470.14(e), 31610, 31662.8, 31663, 31681.51-31681.54, 31685.96) .

Contrary to the assertion by respondent's counsel (AR 308), section 2 of S.B. 193 did not specifically preserve the validity of

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actions taken by county boards of supervisors in adopting the operative language of former section 31460.1, although it could have done so if that had been the Legislature's intent, The saving language refers instead to action taken by counties (cf. reference to "county actions" in section 3(8) -- AR 139), and the better view would be that "action taken . . . pursuant to Section 31460.1" in section 2 of S.B. 183 refers to the clerical action of excluding flexible benefits from "compensation carnable" for employees who retired while former section 31460.1 was operative -- the statutorily authorized exclusion might remain effective for retirements which occurred between January 1, 1991, and May 11, 1992, in Orange County, but not for those which occurred before or after, (See Government Code section 31481.) "The presumption is, that the Legislature did not intend to pass any law that would affect past transactions, or work injustice." (People ex rel. Thorne v. Hays (1854) 4 Cal. 127, 138.) Moreover, the placement of a comma before "prior to" in section 2 (AR 138) indicates that the sentence should be read to impliedly preclude the continued application of section 31460.1 after the effective date of S.B. 193 -- under this construction, Resolution 98-001's post-1990 exclusion of OBP flexible benefits was invalid under section 2 of S.B. 193, inasmuch as the adoption of Resolution 98-001 was itself an "action . . . pursuant to Section 31460.1" by a County agency which was not "taken . . . prior to the effective date of "S.B. 193. "Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, . . . consistent with the clear language and purpose of the statute." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, supra, 16 Cal.4th at 490.)

THE 2002 SETTLEMENT AGREEMENT CONTRAVENES PUBLIC POLICY AND IS VOID INSOFAR AS IT CONFLICTS WITH CERL REQUIREMENTS

Settlement agreements are treated as contracts and are subject to the general rules governing enforcement of contracts. (Stewart v. Preston Pipeline Inc. (2005) 134 Cal.App.4th 1565, 1585.)

A contract must have a lawful object. (Civil Code section 1550.) Any contract which has as its object the violation of an express provision of law 1: unlawful. (Civil Code section 1667, subd. 1.) The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do. (Civil Code section 1595.) The object must be lawful when the contract is made. (Civil Code section 1596.) And that part of the contract which is unlawful is void. (Civil Code section 1599.)

Vierra v. Workers' Comp. Appeals Bd. (2007) 154 Cal.App.4th 1142, 1148: "A contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced.") "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out." (Lee On v. Long (1951) 37 Cal.2d 499, 502; see also Martinez-Ferrer v. Richardson-Merrill, Inc. (1980) 105 Cal.App.3d 316, 327, quoting with approval the tentative draft of the Restatement Second of Judgments, which stated that rules of merger are inapplicable where the prior judgment was "plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme.")

Case law has made clear that the statutory definitions of "compensation" and "compensation earnable" under the CERL may not be altered via negotiated agreements: "The Ventura decision affected the determination of what items were to be included in 'compensation earnable,' and this is not subject to a contract right. . . [P] lan

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members could not bargain regarding their contribution rates or their 'final compensation.'" (In re Retirement Cases (2003) 110 Cal.App.4th 426, 453 (emphasis in original).) "Indeed, '[t]he statutory provisions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflicts therewith.'" (Miller v. State of California (1977) 18 Cal.3d 808, 814, quoting Boren v. State Personnel Board (1951) 37 Cal.2d 634, 641.) As discussed above and in Ventura, the CERL requires cash payments to employees, as well as benefits payable as cash, to be included in "compensation" and "compensation earnable" for purposes of calculating retirement allowances. The 2002 settlement agreement in the Retirement Cases Litigation is consequently void and unenforceable insofar as it would bind OBP participants to accept the post-1990 exclusion of OBP payments set forth in Resolution 98-001. The 2002 judgment approving the unlawful settlement provision is similarly ineffective: "a court cannot validly enter a judgment or order which is void even if the parties agree to it." (Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 13; see Timney v. Lin (2003) 106 Cal.App.4th 1121, 1129: "The settlement judge, of course, was not asked to formally rule on the legality of the . . . provision the parties agreed to. Nor was the court presented with applicable law at the settlement conference, by briefing or otherwise, so as to allow a determination of this issue. Had this occurred, the court would likely have been constrained to rule in accordance with the precedents binding on us, that the . . . provision was invalid.") "[E] ven though there is a strong public policy favoring the settlement of litigation, this policy does not excuse a contractual clause that is othewise illegal or unjust," (Id. at 1127.)

RESPONDENT IS ESTOPPED FROM ASSERTING THAT THE ISSUE OF FLEXIBLE BENEFIT EXCLUSION WAS RESOLVED IN THE RETIREMENT CASES LITIGATION

Respondent initiated the Retirement Cases Litigation by filing a complaint for declaratory relief (OCSC case no. 791315) on March 6, 1998, against two individual attorneys of the District Attorney's office (Jan J. Nolan and Eric W. Snethen) and the County of Orange as defendants. (AR 60-73.) In addition to alleging the existence of a dispute with the County regarding respondent's post-Ventura calculation of retirement allowances (paras. 22-23), the complaint alleged that attorney Snethen had retired from full-time employment and attorney Nolan had announced her intention to retire (paras. 2 and 3), and that the two attorneys had recently threatened litigation with regard to certain aspects of the allowance calculation involving the exclusion of "cash-out" payoffs for vacation/sick leave and holiday pay, of OBP flexible benefits for employees retiring after 1990, and of automobile usage (paras. 20 and 21). The complaint specifically alleged that the calculation of retirement allowances was based upon Government Code sections 31462 and 31462.1 (para. 8 -- AR 62) but made no mention of former section 31460.1. Although the complaint (paras. 20-22) specifically listed only a few aspects of respondent's newly unveiled calculation which were being disputed by the three defendants for various reasons, it alleged (paras. 24 and 25) the existence of "[a]n actual controversy" between respondent "and each of them, as to whether the Board's adoption of Resolution 98-001 complies with applicable law . . . ," and requested "a judicial determination that Resolution 98-001 complies with applicable law."

Four days later, attorneys Nolan and Snethen, joined by the

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Orange County Attorneys' Association, filed a petition for writ of mandate against respondent pursuant to Code of Civil Procedure section 1085. (AR 74-149.) The verified petition (paras. 6 and 7) alleged that "[s]pecific provisions of" Resolution 98-001 contravened the CERL and the state and federal constitutions, as well as the certain agreements and regulations applicable to certain non-Court County employees -- the petition made no mention of the Court PP&Rs or any other agreement governing the compensation and benefits provided to applicant. Specifically, the petition (para. 9) reiterated certain claims of retirement allowance miscalculation previously set forth in respondent's complaint, seeking to require respondent to

perform its duty to include cash payment made in the "measuring period" for all accrued leave. in the calculation of "final compensation" pursuant to the Ventura decision; include cash payment for the flexible benefit plan to all members employed prior date to the effective Boards and who Supervisors'Resolution 90-1551, employed after its ffective date; and, apply the language of the MOU/PSR which specifies the amount of vacation hours that can be cashed out in a calendar year to be included in the calculation of petitioners' "final compensation."

The specific nature of petitioners' claims was further defined in a memorandum of points and authorities attached to the petition, which, with regard to OBP flexible benefits, asserted only that the flexible benefit exclusion for persons retiring after 1990 denied post-1990 employees a vested pension right in violation of the contract clauses of the U.S. and California constitutions. (AR 97-101.)

On April 1, 1998, attorneys Nolan and Snethen filed a general demurrer, challenging the legal sufficiency of respondent's complaint on the ground, inter alia, that, by seeking a declaratory ruling that Resolution 98-001 was properly adopted and complied with

the CERL, the complaint sought an improper advisory opinion with regard to the validity of the numerous inclusions and exclusions contained in the Resolution which did not relate to the specific disputess alleged to have been raised by the defendants. (AR 183-185; see AR 25-26.) The demurrer pointed out, correctly, that Civil Code section 1060 requires that a declaratory relief action adjudicate an "actual controversy" -- i.e., an existing controversy susceptible of definitive and conclusive judicial relief. (See Wilson v. Transit Authority (1962) 199 Cal.App.2d 716, 722-724; Selby Realty Co. v. San Buenaventura (1973) 10 Cal.3d 110, 117-118.) Recognizing the validity of the attorneys' contention in this regard, respondent in its April 14 opposition to the demurrer (AR 200-211) cited the handful of issues identified in paras. 20-22 of the complaint (as well as in the judicially noticeable writ petition) and expressly disclaimed any intention of seeking declaratory relief with regard to the remaining inclusions and exclusions contained in Resolution 98-001:

> In paragraph 25 of its Verified Complaint, the Board requests that the Court make a determination specific controversies raised by the defendants. Presently, the only parties who have raised actual controversies as to the Board's legal duties and their legal rights are defendant's Nolan, Snethen and the County of Orange. Therefore, unless and until other parties create an actual controversy so as to require the Board to amend its Verified Complaint to add additional defendants, those issues are the only issues to be resolved in this dispute. Nolan and Snethen's parade of horribles as to the "over a thousand pay codes" and corresponding Memoranda of Understanding that this court allegedly would be required to review thus is unfounded. The issues in this declaraory relief action are straightforward. . . . The Board thus seeks no "advisory opinion" from this Court, but rather a final determination of the specific issues in dispute. . . .

(AR 206 at 7:1-16.) Respondent reiterated and amplified this

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disclaimer days later in reply papers filed in OCSC case no. 791315 in support of its motion for consolidation which was calendared to be heard concurrently with the demurrer:

Contrary to defendants' assertions, the Board does not here seek sweeping, generalized judicial approval of Resolution 98-001. Rather, as the Board has set forth in its pleading herein, . . . the Board only seeks the Court's determination on Issues that actually are in controversy between the Board and those who contest portions of the Board's Resolution. Those aspects of the Board's Resolution which no party challenges will not require judicial review in this action. The specific controversies to be determined here are only those raised by defendants and their association in the Mandamus Action, the identical (and additional) issues raised by OCEA, and the issues raised by the County in its Anser and Cross-Complaint.

(AR 214-215 (emphasis in original.) In light of these qualifying representations regarding the scope of relief sought in the complaint, the attorneys' demurrer was overruled. (AR 216.)

"'Judicial estoppel prevents a party from aserting a position in a legal proceeding that is contray to a position previously taken in the same or dome earlier proceeding. The doctrine serves a clear purpose: to protect the intebrity of the judicial process.'"

(Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181, quoting Cleveland v. Policy Management Systems Corp. (5th Cir. 1997) 120 F.3d 513, 517.)

The doctrine applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a resul of ignorance, fraud, or mistake.

(Aguilar v. Lerner (2004) 32 Cal.4th 974, 986-987; see Jackson v. County of Los Angeles, supra, 60 Cal.App.4th at 183.) In contrast to

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equitable estoppel, the party invoking judicial estoppel need not show privity, detrimental reliance or prejudice -- "it is the intentional assertion of an inconsistent position that perverts the judicial machinery." (Id.; see also International Billing Services, Inc. v. Emigh (2000) 84 Cal.App.4th 1175, 1190.)) Although equitable in nature, the doctrine may be applicable as a matter of law where facts supportive of its application are not in dispute, and its application may be based upon properly noticed judicial records.

(Minish v. Hanuman Fellowship (2013) 214 Cal.App.4th 437, 449-450 and 455 n. 11.)

Although numerous pleading were filed on the consolidated and coordinated Retirement Cases Litigation after the initial complaint and the petition for writ of mandate, few new claims were asserted, and none involving the applicability or continued viability of former Government Code section 31460.1. A cross-complaint for declaratory relief filed against respondent by Orange County on April 8, 1998 (prior to respondent's opposition to demurrer) alleged that Resolution 98-001 was void as a matter of law due to conflicts of interest on the part of respondent's governing board (an issue later summarily adjudicated in favor of respondent) and that respondent had acted unconstitutionally in including the automobile usage allowance and in billing the County for retirement allowances increased retroactively under Ventura. (AR 195-199.) The answer filed by attorneys Nolan and Snether on May 6 (AR 217-223) denied paras. 20 and 21 of respondent's complaint and asserted affirmative defenses (fifth through tenth) challenging respondent's authority to adopt Resolution 98-001 and reiterating the allegations of the complaint and the writ petition with regard to the identified issues in dispute. None of the other answers filed by the parties in response to the various pleadings alleged any new issues relating to

the inclusion or exclusion of items from the calculation of "compensation" and "compensation earnable." (AR 190-194, 378-383, 387-391, 392-398, 412-416, 417-421.) Virtually identical complaintsin-intervention and accompanying points and authorities in support of writs of mandate, which were filed against respondent by Orange County Employees Association and The Retired Employees' Association of Orange County, Inc. on May 29 and June 10, respectively, denied paragraphs 20 and 21 of respondent's complaint based on lack of information and alleged the erroneous exclusion of certain cash payment received in connection with termination, payments made to insurance providers on behalf of employees retiring after 1990, and flexible benefit plan benefits provided to persons employed "prior to, on and after January 1, 1991," the latter contention being based solely upon the alleged deprivation of a constitutional right to vested contractual benefits. (AR 227, 231-233, 248-253, 260-261, 266-269, 289.) A supplemental cross-complaint filed by Orange County on October 16 addressed the validity of a follow-up financial resolution adopted by respondent in May 1998.

Notably, the doctrine of judicial estoppel has been held to apply to a defendant who attempted to invoke res judicata after asserting in the prior action that no relief could be granted on the pleadings. (Lunsford v. Kosanke (1956) 140 Cal.App.2d 623, 628-631.)

The court said that where a defendant defeats an action on the grounds that the pleadings do not warrant recovery on the facts, he is estopped in the second action to insist that the second action is barred by a former judgment because the matter might have been settled in the former action.

(<u>Davies v. Krasna</u> (1970) 12 Cal.App.3d 1049, 1056.) Positions taken in opposition to a demurrer have been held to give rise to judicial estoppel. (<u>Sukut Construction</u>, Inc. v. Rimrock CA LLC (2011) 199 Cal.App.4th 817, 833-835.) Having asserted successfully that the

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Retirement Cases Litigation did not involve a general adjudication of the validity of all the inclusions and exclusions contained in Resolution No. 98-001, but rather was confined to the specific claims asserted by the other parties, respondent is judicially estopped from now claiming that the 2002 settlement resolved the issues presented in this appeal or otherwise bars them from being asserted herein.

AT BEST, THE 2002 SETTLEMENT AGREEMENT IS AMBIGUOUS AS TO WHETHER IT BARS A CLAIM THAT FLEXIBLE BENEFIT PLAN PAYMENTS MUST BE INCLUDED IN COMPENSATION EARNABLE

OCERS' contention that the 2002 settlement agreement bars this appeal rests upon language contained in paragraphs 3 and 11 of the settlement agreement (AR 37, 40), which provide, on pertinent part,

Each of the parties agrees to accept as final and pinding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001, as amended As of the Effective Date, each Party hereto . . . hereby releases and discharges each other Party . . from any and all claims, demands, causes of action, obligations, damages, expenses liabilities, known and unknown, suspected and unsuspected, that it, or any of its Related Persons, now owns or holds, or at any time heretofore or hereafter may have, that were asserted, or that could have been asserted in connection with, or that in any way relate to matters stated in any of the pleadings on file in Orange County Cases and/or the (including, but not limited to, the Remaining Contested Claims), in OCERS' Resolution 98-001 as amended, . . . and/or in the Judgment, including any exhibits to such documents ('Released Claims').

However, these provisions are qualified by paragraph 15 (AR 42),

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which provides, "Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein" (emphasis added). This language implicitly acknowledges the primacy of the statutory scheme governing the calculation of County pension allowances, and because the settlement agreement does not specifically address either the rights of current retirees under former Government Code section 31460.1 or their right under the CERL to have "payable as cash" OBP benefit payments included in compensation earnable, the settlement agreement should not be construed to affect those rights. "Release . . . provisions are binding on the signatories and enforceable so long as they are . . . 'clear, explicit and comprehensible in each [of their] essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor . . , of the effect of signing the agreement, " (Powers v. Superior Court (1987) 196 Cal.App.3d 318, 320, quoting Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal.App.3d 309, 318.)

Nor, perhaps equally importantly, would a class member reviewing the foregoing language of the settlement agreement after receiving the Notice of Proposed Settlement have reasonably understood that his or her statutory rights were being compromised by the settlement. In it second paragraph (AR 463), the Notice of Proposed Settlement stated, "No retirement allowances correctly calculated in accordance with current OCERS resolutions will be reduced or increased as a result of the Settlement Agreement" (emphasis in original). This highlighted provision would reasonably have been understood by the recipient of the Notice to have impliedly preserved the statutory rights of class members with regard to retirement allowances calculated incorrectly (i.e., unlawfully) pursuant to OCERS resolutions. Although the opening page

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of the Notice stated that class members were "being given certain benefits in exchange for giving up certain claims" (AR 483), the nature of such benefits is nowhere apparent in either the Notice or the settlement agreement. The Notice also stated (AR 485), "The Ventura decision . . . left a number of issues in dispute, including . . . how to treat . . . payments to third parties that were not paid directly to the employee" (emphasis added), implying that payments made directly to the employee, such as OBP payments, were not in dispute. The Notice further stated (AR 485) that OCERS had "excluded from 'compensation earnable' and 'final compensation' cash received by a plan member under an optional benefit plan applicable to members of OCERS on or after January 1, 1991, in conformity with a resolution of the County Bord of Supervisors." There was no hint that an issue might exist -- or might ever have existed -- with regard to the continued validity of that resolution or with regard to the facial applicability of Government Code sectionn 31460.1, or that such an issue would be compromised by the settlement. In addition, Section 7 of the Notice stated that the claims and causes of action encompassed by the Release of Claims were those which were to be "dismissed on the merits and with prejudice" upon approval of the settlement agreement (AR 487) -- because they were not part of the Retirement Cases Litigation, the claims forming the basis of this appeal could not have been so dismissed.

THIS APPEAL IS NOT BARRED BY RES JUDICATA

Insofar as it is otherwise effective, the 2002 settlement agreement, having been incorporated into the Retirement Cases

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Litigation judgment, could be given effect under general principles of res judicata. (Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assn. (1998) 60 Cal.App.4th 1053, 1065.)

The doctrine of res judicata has two distinct aspects. [Citations.] Primarily, it operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. . . . "[W]here the causes of action involved in the two actions are different . . . the estoppel does not extend to matters which might have been litigated in the first action but is limited to those matters or issues common to both actions which were either expressly or by necessary implication adjudged in the first."

(Mitchell v. Jones (1959) 172 Cal.App.2d 580, 584-585, quoting 2 Freeman on Judgments; see also McManus v. Bendlage (1947) 82 Cal.App.2d 916, 922-923.)

The threshold requirements for issue preclusion are: (1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding. [Citation.] When those requirements are met, the propriety of preclusion depends upon whether application will further the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation."

(Castillo v. City of Los Angeles (2001) 92 Cal.App.4th 477, 481, quoting Lucido v. Superior Court (1990) 51 Cal.3d 335, 341.)

Respondent has apparently relied on collateral estoppel in arguing that this appeal is precluded by an August 2001 "Tentative Decision" in the Retirement Cases Litigation. (AR 17.) However, it is clear from this ruling (AR 54-56) that the sole issue presented and determined was the constitutionality of Resolution 90-1551, which had been adopted by the Orange County Board of Supervisors in

December 1990 in order to implement former Government Code section 314601. Specifically, the trial court addressed the question whether the Resolution impaired vested contractual rights of retirees who had been employed prior to its adoption:

rne remaining issue for determination in the concerns the effect of Orange County Resolution 90-1551, passed pursuant to former Government Code section 31460.1. on the includability in pension calculations of cash payments made in lieu of flexible benefits. . . . Plan members argue that Resolution 90-1551 is invalid as to those who were employed prior to its adoption because it unconstitutionally impairs a vested contractual right. . . . When plan members accepted employment prior to the enactment of former section 31460.1 and the adoption of Resolution 90-1551, the parties could not reasonably have anticipated that the cash payments in question would be included in pension calculations. Certainly, the OCERS Board had no such expectation . . . Hence, neither section 31460.1 nor Resolution 90-1551, both adopted to clear up confusion that had arisen on the subject, can be deemed to have impaired a vested right.

(AR 54-56.) Contrary to respondent's assertion in its March 2015 letter (AR 17), the basis for this ruling was not merely "that the Board of Retirement did not anticipate inclusion of flexible benefits in compensation earnable," nor was the Tentative Decision based upon considerations of actuarial soundness as such -- rather, the issue of the reasonable expectations of the parties was addressed because the existence of an unconstitutional impairment of a vested contractual right is determined in large part by reference to such expectations. (Allen v. Board of Administration (1983) 34 Cal.3d 119, 119-125.) In contrast, the issues raised in this appeal regarding the applicability and continued validity of former section 31460.1 involve pure issues of law and statutory construction, without regard to the expectations of respondent or applicant. It is readily apparent that the constitutional "vested right" claim

addressed in the ruling was the same claim set forth in the complaints-in-intervention filed by OCEA anf REAOC -- because this claim was by its nature available only to the subclass of employees who were employed "prior to, on and after January 1, 1991" (i.e., both before and after the date former section 31460.1 first became effective in Orange County), it could not possibly have been asserted on behalf of applicant, who did not begin working at the Court until August 1992 and would have received no benefit whatsoever had the plaintiff class prevailed on its claim. In fact, trial court had addressed the statutory issue of cash flexible benefit payments a year earlier in a separate decision in the coordinated proceedings, ruling that such payments are indeed required to be included in "compensation" when made directly to the employee (AR 470-471) -- evidently, the only reason respondent and other parties to the Retirement Cases Litigation did not participate in that decision was the shared mistaken belief that former Government Code section 31460.1 continued to apply in Orange County. The Tentative Decision thus involved an issue inherently different from applicant's statutory claim under CERL, which was never "actually litigated" in the Retirement Cases Litigation. Collateral estoppel is therefore inapplicable.

"A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action."

(Olwell v. Hopkins (1946) 28 Cal.2d 147, 152; see Civil Code sections 1908, 1911.) As discussed above, no issue involving the facial applicability or continued validity of former Government Code section 31460.1 was raised by the express language of the pleadings in the Retirenment Cases Litigation. Allegations challenging the

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validity of Resolution 98-001 as a whole were contained in the cross-complaint filed by the County and in the answer filed by attorneys Nolan and Snethen, and the settlement agreement could have included language which merely affirmed the validity of the resolution, but it did not do so -- instead, the settlement agreement contains broader provisions which expressly give binding effect to every inclusion and exclusion set forth in Resolution 98-001 and which preclude future claims "that were asserted, or that could have been asserted in connection with, or that in any way relate to matters stated" in Resolution 98-001 or, apparently, in any exhibit to any of the pleadings. (AR 37, 40.) Insofar as they are effective, these provisions could be preclusive of the issues raised in this appeal regarding the applicability and validity of former Government Code section 31460.1, since Resolution 980-001 gives effect to the former statute and since the potition for writ of mandate includes exhibits (AR 133, 138-139) relating to its repeal. However, res judicata is not applicable to issues which "could have been" litigated in the prior action unless the second proceeding involves the same cause of action -- it is not enough that the claims arose from the same subject matter. (Daugherty v. Board of Trustees (1952) 111 Cal.App.2d 519, 521-522; see Concannon v. Smith (1901) 134 Cal. 14, 18: "It may be that the plaintiff might have united other causes of action with that set out in her complaint, . . but as long as these several matters are not tendered as issues in the action, they are not affected by it.") Under the primary right theory followed by California courts, a cause of action consists of a "primary right" held by a plaintiff, a corresponding "primary duty" on the part of the defendant, and a wrongful act by the defendant constituting a breach of that duty -it differs from the legal theory upon which liability is premised

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and from the nature of the remedy sought. (Crowley v. Katleman (1994) 8 Cal.4th 666, 681-682; see also Boeken v. Philip Morris USA, Inc. (2010) 48 Cal.4th 788, 798: "the relevant point for our purposes is what plaintiff . . . alleged, because that allegation indicates what primary right was adjudicated" (emphasis in original).) The primary right asserted by applicant in this appeal involves the statutory right to have his OBP benefits included in retirement allowance calculations under CERL, and the cause of action arising from this right is fundamentally different from a constitutional claim arising from breach of a vested contractual right and from any other claim for affirmative relief in the Retirement Cases Litigation. (Cf. Kay v. City of Rancho Palos Verdes (2007) 504 F.3d 803, 809: "The primary right at issue here is Kay's right to be free of unconstitutional restrictions imposed on his free speech ")

The declaratory relief pleaded by respondent in the original complaint was sufficiently broad to encompass applicant's claims. However, even if judicial estoppel were inapplicable to that cause of action, res judicata could not be invoked by respondent under the statutory prescriptions governing declaratory relief actions. "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." (Code of Civil Procedure section 1062; see Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 898, 902: "While declaratory judgments are issue preclusive, they are not necessarily claim preclusive. . . . The res judicata exception afforded by section 1062 is a narrow one, meant to provide parties with a quick way of resolving disputes without

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the need to assert all claims based on the same cause of action.")

In addition, the 2002 judgment embodying the settlement should not be given preclusive effect insofar as applicant's appeal involves pure issues of law based upon undisputed facts, where application of res judicata would result in injustice or detriment to the public interest. (Pleasant Valley Canal Co. v. Borror (1998) 61 Cal.App.4th 742, 771; see Hight (1977) 67 Cal.App.3d 498, 502: "The court is empowered to refuse to apply the doctrine . . . to prevent defeat of the ends of justice.") It has thus been recognized that the splitting of a cause of action is permissible where the prior judgment "was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme." (Rest. 2d, Judgments, section 26(1)(d);

EVEN IF IT WERE OTHERWISE BINDING, THE 2002 SETTLEMENT AGREEMENT IS SUBJECT TO RESCISSION ON GROUND OF MISTAKE OF LAW

Under general principles of contract law and equity, a settlement agreement is subject to rescission based on a mutual mistake of law. (Harris v. Rudman, Richman & Appel (2002) 95

Cal.App.4th 1332, 1335-1336; People v. Superior Court (2014) 223

Cal.App.4th 567, 573. (2002)) "As other contracts, a stipulation for settlement may be rescinded if it was procured through fraud, duress, undue influence or mistake." (Sterner v. Board of Dental Examiners (2002) 95 Cal.App.4th 128, 133, citing Civil Code section 1689(b)(1).) "A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law, constitues a mistake of law." (Civil Code section 1578(1).) As discussed above, the

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minutes of respondent's 1998 Board proceedings demonstrate unequivocally that respondent accepted counsel's erroneous conclusion that former Government Code section 31460.1 remained in effect in Orange County (AR 300, 308, 312, 334-335), and the reverence universally accorded the January 1, 1991, effectiveness date of the former statute throughout the various pleadings and filings in the Retirement Cases Litigation provides equally compelling evidence that all parties shared respondent's mistaken view of section 31460.1's applicability and validity.

A number of factors peculiar to this case provide substantial support for rescission of that portion of the settlement agreement which purports to bind applicant to Resolution 98-001's unchallenged exclusion of OBF benefits for retirees whose employment commenced after 1990. In addition to the fundamental injustice arising from avoidance of the statutory scheme set forth in the CERL, these factors include significant flaws in the representation of applicant's interests in the no-opt-out class action. Unlike applicant, attorneys Nolan and Snethen, who were designated class representatives along with the Orange County Attorneys Association, Orange County Employees' Association and The Retired Employees Association of Orange County (AR 425), were hired prior to 1990, yet no subclasses were created to safeguard the divergent interests of employees who were differently situated with regard to issues such as retroactivity and OBP exclusion (the Superior Court evidently utilized its own version of OBP -- compare AR 134-136 and AR 611-613), (See "Developments -- Class Actions" (1976) 89 Harv. Law Rev. 1318, 1490-1492, quoted in Richmond v. Dart Industries, Inc. (1961) 29 Cal.3d 462, 473: "'If the factual circumstances underlying class members' claims differ, . . . the trial judge, through use of techniques like subclassing or [other judicial] intervention, may

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incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation. '") As an unrepresented Superior Court employee, applicant was not a member of the Orange County Attorneys Association, Orange County Employees' Association, or The Retired Employees Association of Orange County, whose pleadings framed the issues actually litigated in the Retirement Cases Litigation. The 2002 settlement agreement provided \$250,000.00 in attorney fees to lead class counsel (para. 10 -- AR 39), providing an inducement for counsel's ready acceptance of overbroad provisions favorable to respondent. "The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 932.) The settlement agreement's binding affirmance of the existing inclusions and exclusions set forth in Resolution 98-001 resulted in a significant detriment to applicant and to other Court research attorneys participating in the OBP, in exchange for no identifable consideration. (See Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129, 133: "[No] case suggests that the court may determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. . . . This the court cannot do if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.") As discussed above, the Notice

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of Proposed Settlement was deficient and misleading -- neither it nor the settlement agreement provided any indication to the trial judge that class members might be compromising significant, unpleaded statutory rights under CERL. (See Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801, describing the duty of the trial court to "consider relevant factors, such as the strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. . . . The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of . . . overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. [Citation.]"]

Respectully submitted,

James B. Morell, Applicant

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 2223 Wellington Avenue

Santa Ana, California 92701 Telephone: 714/558-6220

Dawn M. Matsuo

Attorney for Orange County Employees Retirement System

BEFORE THE BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement
) RESPONDENT'S
) PRE-HEARING STATEMENT

JAMES B. MORELL

Applicant.

Date: 5-05-17 Time: 10:00 a.m. teferee: Robert M. Snider

Respondent, Orange County Employees Retirement System, hereby submits its Pre-Hearing Statement:

ISSUES TO BE CONSIDERED

On February 21, 2014, James B. Morell service retired with a life time, monthly benefit amount of \$6,836.72. On or about June 23, 2014, Mr. Morell appealed the Orange County Employees Retirement System's ("OCERS") calculation of his monthly service benefit amount, contending that the money he received as part of the Optional Benefit Plan should have been included when calculating his service retirement benefit amount. Ultimately, the Chief Executive Officer ("CEO") determined that OCERS was correct to not include the money from the Optional Benefit Plan when it calculated Mr. Morell's monthly retirement benefit. Mr. Morell now appeals' the CEO's determination.

The only issue to be determined by this appeal is whether OCERS' should have included the \$3,500, (Optional Benefit Plan) in its calculation when calculating Mr. Morell's monthly service retirement benefit?

J.MORELL - PRE-HEARING STATEMEN 708

SUMMARY OF EVIDENCE 2 Evidence will consist of testimonial, documentary, and/or physical evidence, as to the facts and 3 circumstances concerning the calculation of Mr. Morell's monthly service retirement benefit. 4 WITNESSES WHO MAY BE CALLED 5 JAMES B. MORELL 2. ADINA BERCARU. 6 7 Respondent reserves the right to call any rebuttal witnesses as dictated by Mr. 8 Morell's case. 9 DOCUMENTARY EVIDENCE 10 The Respondent will introduce the following documents at the hearing on this matter: 11 W Administrative Record currently consisting of pages 001 to 56. 12 Various documents in the Administrative Record previously provided to the parties and the 13 Hearing Officer were submitted to the Respondent by and/or on behalf of the Mr. Morell. The fact that the 14 Respondent included those documents when it assembled the Administrative Record is not intended to 15 mean or suggest that the Respondent vouched for any of those documents or that the Respondent has 16 waived any right to object to any such document. 17 Respondent reserves the right to supplement the record with additional other documentary 18 evidence if any are received after this statement is submitted. 19 CONTENTIONS 20 OCERS contends that it correctly calculated Mr. Morell's monthly retirement benefit by 21 excluding the \$3,500 he received as part of the Optional Benefit Plan. 22 23 Respectfully submitted, 24 ORANGE COUNTY EMPLOYEES 25 RETIREMENT SYSTEM 26 27 DATED: April 5, 2017 DAWN M. MATSUO 28 Attorney at Law I.MORGI.L - PRE-HEARING STATEMENT 866/965

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JAMES MORELL 0191

PROOF OF SERVICE I declare that I am employed in Orange County, California, that I am over 18 years old, and that I am not a party to the within action. My business address is 2223 Wellington Ave., Santa Ana, California 92701. 3 On the date set forth below, I served the foregoing RESPONDENT'S PRE-HEARING STATEMENT on interested parties to this action by placing the [X] duplicate original(s) [) true copy(ics) of said document in a sealed envelope in the following manner: 5 (BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a scaled envelope with postage fully prepaid. 8 (BY AIRBORNE EXPRESS) I placed such envelope(s) addressed as shown below for collection 0 and delivery by Airborne Express with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the 10 following day by Airborne Express. 11 (BY EMAIL) I caused such document to be emailed to the addressee(s) shown below, wherein such email is transmitted that same day in the ordinary course of business. 12 (BY PERSONAL SERVICE) I caused such document to be hand-delivered to the individuals 13 listed below while they were at the Orange County Employees Retirement System's office located at 2223 Wellington Ave., Santa Ana, CA 92701. 14 (STATE) I declare under penalty of perjury under the laws of the State of California that the 15 foregoing is true and correct. 16 04 / 05 /17 at Santa Ana, California 17 18 19 20 Dawn M. Matsuo Declarant 21 22 23 24 25 26 27 28

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JAMES MORELL_0192

NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE Robert Snider, Esq. bobsnider58@gmail.com James B. Morell morell@aol.com 868/965

JAMES MORELL 0193

JAMES B. MORELL
Redacted
Applicant in pro per

BEFORE THE BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application for) APPLICANT'S) SUPPLEMENTAL
Correct Retirement Allowance	PRE-HEARING STATEMENT
JAMES B. MORELL	
Applicant.) Date: May 5, 2017) Time: 10:00 a.m.) Referee: Robert M. Snider

Applicant, James B. Morell, hereby submits this supplemental pre-hearing statement:

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In its 2014 and 2015 letter responses to applicant's Initial filings in this administrative review process, respondent asserted that the denial of applicant's appeal was based upon the January 1, 1991, cut-off date embodied in former Government Code section 32460.1 and Resolution 98-001 and upon the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499. (AR 10, 16-18.) Although applicant has sought to address these issues preemptively, it is respondent who bears the burden of showing affirmatively that applicant's right to a statutorily prescribed allowance is precluded on these legal grounds. (See, e.g., Casey v. Proctor (1963) 59 Cal.2d 97, 109; Nicholson v. Fazell (2003) 113 Cal.App.4th 1091, 1100; Casad v. Qualls (1977) 70 Cal.App.3d 921, 927.) In its brief pre-hearing statement, however, respondent states that "[t]he only issue to be determined by this appeal is whether OCERS' [sic] should have included the \$3,500.00 (Optional Benefit Plan) in its calculation when calculating Mr. Morell's monthly service retirement benefit?" It is unclear from this statement, and from the remainder of respondent's pre-hearing statement, whether respondent is implicitly conceding the merit of applicant's arguments on the eight issues addressed in applicant's pre-hearing statement, or simply ignoring them in the expectation that respondent's appeal will ultimately be rejected regardless of its merit. It is to be hoped that the hearing on this matter will not be a waste of time and that the referee will be able to clarify respondent's positions on the material issues and reach solid factual and legal conclusions with regard to applicant's appeal. For ease of reference, and to facilitate discussion of the issues at the hearing and in the referee's statement of decision, a set of proposed factual findings and a set of proposed conclusions of law

are set forth below.

PROPOSED FACTUAL FINDINGS

Applicant requests factual findings with regard to the following matters, which are expected to remain undisputed based upon the parenthetically cited record:

- (1) Applicant was employed as a research attorney at the Orange County Superior Court from August 1992 until his retirement in February 2014. (AR 7, and anticipated testimony of applicant and Adina Bercaru.)
- (2) As part of his standard attorney compensation package at the Superior Court, applicant participated in an Optional Benefit Plan ("OBP") administered by Orange County pursuant to section 125 of the Internal Revenue Code. (AR 57-59, 611-613, 642-645, and anticipated testimony of applicant.)
- (3) During 2010-2014, Superior Court research attorneys such as applicant received an annual OBP benefit in the amount of \$3,500.00. (AR 4, 57-59, 611, and anticipated testimony of applicant.)
- (4) Under the terms of the Optional Benefit Plan, during the open enrollment period each fall, Superior Court research attorneys were permitted to elect an irrevocable allocation of the \$3,500.00 annual OBP benefit among a limited number of options, including: a taxable lump sum cash payment included in the first

payroll distribution of the new year; cash reimbursement on a pretax basis for certain health/dental care expenses not covered by insurance; a pre-tax payroll credit for supplemental accidental death and dismemberment coverage; and a contribution to the research attorney's section 457 deferred compensation plan. (AR 505-506, 544-545, 611-613, and anticipated testimony of applicant.)

- (5) Under the terms of the Optional Benefit Plan, OBP benefits were paid as cash reimbursements directly from the general assets of Orange County. (AR 504, 543.)
- (6) Under the terms of the Optional Benefit Plan, if a Superior Court research attorney did not elect to allocate the OBP benefit during open enrollment, \$3,500.00 in taxable cash was automatically paid to the attorney in the first payroll distribution of the new year. (AR 506, 510, 545, 549, and anticipated testimony of applicant.)
- (7) The Optional Benefit Plan was a standard component of the compensation package for research attorneys at the Superior Court, and applicant received the OBP benefit annually without affirmatively electing to participate in the Plan. (AR 500, 539, 611-613, and anticipated testimony of applicant.)
- (8) Under the terms of the Optional Benefit Plan, the \$3,500.00 annual OBP benefit was fully offset by a corresponding reduction in the amount of applicant's salaried compensation. (AR 503, 542.)
 - (9) Pursuant to the allocations he made during the

pertinent time period, applicant received non-taxable cash payments via a dedicated health care reimbursement account as reimbursement for health/dental care expenses in the amounts of \$2,500.00 in 2011, \$700.00 in 2012, \$2,500.00 in 2013, and \$1,100.00 in early 2014, with the remainder of the OBP benefit paid as taxable cash (\$1,000.00 in 2011, \$2,800.00 in 2012, \$1,000.00 in 2013, and \$2,400.00 in 2014). (AR 57-59, 505, 511-512, 544, 550, 551, 642-645, and anticipated testimony of applicant.)

- (10) Pursuant its Resolution No. 98-001, respondent has excluded the \$3,500.00 annual OBP benefit from "compensation" and "compensation earnable" in determining applicant's monthly retirement allowance under the County Employees Retirement Law of 1937. (AR 10, 16-17, 25-26.)
- (11) In 1990 the Legislature enacted Government Code section 31460.1, effective January 1, 1991, which, in counties in which the board of supervisors voted to make section 31460.1 applicable, excluded "flexible benefit" plan payments from "compensation" for employees "who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds (sic) their employees' salaries." (AR 133; In re Retirement Cases (2003) 110 Cal.App.4th 426, 479.)
- (12) In December 1990, the Orange County Board of Supervisors adopted Resolution 90-1551 making Government Code section 31460.1 applicable in the County, effective January 1, 1991. (AR 115-116.)
 - (13) On May 11, 1992, the Legislature via S.B. 193

repealed section 31460.1 without reenactment. (In re Retirement Cases, supre, 110 Cal.App.4th at 479.)

- (14) The trial court in consolidated Orange County
 Superior Court cases 791315 and 791499 ruled that, apart from the
 effect of former Government Code section 31460.1, cash payments made
 directly to employees in lieu of flexible benefits are included in
 "compensation" under the CERL. (AR 54, 470-472.)
- (15) In late 1997, respondent formed an Ad Hoc Committee to determine what changes should be made to the calculation of retirement allowances in light of the California Supreme Court's decision in Ventura County Deputy Sheriffs Assn. v. Board of Retirement (1997) 16 Cal.4th 483. (AR 62-63, 292.)
- (16) On February 6, 1998, following receipt of the Ad Hoc Committee's recommendations, respondent adopted Resolution No. 98-001, which, inter alia, expressly included cashable accrued vacation and sick leave but excluded "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991" from the calculation of "compensation" and "compensation earnable." (AR 24-26, 64, 292-293, 299.)
- (17) The "Flexible Benefits ('Cafeteria Plan')" referred to in Resolution 98-001 includes the Optional Benefit Plan in which applicant participated as a Superior Court attorney, which is governed by the County's "Section 125 Plan" master plans. (AR 10, 16-17, 488-565 (as stipulated), 611-613.)
 - (18) In determining in early 1998 that "Flexible

Benefits" paid in cash should be excluded (via Resolution 98-001) from the calculation of "compensation" and "compensation earnable" for members retiring after 1990, both respondent's Ad Hoc Committee and respondent's full Board of Retirement accepted and relied upon legal counsel's conclusion that Government Code section 31460.1 remained applicable to flexible benefit plans in Orange County following its repeal. (AR 300, 306, 312, 334-335.)

- (19) In making the determination set forth in Resolution 98-001 that payments received under "flexible benefits" plans should be excluded from "compensation" and "compensation earnable" for post-1990 retirees pursuant to former Government Code section 31460.1, respondent did not consider the specific provisions of the optional benefit plans provided to Superior Court research attorneys or to other County employees. (AR 296-353, 357-360.)
- (20) On April 1, 1998, defendants in Orange County
 Superior Court case no. 791315 filed a general demurrer to
 respondent's complaint for declaratory relief, asserting, inter
 alia, that the complaint violated Civil Code section 1060 by seeking
 a judicial determination "that resolution 98-001 complies with
 applicable law," when an actual controversy existed between the
 parties only with regard to the few limited aspects of Resolution
 98-001 specified in the pleadings. (AR 25-26, 183-185.)
- (21) The demurrer was overruled on April 28, 1998, after respondent expressly and repeatedly disclaimed any intention of seeking declaratory relief with regard to the issues not specifically alleged as actual controversies in the pleadings. (AR 206, 214-216.)

- (22) The issues specifically identified in the pleadings in consolidated Orange County Superior Court cases 791315 and 791499 included Resolution 98-001's exclusion of "Flexible Benefits" payments for pre-1991 employees who retired after 1990, but did not include the facial applicability of former Government Code section 31460.1 or the effect of that statute's repeal upon its validity. (AR 60-149, 180-211, 217-290, 378-421.)
- (23) In September 2002, the parties entered into a "no opt out" settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499, whereby the parties agreed "to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001 . . . ," and this settlement agreement was approved by the trial court and incorporated into the judgment entered on November 1, 1992. (AR 29-34, 37, 423.)
- (24) Although the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 contains a broad release of "any and all claims . . . that in any way relate to matters stated in any of the pleadings on file . . . , in OCERS' Resolution 98-001 as amended, . . . and/or in the Judgment . . . " , the agreement elsewhere states, "Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein." (AR 40 and 42.)
- (25) The only issues raised by class action members in consolidated Orange County Superior Court cases 791315 and 791499

with regard to the "Flexible Benefits" exclusion in Resolution 98-001 were the questions of whether benefit payments made to third party insurers were required to be included and whether employees who were hired prior to 1991 and retired after 1990 were constitutionally entitled to have benefit payments included as a vested contractual right, issues which the trial court resolved in favor of respondent. (AR 54-56, 98-101, 232-235, 242-253, 264-270, 288-289, 395, 440, 446-458, 467-470.)

- (26) By including "Flexible Benefits" payments for employees retiring pior to 1991, Resolution 98-001 manifests an intent on the part of respondent to include OBP payments to the extrent not excluded by former Government Code section 31460.1. (AR 25-26, 300, 308, 312, 334-335.)
- (27) The issues of whether former Government Code section 31460.1 was facially applicable to the OBP benefits provided by the County and the Superior Court, and whether the statute remained effective in Orange County following its 1992 repeal, were not addressed in consolidated Orange County Superior Court cases 791315 and 791499. (AR 19-23, 29-56, 60-487, and anticipated testimony of applicant.)
- (28) The sole issue determined by the trial court in its ruling of August 15, 1991, was whether employees who were hired prior to 1991 and retired after 1990 were constitutionally entitled to have benefit payments included as a vested contractual right. (AR 54-56, 97-101, 248-253, 264-270, 288-289, 395, 440, 453-458.)
 - (29) The parties to consolidated Orange County Superior

Court cases 791315 and 791499 believed that former Government Code section 31460.1 required the exclusion of OBP benefits from "compensation" and "compensation earnable" for Orange County employees who retired after 1990. (AR 65, 66, 97-100, 232-235, 248-249, 253, 264-270, 288-289, 300, 308, 312, 334-335, 454, and anticipated testimony of applicant.)

- (30) As a Superior Court research attorney, applicant was not a member of the Orange County Attorneys' Association, of the Orange County Employees' Association, of The Retired Employees Association of Orange County, or of any other Orange County employee association or bargaining group. (Anticipated testimony of applicant.)
- (31) Attorneys Nolan and Snethen, the only individual designated class representatives in consolidated Orange County Superior Court cases 791315 and 791499, were hired prior to 1991, yet no subclasses were created to safeguard the interests of post-1990 employees such as applicant who were differently situated with regard to issues such as retroactivity and OBP exclusion. (AR 422-425.)
- (32) The 2002 settlement agreement's binding affirmance of the inclusions and exclusions set forth in Resolution 98-001 represented a potentially significant detriment to applicant and to other post-1990 Superior Court research attorneys participating in the Optional Benefit Plan, in exchange for no identifable consideration. (AR 35-53, 483-487.)
 - (33) Neither the notice of proposed settlement nor the

settlement agreement itself provided any indication that class members would be compromising significant, unpleaded statutory rights under the CERL. (AR 35-53, 483-487.)

PROPOSED CONCLUSIONS OF LAW

Applicant requests legal conclusions with regard to the following matters, which are supported by the parenthetical citations to the foregoing proposed factual findings "PFF"s) and to controlling legal authority:

- ("CERL"), the OBP benefits paid to applicant as cash out of county funds are included in "compensation" and "compensation earnable."

 (PFF 14; Government Code sections 31460, 31461; Ventura County Sheriffs' Deputies Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 487, 495-505; Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739; cf. In re Retirement Cases, supra, 110 Cal.App.4th at 477-481.)
- (2) Resolution 98-001 is inconsistent with the CERL and decisional law insofar as it provides for the inclusion of "Flexible Benefits" payments only for employees retiring before January 1, 1991, and only "to the Extent paid in Cash" and not to the extent payable as cash. (PFF 14; Government Code sections 31460, 31461; Ventura County Sheriffs' Deputies Assn. v. Board of Retirement, supra, 16 Cal.4th at 487, 495-505; Salus v. San Diego County

Employees Retirement Ass'n, supra, 117 Cal.App.4th at 739; cf. In re Retirement Cases, supra, 110 Cal.App.4th at 477-481.)

- (3) Because it was payable as cash if no allocation were made during the open enrollment period, the entire \$3,500.00 OBP benefit received annually by applicant as a Superior Court research attorney is included in "compensation" and "compendation earnable" regardless of whether applicant elected to allocate it, in the same manner as cashable accrued vacation and sick leave. (PFF 4, 6 and 16; Ventura County Sheriffs' Deputies Assn. v. Board of Retirement, supra, 16 Cal.4th at 487; Salus v. San Diego County Employees Retirement Ass'n, supra, 117 Cal.App.4th at 739; cf. In re
- (4) The financial cost to respondent of including the OBP benefit in "compensation" and "compensation earnable" is not a justification for disregarding CERL requirements. (Ventura County Sheriffs' Deputies Assn. v. Board of Retirement, supra, 16 Cal.4th at 507.)
- (5) Former Government Code section 31460.1 is facially inapplicable because applicant did not elect to participate in the Optional Benefit Plan. (PFF 7 and 19.)
- (6) Former Government Code section 31460.1 is facially inapplicable because the OBP payments received by applicant did not reflect amounts that exceeded his salary. (PFF 8 and 19.)
 - (7) Even if Government Code section 31460.1 had been

otherwise applicable, the repeal of section 31460.1 rendered that statute, as well as the Board of Supervisors's adoption of the statute, ineffective in Orange County for employees retiring after May 11, 1992. (PFF 15; Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568; Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App. 150, 152-153; cf. Ransome-Crummey Co. v. Fikes (1921) 53 Cal.App. 180, 182-183.)

- (8) The 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 is treated as a contract and is subject to the laws and rules of construction generally applicable to contracts. (Stewart v. Preston Pipeline, Inc. (2005) 134 Cal.App.4th 1565, 1585.)
- (9) The 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 contravenes the CERL and public policy, and is consequently void, insofar as its terms would preclude applicant from receiving the retirement allowance to which he is otherwise entitled under Government Code sections 31460 and 31461. (Civil Code sections 1550, 1595, 1596, 1599, 1667(1); In re Retirement Cases, supra, 110 Cal.App.4th at 453; Boren v. State Personnel Board (1951) 37 Cal.2d 634, 641.)
- (10) The 2002 judgment approving the settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 is similarly invalid insofar as the settlement agreement would preclude applicant from receiving the retirement allowance to which he is otherwise entitled under Government Code sections 31460 and 31461. (Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal.App.4th 1, 13; Timney v. Lin (3003) 106 Cal.App.4th

1121, 1127, 1129.)

- Superior Court case no. 791315 had merit insofar as it asserted that respondent's complaint violated Civil Code section 1060 by seeking declaratory relief with regard to matters not in actual controversy between the parties, and it should have been sustained on that ground had respondent not expressly disclaimed any intention of seeking declaratory relief with regard to issues other than those specifically identified as actual controversies in the pleadings.

 (PFF 20-21: Wilson v. Transit Authority (1962) 199 Cal.App.2d 716, 722-724; Selby Realty Co. v. San Buenaventura (173) 10 Cal.3d 110, 117-118.)
- (12) In light of responsent's prior representation that it sought declaratory relief only with regard to the issues specifically identified as actual controversies in the pleadings in consolidated Orange County Superior Court cases 791315 and 791499, responent's contention that the OBP exclusion issue raised by applicant was resolved via the proceedings in consolidated Orange County Superior Court cases 791315 and 791499 is barred by judicial estoppel. (PFF 20-23; Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181, 183; Minish v. Hanuman Fellowship (2013) 214 Cal.App.4th 437, 449-450 and 455 n. 11; Davies v. Krasna (1970) 12 Cal.App.3d 1049, 1056.)
- (13) Because the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 is ambiguous as to whether the agreement "specifically" bars applicant's claim that former Government Code section 31460.1 is

inapplicable and that all OBP payments received by him must be included in "compensation earnable," extrinsic evidence is admissible for the purpose of determining the parties' intent with regard to the scope of the release. (PFF 23-24; Butler v. The Vons Companies, Inc. (2006) 140 Cal.App.4th 943, 949-951; see Powers v. Superior Court (Hoffman) (1987) 196 Cal.App.3d 318, 320: "Release, indemnity and similar excupatory provisions are binding on the signatories and enforceable so long as they are . . . 'clear, explicit and comprehensible in each [of their] essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement'"; Leaf v. City of San Mateo (1980) 104 Cal.App.3d 398, 411: "mere recital, as in the release signed by plaintiffs, that the protection of Civil Code section 1542 is waived, or that he release covers unknown claims or unknown parties is not controlling. Whether the releasor intended to discharge such claims or parties is ultimately a question of fact"; Dowling v. Farmers Ins. Exchange (2012) 208 Cal.App.4th 685, 695: "If contractual language is ambiguous, we may consider a variety of extrinsic aids, including the purpose of the statute, legislative history and public policy.")

embodied in the CERL, points to the conclusion that the 2002 settlement agreement was not intended, and should not be construed, to forclose applicant from obtaining the full retirement allowance to which he is statutorily entitled based upon the inclusion of OBP cash benefit payments in "compensation" and "compensation earnable." (PFF 21-22, 25-27, 29; In re Retirement Cases, supra, 110 Cal.App.4th at 453.)

- (15) Because applicant's claim is based upon statutory rights set forth in the CERL, and because the trial court's ruling of August 15, 2001, involved constitutionally vested contractual rights, the causes of action are not identical and the 2001 ruling does not bar applicant's claim under the doctrine of collateral estoppel or res judicata. (PFF 28; see Castillo v. City of Los Angeles (2001) 92 Cal.App.4th 477, 481.).)
- (16) Because applicant was not hired prior to 1991 and could claim no vested contractual right to the inclusion of "Flexible Benefits" payments at the time former Government Code section 31460.1 became effective in Orange County, a ruling in favor of class members on August 15, 1991, would not have resulted in the inclusion of OBP benefits in the calculation of applicant's retirement allowance. (PFF 1, 28.)
- (17) Because applicant's claim is based upon distinct statutory rights which were never placed in issue in consolidated Orange County Superior Court cases 791315 and 791499, the judgment entered November 1, 1992, does not bar applicant's claim under the doctrine of res judicata. (PFF 24-25, 27-29; Daugherty v. Board of Trustees (1952) 111 Cal.App.2d 519, 521-522; Concannon v. Smith (1901) 134 Cal. 14, 18; see Boeken v.Philip Morris USA, Inc. (2010) 48 Cal.4th 788, 798; "the relevant point for our purposes is what plaintiff . . . alleged, because that allegation indicates what primary right was adjudicated.")
- (18) Inasmuch as the judgment entered November 1, 1992, in consolidated Orange County Superior Court cases 791315 and 791499 provides declaratory relief in accordance with the pleadings and the

settlement agreement, it does not preclude applicant from seeking additional relief upon the same facts. (PFF 20, 23, 25, 27, 29; Code of Civil Procedure section 1062.)

- (19) The judgment entered November 1, 1992, in consolidated Orange County Superior Court cases 791315 and 791499 should not be given preclusive effect, since as applicant's claim involves pure issues of law based upon undisputed facts, and since application of res judicata would be plainly inconsistent with the statutory scheme and public policy set forth in the CERL. (PFF 14, 18-19; Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739; Pleasant Valley Canal Co. v. Borror (1998) 61 Cal.App.4th 742, 771; Rest. 2d, Judgments, section 26(1)(d).)
- (20) Respondent has failed to show that applicant's claim is barred by former Government Code section 31460.1 or by the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499.
- (21) Because the parties in consolidated Orange County Superior Court cases 791315 and 791499 mistakenly believed that inclusion of OBP cash benefits in "compensation" and "compensation earnable" for post-1990 retirees was precluded by former Government Code section 31460.1, the 2002 settlement agreement is subject to rescission based upon mutual mistake of law. (PFF 25-27, 29; Civil Code sections 1578(1), 1689(b)(1); Harris v. Rudman, Richman & Appel (2002) 95 Cal.App.4th 1332, 1335-1336.)
- (22) A number of factors peculiar to this case provide additional support for the equitable remedy of rescission with

regard to that portion of the 2002 settlement agreement which purports to bind applicant to Resolution 98-001's exclusion of OBP benefits for employees who retired after 1990. (PFF 30-33; see "Developments -- Class Actions" (1976) 89 Harv. Law Rev. 1318, 1490-1492, quoted in Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 473: "'If the factual circumstances underlying class members' claims differ, . . . the trial judge, through use of techniques like subclassing or [other judicial] intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation'"; Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129, 133: "[No] case suggests that the court may determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. . . . This the court cannot do if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.")

Respectfully submitted,

DATED: April 21, 2017

By

James B. Morell Applicant in pro per

PROOF OF SERVICE

I declare that I am unemployed in Los Angeles County, California, that I am over 18 years old, and that I am not a party to the within action. My residential address is 222 Avenue G, Redondo Beach, California 90277.

On the date set forth below, I served the foregoing APPLICANT'S SUPPLEMENTAL PRE-HEARING STATEMENT on interested parties to this action by placing true copies of said document in a sealed envelope in the following manner:

I placed such envelopes addressed as shown below in a mailbox at Redondo Beach, California.

Robert M. Snider Attorney at Law 33208 Decker School Road Malibu, CA 90265

Dawn M Matsuo OCERS Staff Counsel 2223 E. Wellington Ave. Santa Ana, CA 92701

D. Dalton

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 21, 2017, at Redondo Beach, County of Los Angeles, California,

Dina D. Dalton

Matsuo, Dawn

From: jmorell@aol.com

Sent: Friday, April 21, 2017 2:16 PM

To: Matsuo, Dawn; bobsnider58@gmail.com

Subject: [EXTERNAL] Morell -- Supplemental Pre-Hearing Statement

Attachments: Replacement for original content.txt; Replacement for original content.txt

Attached please find my supplemental pre-hearing statement. Also, by way of errata, attached is an amended table of contents to my supplement to the administrative record (the document at AR 212 was misidentified).

With regard to some evidentiary matters:

- (1) Ms. Matsuo and I have agreed to stipulate to the authenticity and effectiveness (during the pertinent 2011-2014 time period) of the County "Section 125 Plan" documents (AR 488-565, obtained from the Superior Court custodian of records), and to the authenticity of the 2007 version of the Superior Court PP&Rs (AR 566-61, provided to me by OCERS). Please let me know what, if anything, needs to be done to formalize these stipulations in order to ensure they are reflected in the record.
- (2) As a "heads up": My testimony will include hearsay statements made to me by class counsel Stephen Silver regarding the issues raised (or not) and adjudicated in the consolidated class action proceedings. I believe these statements should be admissible under Evidence Code section 1230 as statements against interest (Mr. Silver has informed me he will be away on vacation the week of May 1 and consequently unavailable to testify) and under section 15(d) of OCERS Administrative Hearings Policy (as indicated in the attached supplemental pre-hearing statement, these hearsay statements will supplement other evidence and need not be the sole evidentiary basis for any factual finding).

James Morell

Redacted

JAMES B. MORELL Redacted

Applicant in pro per

BEFORE THE BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

	In the Matter of the Applic	cation for)	APPLICAN SUPPLEME	
STATEMENT	Correct Retirement Allowance)	PRE-HEAF	≀ING
)		
	JAMES B. MORELL))		
5, 2017		Applicant.)	Date:	May
10:00 a.m.)	Time:	
	Zod don)	Referee:	
Robert M. :	puraer)		

Applicant, James B. Morell, hereby submits this supplemental

pre-hearing statement:

In its 2014 and 2015 letter responses to applicant's initial filings in this administrative review process, respondent asserted that the denial of applicant's appeal was based upon the January 1, 1991, cut-off date embodied in former Government Code section 32460.1 and Resolution 98-001 and upon the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499. (AR 10, 16-18.) Although applicant has sought to address these issues preemptively, it is respondent who bears the burden of showing affirmatively that applicant's right to a statutorily prescribed allowance is precluded on these legal grounds. (See, e.g., Casey v. Proctor (1963) 59 Cal.2d 97, 109; Nicholson v. Fazell (2003) 113 Cal.App.4th 1091, 1100; Casad v. Qualls (1977) 70 Cal.App.3d 921, 927.) In its brief pre-hearing statement, however, respondent states that "[t]he only issue to be determined by this appeal is whether OCERS' [sic]

should have included the \$3,500.00 (Optional Benefit Plan) in its calculation when calculating Mr. Morell's monthly service retirement benefit?" It is unclear from this statement, and from the remainder of respondent's pre-hearing statement, whether respondent is implicitly conceding the merit of applicant's arguments on the eight issues addressed in applicant's pre-hearing statement, or simply ignoring them in the expectation that respondent's appeal will ultimately be rejected regardless of its merit. It is to be hoped that the hearing on this matter will not be a waste of time and that the referee will be able to clarify respondent's positions on the material issues and reach solid factual and legal conclusions with regard to applicant's appeal. For ease of reference, and to facilitate discussion of the issues at the hearing and in the referee's statement of decision, a set of proposed factual findings and a set of proposed conclusions of law are set forth below.

PROPOSED FACTUAL FINDINGS

Applicant requests factual findings with regard to the following matters, which are expected

JAMES_MORELL_0216

to remain undisputed based upon the parenthetically cited record:

- (1) Applicant was employed as a research attorney at the Orange County Superior Court from August 1992 until his retirement in February 2014. (AR 7, and anticipated testimony of applicant and Adina Bercaru.)
- (2) As part of his standard attorney compensation package at the Superior Court, applicant participated in an Optional Benefit Plan ("OBP") administered by Orange County pursuant to section 125 of the Internal Revenue Code. (AR 57-59, 611-613, 642-645, and anticipated testimony of applicant.)
- (3) During 2010-2014, Superior Court research attorneys such as applicant received an annual OBP benefit in the amount of \$3,500.00. (AR 4, 57-59, 611, and anticipated testimony of applicant.)
- (4) Under the terms of the Optional

 Benefit Plan, during the open enrollment period each

 fall, Superior Court research attorneys were

permitted to elect an irrevocable allocation of the \$3,500.00 annual OBP benefit among a limited number of options, including: a taxable lump sum cash payment included in the first payroll distribution of the new year; cash reimbursement on a pre-tax basis for certain health/dental care expenses not covered by insurance; a pre-tax payroll credit for supplemental accidental death and dismemberment coverage; and a contribution to the research attorney's section 457 deferred compensation plan. (AR 505-506, 544-545, 611-613, and anticipated testimony of applicant.)

- (5) Under the terms of the Optional
 Benefit Plan, OBP benefits were paid as cash
 reimbursements directly from the general assets of
 Orange County. (AR 504, 543.)
- (6) Under the terms of the Optional Benefit Plan, if a Superior Court research attorney did not elect to allocate the OBP benefit during open enrollment, \$3,500.00 in taxable cash was automatically paid to the attorney in the first payroll distribution of the new year. (AR 506, 510, 545, 549, and anticipated testimony of applicant.)

- (7) The Optional Benefit Plan was a standard component of the compensation package for research attorneys at the Superior Court, and applicant received the OBP benefit annually without affirmatively electing to participate in the Plan. (AR 500, 539, 611-613, and anticipated testimony of applicant.)
- (8) Under the terms of the Optional
 Benefit Plan, the \$3,500.00 annual OBP benefit was
 fully offset by a corresponding reduction in the
 amount of applicant's salaried compensation. (AR
 503, 542.)
- (9) Pursuant to the allocations he made during the pertinent time period, applicant received non-taxable cash payments via a dedicated health care reimbursement account as reimbursement for health/dental care expenses in the amounts of \$2,500.00 in 2011, \$700.00 in 2012, \$2,500.00 in 2013, and \$1,100.00 in early 2014, with the remainder of the OBP benefit paid as taxable cash (\$1,000.00 in 2011, \$2,800.00 in 2012, \$1,000.00 in 2013, and \$2,400.00 in 2014). (AR 57-59, 505, 511-512, 544, 550, 551, 642-645, and anticipated testimony of applicant.)

- (10) Pursuant its Resolution No. 98-001, respondent has excluded the \$3,500.00 annual OBP benefit from "compensation" and "compensation earnable" in determining applicant's monthly retirement allowance under the County Employees Retirement Law of 1937. (AR 10, 16-17, 25-26.)
- Government Code section 31460.1, effective January 1, 1991, which, in counties in which the board of supervisors voted to make section 31460.1 applicable, excluded "flexible benefit" plan payments from "compensation" for employees "who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] their employees' salaries." (AR 133; In re Retirement Cases (2003) 110 Cal.App.4th 426, 479.)
- (12) In December 1990, the Orange County
 Board of Supervisors adopted Resolution 90-1551
 making Government Code section 31460.1 applicable in
 the County, effective January 1, 1991. (AR 115-116.)
 - (13) On May 11, 1992, the Legislature via

- S.B. 193 repealed section 31460.1 without reenactment. (<u>In re Retirement Cases</u>, supra, 110 Cal.App.4th at 479.)
- (14) The trial court in consolidated
 Orange County Superior Court cases 791315 and 791499
 ruled that, apart from the effect of former
 Government Code section 31460.1, cash payments made
 directly to employees in lieu of flexible benefits
 are included in "compensation" under the CERL. (AR
 54, 470-472.)
- (15) In late 1997, respondent formed an Ad Hoc Committee to determine what changes should be made to the calculation of retirement allowances in light of the California Supreme Court's decision in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483. (AR 62-63, 292.)
- (16) On February 6, 1998, following receipt of the Ad Hoc Committee's recommendations, respondent adopted Resolution No. 98-001, which, inter alia, expressly included cashable accrued vacation and sick leave but excluded "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January

- 1, 1991" from the calculation of "compensation" and "compensation earnable." (AR 24-26, 64, 292-293, 299.)
- (17) The "Flexible Benefits ('Cafeteria Plan')" referred to in Resolution 98-001 includes the Optional Benefit Plan in which applicant participated as a Superior Court attorney, which is governed by the County's "Section 125 Plan" master plans. (AR 10, 16-17, 488-565 (as stipulated), 611-613.)
- "Flexible Benefits" paid in cash should be excluded (via Resolution 98-001) from the calculation of "compensation" and "compensation earnable" for members retiring after 1990, both respondent's Ad Hoc Committee and respondent's full Board of Retirement accepted and relied upon legal counsel's conclusion that Government Code section 31460.1 remained applicable to flexible benefit plans in Orange County following its repeal. (AR 300, 308, 312, 334-335.)
- (19) In making the determination set forth in Resolution 98-001 that payments received

under "flexible benefits" plans should be excluded from "compensation" and "compensation earnable" for post-1990 retirees pursuant to former Government Code section 31460.1, respondent did not consider the specific provisions of the optional benefit plans provided to Superior Court research attorneys or to other County employees. (AR 296-353, 357-360.)

(20) On April 1, 1998, defendants in Orange County Superior Court case no. 791315 filed a general demurrer to respondent's complaint for declaratory relief, asserting, inter alia, that the complaint violated Civil Code section 1060 by seeking a judicial determination "that resolution 98-001 complies with applicable law," when an actual controversy existed between the parties only with regard to the few limited aspects of Resolution 98-001 specified in the pleadings. (AR 25-26, 183-185.)

(21) The demurrer was overruled on April 28, 1998, after respondent expressly and repeatedly disclaimed any intention of seeking declaratory relief with regard to the issues not specifically alleged as actual controversies in the pleadings.

(AR 206, 214-216.)

- (22) The issues specifically identified in the pleadings in consolidated Orange County Superior Court cases 791315 and 791499 included Resolution 98-001's exclusion of "Flexible Benefits" payments for pre-1991 employees who retired after 1990, but did not include the facial applicability of former Government Code section 31460.1 or the effect of that statute's repeal upon its validity. (AR 60-149, 180-211, 217-290, 378-421.)
- entered into a "no opt out" settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499, whereby the parties agreed "to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001 . . . ," and this settlement agreement was approved by the trial court and incorporated into the judgment entered on November 1, 1992. (AR 29-34, 37, 423.)
- (24) Although the 2002 settlement agreement in consolidated Orange County Superior

Court cases 791315 and 791499 contains a broad release of "any and all claims . . . that in any way relate to matters stated in any of the pleadings on file . . . , in OCERS' Resolution 98-001 as amended, . . . and/or in the Judgment . . . " , the agreement elsewhere states, "Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein." (AR 40 and 42.)

action members in consolidated Orange County
Superior Court cases 791315 and 791499 with regard
to the "Flexible Benefits" exclusion in Resolution
98-001 were the questions of whether benefit
payments made to third party insurers were required
to be included and whether employees who were hired
prior to 1991 and retired after 1990 were
constitutionally entitled to have benefit payments
included as a vested contractual right, issues which
the trial court resolved in favor of respondent. (AR
54-56, 98-101, 232-235, 242-253, 264-270, 288-289,
395, 440, 446-458, 467-470.)

(26) By including "Flexible Benefits" payments for employees retiring pior to 1991,

Resolution 98-001 manifests an intent on the part of respondent to include OBP payments to the extrent not excluded by former Government Code section 31460.1.

(AR 25-26, 300, 308, 312, 334-335.)

- (27) The issues of whether former

 Government Code section 31460.1 was facially
 applicable to the OBP benefits provided by the County
 and the Superior Court, and whether the statute
 remained effective in Orange County following its
 1992 repeal, were not addressed in consolidated
 Orange County Superior Court cases 791315 and
 791499. (AR 19-23, 29-56, 60-487, and anticipated
 testimony of applicant.)
- (28) The sole issue determined by the trial court in its ruling of August 15, 1991, was whether employees who were hired prior to 1991 and retired after 1990 were constitutionally entitled to have benefit payments included as a vested contractual right. (AR 54-56, 97-101, 248-253, 264-270, 288-289, 395, 440, 453-458.)
- (29) The parties to consolidated Orange
 County Superior Court cases 791315 and 791499
 believed that former Government Code section 31460.1

required the exclusion of OBP benefits from "compensation" and "compensation earnable" for Orange County employees who retired after 1990. (AR 65, 66, 97-100, 232-235, 248-249, 253, 264-270, 288-289, 300, 308, 312, 334-335, 454, and anticipated testimony of applicant.)

- (30) As a Superior Court research attorney, applicant was not a member of the Orange County Attorneys' Association, of the Orange County Employees' Association, of The Retired Employees Association of Orange County, or of any other Orange County employee association or bargaining group.

 (Anticipated testimony of applicant.)
- (31) Attorneys Nolan and Snethen, the only individual designated class representatives in consolidated Orange County Superior Court cases 791315 and 791499, were hired prior to 1991, yet no subclasses were created to safeguard the interests of post-1990 employees such as applicant who were differently situated with regard to issues such as retroactivity and OBP exclusion. (AR 422-425.)
- (32) The 2002 settlement agreement's binding affirmance of the inclusions and exclusions

set forth in Resolution 98-001 represented a potentially significant detriment to applicant and to other post-1990 Superior Court research attorneys participating in the Optional Benefit Plan, in exchange for no identifable consideration. (AR 35-53, 483-487.)

(33) Neither the notice of proposed settlement nor the settlement agreement itself provided any indication that class members would be compromising significant, unpleaded statutory rights under the CERL. (AR 35-53, 483-487.)

PROPOSED CONCLUSIONS OF LAW

Applicant requests legal conclusions with regard to the following matters, which are supported by the parenthetical citations to the foregoing proposed factual findings "PFF"s) and to controlling legal authority:

(1) Under the County Employees

Retirement Law of 1937 ("CERL"), the OBP benefits

paid to applicant as cash out of county funds are

included in "compensation" and "compensation
earnable." (PFF 14; Government Code sections 31460,
31461; Ventura County Sheriffs' Deputies Assn. v.

Board of Retirement (1997) 16 Cal.4th 483, 487,
495-505; Salus v. San Diego County Employees

Retirement Ass'n (2004) 117 Cal.App.4th 734, 739;
cf. In re Retirement Cases, supra, 110 Cal.App.4th
at 477-481.)

- with the CERL and decisional law insofar as it provides for the inclusion of "Flexible Benefits" payments only for employees retiring before January 1, 1991, and only "to the Extent paid in Cash" and not to the extent payable as cash. (PFF 14; Government Code sections 31460, 31461; Ventura

 County Sheriffs' Deputies Assn. v. Board of

 Retirement, supra, 16 Cal.4th at 487, 495-505; Salus v. San Diego County Employees Retirement Ass'n, supra, 117 Cal.App.4th at 739; cf. In re Retirement

 Cases, supra, 110 Cal.App.4th at 477-481.)
- (3) Because it was payable as cash if no allocation were made during the open enrollment period, the entire \$3,500.00 OBP benefit received annually by applicant as a Superior Court research

attorney is included in "compensation" and "compendation earnable" regardless of whether applicant elected to allocate it, in the same manner as cashable accrued vacation and sick leave. (PFF 4, 6 and 16; Ventura County Sheriffs' Deputies Assn. v. Board of Retirement, supra, 16 Cal.4th at 487; Salus v. San Diego County Employees Retirement Ass'n, supra, 117 Cal.App.4th at 739; cf. In re Retirement Cases, supra, 110 Cal.App.4th at 477-481.)

- (4) The financial cost to respondent of including the OBP benefit in "compensation" and "compensation earnable" is not a justification for disregarding CERL requirements. (Ventura County Sheriffs' Deputies Assn. v. Board of Retirement, supra, 16 Cal.4th at 507.)
- (5) Former Government Code section
 31460.1 is facially inapplicable because applicant
 did not elect to participate in the Optional Benefit
 Plan. (PFF 7 and 19.)
- (6) Former Government Code section
 31460.1 is facially inapplicable because the OBP
 payments received by applicant did not reflect
 amounts that exceeded his salary. (PFF 8 and 19.)

- (7) Even if Government Code section
 31460.1 had been otherwise applicable, the repeal of section 31460.1 rendered that statute, as well as the Board of Supervisors's adoption of the statute, ineffective in Orange County for employees retiring after May 11, 1992. (PFF 15; Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568;

 Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App.
 150, 152-153; cf. Ransome-Crummey Co. v. Fikes
 (1921) 53 Cal.App. 180, 182-183.)
- (8) The 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 is treated as a contract and is subject to the laws and rules of construction generally applicable to contracts. (Stewart v. Preston Pipeline, Inc. (2005) 134 Cal.App.4th 1565, 1585.)
- (9) The 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 contravenes the CERL and public policy, and is consequently void, insofar as its terms would preclude applicant from receiving the retirement allowance to which he is otherwise

entitled under Government Code sections 31460 and 31461. (Civil Code sections 1550, 1595, 1596, 1599, 1667(1); In re Retirement Cases, supra, 110 Cal.App.4th at 453; Boren v. State Personnel Board (1951) 37 Cal.2d 634, 641.)

- (10) The 2002 judgment approving the settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 is similarly invalid insofar as the settlement agreement would preclude applicant from receiving the retirement allowance to which he is otherwise entitled under Government Code sections 31460 and 31461. (Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal.App.4th 1, 13; Timney v. Lin (3003) 106 Cal.App.4th 1121, 1127, 1129.)
- (11) The demurrer filed April 1, 1998, in Orange County Superior Court case no. 791315 had merit insofar as it asserted that respondent's complaint violated Civil Code section 1060 by seeking declaratory relief with regard to matters not in actual controversy between the parties, and it should have been sustained on that ground had respondent not expressly disclaimed any intention of seeking declaratory relief with regard to issues

other than those specifically identified as actual controversies in the pleadings. (PFF 20-21; Wilson v. Transit Authority (1962) 199 Cal.App.2d 716, 722-724; Selby Realty Co. v. San Buenaventura (173) 10 Cal.3d 110, 117-118.)

- representation that it sought declaratory relief only with regard to the issues specifically identified as actual controversies in the pleadings in consolidated Orange County Superior Court cases 791315 and 791499, responent's contention that the OBP exclusion issue raised by applicant was resolved via the proceedings in consolidated Orange County Superior Court cases 791315 and 791499 is barred by judicial estoppel. (PFF 20-23; Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181, 183; Minish v. Hanuman Fellowship (2013) 214 Cal.App.4th 437, 449-450 and 455 n. 11; Davies v. Krasna (1970) 12 Cal.App.3d 1049, 1056.)
- (13) Because the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499 is ambiguous as to whether the agreement "specifically" bars applicant's claim that former Government Code

section 31460.1 is inapplicable and that all OBP payments received by him must be included in "compensation earnable," extrinsic evidence is admissible for the purpose of determining the parties' intent with regard to the scope of the release. (PFF 23-24; Butler v. The Vons Companies, Inc. (2006) 140 Cal.App.4th 943, 949-951; see Powers v. Superior Court (Hoffman) (1987) 196 Cal.App.3d 318, 320: "Release, indemnity and similar excupatory provisions are binding on the signatories and enforceable so long as they are . . . 'clear, explicit and comprehensible in each [of their] essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement'"; Leaf v. City of San Mateo (1980) 104 Cal.App.3d 398, 411: "mere recital, as in the release signed by plaintiffs, that the protection of Civil Code section 1542 is waived, or tha the release covers unknown claims or unknown parties is not controlling. Whether the releasor intended to discharge such claims or parties is ultimately a question of fact"; Dowling v. Farmers Ins. Exchange (2012) 208 Cal.App.4th 685, 695: "If contractual language is ambiguous, we may consider a variety of extrinsic aids, including the purpose of the

statute, legislative history and public policy.")

- (14) Extrinsic evidence, as well as the public policy embodied in the CERL, points to the conclusion that the 2002 settlement agreement was not intended, and should not be construed, to forclose applicant from obtaining the full retirement allowance to which he is statutorily entitled based upon the inclusion of OBP cash benefit payments in "compensation" and "compensation earnable." (PFF 21-22, 25-27, 29; In re Retirement Cases, supra, 110 Cal.App.4th at 453.)
- (15) Because applicant's claim is based upon statutory rights set forth in the CERL, and because the trial court's ruling of August 15, 2001, involved constitutionally vested contractual rights, the causes of action are not identical and the 2001 ruling does not bar applicant's claim under the doctrine of collateral estoppel or res judicata. (PFF 28; see Castillo v. City of Los Angeles (2001) 92 Cal.App.4th 477, 481.).)
- (16) Because applicant was not hired prior to 1991 and could claim no vested contractual right to the inclusion of "Flexible Benefits"

payments at the time former Government Code section 31460.1 became effective in Orange County, a ruling in favor of class members on August 15, 1991, would not have resulted in the inclusion of OBP benefits in the calculation of applicant's retirement allowance. (PFF 1, 28.)

- upon distinct statutory rights which were never placed in issue in consolidated Orange County Superior Court cases 791315 and 791499, the judgment entered November 1, 1992, does not bar applicant's claim under the doctrine of res judicata. (PFF 24-25, 27-29; Daugherty v. Board of Trustees (1952) 111 Cal.App.2d 519, 521-522; Concannon v. Smith (1901) 134 Cal. 14, 18; see Boeken v.Philip Morris USA, Inc. (2010) 48 Cal.4th 788, 798: "the relevant point for our purposes is what plaintiff . . . alleged, because that allegation indicates what primary right was adjudicated.")
- (18) Inasmuch as the judgment entered

 November 1, 1992, in consolidated Orange County

 Superior Court cases 791315 and 791499 provides

 declaratory relief in accordance with the pleadings
 and the settlement agreement, it does not preclude

applicant from seeking additional relief upon the same facts. (PFF 20, 23, 25, 27, 29; Code of Civil Procedure section 1062.)

- (19) The judgment entered November 1, 1992, in consolidated Orange County Superior Court cases 791315 and 791499 should not be given preclusive effect, since as applicant's claim involves pure issues of law based upon undisputed facts, and since application of res judicata would be plainly inconsistent with the statutory scheme and public policy set forth in the CERL. (PFF 14, 18-19; Salus v. San Diego County Employees

 Retirement Ass'n (2004) 117 Cal.App.4th 734, 739; Pleasant Valley Canal Co. v. Borror (1998) 61

 Cal.App.4th 742, 771; Rest. 2d, Judgments, section 26(1)(d).)
- (20) Respondent has failed to show that applicant's claim is barred by former Government Code section 31460.1 or by the 2002 settlement agreement in consolidated Orange County Superior Court cases 791315 and 791499.
- (21) Because the parties in consolidated
 Orange County Superior Court cases 791315 and 791499

mistakenly believed that inclusion of OBP cash benefits in "compensation" and "compensation earnable" for post-1990 retirees was precluded by former Government Code section 31460.1, the 2002 settlement agreement is subject to rescission based upon mutual mistake of law. (PFF 25-27, 29; Civil Code sections 1578(1), 1689(b)(1); Harris v. Rudman, Richman & Appel (2002) 95 Cal.App.4th 1332, 1335-1336.)

(22) A number of factors peculiar to this case provide additional support for the equitable remedy of rescission with regard to that portion of the 2002 settlement agreement which purports to bind applicant to Resolution 98-001's exclusion of OBP benefits for employees who retired after 1990. (PFF 30-33; see "Developments -- Class Actions" (1976) 89 Harv. Law Rev. 1318, 1490-1492, quoted in Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 473: "'If the factual circumstances underlying class members' claims differ, . . . the trial judge, through use of techniques like subclassing or [other judicial] intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation'"; Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129, 133: "[No] case suggests that the court may determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. . . This the court cannot do if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.")

Respectfully submitted,

By

DATED: April 21, 2017 _

James B.

Morell

Applicant in pro per

JAMES_MORELL_0239

APPLICANT'S SUPPLEMENT TO ADMINISTRATIVE RECORD

Description

Date Number

Orange County Benefits Center record of applicant's 2010 57

OBP election for 2011

Orange County Benefits Center record of applicant's 2011 58

OBP election for 2012

Orange County Benefits Center record of applicant's 2012 59

OBP election for 2013

Respondent's complaint for declaratory relief 3/6/98 60

Petition for writ of mandate 3/10/98 74

Respoindent's memorandum of points and authorities in 3/13/98 150

support of ex parte application to enjoin or condolidate

Defendants' opposition to ex parte motion 3/16/98 156

Defendants' general demurrer to complaint 4/1/98 180

County's answer to complaint 4/8/98 190

County's cross-complaint for declaratory relief 4/8/98 195

Respondent's opposition to demurrer 4/14/98 200

Respondents' reply memorandum of points and authorities in 4/24/98 212

support of motion to enjoin or consolidate

Minute order

4/28/98 216

Defendant attorneys' answer to complaint 5/6/98 217

OCEA complaint in intervention 5/29/98 224

OCEA memorandum of points and authorities in support of 5/29/98 240

cross-petition for writ of mandate

REAOC complaint in intervention 6/10/98 257

REOC memorandum of points and authorities in support of 6/10/98 274

cross-petition for writ of mandate

Declaration of Raymond A. fleming in support of respondent's 6/11/98 291

opposition to motion for preliminary injunction

County's answer to REAOC cross-complaint for writ of mandate 7/1/98 378

OCEA notice of motion and application for peremptory writ 7/22/98 384

of mandate

Respondent's answer to OCEA cross-petition for writ of mandate 8/25/98 387

OCEA's answer to complaint 9/14/98 392

County's supplemental cross-complaint 10/16/98 399

Joint case summary 10/30/98 403

Respondent's answer to supplemental cross-complaint 12/7/98 412

Respondent's answer to REAOC cross-petition for writ 4/16/99 417

of mandate

Order on matters addressed at August 27, 1999 status conference 11/22/99-422

Opening brief of plan members regarding obligation of retirement 3/30/00 434

associations

- Statement of decision re includability of: (1) termination pay; 7/20/00 462
 - (2) insurance-related payments; and (3) pick-ups
- Statement of decision re includability of in service cash-outs 11/8/00 478

of accrued leave benefits

- Notice of proposed settlement and fairness hearing 9/11/02 483
- Third Amended and Restated County of Orange Section 125 Plan 6/1/11 488
- Fourth Amended and Restated County of Orange Section 125 Plan 1/1/13 527
- Orange County Superior Court Personnel Policies and Regulations 9/28/07 566
- Orange County Superior Court pay statement 1/7/11 642
- Orange County Superior Court pay statement 1/6/12 643
- Orange County Superior Court pay statement 1/4/13 644
- Orange County Superior Court pay statement 1/3/14 645

Matsuo, Dawn

From:

bob snider <bobsnider58@gmail.com>

Sent:

Sunday, April 23, 2017 9:17 AM

To:

jmorell@aol.com; Matsuo, Dawn

Subject:

Re: Morell -- Supplemental Pre-Hearing Statement

Mr. Morell and Ms. Matsuo:

In response to Applicant's submission of Friday afternoon, which appears below:

- The parties' stipulations should be on the record. Reciting them orally at the hearing will be sufficient.
- With respect to the proposed hearsay being offered: If
 Respondent has an objection, please state the basis for it by the close of business Wednesday.
 I may be able to rule on the admissibility of the proffered evidence by Friday.

I will be on the East Coast from Friday until next Thursday, May 4, but available for our hearing beginning at 10:00 a.m. the next day.

Looking forward to seeing you both then.

Cordially, Bob Snider

On 4/21/17, jmorell@aol.com <jmorell@aol.com> wrote:

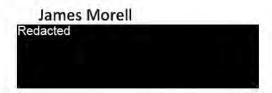
Attached please find my supplemental pre-hearing statement. Also, by way of errata, attached is an amended table of contents to my supplement to the administrative record (the document at AR 212 was misidentified).

With regard to some evidentiary matters:

(1) Ms. Matsuo and I have agreed to stipulate to the authenticity and effectiveness (during the pertinent 2011-2014 time period) of the County "Section 125 Plan" documents (AR 488-565, obtained from the Superior Court custodian of records), and to the authenticity of the 2007 version of the Superior Court PP&Rs (AR 566-61, provided to me by OCERS). Please let me know what, if anything, needs to be done to formalize these stipulations in order to ensure they are reflected in the record.

(2) As a "heads up": My testimony will include hearsay statements made to me by class counsel Stephen Silver regarding the issues raised (or not) and adjudicated in the consolidated class action proceedings. I believe these statements should be admissible under Evidence Code section 1230 as statements against interest (Mr. Silver has informed me he will be away on vacation the week of May 1 and consequently unavailable to testify) and under section 15(d) of OCERS'

Administrative Hearings Policy (as indicated in the attached supplemental pre-hearing statement, these hearsay statements will supplement other evidence and need not be the sole evidentiary basis for any factual finding).



ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 2223 Wellington Avenue

Santa Ana, California 92701 Telephone: 714/558-6220

Dawn M. Matsuo Attorney for Orange County Employees Retirement System

BEFORE THE BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application for Disability Retirement

JAMES B. MORELL

Applicant.

) RESPONDENT'S
) RESPONSE TO HEARING
) OFFICER'S REQUEST FOR OCERS'
) RESPONSE TO MORELL'S
) REQUEST TO PRESENT HEARSAY
) TESTIMONY AT HEARING

Date: 5-05-17 Time: 10:00 a.m. teferee: Robert M. Snider

Respondent, Orange County Employees Retirement System, hereby submits its Response to Hearing Officer's Request for OCERS' Response to Morell's Request to Present Hearsay Testimony at Hearing:

OBJECTION NO.1: Rule 14 of the Administrative Hearing Procedures entitled "Resolution of Disputes about Depositions and Conduct of Hearings has not been followed.

14. Resolution of Disputes about Depositions and Conduct of Hearings

The Hearing Officer shall resolve disputes about depositions and conduct of the Hearing. If not made at a Hearing, a request for resolution of a dispute shall be made in writing and may be supported by declarations, a copy of the deposition or Hearing transcript, a memorandum of points and authorities and a proposed resolution. The adverse Party involved shall have ten (10) days after receipt of such a request in which to respond. Declarations, a copy of the deposition or Hearing transcript, a memorandum of

J.MORBLL - PRE-HEARING STATEMENT 703

JAMES MORELL 0245

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points and authorities and a proposed resolution may also accompany the response. The Hearing Officer shall notify the Parties and the witness(es) involved of the Hearing Officer's resolution of the dispute within thirty (30) days of the Hearing Officer's receipt of the adverse Party's response to the request for resolution.

OCERS objects to having only three days to respond to what amounts to Appellant's request for a motion to determine "Conduct of Hearings." Rule 15 is entitled "Conduct of Hearings" and Appellant is relying on rule 15 (d) to request that he be allowed to submit hearsay testimony at the hearing.

OCERS should be provided with the time set forth in Rule 14 to respond, no a mere three days.

OBJECTION NO. 2: Until hearsay statements are made, a determination of whether such statement complies with Evidence Code section 1230 or Rule 15(d) cannot be made.

Evidence Code section 1230 states:

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Until we know what the hearsay statement(s) is (are) a determination cannot be made as to whether the statement "when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." Therefore, OCERS request that any ruling on the admissibility of any and all hearsay statements be deferred until after an argument can be made that it either satisfies or does not satisfy Section 1230.

Administrative Hearing Procedures, Rule 15. Conduct of Hearings, also has specific requirements for hearsay statements to be admissible.

Rule 15 (d) states:

"Hearsay evidence may be used for the express purpose of supplementing or explaining other evidence but shall not be sufficient by itself to support a finding unless it would be admissible over objection in civil actions. Every Hearing shall proceed as though each Party had made a standing objection to all inadmissible hearsay at the commencement of the Hearing. This section shall not be applicable to written medical reports received into evidence pursuant to Rule 12."

J.MORELL - PRE-HEARING STATEMENT 704

Whether a specific hearsay statement was used for the express purpose of supplementing or explaining other evidence cannot be determined until the statement(s) has actually been made. OCERS request that at the time of the hearing, pursuant to Rule 15 (d), that it proceed as though OCERS made a standing objection to all inadmissible hearsay at the commencement of the hearing and that OCERS be given the opportunity to brief and further argue the inadmissibility of any and all hearsay statements made during the hearing as not complying with Evidence Code section 1230 and/or Rule 15 (d). Respectfully submitted, ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM DATED: April 26, 2017 By DAWN M. MATSUO Attorney at Law

JAMES MORELL 0247

J.MORELL - PRE-HEARING STATEMENTOS

PROOF OF SERVICE I declare that I am employed in Orange County, California, that I am over 18 years old, and that I am not a party to the within action. My business address is 2223 Wellington Ave., Santa Ana, California 92701. 3 On the date set forth below, I served the foregoing RESPONDENT'S PRE-HEARING STATEMENT 4 on interested parties to this action by placing the [X] duplicate original(s) [] true copy(ies) of said document in a sealed envelope in the following manner: 5 (BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing 6 at Santa Ana, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. 8 (BY AIRBORNE EXPRESS) I placed such envelope(s) addressed as shown below for collection and delivery by Airborne Express with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the 10 following day by Airborne Express. 11 (BY EMAIL) I caused such document to be emailed to the addressee(s) shown below, wherein such email is transmitted that same day in the ordinary course of business. 12 (BY PERSONAL SERVICE) I caused such document to be hand-delivered to the individuals 13 listed below while they were at the Orange County Employees Retirement System's office located at 2223 Wellington Ave., Santa Ana, CA 92701. 14 (STATE) I declare under penalty of perjury under the laws of the State of California that the 15 foregoing is true and correct. 16 Executed on 04 / 26 / 17 , at Santa Ana, California. 17 18 19 20 Dawn M. Matsuo, Declarant 21 22 23 24 25 26 27 28

JAMES MORELL 0248

NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

Robert Snider, Esq.

bobsnider58@gmail.com

fames B. Morell morell@aol.com

Matsuo, Dawn

From: jmorell@aol.com

Sent: Wednesday, April 26, 2017 11:08 PM

To: Matsuo, Dawn; bobsnider58@gmail.com

Subject: Re: Hearsay Statements and OCERS' Attorney's unavailability

Herewith are my (applicant's) responses to OCERS' stated objections to my anticipated hearsay testimony (please let me know if a more formal written response may be necessary):

Objection No. 1: The admissibility of hearsay testimony is specifically governed by Rule 15(d) of the Administrative Hearing Procedures, and not by Rule 14. Rulings on such routine evidentiary matters should not require advance notice or an opportunity for "briefing," particularly when the evidence in question is merely supplementary in nature. The "heads up" in my April 21 email was not intended to constitute a "motion to determine 'Conduct of Hearings," but rather to alert the referee and OCERS to the hearsay issue in an effort to minimize the time required to be devoted to the issue at the hearing. However, if the referee is inclined to rule on the admissibility issue prior to the hearing, in full or in part (e.g., solely under Rule 15(d)), applicant has no objection that procedure.

Objection No. 2: Because, as stated above, I did not intend to seek a pre-hearing ruling on the issue, I did not fully set forth the proffered hearsay testimony, which will consist primarily of the following:

Soon after receiving OCERS' March 2015 denial of my appeal (AR 16-18), which referenced for the first time the 2002 settlement agreement in the consolidated class action cases. I contacted lead class counsel Stephen Silver by telephone. In response to my questioning, after hearing my explanation of the bases for my appeal to that point. Mr. Silver stated that he had never considered whether the May 1992 repeal of former Government Code section 31460.1 might have rendered that statute ineffective thereafter; that so far as he was aware no one had raised a question as to the applicability or validity of former Government Code section 31460.1 during the course of the consolidated class action litigation; that he had never reviewed any actual OBP provisions applicable to Orange County employees (i.e., the class action members he represented); that he was unaware of the existence of the OBP provisions contained in the Superior Court's Personnel Policies & Regulations; that if the annual OBP benefits were indeed fully payable to the employee as cash in the event no annual allocation was made, such benefits might well have been treated differently from from the type of payable-to-third-parties "flexible benefit plan" benefits which were actually litigated elsewhere in the coordinated proceedings; and that the sole consideration received by class action members in exchange for acceptance of the exclusions set forth in Resolution 98-001 consisted of confirmation that the Ventura decision was to be applied retroactively to existing retirees."

I believe that the foregoing statements effectively constitute an admission of legal malpractice and that as such they are so far contrary to Mr. Silver's pecuniary interest (he is still practicing law, as a member of Rains, Lucia, Stern, St. Phalle & Silver, PC) and created such a risk of making him an object of ridicule in the legal community that a reasonable man in his position would not have made these statements unless they were true. I nonetheless concede that a final ruling on admissibility under Evidence Code section 1230 might best be deferred until the actual testimony is provided at the hearing. However, Rule 15(d) provides an independent basis for the admission of hearsay testimony for the express purpose of supplementing or explaining other evidence in the record. As set forth at pages 8-10 of Applicant's Supplemental Pre-Hearing Statement (PFF 25, 27 and 32), other evidence in the record supports findings that (1) issues regarding the applicability and continued effectiveness of former Government Code section 31460.1 were never raised or addressed in the consolidated class action cases (AR 19-23, 29-56, 60-487); (2) the legal significance of the payability of the annual OBP benefit as cash was never raised or addressed in the consolidated class action cases (AR 54-56, 98-101 232-235, 242-253, 264-270, 288-289, 395, 440, 446-458, 467-470), and (3) the 2002 settlement agreement provided no consideration vis-a-vis applicant (AR 35-53, 483-487). Based upon this record, it would be appropriate for the referee to rule prior to the hearing that the foregoing hearsay statements are admissible pursuant to Rule 15(d) as supplemental and/or explanatory evidence in support of the proposed factual findings set forth in PFF 25, 27 and 32 and of any other relevant factual findings warranted by the administrative record.

Objection No. 3: I am uncertain what type of showing of unavailability is required under Evidence Code section 1230 (respondent cities no authority), but I am prepared to offer evidence of Mr. Silver's unavailability at the hearing if necessary.

Respectfully submitted, James B. Morell

1

-----Original Message----From: Matsuo, Dawn <dmatsuo@ocers.org>
To: bob snider (bobsnider58@gmall.com) <bobsnider58@gmall.com>; jmorell <jmorell@aol.com>
Sent: Wed, Apr 26, 2017 4:48 pm
Subject: Hearsay Statements and OCERS' Attorney's unavailability

Mr. Snider,

Attached is OCERS Response to Mr. Morell's statements that he intends to present hearsay statements during the Hearing and your request that OCERS provide objections by end of business today.

Please also note that I will be out of the office starting tomorrow and will not return until Friday, May 5th – the day of the hearing in this matter. I will not be available to respond to anything further on this matter until the day of the hearing.

Dawn M. Matsuo
Orange County Employees Retirement System
Staff Attorney
dmatsuo@ocers.org
(714) 558-6220

Matsuo, Dawn

From: bob snider < bobsnider58@gmail.com>
Sent: Thursday, April 27, 2017 10:08 PM
To: jmorell@aol.com; Matsuo, Dawn

Subject: Hearsay statements and OCERS' Attorney's unavailability

Mr. Morell and Ms. Matsuo:

As I read the Policy for Administrative Hearings, there is no rule specifically covering evidentiary disputes. I don't believe Rule 14's 10-day period for responding in disputes over depositions and the conduct of hearings applies to hearsay proffers and objections. That said, I'm disinclined to rule now on Applicant's proposed evidence, particularly since Applicant was not seeking a pre-hearing ruling and since Respondent was unaware until last night of the specific statements being offered.

Therefore, I think our best course of action is to take up the evidence's admissibility just before testimony begins. This course is consistent with Rule 15(d)'s directive to assume the existence of standing objections to inadmissible hearsay at the hearing's commencement. Both parties should feel free, though not obliged, to add to the points already made, either orally or in writing.

Cordially, Bob Snider

From: jmorell@aol.com [jmorell@aol.com] Sent: Wednesday, April 26, 2017 11:07 PM

To: dmatsuo@ocers.org; bobsnider58@gmail.com

Subject: Re: Hearsay Statements and OCERS' Attorney's unavailability

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is inclined to rule on the admissibility issue prior to the hearing, in full or in part (e.g., solely under Rule 15(d)), applicant has no objection that procedure.

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To: bob snider (bobsnider58@gmail.com) <bobsnider58@gmail.com>; jmorell

<jmorell@aol.com>

Sent: Wed, Apr 26, 2017 4:48 pm

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Dawn M. Matsuo
Orange County Employees Retirement System Staff Attorney
dmatsuo@ocers.org<mailto:dmatsuo@ocers.org>
(714) 558-6220

ADMINISTRATIVE RECORDS James B. Morell

Description	Date	Number(s)
Letter from Morell to Jenike	6/23/2014	1-2
Personnel Policies and Regulations, OC Superior Court	12/18/2013	3-5
OCERS Letter to James B. Morell	3/26/2014	6
Orange County ERS, Retirement Benefit Estimate	3/25/2014	7-9
OCERS Letter to James B. Morell	9/9/2014	10
Letter from Morell to Steve Delaney received 12/01/2014	6/23/2014	11 - 15
OCERs Letter to James B. Morell	3/20/2015	16-18
Letter from Morell to Steve Delaney	6/15/2015	19 - 23
Board of Retirement, OCERS RESOLUTION 98-001	2/16/1998	24 - 28
Judgement in Orange County Superior Court Case Nos. 791315 and 791499	11/1/2002	29-31
Order Approving Settlement Agreement	11/1/2002	32 - 34
Settlement Agreement	9/12/2002	35 - 53
Judicial Council Coordination Proceeding No. 4049, Tentative Decision Re: Orange County Resolution 90-1551	8/14/2001	54 - 56

APPLICANT'S SUPPLEMENT TO ADMINISTRATIVE RECORD

Description	Date	Number
Orange County Benefits Center record of applicant's	2010	57
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Defendant attorneys' answer to complaint	5/6/98	217
OCEA complaint in intervention	5/29/98	224
OCEA memorandum of points and authorities in support of	5/29/98	240
cross-petition for writ of mandate		
READC complaint in intervention	6/10/98	257
REOC memorandum of points and authorities in support of	6/10/98	274
cross-petition for writ of mandate		
Declaration of Raymond A. fleming in support of respondent's	9 6/11/98	291
opposition to motion for preliminary injunction		
County's anser to REACC cross-complaint for writ of mandate	7/1/98 37	8
OCEA notice of motion and application for peremptory writ	7/22/98	384

of mandate

Respondent's answer to OCEA cross-petition for writ of mandate	8/25/98	387
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James B. Morell

Ame 23, 2014

RECEIVED

JUN 23 2014

Orange County Emproyees
Relirement System

Ms. Suzanne Jenike Member Services Director Orange County Employees Retirement System 2223 E. Wellington Avenue, Suite 100 Santa Ana, CA 92701

Dear Ms. Jenike,

On February 21, 2014, I retired from my position as a Senior Research Attorney with the Orange County Superior Court. Because I believe a \$3,500.00 annual "optional benefit" was erroneously excluded from the calculation of "compensation" and/or "compensation earnable" in determining my monthly retirement allowance (see enclosed documents), I am presenting this appeal of the calculation.

The compensation at issue consists of \$3,500.00 which has been made available to attorneys at OCSC at the beginning of each calendar year as part of their annual compensation package. During most of my time of employment at the Court, at open enrollment each November the attorneys were permitted to elect that these funds be applied to a limited number of options in the manner decided by the attorney: (1) a cash payment (included in the first payroll "check" of the new year), (2) certain health/dental care expenses not covered by insurance, (3) supplemental accidental death and dismemberment coverage, (4) tuition reimbursement for professional coursework (this option was eliminated effective January 1, 2014), or allocation of the funds to the attorney's 457 deferred compensation plan. If options (2), (3) and/or (4) were elected, the amount of designated funds is payable, on a pre-tax basis, as reimbursement for the use elected; if no election is made, \$3,500.00 is automatically paid to the attorney as part of his first "paycheck" of the year. Article Dt., section 4(5) of the Court's Personnel Policies and Regulations (attached hereto) specifies the purpose of this "Optional Benefit Plan". To provide options to individual employees to best meet the needs of themselves and dependents while enhancing the employee's expertise and skills on the job."

"Compensation' means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation . . . , but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." (Government Code section 31460.) "Final compensation' means the average annual compensation earnable by a member during any three years elected by a member at or before the time he or she files an application for retirement, or, if he or she fails to elect, during the three years immediately preceding his or her retirement. . . . * (Government Code section 31462(a).) In construing these statutes, any ambiguities or uncertainties are to be resolved in favor of the pensioner. (Ventura County Deputy Sherits' Assn. v. Board of Retirement (1997) 15 Cai.4th 463, 490.)

Under <u>Ventura</u> and the express language of section 31460, an annual \$3,500.00 pure cash payment (option 1, supra) would clearly constitute "compensation," nor would an election to apply any or all of an annual cash payment to a deferred compensation account (option 5) result in exclusion of the deferral from "compensation" or "compensation earnable." In addition, tuition reimbursement for professional coursework (option 4) is a form of educational incentive pay relating to services expected to be performed with special skills or at higher level of competence, and thus is "compensation." (<u>Ventura</u>, supra, at p. 498.) The question thus presented is whether (or to what extent) the ability of the attorney to elect to apply some or all of the 3,500.00 to health/dental care expenses (option 2) or to supplemental accident/ dismemberment coverage (option 3) requires the \$3,500.00 to be excluded from "compensation" or "compensation earnable." The ability of the attorney to apply the funds in the manner specified in options 2 and 3 on a pre-tax basis should not detract from the monetary value of the funds so applied. Any funds designated for the payment of non-insurance-covered medical/dental expenses (option 2) are paid by the County (on behalf of the Count) into a dedicated health care reimbursement account (aka "flexible spending account," currently administered by third party contractor ADP) for

use by the attorney in accordance with IRS regulations -- although made to the attorney's ADP account for limited use rather than to the attorney's bank account for general use, it is nonetheless a cash payment, and as a lump-sum payment for the attorney's subsequent use it is inherently different from the type of ad hoc reimbursement of miscellaneous employment-related expenses which may otherwise be excluded from "compensation" or "compensation earnable." Similarly, supplemental accidental death/dismemberment coverage (option 3) has been funded via a payroll credit - again, this would constitute a cash payment out of County funds insofar as the credit results in a higher of-weekly payment to an attorney who elected option 3. In evaluating the annual "optional benefit" package, it should be born in mind that the Orange County Superior Court has designed the package as a whole for the purpose of enhancing the employee's expertise and skills on the job (Personnel Policies and Regulations, Art. IX, section 4(8)), and that such skill enhancement payments are considered "compensation" under section 31480 (Ventura, supra, at p. 498). Perhaps more importantly, the fact an altomey may elect for the entire \$3,500,00 to be payable directly to himself or herself in cash, in the same manner as vacation and sick-time pay-offs (in fact, option 1 is the "default option" unless a different election is made), points to treatment of the entire \$3,500.00 as "compensation" or "compensation esmable." (See Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal App 4th 734, 739: "In Ventura the court found that the payments the officers received in lieu of annual leave were carnable compensation within the meaning of sections 31460 and 31461 for the self-evident reason the officers had the ability to receive the pay in cash rather than in time off (emphasis added); of In re Retirement Cases (2003) 110 Cal App.4th 426, 477-481 holding flexible benefit plans to be excluded from "compensation" because they had not been payable directly to the employee.) "In contrast to the result reached in Ventura, the court in In re Retirement Cases . . . found that under Ventura sick leave or annual leave which was not or could not be converted to cash before retirement is not final compensation." (Splus y, San Diego County Employees Retirement Ass'n, supre, 117 Cal App.4th at p. 739 (emphasis omitted and added).)

Even if the annual \$3,500.00 "optional benefit" as a whole might not constitute "compensation" or "compensation earnable," Ventura nonetheless requires the calculation of my retirement benefit to be based upon my own individual remuneration as a member of the class of attorneys to which the "optional benefit" package has been made available. During my employment with the Orange County Superior Count, I elected to apply a portion of my annual "optional benefit" towards health/dental care not covered by insurance (option 2, supra) and to take the remainder of the \$3,500.00 as a cash payment included in the first payrroll payment of the year. Specifically, in January 2014 I received a cash "optional benefit" payment in the amount of \$2,500.00, in January 2013 I received a cash "optional benefit" payment in the amount of \$1,000.00, and in January 2012 I received a cash "optional benefit' payment in the amount of \$2,800.00 (the Court's HR Department can verify these amounts). Regardless of whether the portion of my annual "optional benefit" payment applied to health/dental care may be treated "compensation" or "compensation earnable," these annual cash payments (averaging \$2,100.00 during the threeyear period preceding my retirement) were required to be included in the calculation of my average annual compensation earnable under sections 31460 and 31462(a). "[I]tems of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Venture, supra, at p. 87; see also Salus v. San Diego County Employees Retirement Ass'n, supra, 117 Cal.App.4th at p. 736: "final compensation under CERL involves three requirements; compensation in the form of cash, rather than in the form of in-kind goods and services or time off; cash earned during a usual work period, as opposed to cash earned for overtime; and cash earned before retirement, rather than at or after retirement.")

I therefore request that my average annual compensation earnable be increased by \$3,500.00, or, at minimum, \$2,100.00.

Respectfully submitted.

James B. Morell

PERSONNEL POLICIES AND REGULATIONS

Adopted by the Orange County Superior Court December 18, 2013

ARTICLE IX - REIMBURSEMENT PROGRAMS

Section 1 Mileage Reimbursement

- A. An unployee who is authorized to use a private automobile in the performance of duties shall be reimbursed for each mile driven in the performance of his or her duties during each monthly period, subject to the Administrative Office of the Court's Travel Rate Guidelines.
- B. An employee who is required by the Court to furnish a privately owned vehicle for the performance of his or her duties shall receive a minimum of sex (10) dollars in any month in which the actual mileage reimbursement would otherwise be less than ten (10) dollars. The minimum shall not apply in any month:
 - 1. in which the employee has not actually worked eighty (80) hours;
 - unless the employee claims the ten (10) dollar minimum and the Court certifies that the
 employee was required to use a privately owned vehicle on Court business.

Section 2. Personal Property Reimbursement

Employees shall, in proper cases, be reimbursed for the repair or replacement of personal property damaged in the line of duty without fault of the employee. The amount of reimbursement for articles of clothing shall be the depreciated value based on the age and condition of the article. Reimbursement for a watch shall be limited to the functional value of the watch.

Section 3. Attorney Bar Fees

Upon request and as permitted by policies set forth by the Administrative Office of the Court and/or the Judicial Council, the Court shall: 1) reimburse eligible regular or limited term status employees as of January 1 of each year in Attentey or other classifications as approved by the Chief Executive Officer, for their active State Bar dues; and 2) reimburse eligible Superior Court Commissioners and Court Referces holding regular positions for inactive State Bar dues.

Section 4. Optional Benefit Plan

- A. Effective January 1, 2008, each eligible employee shall be entitled to select benefits from those listed below not to exceed three thousand five hundred (3,500) dollars.
- B. The purpose of the plan is to provide options to individual employees to beat meet the needs of themselves and dependents while enhancing the employee's expertise and skills on the job.

The options available shall include the following types of benefits such as:

I cash (taxable);

2. health/secident.

- bealth programs (employee and/or dependence) such as physical, mental and/or emotional health related counseling for individual and/or family not covered or partially covered through existing plans;
- employee's there of health insurance premiums (employee and/or dependents). Also includes payment of Accidental Death and Dismemberment coverage for employee and dependents available through the County;
- bealth cure and/or dental (employee and/or dependents) excluded or partially included under the County's insurance plans. Examples of items covered under this provision include deductibles, eye care, leases and frames.
- County administered 457 Deferred Compensation Plan.
- C. The County Chief Human Resources Officer administers the plan. Each employee to be eligible must file An latent to Participate statement and follow instructions prepared by the County Chief Human Resources Officer. If an employee does not file An latent to Participate form prior to the commencement of the plan, the employee may only receive cash for any period prior to the first of the month following the date the employee files an latent to Participate form. Employee designations are irrevocable unless they have a change in family status. For expenses to be eligible, they must be incurred after the filing of An latent to Participate form and during a plan period in which an employee is eligible. Claims may be filed at any time during the plan period and all claims must be filed no later than one month following the close of the plan period. The Chief Human Resources Officer shall notify the Auditor-Controller to writing of payments to be made to employees. Such notification shall constitute authorization for the County's Claims Administrator to make payments.
- D. Eligibility a regular, limited term or probationary employee is eligible to receive the optional benefit provided he or she is continuously employed in a regular full-time capacity in the Confidential/Management/Professional Group as set forth in Article XIX. Employees hired or promoted after the commencement of a plan will be eligible for the optional benefit on a pro rata basis the first day of the month following the twenty-eighth day in an eligible classification. Employees in eligible classifications who work part-time will be eligible to receive the optional benefit consistent with County of Orange policy for part-time employees.
- E. Any portion of the optional benefit not incurred within the plan period shall remain Court or County funds.
- F. Claims shall be made on forms provided by the County on which claims at declares the category of service received as defined in the plan, the dates the expenses were incurred by the claimant or cligible dependents, by whom service was provided and the amount being claimed. The County Claims Administrator shall pay claims submitted with a declaration under penalty of perjury signed by the claimant and approved by the County of Orange. The County will approve for payment only those claims which are accompanied by documentation that as eligible expense has been incurred during the plan period.



Serving the Actional Retired Newlors of

CAPETRANO

COUNTY OF DRANGE

CRANGE COGN'T CIDALITERY DISTRICT

CHILDREN & FAMILIES COMMISSION

DEPARTMENT OF DOUGATION (CLOSED TO HEW ASSAURAL)

EMPLOYERS RETURNSTY SYSTEM

ORANGE COUNTY FIRST

ORANGE COUNTY IN-HOUSE SUPPORTIVE SERVICES PURCE AUTHORITY

ORANGE COUNTY LOCAL ACCIDICY FORMATION COMMISSION

ORANGE COUNTY FUELCE

GRAHOV COLLINY SANTATION DISTRICT

TRANSPORTATION AUTHORITY

SUPPRIOR COURT OF CALIFORNIA, COUNTY OF GRANCE

TRANSPORTATION CORRESPONDENCES

CAMPUS (CLOSE) TO HIEW MANUERS) March 26, 2014

James B. Morell

RE: Account Number xxx-xx-

Dear Mr. Morell:

Congratulations on your recent retirement with the Orange County Employees Retirement System. Your retirement effective date is 2/21/2014 and your current monthly allowance is \$6,836.72 (gross). This is a lifetime benefit with annual cost of living adjustments each April.

Your final average salary is \$11,781.94 using the measuring period from 2/7/2011 to 2/6/2014. On April 1, 2014 OCERS will issue a payment of \$7,786.96 which covers all benefits payable to you retroactive to your retirement date.

If you do not agree with this determination, you have the right to have the decision reviewed. In order to exercise this right, you must submit a written appeal to the attention of Ms. Suzanne Jenike, Member Services Director, within ninety (90) days of the date of this letter.

Sincerely,

Steven Ciocan

Retirement Program Specialist

let.

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM * 2223 E. Wellington Avenue, Suite 100, Santa Ana, CA 92701
Telephona (714) 558-6200 Fax (714) 558-6234

6

Run Date : 03/25/2014 Run Time : 2:23 PM

Orange County ERS Retirement Benefit Estimate

User Id : IRQUAS

Page 1

BSM:

XXX-XX-

Date Of Birth:

JAMES B. MORELL

Estimate Information

Separation Date	02/20/2014	Increase Percent	Date
Benefit Type	Service Retirement	Increase Percent	Date
Projected Retirement Date	02/21/2014	Increase Percent	Date
Stop Date			
Age At-Retirement		Separation Subtype	N/A
Prepared By	IROJAS	Level Income Age	Amount
FAS Date Range: 02	207/2011 to 02/06/2014	Cash Refund	Amount
First Eligible Retirement Date	04/05/2006	0.00	
First Eligible Retirement Date			

Service Information

Plan Name Plan J	Regular	Sick Leave	Miscellaneous	Plan Total
Plan J	19.42242	0.00000	2.06910	21.49152
Total	19.42242	0.00000	2.06910	21,49152

Benefit Information

Plan Name	Multiplier		Average Salary	B4	nelit Amount	-1-180
Pian J	0.58027	X	\$ 11,781.94		\$6,836.72	
Total					\$ 6,836.72	

Your Payment Options and Amounts

Payment Option	Form Factor	To Retiree	To Surviving Beneficiary	To Retiree If Sons. Dies First	A15 Test PuPate, PeFall
Option 2	0.89802	\$ 6,139.54	\$ 6,139.54	\$.6,139.54	P/\$11.572.58
Option 3	0.94627	\$ 6,469.40	\$ 3,234.70	\$ 6,469.40	P / \$ 11,572.56
Option 1	0.99642	\$ 6,812.23	\$ 0.00	\$ 6,812.23	P/\$ 11,572.56
Option 4	0.99642	\$ 6,812.23	\$ 0.00	\$ 6,812.23	P/\$11,795.64
Unmodified - Life	1.00000	\$ 6,836.72	\$ 0.00	\$ 6,836.72	P/\$ 11,572.56

Tax Effect on Benefit

Payment Option	Gross Retiree Benefit	Federal Tax	State Tax	Net Retiree Benefit
Option 2	\$ 6,139.54	\$ 591.54	\$ 0.00	\$ 5,548.00
Option 3	\$ 6,469.40	\$ 641.02	\$ 0.00	\$ 5,828.38
Option 1	\$ 6,812.23	\$ 692.44	\$ 0.00	\$ 6,119.79
Option 4	\$ 6,812.23	\$ 692.44	\$ 0.00	\$ 6,119.79
Unmodified - Life	\$ 6,836.72	\$ 696.12	\$ 0.00	\$ 8,140.60

Run Time : 2:23 PM

Orange County ERS Retirement Benefit Estimate

User id : IROJAS

Page 2

SSN:

XXX-XX

JAMES B. MORELL

Date Of Birth:

Optional Retirement Beneficiary Information

Beneficiary Name	Date Of Birth	Relationship
DINA DALTON	4 mg At	Willia

Average Seleny Breekdown

Date Range	Salary	Projected	Date Range	Salary	Projected
02/07/2011 to 02/10/2011	- 5 3,695.34	Tojected	05/18/2012 to 05/31/2012	- 5:140.62	Projected
02/11/2011 to 02/24/2011	\$ 5,140.82		06/01/2012 to 06/14/2012	\$ 5,140.62	
02/26/2011 to 03/10/2011	\$ 5,140.62		06/15/2012 to 06/28/2012	\$ 5,140.62	
03/11/2011 to 03/24/2011	\$ 5,140.62		06/29/2012 to 07/12/2012	\$ 10,258.22	
03/25/2011 to 04/07/2011	\$ 5,140.62		07/13/2012 to 07/26/2012	\$ 5,140.62	
04/08/2011 to 04/21/2011	\$ 5,140.62		07/27/2012 to 08/09/2012	\$ 5,140.62	
04/22/2011 to 05/05/2011	\$ 5,140.62		08/10/2012 to 08/23/2012	\$ 5,140.62	
05/08/2011 to 05/19/2011	\$ 5,140.62		08/24/2012 to 09/06/2012	\$ 5,140.52	
05/20/2011 to 05/02/2011	\$ 6,140.62		09/07/2012 to 09/20/2012	\$ 5,140.62	
06/03/2011 to 06/18/2011	\$ 5,140.62		09/21/2012 to 10/04/2012	\$ 5,140.62	
06/17/2011 to 06/30/2011	\$ 5,140.62		10/05/2012 to 10/18/2012	\$ 5,140.62	
07/01/2011 to 07/14/2011	\$ 10,258.22		10/19/2012 to 11/01/2012	\$ 5,140.62	
07/15/2011 to 07/28/2011	\$ 5,140.62		11/02/2012 to 11/15/2012	\$ 5,140.62	
07/29/2011 to 08/11/2011	\$ 5,140.62		11/16/2012 to 11/29/2012	\$ 6,140.62	
08/12/2011 to 08/25/2011	\$ 5,140,62		11/30/2012 to 12/13/2012	\$ 5,140.82	
08/26/2011 to 09/08/2011	\$ 5,140.62		12/14/2012 to 12/27/2012	\$ 5,140.62	
09/09/2011 to 09/22/2011	\$ 6,140.62		12/28/2012 to 01/10/2013	\$ 5,140.62	
09/23/2011 to 10/00/2011	\$ 5,140.62		01/11/2013 to 01/24/2013	\$ 5,140.62	
10/07/2011 to 10/20/2011	\$ 5,140.62		01/25/2013 to 02/07/2013	\$ 0,140.62	
10/21/2011 to 11/03/2011	\$ 5,140.62	-	02/08/2013 to 02/21/2013	\$ 6,140.62	
11/04/2011 to 11/17/2011	\$ 5,140.82		02/22/2013 to 03/07/2013	\$ 5,140.62	
11/18/2011 to 12/01/2011	\$ 5,140,62		03/08/2013 to 03/21/2013	\$ 5,140.82	
12/02/2011 to 12/15/2011	\$ 5,140.62		03/22/2013 to 04/04/2013	\$ 5,140.82	
12/16/2011 to 12/29/2011	\$ 5,140.62		04/05/2013 to 04/18/2013	\$ 6,140.62	
12/30/2011 to 01/12/2012	\$ 5,140,62		04/19/2013 to 05/02/2013	\$ 5,140.62	
01/13/2012 to 01/26/2012	\$ 5,140.62		05/03/2013 to 05/16/2013	\$ 5,140.62	
01/27/2012 to 02/09/2012	\$ 6,675.90		05/17/2013 to 05/30/2013	\$ 5,140.62	
02/10/2012 to 02/23/2012	\$ 5,140.62		05/31/2013 to 06/13/2013	\$ 5,268.62	
02/24/2012 to 03/08/2012	\$ 5,140.62		06/14/2013 to 06/27/2013	\$ 5,268.62	
03/09/2012 to 03/22/2012	\$ 5,140,62		06/28/2013 to 07/11/2013	\$ 10,514.22	
03/23/2012 to 04/05/2012	\$ 5,140.62		07/12/2013 to 07/25/2013	\$ 5,268.62	
04/08/2012 to 04/19/2012	\$ 5,140.62		07/26/2013 to 08/08/2013	\$ 5,268.62	
04/20/2012 to 06/03/2012	\$ 5,140.62		08/09/2013 to 08/22/2013	\$ 5,268.82	
05/04/2012 to 05/17/2012	\$ 5,140.62		08/23/2013 to 09/05/2013	\$ 5,268,52	

on Date: 03/25/2014 Run Time: 2:23 PM

Orange County ERS Retirement Benefit Estimate

User Id : IROJAS

Page 3

SSN:

XXX-XX

Date Of Birth:

JAMES B. MORELL

Date Range	Salary	Projected	Date Range	Salary	Projected
09/06/2013 to 09/19/2013	\$ 5,268.82		11/29/2013 to 12/12/2013	\$ 5,268.62	
09/20/2013 to 10/03/2013	\$ 5,268.62		12/13/2013 to 12/26/2013	\$ 5,268.62	
10/04/2013 to 10/17/2013	\$ 5,268.62		12/27/2013 to 01/09/2014	\$ 5,268.62	
10/18/2013 to 10/31/2013	\$ 5,268.62		01/10/2014 to 01/23/2014	₩ 8,268.62	
11/01/2013 to 11/14/2013 -	\$-5,268.62		01/24/2014 to 02/00/2014	\$ 5,524.62	
11/15/2013 to 11/28/2013	\$ 5,268.62				

Afready captured in salary record are two cash outs of sick hours (24 hours) each along with three 80 hours vacation cash outs.

Additional Item:

2 pay periods of ratro rate increase \$256.00 Total \$256.00

Disclaimer:

While every effort has been made to provide accurate information, these figures should be regarded as estimates only. The estimate assumes full payment of any required balances and/or pay-offs of any open service purchase contracts, if applicable. It also assumes that any data provided by you is accurate. The final benefit calculation may differ due to data changes and/or corrections. Final benefit amounts may also be affected by changes to pension laws. Retires benefits after tax may be affected by changes in federal and state tax laws. Also, this estimate does not reflect reductions for benefits payable to an alternate payee.



Sarving the Active and Restrict Members of

CHYCH SAVEAN

COUNTY IN DRANGE

DRAMON COUNTY CHARLEST DISTRICT

CHANGE COUNTY
THE ORDER & FARMER'S
COMMISSION

DEADOR COUNTY
DEPARTMENT OF
COME ATTOM/CLUSTED IN
NEW MEMBERN

CHANGE COUNTY EARTH OFFIES RETURNMENT SYSTEM

DRANGE COUNTY FIRE AUTHORITY

DRAMO COUNTY IN-HOME SUPPORTIVE SERVICES PERSON AND OTHER

OMANGE COUNTY LOCAL ASSESSEY FORAL TION CUNSHISSHIP

LAW LIBRARY

SANGADIN DISTREE!

TRANSPORTATION PARTIESPECTY

STATEMENTS COUNTY OF ORANGE

CORNIDOR ACENCIES

CAMPIS (PISELLE)

September 9, 2014

Mr. James Morell

Re: Member Appeal

Dear Mr. Morell,

This is in response to your letter of June 23, 2014 regarding your monthly retirement allowance and your request to have the \$3,500.00 Optional Benefit Payment (OBP) you received included in your final average salary.

Resolution No. 98-001 as adopted by the Board of Retirement in February 1998 specifically identifies the categories of pay that are included and excluded from a retiring member's compensation earnable. This resolution is used in conjunction with the applicable employee Memorandums of Understanding or salary agreements to determine in each retiring member's calculations which pay items are included or excluded from consideration.

The Resolution specifically excludes flexible benefit payments for employees retiring after January 1, 1991 from being considered compensation earnable. The Optional Benefit Payment you received is a flexible benefit payment and since you retired after January 1, 1991, your OBP payment(s) is excluded from your compensation earnable. Your appeal therefore must be denied.

If you do not agree with this determination, you may file an appeal within 90 days of the above date, by sending a letter to the attention of Steve Delaney, CEO, at OCERS, 2223 E. Wellington Avenue, Suite 100, Santa Ana, CA, 92701.

Very truly yours,

ORANGE COUNTY EMPLOYEES

CILIANA

RETIREMENT SYSTEM

Assistant QEO, External Operations

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM # 2223 E. Wellington Avenue, Suite 100, Santu Ann, CA 92701 Telephone (714) 558-6200 Fax (714) 558-6234

10

James B. Morell

Mr. Steve Delaney Chief Executive Officer Orange County Employees Retirement System 2223 E. Wellington Avenue, Suite 100 Santa Ana, CA 92701



Dear Mr. Dolaney,

By letter of September 9, 2014, OCERS denied my June 23 letter appeal (attached hereto and incorporated herein by reference), wherein I requested that the \$3500.00 annual benefit I received under the Superior Court's "Optional Benefit Plan" be included in "compensation earnable" for purposes of determining my retirement allowance. The denial was based upon Resolution No. 98-001, which was adopted by the Board of Retirement in February 1998 following the California Supreme Court decision in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement and which specifically excluded "Flexible Benefits (Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991" from "compensation earnable."

The basis for the January 1, 1991, cut-off date is not stated in either Resolution No. 98001 or the September 9 denial letter. Presumably, this is not an arbitrary date, inasmuch as arbitrary exclusion of a certain class of retirees from a full calculation of "compensation" and "compensation earnable" would clearly be unlawful under the County Employees Retirement Law as construed by Ventura and other decisional authority. "With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 18 Cal.4th 483, 488.) While correctly including benefits "paid in Cash" under a "Cafeteria Plan" for members who had retired prior to 1991, Resolution No. 98-001 excludes those benefits for members retiring after January 1, 1991, and it makes no mention of "Cafeteria Plan" benefits which are "payable" (whether or not actually paid). Because Resolution No. 98-001 was enacted several months after the Ventura decision became final it does not reflect later appellate decisions which further clarified the pertinent definitional requirements of the County Employees Retirement Law of 1937.

Insofar as the January 1, 1991, date might be based upon provisions of an unspecified bargaining agreement, Resolution No. 98-001 would appear to be unlawfully overbroad to the extent that date is made applicable to persons, such as myself, who have never been represented by a bargaining unit and have never been party to any such bargaining agreement. Moreover, decisional law subsequent to Resolution No. 98-001 has made clear that the statutory definition of "compensation" under the County Employees Retirement Law may not be altered via negotiated bargaining agreements. "The Ventura decision affected the determination of what items were to be

included in 'compensation semable,' and this is not subject to a contract right. . . . [P]ten members could not bargain regarding their contribution rates or their 'final compensation." (In re Retirement Cases (2003) 110 Cal.App.4th 426, 453 (emphasis in original).) A fortion, the pertinent statutory definition(s) may not be altered unilaterally by a retirement board in order to exclude a certain class of retirees based upon date of retirement.

Based upon inquiries made of staff, it appears the January 1, 1991, cut-off date in Resolution No. 98-001 may relate to former Government Code section 31460.1, which was enacted in 1990 via A.B. 3146 and became effective at the start of 1991. Section 31460.1 provided.

"Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] ... their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in the county.

(Howard Jarvis Taxpayers' Asan. v. Board of Supervisors (1996) 41 Cal.App.4th 1383, 1367.) The first paragraph of section 31460.1 apparently became operative in Orange County on June 11, 1991, when the Board of Supervisors adopted a resolution pursuant to Government Code section 31525 approving a revision of the entire "Bylaws and Regulations" of the Orange County Employees Retirement System which referenced section 31460.1 (as well as section 31460) and specifically excluded "flexible benefits paid under a cafeteria plan" from the definition of "compensation samable." "[A] provision in legislation delaying the 'operative' date is simply a component of a statute subject to the usual rules of statutory construction and interpretation," (Johnston v. Alexis (1984) 153 Cal.App.3d 33, 41.)

The operative language of former Government Code section 31460.1 appears to be facially inapplicable to the Optional Benefit Plan in question, however, inasmuch as the statute was made expressly applicable only to employees who had "elected to participate in" such a flexible benefits program. As previously noted, the Optional Benefit Plan provided to research attorneys at the Orange County Superior Court did not require - or permit - any election, other than an opportunity to allocate some or all of the \$3500.00 annual banefit among certain non-cash cotions (non-covered health/dental expenses, accidental death/dismemberment coverage, or tuition mimbursement). If no such election was made during the open enrollment period in any year, the full \$3500.00 was automatically paid as taxable cash via inclusion in the first payroll payment of the new year. The Optional Benefit Plan was thus "optional" only with regard to the allocation of the \$3500.00 benefit, not with regard to its provision, and was treated throughout my period of employment as an integral part of the overall compensation package provided to research attorneys at the Superior Court. The distinction is significant, inasmuch as former section 31460.1 appears to have been intended to apply only to plans which were elective and which provided payments in excess of employees' normal compensation. (See now Government Code section 31461(b)(1)(B).) (Cf. Hudson v. Board of Admin, of Public Employees' Retirement System (1997) 59 Cal App.4th 1310, involving election to convert certain in-kind benefits to salary).)

Even if section 31480.1 were otherwise applicable, the operative language contained in the first paragraph of the statute became ineffective when it was repealed without reenactment on May 11, 1992, vie S.B. 193, (Cf. Government Code section 20636(g)(4)(K), which continues to govern calculation of "compensation earnable" for State employees under the Public Employees: Retirement System.) Alli wug/r S.B. 193 contained a declaration that the Lagislature never considered inclusion of flexible benefits to be mandatory under the County Employees Retirement Law (Section 3 of Stats 1992, c. 45), subsequent case law has given effect to this retroactive expression of legislative intent only with regard to "in-kind" benefits - "consistent with the interpretation of CERL as set forth in Ventura," flexible benefits which are payable as cash, such as the Optional Benefit Plan, are to be included in "compensation earnable." (in re Retirement Cases, supra, 110 Cal App.4th at 479-481 and n. 26, noting that flexible benefits payable as cash which were authorized by Los Angeles County in 1992 were required to be included in "compensation" earnable" until legislation specifically permitting "a county of the first class" to exclude those benefits was enacted in 1993; cf. Government Code sections 31461.1 and 31461.4, which are inapplicable to Orange County.) The Legislature has now codified its approval of the holding of in re Retirement Cases. (Government Code section 31461(c).) As early as 1999, the Legislature's avolving post-Ventura view of flexible benefit plans was reflected in an analysis of the statute which added section 31461.4 to the Government Code: "Current law requires that contributions to employee cafeteria or flexible benefit plans be included in the calculation of compensation and compensation semable when computing retirement benefits in counties that operate independent retirement systems under authority granted by the 1937 County Retirement Act. [1] For current Los Angeles County represented employees first hired prior to January 1, 1998, that portion of the County contribution toward the employee's cateteria plan that may be taken as cash is included in the definition of compensation or compensation earnable," (California Bill Analysis, A.B. 288 Assem., 2/18/1999.)

Resolution No. 96-001 may have reflected the view that exclusion of flexible plan benefits was unaffected by the 1992 repeal of Government Code section 31460.1 because the statute had become "grandfathered" into law for Orange County when it was made affective by the Board of Supervisors in June 1991. In repealing section 31460.1, S.B. 193 provided, "Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31480.1 of the Government Code, prior to the effective date of this act." (Section 2 of Stats 1992, c. 45.) However, construing "action taken" to refer to the Board of Supervisors's adoption of the June 1991 resolution which made former section 31460.1 operative is statutorily problematic, since any continued validity of the resolution itself became legally inconsequential when the operative provisions of former section 31480.1 were repealed. (See Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568, holding that an assessment exemption adopted by municipal ordinance pursuant to statutory authorization was abrogated by the subsequent repeal of the authorizing statute -- "the legislative repeat of section 20 of the Vrooman Act operated to repeat the power conferred upon the city of San Jose In the matter [M]hen in its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end"; Ransome-Crummey Co. v. Coulter (1920) 50 Cal.App. 150, 152-153, rejecting the contention that the continued validity of the ordinance gave continuing legal effect to the exemption notwithstanding the statutory repeal; cf. Ransome-Crummey Co. v. Fikes (1921) 53 Cal.App. 180, 182-183, giving effect to the exemption as to work completed prior to the repeal.) "It is usual for legislative bodies to use the word repealed, and, when used, the act referred to is abrogated, - done away with." (Thomason v. Ruggles (1896) 69 Cal. 465, 470; see Government Code section 9608.) "[I]t is the general rule that one legislature cannot enact irrepealable legislation or limit or restrict its own power or the power of its successors as to the repeal of statutes." (United Milk Producers of Cal. v. Cecil (1941) 47 Cal.App.2d 758, 764.) The second paragraph of former section 31460.1 thus did not permit the Board of Supervisors to render the first paragraph permanently operative regardless of any

subsequent action by the Legislature or the Board. (See, e.g., Government Code section 31858(h). whereby the Legislature effectively terminated operation of section 31659 in 2013 notwithstanding any such prior adoption by the board of supervisors; also Government Code section 31482 1(b),) The Legislature merely utilized a commonly employed "trigger" for operation of the first paragraph, which was not self-executing and remained inoperative in any county "until" it was activated by the board of supervisors (cf., e.g., Government Code sections 31453(b)(2), 31454(b)(2), 31458.4(b), 31462.3(c), 31469.4, 31489.8(c), 31470.12, 31470.14(e), 31610, 31682.8, 31663, 31681.51-31681.54, 31685.96). The better view would be that "action taken ... pursuant to Section 31460.1" In S.B. 183 refers instead to the derical exclusion of flexible benefits from "compensation earnable" for employees who retired while former section 31460.1 was operative -- the statutorily authorized exclusion might remain effective for retirements which occurred between June 11, 1991, and May 11, 1992, in Orange County, but not for those which occurred before or after. (See Government Code section 31481.) The presumption is, that the Legislature did not intend to pass any law that would affect past transactions, or work injustice." (People ex rel. Thorne v. Havs (1854) 4 Cal. 127. 138.) "Any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner, ... consistent with the clear language and purpose of the statute." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, supra, 16 Cal.4th at 490; see also Taylor v. Board of Ed. of City of San Diego (1939) 31 Cal.App.2d 734, 742; "Under well recognized principles of law, a legislative act which would, if construed to be a contract, limit or extinguish the power of the government completely to control the subject matter of the enactment, will not be so construed unless the legislative intention to create a contract clearly appears, and all doubts must be resolved in favor of the continuance of the power of the government.") Moreover, the integrated "Bylaws and Regulations" approved by the Board of Supervisors on June 11, 1991, evidently have themselves been repealed and/or superseded, inasmuch as the current OCERS bylaws make no mention of the flexible benefit exclusion, which now appears to be merely a policy of OCERS. rather than a regulation (cf. Government Code sections 31526 and 31527, defining permissible subjects of Board regulations) - insofar as the adoption of the "Bylaws and Regulations" via the Board of Supervisors resolution of June 11, 1991, made former section 31460.1 operational in Orange County, the subsequent repeal of those same "Bylaws and Regulations" after S.B. 193 became affective in May 1902 would have operationally negated any grandfathered effect of section 31460.1. (See Rigley v. Board of Retirement of San Diego County Emp. Retirement (1968) 260 Cal.App.2d 445, 450; "The By-Laws and Regulations adopted by the Board, pursuant to Government Code, Section 31525 were binding until abrogated * Mack v. Jastro (1899) 126 Cal. 130, 132: "whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two"; Bond v. Farmers & Merchants Nat. Bank, Los Angeles (1944) 54 Cal App.2d 842, 848: "The enactment of the new statute will not be considered as repealing by implication but rather is it to be understood that the later legislative attempt is a revision of the entire subject matter embodied in the successive legislative enactments and that the latest was designed as a substitute for all precading acts. Whatever of the old is excluded from the new must be ignored.")

Prior to <u>Ventura</u>, it was recognized that "flexible benefit" plans such as the Superior Court's Optional Benefit Plan may be properly included as part of "compensation" and "compensation samable" under Government Code sections 31460 and 31461. (See <u>Howard Jarvis Taxpayers' Assn. v. Board of Supervisors</u>, supra, 41 Cal App.4th at 1374: "There is no dispute that such flexible benefit payments constitute "remuneration" which may permissibly be taken into account in determining "compensation earnable" for retirement plan purposes.") Post-<u>Ventura</u> decisional law has endorsed application of "a bright-line rule that requires the employee to receive

a cash payment from the employer" in order for the benefit to be included. (In re Retirement Cases, supre, 110 Cal.App.4th at 477 n. 24 (emphasis in original).) Because the entire \$3500.00 annual benefit conferred by the Optional Benefit Plan is payable directly to the employee as cash, the Ventura decision now precludes the Retirement Board from exercising discretion to exclude that benefit from "compensation earnable" and "final compensation." (Cf. In re Retirement Cases, supra, 110 Cal.App.4th at 478: "Here, the employee is receiving an insurance premium, not a cash payment. Thus, it is an in-kind benefit, which is not "compensation" under section 31460"; see also id. at 481 n. 28, noting that, in the absence of a specific statutory exclusion, inclusion of flexible benefits is mandatory where the benefits are payable as cash.) "The court in Venture emphasized that while only cash payments received by an employee qualify as compensation within the meaning section 31460, when cash is paid in lieu of other in-kind benefits, those payments qualify as compensation." (Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 738.)

Thus, Insofar as former Government Code section 31460.1 may have been applicable to the type of flexible benefit plan at issue here, Resolution No. 98-001 appears to misapply that statute by excluding "payable as cash" flexible benefit plans from "compensation earnable" for retirements which occurred while section 31460.1 was inoperative - i.e., during January 1 through June 10, 1991, and after May 11, 1992. In addition, the Resolution is inconsistent with Ventura and other decisional law insofar as it provides for inclusion of "Cafeteria Plan" benefits only "to the Extent paid in Cash" - as discussed above and in my June 23 appeal letter, post-Ventura court decisions have consistently held that "compensation" and "compensation earnable" under the County Employees Retirement Law includes not only benefits which are actually paid in cash but also those which are payable in cash, regardless of the amount actually paid in cash in a particular year. (See Salus v. San Diego Employees Retirement Ass'n, supra, 117 Cal App.4th at 739.) Insofar as the Chief Executive Officer and staff believe Resolution No. 98-001 to be nonetheless binding with regard to the disposition of this appeal, I would request that this matter be brought to the attention of the Retirement Board, so that the Board may take appropriate action to modify the Resolution or take other steps to bring treatment of the Optional Benefit Plan in question into conformity with current applicable law.

Respectfully submitted,

James B. Morell



March 20, 2015

Serving the Active and Retired Members of:

CAPISTRANO

COUNTY OF CRANGE

CRANGE COUNTY CEMETRRY DITTRICT

CHANGE COUNTY

CHILDREN & FAMILIES

COMMISSION

DEPARTMENT OF EDUCATION (CLOSED TO NEW MEMBERS)

CRANGE COUNTY BMPLOYEES RETREMEN! SYSTEM

ORANGE COUNTY PRE AUTHORITY

ONANGE, CODINTY BLHCINE SUPPORTIVE SETVICES PUBLIC AUTHORITY

VANCE COUNTY LOCK VARIOUS FORMATION COMMISSION

LAW LEBARY

SANTATION DISTRICT

ORANGE CIDLETY
TRANSPORTATION
AUTHORETY

SUPERIOR COURT OF CALIFORNIA COUNTY OF CHANGE

TRANSPORTATION COMMISSION ACENCY

(CLOSED TO NEW MEMBERS) James Morell

Re: Member Appeal - Final Average Salary / Optional Benefits Plan

Dear Mr. Morell:

Thank you for your letter that OCERS received on December 1, 2014. I apologize that it has taken some time for me to write back to you. Your appeal letter presents some complex issues that required extensive staff time to research.

My understanding is that you are appealing the determination by OCERS' Member Services Department that optional benefit plan ("OBP") benefits are not included in the calculation of your final average salary.

I have reviewed your correspondence with OCERS, OCERS' return correspondence, your member file, relevant court decisions, and OCERS' resolution regarding compensation earnable. I find that your request to include OBP payments in the calculation of your final average salary was properly denied by the OCERS Member Services Department.

Your correspondence indicates you received \$3,500 per year under your employer's OBP. You received some of the benefit in the form of insurance premiums and some as each payments. Your contention is that at least the each payments should be included in your final average salary calculation because the benefits were paid in each out of employer funds.

Enclosed with this letter, please find a copy of the Board of Retirement Resolution No. 98-001 ("Resolution") adopted by the Board on February 5, 1998. The Resolution was adopted by the Board in response to the Ventura case and the settlement agreement between OCERS, the county, OCAA, and other parties that followed Ventura. The Resolution enumerates elements of remuneration that are to be included and excluded from compensation carnable.

The Resolution provides elements that are to be excluded from compensation carnable. The Resolution states, "Remuneration or other value to the employee neither carned or payable in cash to the employee during the final compensation

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ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM - 2223 E. Wellington Avenue, Suite 100, Senta Ana, CA 92701 Telephone (714) 558-6200 Fex (714) 558-6234 www.ocers.org

period for working the ordinary time required of other employees in the same grade / class shall be excluded from 'compensation canable.'" OCERS' practice since passage of the Resolution has been to exclude items on this list and "others substantially similar to them" in conformity with the Resolution.

Among the items specifically excluded from compensation canable in the resolution are "Flexible Benefits ('Cafeteria Plan') provided in-kind" and "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991." Your OBP benefits fall within the category of Flexible Benefits under the Resolution whether paid in-kind or in cash.

The Resolution is supported by the Tentative Decision Re: Orange County Resolution 90-1551 that I have enclosed for your review. In its tentative decision the court considered cash payments made in lieu of flexible benefits. The court found that these benefits were not includable in compensation earnable. The tentative decision became the final decision of the court.

The reasoning for the court's decision was that the Board of Retirement did not anticipate inclusion of flexible benefits in compensation earnable. Since flexible benefits were not an anticipated factor in compensation earnable, OCERS did not collect employee or employer contributions based on those benefits.

In order for OCERS to remain actuarially sound, it must collect sufficient contributions to pay for benefits. The court recognized that inclusion of unanticipated benefits in compensation earnable would have a negative effect on OCERS' actuarial soundness. For your information, inclusion of OBP in compensation earnable would also increase the cost of the plan for employees and employers.

I understand that you dispute whether the Resolution is applicable to you since you were not a direct party to the Ventura case or the settlement agreement that arose from that case. Ventura was a class action case that led to the In re Retirement Cases consolidated action. I have enclosed a copy of the Judgment in the Orange County portion of the In re Retirement Cases matter. The Judgment states that it "shall be binding upon and implemented by all parties to these actions, including all members of the class consisting of all past, present and future members of the Orange County Employees Retirement System, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest." (Emphasis added)

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In addition, the Settlement Agreement attached to the Judgment specifically references Resolution 98-001, and states, "Each of the parties agrees to accept as final and binding the inclusions and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001." The Settlement Agreement also states that the class represented in the Settlement Agreement includes all past, present, and future members of OCERS. Therefore, the Settlement Agreement and Resolution 98-001 are binding on you as a member of OCERS regardless of whether your specific employer or employee group signed the Settlement Agreement.

Based on my review of correspondence, the Resolution, and relevant court decisions, I find that OCERS Member Services Department properly advised you regarding exclusion of OBP from compensation earnable and final average salary calculations. Therefore, your appeal is denied.

If you do not agree with this decision, you have the right to request an appeal through the Board of Retirement. If you choose to exercise this right, please send a letter to my attention at OCERS, 2223 E. Wellington Avenue, Suite 100, Santa Ana, CA, 92701, within 90 days of the date of this letter, requesting that your matter be placed on the Retirement Board's agenda to be discussed at a future Retirement Board meeting. You will receive a letter with the date and time of the meeting and instructions for submitting any documentation for the Board's consideration.

Very truly yours.

Steve Delaney

Chief Executive Officer

James Morell - Member appeal March 20, 2015

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James B. Morell

June 15, 2015

Mr. Steve Delaney Chief Executive Officer Orange County Employees Retirement System 2223 E. Wellington Avenue, Suite 100 Sents Ana, CA 92701

Dear Mr. Delaney,

Pursuant to your letter of March 20, I hereby further appeal the exclusion of the \$3500.00 annual benefit I received under the Superior Court's "Optional Benefit Plan" from "compensation earnable" for purposes of determining my retirement allowance. I request that the matter be placed on the Retirement Board's agenda to be discussed at a future Board meeting. Set forth herein is a summary of the basis for my appeal, and I request that this summary be made available to Board members and counsel prior to the meeting.

In 1997 the California Supreme Court clarified the treatment of cash remuneration under the County Employees Retirement Law: "With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation' earnable' and 'final compensation' on which an employee's pension is based." (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 488.) "The court in Ventura emphasized that while only cash payments received by an employee qualify as compensation within the meaning section 3 1460, when cash is paid in lieu of other in-kind benefits, those payments qualify as compensation." (Salus v. San Diego County Employees Retirement Ass'n (2004) 117 Cal.App.4th 734, 739.) The Supreme Court further held that any ambiguity or uncertainty in the statutory scheme is to be resolved in favor of the pensioner. (Ventura County Deputy Sheriffs' Assn. v. Board of Retirement, supra, 16 Cal.4th at 490.)

The Initial denial of my appeal in September 2014 cited only Resolution No. 98-001, which was adopted by the Board of Retirement in February 1996 following the Ventura decision and which specifically excluded "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991" from "compensation earnable." As is clear from the analysis provided by OCERS attorney Harvey Leiderman at a meeting of the Ad Hoc Committee of the Board of Retirement on January 21, 1998, the 1991 cut-off date was based upon a resolution adopted by the Orange County Board of Supervisors pursuant to former Government Code section 31480.1, which was enacted in 1990 and became effective January 1, 1991. For several reasons, I contend the conclusion of Mr. Leiderman, that the Board of Supervisors resolution had been "grandfathered into the law" and continued to authorize the exclusion of "paid in cash" flexible benefits from "compensation earnable," was misplaced, at least with respect to the flexible benefit plan in which I was a participant.

- (1) Former Government Code section 31480.1, which authorized the exclusion of "employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a llexible benefits program" from "compensation earnable," was facially inapplicable to the Optional Benefit Plan in question, which apparently is unique to a few hundred attorneys and management personnel at the Superior Court. I never "elected to participate in" any flexible benefits program. The Court's "Optional Benefit Plan" does not require - or permit - any election. other than an opportunity to allocate some or all of the \$3500.00 annual banefit payment as taxfree reimbursement for certain out-of-pocket expenses (non-covered health/dental expenses, accidental death/dismemberment insurance, and/or professional tuition). If no such allocation is made during the open enrollment period in any year, the full \$3500.00 is automatically paid as taxable cash in the first payroll payment of the new year. The Optional Benefit Plan is thus "optional" only with regard to the allocation of the \$3500,00 benefit, not with regard to its provision. By making former section 31450.1 applicable only to employees who "elected to participate in" a flexible benefits program, the Legislature intended the statute to apply only to voluntary plans which were supplemental to salary and which provided payments in excess of employees' normal compensation, not to plans such as the Court's Optional Benefit Plan, which are an integral part of the employee's overall compensation. Because former section 31480.1 was inapplicable to the flexible benefit plan in which I was a participant, the exclusionary language of Resolution No. 98-001 was unlawfully overbroad, and to that extent invalid, insofar as it encompassed that plan.
- (2) Even if Government Code section 31460.1 had been applicable to the Superior Count's Optional Benefit Plan, the operative language contained in the first paragraph of the statute became ineffective when section 31460.1 was repealed without reenactment on May 11, 1992, via S.B. 193. (Cf. the similar tanguage of Government Code section 20636(g)(4)(K), which continues to govern calculation of "compensation semable" for State employees under the Public Employees! Retirement System; Government Code sections 31461.1 and 31461.4, which are inapplicable to Orange County.) S.B. 193 contained a declaration that the Legislature never considered inclusion of flexible benefits to be mandatory under the County Employees Retirement Law (Section 3 of Stats 1992, c. 45), but subsequent cause law has given effect to this retroactive expression of legislative intent only with regard to non-cash "in-kind" benefits. (See In re Retirement Cases (2003) 110 Cal App.4th 426, 479-481 and n. 2; Government Code section 31461(c).) Although S.B. 193 also contained a savings clause ("Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31480,1 of the Government Code, prior to the affective date of this act" - evidently the language relied upon by attorney Leiderman in 1998), the better view would appear to be that "action taken by a county pursuant to Section 31460.1" refers to the clerical action of excluding flexible benefit payments from "compensation earnable" for employees who retired during 1991-1992 while former section 31460.1 was operative (see Government Code section 31481) - construing "action taken" to refer to the Board of Supervisors's adoption of the resolution making former section 31480.1 operative is problematic, since the continued validity of the resolution itself became legally inconsequential when the operative provisions of former section 31480.1 were repealed. (See Ransome-Crummey Co. v. Bennett (1918) 177 Cal. 560, 566-568, holding that an assessment exemption adopted by municipal ordinance pursuant to statutory authorization was abrogated by the subsequent repeat of the authorizing statute -- "the legislative repeal of section 20 of the Vrooman Act operated to repeal the power conferred upon the city of San Jose in the matter [W]hen in its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end"; Rensome-Crummey Co. v. Coulter (1920) 50 Cal App. 150, 152-153, rejecting the contention that the continued validity of the ordinance gave continuing legal effect to the exemption notwithstanding the statutory repeal; cf. Ransome-Crummey Co. v. Fikes (1921) 53 Cal App. 180, 182-183, giving effect to the exemption as to work completed prior to the repeal.) "It is usual for legislative bodies to use the word

'repealed,' and, when used, the act referred to is abrogated, -- done away with." (Thomason v. Ruggles (1888) 69 Cal. 465, 470; see Government Code section 9606.)

(3) Any exclusion of "flexible benefit" payments from "compensation earnable" in Orange. County pursuant to former Government Code section 31460.1 has been abrogated by subsequent actions taken by OCERS and/or the Board of Supervisors. On June 11, 1991, the Orange County Board of Supervisors adopted a resolution pursuant to Government Code section 31525 approving an integrated revision of the entire "Bylaws and Regulations" of the Orange County Employees Retirement System, a revision which referenced section 31460.1 and specifically excluded "flexible benefits paid under a cafeteria plan" from the definition of "compensation earnable. These "Bylaws and Regulations" (the predecessor of Resolution No. 98-001, which evidently did not receive similar approval from the Board of Supervisors) have apparently now been repealed and/or superseded themselves, since the current OCERS bylaws make no mention of the flexible benefit exclusion and since the exclusion now appears to be merely a policy of OCERS rather than a regulation. (Cf. Government Code sections 31526 and 31527.) Insofar as the adoption of such "Bylaws and Regulations" by the Board of Supervisors rendered former section 31480.1 operational in Orange County, the subsequent repeal of those same "Bylaws and Regulations" after S.B. 193 became effective in May 1992 would have operationally negated any grandfathered effect of section 31460.1. (See Rigley v. Board of Retirement of San Diego County Emp. Retirement (1968) 260 Cal.App.2d 445, 450; "The By-Laws and Regulations adopted by the Board, pursuant to Government Code, Section 31525 . . . were binding until abrogated . . . "; Mack v. Jastro (1899) 126 Cel. 130, 132: "whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or regugnancies between the two"; Bond v. Farmers & Merchants Nat. Bank. Los Angeles (1944) 64 Cal. App.2d 842, 846: "The enactment of the new statute will not be considered as repealing by implication but rather is it to be understood that the later legislative attempt is a revision of the entire subject matter embodied in the successive legislative enactments and that the latest was designed as a substitute for all preceding acts. Whatever of the old is excluded from the new must be ignored.")

As set forth in the March 20 letter, the second denial of my appeal did not dispute any of the foregoing, relying instead upon the outcome of class action litigation (the "Retirement Cases," OCSC case now. 791315 and 791499) of which I had previously been unaware (I do not recall receiving any notice regarding this litigation or the settlement thereof, but at this time I am unable to prove I did not receive it). Specifically, the letter cited "Tentative Decision Re: Orange County Resolution 90-1551," Issued August 14, 2001, in the coordinated Retirement Cases. However, It is clear from the Tentative Decision that the sole issue presented and determined was the constitutionality of Resolution 90-1551, which had been adopted by the Orange County Board of Supervisors in December 1990 in order to implement former Government Code section 314601 – the court ruled only that the Resolution did not impair vested contractual rights of retirees who had been employed prior to its adoption:

The remaining Issue for determination in the includability phase of the Orange County litigation concerns the effect of Orange County Resolution 90-1551, passed pursuant to former Government Code section 31460.1, on the includability in pension calculations of cash payments made in lieu of flexible benefits. . . . Plan members argue that Resolution 90-1551 is invalid as to those who were employed prior to its adoption

because it unconstitutionally impairs a vested contractual right. When plan members accepted employment prior to the enactment of former section 31460.1 and the adoption of Resolution 90-1551, the parties could not reasonably have anticipated that the cash payments in question would be included in pension calculations. Certainly, the OCERS Board had no such expectation Hence, neither section 31460.1 nor Resolution 90-1551, both adopted to clear up confusion that had arisen on the subject, can be deemed to have impaired a vested right."

Contrary to the assertion in the March 20 letter, the basis for the Tentative Decision was not solely "that the Board of Retirement did not anticipate inclusion of flexible benefits in compensation earnable," nor was the Tentative Decision based upon considerations of actuarial soundness as such – rather, the reasonable expectations of the parties was addressed because the existence of an unconstitutional impairment of a vested contractual right is determined in large part by reference to such expectations. (Allen v. Board of Administration (1983) 34 Cal.3d 114, 119-120.) In contrast, the issues which I have addressed above regarding the applicability and validity of former section 31460.1 and Resolution 98-001 involve pure issues of law and statutory construction, without regard to the expectations of OCERS or myself. The August 2001 Tentative Decision makes no mention of these issues, and cannot be said to have addressed or resolved them. It simply has no bearing upon this appeal.

As a further basis for the denial of my appeal, the March 20 letter cites the 2002 settlement agreement and the judgment entered thereon in the Retirement Cases, which, it is asserted, has bound me as an OCERS participant to accept the provisions of Resolution No. 98-001, including the 1991 cut-off date for inclusion of "flexible benefit" payments in "compensation earnable," regardless of the validity or applicability of Resolution No. 98-001 or of former Government Code section 31460.1. This assertion fails for at least two ressons:

(1) It is a basic principle of civil litigation that the issues to be adjudicated in a case are delineated and bounded by the pleadings - just as res judicata cannot be asserted against a party if the claim was not presented for adjudication in the prior action, a settlement agreement cannot be raised as a bar to a claim which was not placed at issue by the pleadings in the settled case. None of the various pleadings filed in OCSC case nos. 791315 and 791499 specifically challenged the applicability or validity of former Government Code section 31460.1 or Resolution 98-001 on the grounds stated above. The mandamus petitioners in OCSC case no. 791499, joined by intervenors OCEA and REAOC, specifically challenged the "flexible benefit" exclusion on the ground that it unconstitutionally impaired the vested contractual rights of pre-1991 retirees, and this was the sole issue adjudicated by the court (in the Tentative Decision) regarding the validity of the "flexible benefit" exclusion under former section 31460.1, Although the complaint for declaratory relief filed by the Board of Retirement in OCSC case no, 791315 alleged more generally that the defendants were subject to the exclusions set forth in Resolution No. 98-001, the Board subsequently made clear in its opposition to defendants' demurrer that, "unless and until other parties create an actual controversy so as to require the Board to amend its Verified Complaint to add additional defendants," the only issues presented for adjudication were those raised by the defendants (as set forth in OCSC case no 791499) and that "[t]ne Board thus seeks no advisory opinion' from this Court, but rather a complete and final determination of the specific issues in dispute "Having thus argued successfully that the Retirement Cases litigation did not involve a peneral adjudication of the validity of the inclusions and exclusions contained in Resolution No. 98-001, but rather was confined to the specific claims asserted by the other parties, OCERS is estopped from now claiming that the settlement of the Retirement Cases resolved different issues such as those presented in this appeal or otherwise bars them from being asserted. Further

evidence that the settlement does not bar this appeal is found in Section 7 of the Notice of Proposed Settlement sent to class members on September 11, 2002, which makes clear that the only claims and causes of action encompassed by the Release of Claims are those which were to be "dismissed on the merits and with prejudice" upon approval of the settlement agreement — because they were not part of the Retirement Cases, the claims forming the basis for this appeal could not have been so dismissed, and they consequently are not precluded by the Release of Claims referenced in the settlement agreement.

(2) It is well established that settlement agreements are treated as contracts and are subject to the general rules governing enforcement of contracts. Case law published subsequent to the 2002 settlement of the Orange County portion of the Retirement Cases has made clear that the statutory definitions of "compensation" and "compensation earnable" under the County Employees Retirement Law may not be altered via negotiated agreements. "The Ventura decision affected the determination of what items were to be included in "compensation earnable," and this is not subject to a contract right. . . . [P]lan members could not bargain regarding their contribution rates or their "final compensation." (In re Retirement Cases (2003) 110 Cal.App.4th 428, 453 (emphasis in original).) Insofar as the settlement agreement purports to bind OCERS participants to accept a bargained-for unlawful definition of "compensation earnable" in derogation of existing statutory requirements, the settlement agreement is consequently unenforceable.

Respectfully submitted,

James B. Morell

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Oranga County Estaployees Referement System

Resolution No. 98-001 Adopted by the Board of Retirement February 6, 1996, Board Meeting

BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

RESOLUTION

- Subject: Action of the Board of Retirement With Regard to Implementing the Ventural Decision
- WHEREAS, On October 1, 1997, the decision of the California Supreme Court in the case, Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County Employees' Retirement Association (1997) 16 Cal 4th 483 ('Ventura') became final.
- WHEREAS, The Supreme Court in Ventura mandated a change in the method for calculating pension benefits for members and their beneficiaries by retirement systems governed by the County Employees Retirement Law of 1937 ("CERL").
- WHEREAS, On November 18, 1997, the Board of Retirement ("Board") of the Orange County Employees Retirement System ("OCERS") established an Ad Hoc Committee of the Board to analyze Ventura and its effect on the retirement system, and to make recommendations to the Board for implementing the mandate of the Supreme Count.
- WHEREAS, The Ad Hoc Committee analyzed Ventura, retained the services of independent legal counsel, its actuary and other advisors, conducted a series of open public hearings to consider the impact of Ventura on the retirement system, its members and their beneficiaries, the County of Orange and other plan sponsors, and adopted its Recommendations to this Board on January 21, 1998.
- WHEREAS, The Board of Retirement is charged with the responsibility for determining "compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retiring members, pursuant to Sections 31460, 31461, 31462 and 31462.1 of the Government Code.
- WHEREAS. The Board of Retirement finds that the proper exercise of its statutory duties under the Government Code requires it to prevent the improper manipulation of compensation for purposes of determining compensation earnable, and to avoid the artificial inflation of pension benefits.
- WHEREAS, After considering all of the information available to the Board, the Recommendations of the Ad Hoc Committee, and exercising its judgment in the matter,
- RESOLVED, (A) That the Board hereby adopts the following policies and guidelines, which shall be separate from the Board's Bylaws and the Board's Regulations:

Resolution No. 98-001 Adopted by the Board of Retirement, February 6, 1998, Board Meeting

1. Elements to be included in "Compensation Earnable". Remuneration earned and receivable in cash (under applicable MOU) to the retiring employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be included in "compensation earnable", including but not limited to the following items of compensation, and others substantially similar to them:

Base Salary and Wages

Bilingual Premium Pay
Educational Incentive ("POST") Pay
Aircraft Rescue Firefighting
Paramedic Pay
Motorcycle Bonus
Emergency Dispatch Pay
Field Training Officer Bonus
Shift differential pay
Confined Space Pay
Longevity Incentive
Automobile Allowance (paid in cash or to extent
automobile provided for personal use and
declared as income)

Uniform Allowance
Uniform Maintenance Allowance

Payoffs of Vacation and Sick Leave and Holiday to the extent earned (pro-rated on a monthly basis), not taken as time off and permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually cashed-out

Employee Contributions to Deferred Compensation

"Overtime" required to be worked that is ordinarily worked by others in same grade/class/rate of pay

Compensatory Time (if not excluded as "true overtime" (see definition in section 2) and to the extent in excess of minimum required reserve)

"Madera" Pay Additional Compensation for Scheduled Meal Periods

Flexible Benefits ("Cafeteria Plan") to the Extent paid in Cash (applicable to members retiring before January 1, 1981)

Resolution Mo. 98-001 Adopted by the Board of Retirement February 6, 1996, Board Meeting

Elements to be Excluded From "Compensation Earnable". Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be excluded from "compensation earnable", including but not limited to the following items, and others substantially similar to them:

> True Overtime (amounts paid for working in excess of the time required and ordinarily worked by others in the same grade/class.) Employer Contributions to Deferred Compensation Plan Employer Contributions to Retirement System Employer "Pick-up" of Employee Contributions to Retirement System Payoffs of Vacation and Sick Leave and Holiday Pay, to the extent neither earned nor permitted to be cashed-out under the applicable MOU, regardless of when actually cashed-out Flexible Benefits ("Cafeteria Plan") provided in-kind Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991 Terminal ("Final") Pay, to the extent not included per Sec. 1, above Expense Reimbursements In-kind Advantages (e.g., food, lodging, board, laundry, fuel) Fees, Licenses, Memberships provided to member

The retiring employee's compensation shall be "regularized" to what would have been received had the employee been paid for a normal work schedule during the Final Compensation Period. The Board shall calculate "compensation earnable" by creating a fraction, the numerator of which is the amount of the employee's qualifying compensation and the denominator of which is the number of ordinary work hours for which the employee was actually paid. The Board shall multiply that fraction by the number of paid hours ordinarily required to be worked by others in the same grade/class. The result shall be the retiring employee's "compensation earnable" for the Final Compensation Period.

by the employer

Resolution No. 88-001 Adopted by the Board of Retirement February 6, 1998, Board Meeting

- Application of Policies and Guidelines.

 The Board shall apply these policies and guidelines to all benefit payments to members and their beneficiaries due on and after October 1, 1994, as requested by members retiring before October 1, 1997, and automatically for all members retiring thereafter.
- Changes in Contribution Rates.
 The Board shall calculate on an actuarial basis the effect on the retirement system of any increases in anticipated final compensation going forward, and shall adopt appropriate adjustments to employer and employee contribution rates effective July 1, 1998.
- 6. Arrears Contributions of Active Members.

 The Board shall determine the shortfall, if any, in (1) each active member's Member Contribution Account, and, (2) in the future, the Member Contribution Account of each prior member returning to active status who wishes to purchase prior service. Effective July 1, 1998, the Board shall collect the shortfall by a lump-sum payment from a member, or through an extended payment program amortizing the shortfall over a period not to exceed five years. Any member who is allowed to extend the payment of arrears contributions must agree to toll the statute of limitations provided for in California Code of Civil Procedure section 338(d), as it applies to Board recovery of arrears contributions, during the period of any such extension (such agreement shall survive any revocation of the extension).
- 7. Interim Retirees' Final Compensation Period. The Board shall permit all members retiring during the period October 1, 1997 through February 10, 1998 to redesignate their Final Compensation Period by no later than March 31, 1996.
- To the extent there is a shortfall in a retiree's Member Contribution Account, the Board shall collect the shortfall from the member, either by payment in full, through a voluntary assignment and offset from the retiree's past-due benefits, or through an extended payment program requiring full application of the amount of the past-due benefit check payable plus not less than 2/3 of the increase in the amount of each future benefit payment until the full arrears contribution has been satisfied. Payment or satisfactory arrangement for payment of arrears contributions thereon shall be a condition precedent to the payment of any increased benefits to a retiree.

Resolution No. 98-091 Adopted by the Board of Retirement February 6, 1986, Board Meeting

 Claims Procedure for Retirees; Recalculation of Benefits and Contributions.

The Board hereby directs the Administrator to establish a claims procedure for all existing retirees who wish to make a claim, for the purpose of facilitating adjustment of their monthly pension benefits. The Board shall offer the retirees the opportunity to have their final compensation recalculated, and have the Board calculate both the additional benefits, plus interest, due to them and the additional contributions, plus interest, that the Board must collect from them before they are entitled to receive the increased benefits. Adjustments in benefit payments due to retirees shall be paid as of July 1, 1998 or as soon thereafter as the retiree's claim can be processed.

- To the extent that a three-year period of limitations for commencing legal action under 'Section 338(a) of the California Code of Clvli Procedure shall be applied to the claims of any member or member's beneficiaries concerning the calculation of such member's compensation earnable under these policies and guidelines, the Board hereby agrees to toll (suspend) the running of such period of limitations for the period October 1, 1997 to through June 30, 1998. After June 30, 1998, the running of the period of limitations shall recommence.
- Member and Sponsor Education.

 The Board shall make available to all members and plan sponsors these policies and guidelines, together with examples of how these policies and guidelines affect the pension benefits of typical members and their beneficiaries.

RESOLVED, (B) That this Resolution shall be effective immediately upon adoption.

I hereby certify that on the AH day of FEBRUAN, 1998, the Board of Retirement of the Orange County Employees Retirement System made and adopted this Resolution.

Raymond A. Fleming, Secretary to the

Board of Retirement

Orange County Employees Retirement System

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1 HARVEY L. LEIDERMAN (State Bar No. 55838) ASHLEY K. DUNNING (State Bar No. 185014) STEEFEL, LEVITT & WEISS 2 A Professional Corporation One Embarcadero Center, 30th Floor 3 San Francisco, California 94111 Telephone: (415) 788-0900 (415) 788-2019 Facsimile: 5 Liaison Counsel and Attorneys for BOARD OF RETTREMENT OF ORANGE COUNTY 6 EMPLOYEES RETIREMENT SYSTEM 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 9 CITY AND COUNTY OF SAN FRANCISCO BARARCADERO CENTER - SITE PLOOR - SAM FRANCISCO, CA. 94111 10 UNLIMITED JURISDICTION 11 Coordination Proceeding CASE NO. JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4049 Paramile: 415/181-2019 LEVITT & WEISS 12 Special Title (Rule 1550(b)) JUDGMENT IN ORANGE COUNTY 13 RETIREMENT CASES SUPERIOR COURT CASE NOS. 791315 AND 791499 14 November 1, 2002 Date: DEC 415778-3930 15 Time: 3:30 Dept: 304 Judge: Hon. Stuart R. Pollak 16 17 18 BOARD OF RETIREMENT OF THE 19 ORANGE COUNTY EMPLOYEES ORANGE COUNTY CASE NO. 79315 RETIREMENT SYSTEM, a local public 20 catity, 21 Plaintiffs, 22 23 JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF 24 ORANGE, a political subdivision of the State of California, and DOES 1-30,000. 25 inclusive. 26 Defendants. 27 28 11408-6323883-2 PROPOSEDI JUDGMENT

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COUNTY OF ORANGE, a political subdivision of the State of California,

Cross-Complainant and Defendant.

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIRMENT SYSTEM, a local public entity.

Cross-Defendant and Plaintiff.

JAN J. NOLAN, ERIC W. SNETHEN, ORANGE COUNTY ATTORNEYS' ASSOCIATION,

Plaintiffs,

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,

Defendant.

ORANGE COUNTY CASE NO. 791499

Pursuant to the ORDER APPROVING SETTLEMENT AGREEMENT issued by this Court on November 1, 2002, a copy of which is attached hereto and incorporated herein as Appendix "1," it is hereby ORDERED, ADJUDGED AND DECREED that all of the terms and provisions of the approved Settlement Agreement, a copy of which is attached hereto and incorporated herein as Appendix "2," shall be binding upon and implemented by all parties to these actions, including all members of the class consisting of all past, present and future members of the Orange County Employees Retirement System, including retirees, deferred retirees, and active employees, and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest.

Pursuant to California Rules of Court 1859(h), and the ORDER APPROVING SETTLEMENT AGREEMENT, the Court retains jurisdiction over the parties to enforce the 11408:6322883.2

(PROPOSED) JUDGMENT

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terms of this Judgment and to decide whether or not to approve any future amendments to the Settlement Agreement, provided that no Court approval need be obtained where (1) class members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected class member submits to the Court a timely written objection to the proposed amendment.

Pursuant to California Rule of Court 1861, notice of this Judgment shall be given to the class by providing a copy thereof (without its Appendix 2, which already has been made available for public review as set forth in the Notice of Fairness Hearing attached to the Settlement Agreement as Exhibit E) to each current active employee member and deferred retiree member of the system, each person currently receiving any benefit payments from the retirement system, and each recognized employee organization for any current active employee member of the system by mailing, payroll distribution, or any other means reasonably calculated to provide notice. The copy of this Judgment and its Appendix 1 may be reduced in font size to the same font size as used for the Notice of Fairness Hearing for the purposes of providing the above-referenced notice of the Judgment.

Dated: November _____, 2002

JUDGE OF THE SUPERIOR COURT

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PROPOSEDI JUDGMENT

STEPHEN H. SILVER, ESQ. 1 NOV - 1 2002 California State Bar No. 38241 ELIZABETH SILVER TOURGEMAN, ESQ. California State Bar No. 193114 GORDON FARK LI, Clerk SILVER, HADDEN & SILVER BY: ANDR 3 1428 Second Street P.O. Box 2161 Santa Monica, CA 90407-2161 5 (310) 393-1486 Liaison Counsel for Plan Members and Co-Counsel for Class Representatives 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 FOR THE CITY AND COUNTY OF SAN FRANCISCO 10 Coordination Proceeding JUDICIAL COUNCIL 11 Special Title (Rule 1550(b)) COORDINATION PROCEEDING NO. 12 13 RETIREMENT CASES [FROTOSED] ORDER APPROVING SETTLEMENT AGREEMENT 14 ORANGE COUNTY SUPERIOR COURT CASE NOS. 791315 AND 15 941499] 16 Honorable Stuart R. Pollak Department No. 304 17 BOARD OF RETTREMENT OF THE Orange County Superior Court Case No. 18 ORANGE COUNTY EMPLOYEES 791315 19 RETIREMENT SYSTEM, a local public November 1, 2001 DATE: 20 3:30 p.m. TIME: Plaintiff, DEPT: 304 21 22 JAN J. NOLAN, an individual, ERIC W. 23 SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, 24 inclusive 25 Defendants. 26 27 III28 111 APPLICATION FOR ORDER APPROVING SETTLEMENT AGREEMENT T

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COUNTY OF ORANGE, a political subdivision of the State of California. 2 Cross-Complainant and 3 Defendant, 4 BOARD OF RETIREMENT OF THE 5 ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public 6 entity, 7 Cross-Defendants and 8 Plaintiff. 9 ORANGE COUNTY EMPLOYEES' 10 ASSOCIATION, 11 Intervenor and Cross-Petitioner, 12 13 BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' 14 RETIREMENT SYSTEM, a local public 15 entity. Plaintiff, Cross-Defendant 16 and Cross-Respondent. 17 COUNTY OF ORANGE, 18 19 Real Party in Interest, Defendant and Cross-20 Complainant. 21 ORANGE COUNTY ATTORNEYS' Orange County Superior Court Case No. 22 ASSOCIATION; JAN J. NOLAN; and 791499 ERIC W. SNETHEN, 23 Petitioners, 24 25 BOARD OF RETIREMENT, ORANGE 26 COUNTY RETIREMENT SYSTEM, 27 Respondent. 28 APPLICATION FOR ORDER APPROVING SETTLEMENT AGREEMENT

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On November 1, 2002, this matter came before this Court, in Department 304, at 3:30 p.m. upon the Application of Liaison Counsel for Plan Members and Co-Counsel for Class Representatives for approval of the Settlement Agreement, notice of which was mailed to all members of the class on or about September 17, 2002. The Notice advised all members of the terms of the Settlement Agreement and the right of any class member to object and appear at the Fairness Hearing on November 1, 2002, at 3:30 p.m. No objections were received from any class members.

GOOD CAUSE APPEARING THEREFOR, it is ORDERED, ADJUDGED AND DECREED that the Settlement Agreement attached to Liaison Counsel for Plan Members and Co-Counsel for Class Representatives' APPLICATION FOR ORDER APPROVING SETTLEMENT AGREEMENT is fair and reasonable and in the best interests of the members of the class, and therefore is hereby APPROVED by the Court. The contents of the Settlement Agreement are adopted as the Order of this Court. The Court retains jurisdiction to decide whether or not to approve any future amendments to the Settlement Agreement, provided that no Court approval need be obtained where (1) class members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected class member submits to the Court a timely written objection to the proposed amendment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

NOV - 1 2002

STUART R. POLLAK

JUDGE STUART R. POLLAK

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Dated:

APPLICATION FOR ORDER APPROVING SETTLEMENT AGREEMENT

JAMES MORELL 0291

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into as of the Effective Date, as defined herein, by and among each of the following persons and entities: Orange County Employees' Association; Retired Employees' Association of Orange County, Inc.; Orange County Attorneys' Association; Jan J. Nolan, an individual; and Enc W. Snethen, an individual (collectively the "Class Representatives"), individually and as members and representatives of a class consisting of all past, present, and future members of the Orange County Employees Retirement System ("OCERS"), including, but not limited to, retirees, deferred retirees, and active employees and all of the members' survivors, beneficiaries, agents, assigns, representatives and successors in interest ("Class Members"); the County of Orange, a California political subdivision ("County"); and OCERS, a California public agency created pursuant to the County Employees Retirement Law of 1937, as amended, California Government Code Section 31450, et seq. ("CERL"). These persons and entities are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

- A. The Parties are parties to one or both of the related cases of Board of Retirement of Orange County Employees Retirement System v. Nolan, et al., Orange County Superior Court Case No. 791315, and Orange County Attorneys' Association, et al. vs. Orange County Employees Retirement System, Orange County Superior Court Case No. 791499 (the "Orange County Cases"). The Orange County Cases were coordinated with a number of other similar cases pending in other county Superior Courts and included in the Retirement Cases, Judicial Council Coordination Proceeding No. 4049 in the Superior Court of the State of California, City and County of San Francisco before the Honorable Stuart R. Pollak (hereinafter the "Action").
- B. The Class Representatives have been named by the San Francisco County Superior Court to represent a certified no-opt-out class (i.e., the Class) consisting of all Class Members.
- C. As used in this Agreement, the term "Class Counsel" shall mean the following alterneys:

Stephen H. Silver, Esq. Silver, Hadden & Silver 1428 Second Street P.O. Box 2161 Santa Monica, CA. 90407-2161.

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Richard Rockwell, Esq. Rockwell & Meyer 315 Centennial Way Tustin, CA 92780

Paul Crost, Esq. Reich, Adell, Crost & Cvitan 501 Shatto Pl, Suite 100 Los Angeles, CA 90020

Jan J. Nolan, Esq. 23522 Long Meadow Mission Viejo, CA 92692

Eric W. Snethen, Esq. P.O. Box 742 Searchlight, NV 89046-0742

- D. As used in this Agreement, "compensation," "compensation carnable" and "final compensation" shall have the meanings ascribed to them under CERL.
- E. Judge Pollak has entered the following orders and rulings in the Action (the "Orders and Rulings"):
- Order on Matters Addressed at August 27, 1999 Status Conference issued on November 22, 1999, pertaining to class certification;
- Order Granting (1) Board of Retirement of Orange County
 Employees Retirement System's Motion for Summary Adjudication of Conflict of
 Interest of Board Members; and Denying (2) County of Orange's Motion for Summary
 Judgment on Conflict of Interest Allegations, issued on March 6, 2000;
- Statement of Decision Re Includability: (1) Termination Pay; (2)
 Insurance -Related Payments; and (3) Pick-Ups, issued on July 20, 2000;
- Statement of Decision re Includability of in-Service Cash-Outs of Accrued Leave Benefits, issued on November 8, 2000;
- Tentative Decision re Orange County Resolution 90-1551, issued on August 14, 2001; and
 - 6. Statement of Decision Re: Retroactivity, issued on August 31, 2001
- F. The Orders and Rulings have not disposed of all contested causes of action in the Orange County Cases. Among the remaining contested causes of action ("Remaining Contested Claims") are (1) the County's allegations concerning OCERS'

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use of excess earnings, (2) OCERS' claims to attorneys fees against the County, and (3) other Parties' claims to attorneys fees.

G. The Parties now wish to compromise and settle their disputes, as stated in the Orange County Cases and in the Action, and to avoid the risks and costs of continued litigation, on the terms and conditions set forth in this Agreement.

NOW THEREFORE, FOR GOOD AND VALUABLE

CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, THE PARTIES AGREE AS FOLLOWS:

AGREEMENT

- Recitals. The foregoing Recitals are true and correct and are incorporated herein by this reference.
- 2. Orders and Rulings Final and Binding. The Panies agree that the Orders and Rulings shall be final and binding, are incorporated herein by this reference, and that a Judgment in the form attached hereto as Exhibit A (with each of its contemplated Exhibits) may be entered by the San Francisco County Superior Court in the Action. Each of the Parties agrees to do all things reasonably necessary and appropriate to obtain entry of the Judgment in the Action, and any other related judgment(s) in the Orange County Superior Court in either or both of the Orange County Cases, as appropriate.
- 3. OCERS' Resolutions Final and Binding. Each of the Parties agrees to accept as final and binding the inclusions in and exclusions from compensation, compensation earnable, and final compensation as more particularly set forth in OCERS' Resolution 98-001, as amended by OCERS' Resolution 98-009, and as further amended by OCERS' action adopting its Resolution 00-003 on or about December 18, 2000. Resolution 98-001, including its amendment by Resolution 00-003, are attached hereto as Exhibit B and are incorporated herein by this reference. Resolution 98-009 is attached hereto as Exhibit C and is incorporated herein by this reference. Each of these Resolutions shall also be entered into the Judgment by the San Francisco County Superior Court in the Action.
- 4. Dismissal of Remaining Contested Claims. Each of the Parties agrees to dismiss, with prejudice, any and all Remaining Contested Claims it may have in the Orange County Cases. Each of the Parties agrees to file a dismissal, with prejudice, of its Remaining Contested Claims in the Orange County Cases, if any, within ten (10) days following the Effective Date.
- No Further Appeals or Challenges. The Judgment, when entered by the Court, shall be final and binding on all of the Parties, including each Class Member. Each of the Parties agrees not to appeal from, seek modification of, or otherwise challenge the Judgment.

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Calculation of Retirement Allowances.

- a. OCERS has applied Resolution 98-001, as amended, to calculate and recalculate the retirement allowances received by all Class Members on and after October 1, 1994, subject to the statute of limitations provisions in paragraph 10 of Resolution 98-001. The Parties agree that the allowances recalculated pursuant to Resolution 98-001, as amended, have and shall continue to use the final compensation periods already in effect for all retired Class Members, which final compensation periods shall remain unchanged. The Parties further agree that all retirement allowances of all retired Class Members whose final compensation is not adjusted as a result of this Agreement shall remain unchanged and all retirement allowances of retired Class Members whose benefits already have been adjusted as a result of OCERS' application of OCERS Resolution 98-001, as amended, shall also remain unchanged.
- b. To the extent that OCERS has not already adjusted members' retirement allowances consistent with Resolution 98-001, the Parties agree that the burden of showing actual receipt of any newly included pay item during the time period used to compute final compensation will remain with each Class Member upon timely filing of a claim with OCERS. Although the burden of proof will remain with the Class Member, the Parties agree that the burden may be satisfied from evidence in the employer records to the extent that such records can be located by the employer (using reasonable efforts), even if the Class Member has no independent documentary evidence in his or her own possession to show receipt of an included pay item within the final compensation period.
- c. Any retroactive payments due for past increased retirement allowance amounts not already paid in accordance with the claim procedure established by OCERS pursuant to OCERS Resolution 98-001 will be paid, plus interest, upon timely filing of a claim by a member and verification of the accuracy of, and entitlement to, the claimed amount by OCERS.
- 7. Arears Contributions. The Parties agree that OCERS' Resolution 98-009 shall be final and binding. All Parties agree that no contributions to OCERS for pay periods preceding July 1, 1998 will be due from the Class Members by reason of the elements of pay newly included in compensation, compensation earnable, and final compensation pursuant to OCERS' Resolution 98-001, as amended, or this Agreement. Since on and after July 1, 1998, normal cost contributions, as defined under CERL, have and shall continue to reflect the changes to compensation, compensation earnable and final compensation. Any increase in unfunded actuarial accrued liability of OCERS as a result of the inclusion of the pay items included by Resolution 98-001, as amended, and by this Agreement, which liability was not funded by the application of excess earnings pursuant to OCERS' Resolution 98-009, shall be paid by the County and other districts participating in the retirement system on an amortized basis pursuant to the regular amortization schedule set by the Board of Retirement and as authorized by CERL.
- 8. <u>Binding Effect of Agreement</u>. The Parties agree that this Agreement settles, compromises and resolves all issues among the Parties with respect to the

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compensation, compensation earnable, final compensation, employer contributions, and employee contributions respecting retirement allowances due to the Class Members under CERL with respect to all of the items referenced in this Agreement and its attached exhibits, as well as the right to, amount of, and statute of limitations applicable to such retirement allowances. All Parties further agree that this Agreement is intended to be complete and final with respect to the issues that it has resolved, and that the terms or applicability of the Agreement will not be changed on behalf of any of the Parties, including the Class Members, in response to later court decisions, whether favorable or unfavorable, to any of the Parties hereto. Each of the Parties agrees that any subsequent determinations by a court or courts of competent jurisdiction that enlarge, define, narrow or in any other way relate to the scope of the decision of the California Supreme Court in Ventura County Deputy Sheriffs' Association v. Board of Retirement, 16 Cal. 4th 483 (1997) ("Ventura County") or the items of compensation to be included or excluded for benefit purposes under CERL shall have no effect on the terms or applicability of this Agreement. Notwithstanding the foregoing, nothing in this Agreement is intended to nor shall it expand or limit, or affect in any way, either positively or negatively, whatever rights any Party may have regarding the future continuation, modification or elimination of any item of compensation or other employment benefit by such Party's employer.

- Retiree Health Benefits. The County and OCERS are parties to that certain Memorandum of Understanding Agreement dated January 5, 1993, as amended by that certain First Amendment to Memorandum of Understanding Agreement dated January 5, 1993, dated November I, 1996, concerning the funding of a health benefit program for retired employees of the County who are members of OCERS, and their eligible beneficiaries and other matters (the "ARBA Agreement"). County and OCERS have agreed independently to enter into an Amended and Restated Memorandum of Understanding Agreement re: Additional Retiree Benefit Account ("New ARBA Agreement"), a true and correct copy of which is attached hereto as Exhibit D. As set forth in the New ARBA Agreement, the agreement provides for a greater level of assurance for funding County retirec health benefits grants. Notwithstanding this Agreement, County and OCERS reserve the right to amend the New ARBA Agreement in all respects. Nothing in this Agreement is intended to, nor shall, create any vested right in any Class Member under the New ARBA Agreement, nor confer jurisdiction over the New ARBA Agreement on the Superior Court of the City and County of San Francisco.
- 10. Attorneys' Fees and Costs. County agrees to pay the sum of \$250,000.00 to Silver, Hadden & Silver, in full and complete satisfaction of Class Counsels' claims to attorneys' fees and costs against any of the Parties hereto in the Orange County Cases and the Action. Except as expressly so provided, each of the Parties shall bear its own attorneys' fees and costs in connection with the Orange County Cases, the Action, the execution, implementation and obtaining of court approval of this Agreement, and obtaining the Judgment. Each Class Counsel agrees not to seek further fees or costs from any of the Parties hereto arising out of any such matters.

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- Mutual Releases and Covenant Not to Sue. As of the Effective Date, each 11. Party hereto, on its own behalf and on behalf of each of its respective members, officers, directors, supervisors, boards, managers, employees, attorneys, actuaries, accountants, agents, servants, representatives, beneficiaries, aurvivors, predecessors, successors, assigns, heirs and executors (collectively, each Party's "Related Persons") hereby releases and discharges each other Party and such Party's Related Persons from any and all claims, demands, causes of action, obligations, damages, expenses and liabilities, known and unknown, suspected and unsuspected, that it, or any of its Related Persons, now owns or holds, or at any time heretofore or hereafter may have, that were asserted, or that could have been asserted in connection with, or that in any way relate to matters stated in any of the pleadings on file in the Orange County Cases and/or the Action (including, but not limited to, the Remaining Contested Claims), in OCERS' Resolution 98-001 as amended, in OCERS' Resolution 98-009, and/or in the Judgment, including any exhibits to any such documents ("Released Claims"). Notwithstanding the foregoing, this mutual release and discharge expressly does not include any Released Claims first arising out of and by virtue of the terms of this Agreement or the Parties' respective rights and obligations hereunder. Each Party hereto covenants and agrees never to sue upon or otherwise attempt to assert any of the Released Claims that are the subject of this mutual release.
- 12. Waiver and Relinquishment of Unknown Claims. It is understood and agreed that with respect to the munial releases set forth in Paragraph 11 of this Agreement, all rights and benefits provided under California Civil Code section 1542 and any similar law of any state or territory of the United States are hereby expressly waived and relinquished by each of the Parties. Section 1542 reads as follows:

CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE. A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS, WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IP KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

In waiving and relinquishing the provisions and benefits of section 1542 of the California Civil Code, each of the Parties acknowledges that it may hereafter discover facts, information or evidence in addition to or different from those facts, information or evidence which they now believe to exist or be true, with respect to the Released Claims, including the possibility of further clarifications and development in the case law pertaining to the inclusion or exclusion of items referenced in this Agreement or its attached exhibits in compensation, compensation earnable, or final compensation under the provisions of CERL. Each Party agrees that it has taken that possibility into account in determining the amount of consideration to be given under this Agreement. Further, the Parties agree that the releases given herein shall remain in effect as a full and complete general release of the matters described above, notwithstanding discovery of the

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existence of any such additional or different facts, information or evidence, or developments in the case law.

- 13. Notice to Class of Hearing to Approve Agreement. The Parties agree to jointly seek the approval of the San Francisco Superior Court of the notice to be given to Class Members of the hearing to approve this Agreement, in the form attached hereto as Exhibit E. After approval of the form of notice, OCERS shall disseminate the notice of the hearing for the Court to consider objections and to approve or reject this Agreement to the Class Members, as required by the Court.
- 14. Effective Date. The Effective Date of this Agreement shall be the first business day following the last to occur of the following events, each of which shall be a condition precedent to the effectiveness of this Agreement:
 - a. The execution of this Agreement by the Parties hereto;
- The date on which the San Francisco County Superior Court enters an order approving this Agreement; and
- The date on which the San Francisco County Superior Court enters the Judgment in the Action.

In the event that the Effective Date does not occur on or before November 30, 2002, unless the Parties through their attorneys of record jointly agree otherwise, then:

- a. This Agreement shall be null and void and shall have no force or effect, and no Party shall be bound by any of its terms;
- This Agreement, all of its provisions, and all negotiations, statements, and proceedings relating to it shall be without prejudice to the rights of any of the Parties;
- All Parties shall be restored to their respective positions existing immediately before the execution of this Agreement; and
- d. Neither the provisions of this Agreement, nor the fact of its having been made, shall be admissible or entered into evidence in either of the Orange County Cases or the Action for any purpose whatsoever.
- agreement and constitutes the only existing and binding agreement between them with respect to the matters stated herein, except for those certain agreements being entered into simultaneously between the County and OCERS entitled, "Master Settlement Agreement," "Amended and Restated Memorandum of Understanding Agreement re Additional Retiree Benefit Account" and "Amended and Restated Investment Account Agreement." This Agreement supersedes any and all prior agreements, representations, promises and understandings of any kind, whether oral or written, express or implied.

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between the Parties regarding the subject matters of this Agreement. Nothing herein is intended to nor shall affect any party's rights and obligations under CERL, except as specifically set forth herein. In entering into this Agreement, each Party disclaims any reliance upon any representation, fact or opinion that is not otherwise set forth in writing in this Agreement.

- 16. Interpretation. Each of the Parties agrees that this Agreement was drafted by the respective counsel for the Parties at arm's length. Each Party, and counsel for each Party, has reviewed and revised, or has had the opportunity to review and revise, this Agreement, and accordingly, any rules of construction to the effect that any ambiguities are to be resolved against the drafting party, including, but not limited to. California Civil Code Section 1654, shall not be employed in the interpretation of this Agreement or any amendment of it.
- 17. No Admissions. This Agreement and the negotiations and court proceedings relating to this Agreement shall not be construed as, or offered as, any type of admission or concession of any liability or wrong doing on the part of any person or entity. Each of the Parties denies any wrongdoing alleged in the Orange County Cases and the Action and does not admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that were alleged or could have been alleged in the Orange County Cases or the Action.
- 18. Amendments; Court Approval. The terms and provisions of this Agreement may only be amended, modified, or expanded by written agreement of those Parties affected by the particular amendment sought. The Parties agree that the San Francisco Superior Court shall retain jurisdiction over them to enforce the terms of this Agreement and the Judgment, and to decide whether or not to approve any future amendments to either, provide that no Court approval need be obtained where (1) Class Members affected by the proposed amendment have been provided at least sixty days advance written notice of the proposed amendment and (2) no affected Class Member submits to the Court and counsel to the affected Party a timely written objection to the proposed amendment.
- 19. Authority. Class Representatives hereby represent that they are seeking to protect the interests of the entire Class, including each and every Class Member. Each person executing this Agreement represents that s/he has read this Agreement and agrees to its terms both individually and as a representative of the Party or Parties on whose behalf s/he is executing this Agreement; and that s/he is authorized to enter into this Agreement on behalf of the Party for whom s/he is executing this Agreement.
- 20. Choice of Law. This Agreement and any ancillary agreements to be executed in order to carry out its terms shall be governed by, and interpreted according to, the laws of the State of California, as applied to domiciliaries thereof.
- 21. Jurisdiction: Venue. Any action to enforce this Agreement shall be commenced and maintained in the Retirement Cases Judicial Council Coordinated Proceeding No. 4049 in the San Francisco County Superior Court, if that proceeding is

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still pending before that court. Otherwise any action to enforce this Agreement shall be commenced and maintained in the Orange County Superior Court, and shall not be commenced or maintained in any other court or tribunal. Each of the Parties stipulates and agrees to personal and subject matter jurisdiction and venue in the foregoing courts.

- 22. Matters Excluded From Agreement. Nothing in this Agreement shall be interpreted as preventing the County or OCERS, and each of their respective agents and employees, from communicating with the Class Members within the ordinary course of their business activities.
- 23. Binding Nature. This Agreement shall be binding upon and for the benefit of each of the Parties hereto, their respective predecessors, successors, devisees, assigns, heirs, executors, survivors, beneficiaries, affiliates, representatives, members, officers, directors, supervisors, boards, managers, agents, employees, attorneys, actuaries, accountants, servants and representatives.
- 24. Good Faith Efforts. The Parties undertake to implement the terms of this Agreement in good faith and in a timely manner, and to use good faith in resolving any disputes that may arise in implementing the terms of this Agreement. The Parties agree to cooperate fully with one another, to use their best efforts, and to execute all documents necessary to obtain Superior Court approval of this Agreement.
- 25. <u>Counterpart Execution</u>. This Settlement Agreement may be signed in counterparts, each of which shall constitute a duplicate original and taken together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement on the following dates, through their authorized representatives as designated below.

[signatures appear on following pages]

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APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By: Mil Thornton Dated: Supt 12, 2002

President, Orange County Employees Association

RETIRED EMPLOYEES' ASSOCIATION OF ORANGE COUNTY, INC.

By: Dated:

H. William Kirkwood President, Board of REAOC

ORANGE COUNTY ATTORNEYS' ASSOCIATION

By: _____ Dated:____

Christopher Kralick
President, Orange County Attorneys' Association

INDIVIDUALS AND AS ATTORNEYS IN PRO PER

By: Dated:

By: Dated:

Eric W. Spethen

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Jan J. Nolan

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APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By:		Dated:	
	Mil Thornton		
	President, Orange County Employees	Association	
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DET	RED EMPLOYEES' ASSOCIATION		
	RANGE COUNTY, INC.		
	2		
	1-100		
By:	from the	Dated: 09.16	02
	H. William Kirkwood		
	President, Board of REAOC		
ODA	NGE COUNTY ATTOUNIEVE ACCO	T L THOM	
OKA	NGE COUNTY ATTORNEYS' ASSOC	JATION	
By:	Parameter (A.)	Dated:	
-	Christopher Kralick	1000	
	President, Orange County Attorneys'	Association	
INDI	VIDUALS AND AS ATTORNEYS IN	PROPER	
By:		Detail.	
Dy.	Jan J. Nolan	Dated:	_
	Jan 3- 110/60		
By:		Dated:	
	Eric W. Cruthon		

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APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By:		Deted:	
	Mil Thornton President, Orange County Employees A	ssociation	
	RED EMPLOYEES' ASSOCIATION PRANGE COUNTY, INC.		
Ву:	H. William Kirkwood	Dated: _	
	President, Board of REAOC		
ORA	NGE COUNTY ATTORNEYS' ASSOCI	ATION	
Ву:	Christopher Kralick	Dated:	Sept 14, 2002
	President, Orange County Attorneys' As	ssociation	
INDI	VIDUALS AND AS ATTORNEYS IN PR	IO PER	
Ву:	Jan J. Nolan	Dated:	
	Int J. Holati		
Ву:	Eric W Snethen	Dated: _	

APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS:

ORANGE COUNTY EMPLOYEES ASSOCIATION

By:		Dated:	
	Mil Thornton President, Orange County Employees	Association	
	RED EMPLOYEES' ASSOCIATION PRANGE COUNTY, INC.		
By:	H. William Kirkwood	Dated;	_
	President, Board of REAOC		
ORA	NGE COUNTY ATTORNEYS' ASSOC	CIATION	
Ву.		Dated:	
Ву.	Christopher Kralick President, Orange County Attorneys'		_
		Association	
	President, Orange County Attorneys' A	Association	*

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NAMED CLASS REPRESENTATIVES APPROVED AND AGREED TO BY AND ON BEHALF OF THEMSELVES INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF THE CLASS MEMBERS: ORANGE COUNTY EMPLOYEES ASSOCIATION By: Mil Thornton President, Orange County Employees Association RETIRED EMPLOYEES' ASSOCIATION OF OR ANGE COUNTY, INC. By: H. William Kirkwood President, Board of REAOC OR ANGE COUNTY ATTORNEYS' ASSOCIATION By: Duted: Christopher Kralick President, Orange County Attorneys' Association INDIVIDUALS AND AS ATTORNEYS IN PRO PER Eric W. Snethen

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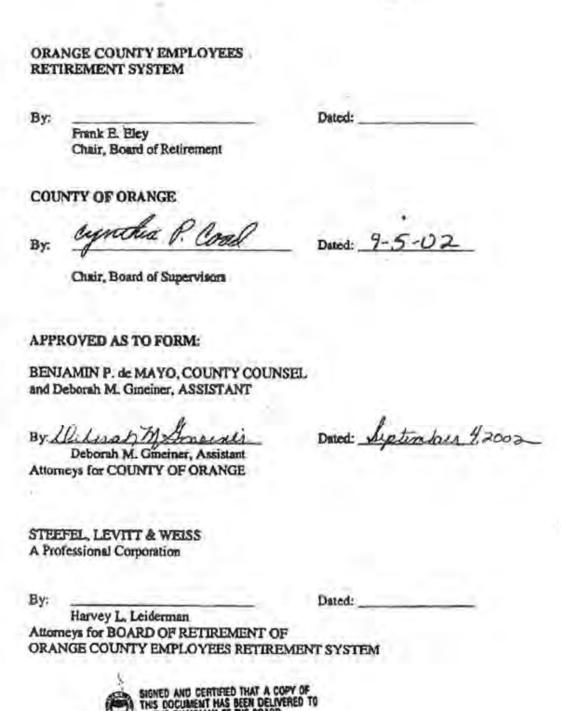
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM By: Frank E. Eley Chair, Board of Rethernght COUNTY OF ORANGE By: Dated: Chair, Board of Supervisors APPROVED AS TO FORM: BENJAMIN P. de MAYO, COUNTY COUNSEL and Deborah M. Gmeiner, ASSISTANT By: Dated: Deborah M. Gmeiner, Assistant Attorneys for COUNTY OF ORANGE STEEFEL, LEVITT & WEISS A Professional Corporation Harvey I Leiderman

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Attorneys for BOARD OF RETTREMENT OF

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

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CLASS COUNSEL:	
SILVER, HADDEN & SILVER	
By: Stephen H. Silver	Dated:
ROCKWELL & MEYER	
By: Richard S. Rockwell	Dated: 4/16/22
REICH, ADELL, CROST & CV	ITAN
By: Paul Cross	Dated:

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CLASS COUNSEL:

SILVER, HADDEN & SILVER

By: Dated: ______

ROCKWELL & MEYER

By: Richard S. Rockwell

REICH, ADELL, CROST & CVITAN

By: Dated: ______

Dated: 9/16/02

ENDORSED
FILED
San Francisco County Superior Count
AUG 1 4 2001
GORDON PARK-LI, Clerk
SK. JAMES RAUBES

CALIFORNIA SUPERIOR COURT COUNTY OF SAN FRANCISCO DEPARTMENT NUMBER 304

Coordination Proceeding Special Title (Rule 1550(b)) JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4049

RETIREMENT CASES

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TENTATIVE DECISION RE: ORANGE COUNTY RESOLUTION 90-1551

The Honorable Stuart R. Pollak

The remaining issue for determination in

The remaining issue for determination in the Includability phase of the Orange County
litigation concerns the effect of Orange County Resolution 90-1551, passed pursuant to former
Government Code section 31460.1, on the includability in pension calculations of cash payments
made in lieu of flexible benefits. Under this court's prior ruling, cash payments made in lieu of
flexible benefits are "compensation" under CERL. Former section 31460.1 authorized the counties,
however, to adopt a resolution excluding such payments from compensation for this purpose. The
Orange County Board of Supervisors adopted Resolution 90-1551 pursuant to former section
31460.1 on December 1, 1990, to become effective January 1, 1991. Plan members argue that

Tentative Decision Re: Orange County Resolution 90-1551, Retirement Cases, JCC 4049, 08/14/01

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Resolution 90-1551 is invalid as to those who were employed prior to its adoption because it unconstitutionally impairs a vested contractual right.

It is well established that "upon acceptance of public employment [one] acquire[s] a vested right to a pension based upon the system then in effect." (Miller v. State of California (1977) 18

Cal.3d 808, 814.) Such pension rights are "obligations protected by the contract clause of the federal and state Constitution." (Ibid.) Not all changes in pension calculations necessarily impair plan members' vested rights. (Allen v.Board of Administration (1983) 34 Cal.3d 114, 119.) "The constitutional prohibition against contract impairment does not exact a rigid literal fulfillment; rather it demands that contracts be enforced according to their just and reasonable purport." (Id. at 119-120.) "The impairment provision does not prevent laws which restrict a party to the gains reasonably to be expected from the contract." (Ibid.)

When former section 31460.1 was enacted, the obligation to include cash payments received in lieu of flexible benefits in compensation was at best uncertain. This case therefore is unlike those cited by plan members where legislation purported to alter an unambiguous benefit held to have been vested. (See Allen v. City of Long Beach (1955) 45 Cal.2d 128; United Firefighters of Los Angeles City v. City of Los Angeles (1989) 210 Cal. App.3d 1095.) When plan members accepted employment prior to the enactment of former section 31460.1 and the adoption of Resolution 90-1551, the parties could not reasonably have anticipated that the cash payments in question would be included in pension calculations. Certainly the OCERS Board had no such expectation since, even prior to the adoption of resolution 90-1551, these benefits were not being included in pension calculations, and the reasonable expectation of the plan members must have been affected accordingly. Hence, neither section 31460.1 nor Resolution 90-1551, both adopted to clear up

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Tentative Decision Re: Orange County Resolution 90-1551, Retirement Cases, JCC 4049, 08/14/01

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confusion that had arisen on the subject, can be deemed to have impaired a vested right. Even if the explicit exclusion of the cash benefits disadvantaged employees without providing a corresponding advantage, the clarification of an existing uncertainty in the law was sufficient to support the provision. (Cf. Restatement of Contracts 2d. §74(1)(a)). Whether the legislation impaired the reasonable expectations of the parties cannot turn on a court's decision ten years later establishing what their expectations should have been.

However, affected retirees are entitled to have these cash payments included in the calculation of their retirement benefits up to the date on which the Orange County resolution became effective.

Pursuant to California Rule of Court, Rule 232(a), this Tentative Decision shall be the Statement of Decision with respect to the issues addressed herein unless within ten days any party specifies controverted issues or makes proposals not covered in the Tentative Decision.

Dated: 8/15/01

STUART R. POLLAK Judge of the Superior Court

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Tentative Decision Re: Orange County Resolution 90-1551, Retirement Cases, ICC 4049, 08/14/01

12/14/2015

JASON

Gounty of Orange - My Health

,	Dist.
	Optional Benefit Plan-Taxable Cash Lump Sum Coverage \$1,000.00
	YOU
	DINA
	JESSICA
	JASON
	Optional Benefit Plan-Voluntary AD&D Payroll Credit No Coverage \$0.00
	YOU
	DINA
	JESSICA
	JASON
	Optional Benefit Plan-Health Care Reimbursement Account Coverage \$2,500.00
	YOU
	DINA
	JESSICA

12/14/2015 County of Orange - My Health Optional Benefit Plan-Taxable Cash Lump Sum Coverage \$2,800.00 YOU DINA **JESSICA** MOSAL Optional Benefit Plan-Voluntary AD&D Payroll Credit No Coverage \$0.00 YOU DINA **JESSICA** JASON Optional Benefit Plan-Health Care Reimbursoment Account Coverage \$700.00

YOU

DINA

JESSICA

JASON

\$142015 County of Orange - My Health Optional Benefit Plan-Taxable Cash Lump Sum Coverage \$1,000.00 YOU DINA **JESSICA** JASON Optional Benefit Plan-Voluntary AD&D Payroll Credit No Coverage \$0.00 YOU DINA JESSICA MOSAL Optional Benefit Plan-Health Care Reimbursement Account Coverage \$2,500.00

YOU

DINA

JESSICA

JASON

GRANGE COUNTY SUPERIOR COURT HARVEY L. LEIDERMAN (State Bar No. 55838) ASHLEY K. ILANGWA (State Bar No. 185014) STEEFEL. LEVITT & WEISS MAR 06 1998 A Professional Corporation ALAN SLATER, Executive Officer/ Clerk 3 One Embarcadero Center, 30th Floor San Francisco, California 94111 TS MULLIEL-EY KAREN E. MAGEE Telephone: (415) 788-0900 5 Attorneys for Plaintiff. BOARD OF RETIREMENT OF THE 6 ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 7 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA FLOOR - SAN FRANCISCO CA MITTE 9 FOR THE COUNTY OF ORANGE 10 791315 11 BOARD OF RETIREMENT OF THE NO. ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public VERIFIED COMPLAINT FOR entity. 13 DECLARATORY RELIEF Plaintiff. WEISS 14) LLC JUDGE RONALD C. KLINE DEPT. 7 JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the 17 THE RULES SET FORTH IN ORANGE COUNTY RULES OF COURT
EACH PLEADING MUST INCLUDE THE ASSIGNED JUDGE DESIGNATION
UN THE CASE NUMBER OF THIS DOCUMENT, PURSUANT TO ORANGE
ILES. State of California, and DOES 1-30,000. : neluswa 18 Detendants. 19 20 21 Plaintiff, the Board of Retirement of the Orange County Employees Retirement 22 System ("Board of Retirement") alleges as follows: 23 Parties and Venue 24 Plaintiff is the duly constituted governing body of the Orange County 25 Employees Retirement System ("OCERS"), a local public entity, as defined by Government 26 Code Section 940.4. At all relevant times herein. OCERS was and is an independent public 27 retirement system operating under the provisions of the County Employees Retirement Law of 28 1937 as codified in 1947 (Government Code Sections 31450 et seq.) ("CERL"), for the benefit VERIFIED COMPLAINT JAMES MORELL 0317 97/965 Page 1

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The members and retired members of the system and their survivors and beneficiaries. The members of TERS were and are employees of the County of Orange and certain public assured within the County of Orange electing to participate in OCERS. OCERS is intuited in the County of Orange, California and conducts business in Santa Ana, County of Orange, California.

- 2. Plaintiff is informed and believes, and on that basis alleges as follows: Defendant Jan J. Nolan ("Nolan") is an individual residing in the County of Orange, California; and at all relevant times herein Nolan was and is an active employee of the County of Orange (to wit, an Assistant District Attorney) and a member of OCERS. Nolan has publicly announced her impending intention to retire from active, full-time employment with the County. Nolan is named herein in her individual capacity.
- 3. Plaintiff is informed and believes, and on that basis alleges as follows:

 Defendant Eric W. Snethen ("Snethen") is an individual residing in the County of Clark, State of Nevada; at all relevant times herein Snethen was and is an employee of the County of Orange (to wit, a Deputy District Attorney); Snethen has retired from active, full-time employment with the County of Orange but continues to perform services for the County; and is a retiree member of OCERS. Snethen is named herein in his individual capacity.
- 4. Defendant County of Orange, California ("County") is a political subdivision of the State of California and a local public entity, as defined in Section 940.4 of the Government Code. The County may sue or be sued, pursuant to Sections 23004(a) and 945 of the Government Code. The County was and is the employer of the majority of retired and active members of OCERS.
- 5. Plaintiff is ignorant of the true names, capacities and/or liabilities of the defendants sued herein as Does I through 30,000, inclusive, and therefore sues those defendants by these fictitious names. Plaintiff is informed and believes, and on that basis alleges, that the defendants sued herein as Does I through 30,000, inclusive, should be bound by the declaratory relief requested herein. Plaintiff will amend this Complaint to insert the true names, capacities and/or liabilities of such fictitiously named defendants, when ascertained. Defendants Nolan,

VERIFIED COMPLAINT

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Snethen, County and Does 1-30,000, inclusive, collectively are referred to herein as "Defendants"

Pursuant to Code of Civil Procedure Sections 394 and 395, jurisdiction and venue for this action is proper in the Superior Court for the County of Orange.

Factual Background

- 7. Employees of the County and of the other public districts situated within the County and participating in OCERS receive retirement benefits under a retirement system. established pursuant to CERL. The retirement benefits are funded by employer contributions, employee contributions and earnings on the investment of the funds of the system.
- 8. The County adopted its current retirement plan for employees, as provided by CERL, effective July 1, 1962. Pursuant to the plan, upon retirement, members of OCERS receive a regular retirement allowance, and in most cases, supplemental benefits, including various types of cost-of-living adjustments. The amount of the member's retirement allowance is based upon a stanutory formula derived from the member's "final compensation" as defined in Sections 31462 and 31462.1 of the Government Code.
- The Board of Retirement has the statutory authority to determine "compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retiring members on which retirement allowances are based, pursuant to Sections 31460, 31461, 31462 and 31462 1 of the Government Code.
- On October 1, 1997, the decision of the California Supreme Court in the case, Ventura County Deputy Sheriff's Association v. Board of Retirement of Ventura County, ("Ventura") became final. The Ventura decision is reported at 16 Cal. 4th 483.
- The California Supreme Court in Ventura mandated a method for determining "final compensation" under CERL which differed from the method previously utilized by the Board of Retirement. The decision in Ventura was silent as to whether and to what extent the ruling was to apply to active and former employees of other counties and public districts not before the Court in Ventura.
 - On November 18, 1997, the Board of Retirement established an Ad Hoc 62

VERIFIED COMPLAINT

Committee of a less than a quorum of members of the board (the "Ad Hoc Committee") to analyze the Ventura decision and to determine its effect on OCERS and its members, if any, and to make recommendations to the Board of Retirement as to whether and how to implement the mandate of the Supreme Court. The Ad Hoc Committee was and is composed of both elected and appointed members of the Retirement Board.

- 13. On or about November 18, 1997, the Ad Hoc Committee retained the services of independent legal counsel to assist it in analyzing CERL, Ventura and other applicable law, and determine the effect on OCERS and its members, if any.
- other advisors, the Ad Hoc Committee analyzed the relevant provisions of CERL, Ventura and other applicable law, the governing employment agreements and salary resolutions between members of OCERS and their employers (collectively, "MOUs") and other statements and documents; and conducted a series of duly noticed, open public meetings to consider the effect, if any, of the Ventura decision and other laws on OCERS, its members and their beneficiaries and survivors, the County and other districts participating in OCERS. At the open public meetings, individuals appearing on behalf of the County, other public districts, active members of OCERS and retired members of OCERS were given the opportunity to and, in fact, many did speak out on the matters under consideration.
- Ad Hoc Committee presented its findings and conclusions and unanimously voted to adopt a series of recommendations to be made to the full Board of Retirement for action by the board ("Ad Hoc Committee Recommendations"). At the open public meeting, individuals appearing on behalf of the County, other public districts, active members of OCERS and retired members of OCERS were given the opportunity to and, in fact, many did speak out on the matters under consideration.
- 16. On and after January 21, 1998, the Board of Retirement considered the Ad-Hoc Committee Recommendations, the advice of independent legal counsel, OCERS' actuary and other advisors, and exercised its judgment and discretion in the matter pursuant to the

VERIFIED COMPLAINT

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authority conferred on it under CERL and the Constitution of the State of California.

- On or about February 6, 1998, the Board of Retirement conducted a duly 17. noticed, open public meeting to discuss and act upon the Ad Hoc Committee Recommendations and to hear public comment thereon. At the open public meeting, individuals appearing on behalf of the County, other public districts, active members of OCERS and retired members of OCERS were given the opportunity to and, in fact, many did speak out on the matters under consideration
- At the conclusion of the February 6, 1998 open public meeting, the Board 18 of Retirement, by a vote of 7-2, adopted Resolution No. 98-001 (the "Board Resolution"), setting forth a series of policies and guidelines by which, inter alia, the Board of Retirement would (a) calculate "compensation" and "compensation earnable" to determine "final compensation" under CERL for all members of OCERS and their beneficiaries and survivors and (b) obtain the payment of employer and employee contributions necessary to pay for any increases in retirement allowances attributable to the new method for calculating "final compensation" mandated by the Ventura decision and other applicable law. A true and correct copy of the Board Resolution is attached hereto as Exhibit A and is incorporated herein by this reference.

FIRST CAUSE OF ACTION

(Declaratory Relief)

- Plaintiff realleges and incorporates herein by this reference the allegations 19. set forth in paragraphs 1 through 18 of its Complaint, inclusive, as though fully set forth.
- On or about January 21, 1998 and thereafter, Defendant Nolan stated her 20. disagreement with the Ad Hoc Committee Recommendations and the Board Resolution in order that her anticipated retirement allowance would be increased beyond that which might be authorized by the Board of Retirement. On or after February 11, 1998, the Board of Retirement received a letter from Defendant Nolan contesting the following provisions of the Board Resolution, requesting the Board of Retirement reverse its action as to those provisions, and requesting the right to exhaust all of her administrative remedies "as soon as possible";

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VERIFIED COMPLAINT

JAMES MORELL 0321

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Payoffs of vacation and sick leave and holiday pay, to the extent neither
earned nor permitted to be cashed-out under the applicable MOU,
regardless of when actually cashed-out (Board Resolution, paragraph A
section 2);

- Flexible Benefits ("Cafeteria Plan") Paid in Cash to the Extent Paid to Members Retiring on and after January 1, 1991 (Board Resolution, paragraph A, section 2);
- e. Payoffs of Vacation and Sick Leave and Holiday to the extent earned (prorated on a monthly basis), not taken as time off and permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually cashed-out" (Board Resolution, paragraph A, section 1).

On or about March 5, 1998, Defendant Nolan stated to OCERS' counsel her belief that she had exhausted her administrative remedies and was free to commence suit against OCERS.

- 21. On or after February 17, 1998, the Board of Retirement received a letter from Defendant Snethen contesting provisions of the Board Resolution that would not allow him to include the following items in his "final compensation", so that his retirement allowance would be increased beyond that which had been authorized by the Board of Retirement:
 - Attorney Optional Benefit:
 - Vacation cash out of 66.07 hours;
 - c. Sick Leave cash out of 328.5 hours; and
 - d. Mileage allowance of \$182.07.

In his letter Snethen requested that the Board of Retirement either reverse its action so as to include these items in calculating his retirement allowance or allow him to exhaust his administrative remedies so that he may bring suit to compel their inclusion.

22. On or about February 6, 1998, during the open public meeting held by the Board of Retirement, an individual representing himself as acting on behalf of the County presented a letter, dated February 6, 1998, from Janice M. Mittermeier, Chief Executive Officer

VERIFIED COMPLAINT

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of the County, to the Board of Retirement, contesting the following provisions of the Ad Hoc Committee Recommendations and requesting reconsideration thereof, or deferral of the Board of Retirement's decision:

- a. Application of Ventura to members retiring prior to October 1, 1997 and to "compensation" earned and received by active members prior to October 1, 1997 (Board Resolution, paragraph A, sections 4, 5, 6, 8 and 9);
- b. Automobile Allowance (Board Resolution, paragraph A, section 1);
- Flexible Benefi., Paid in Cash Prior to January 1, 1991 (Board Resolution, paragraph A, section 1).

The effect of granting the County's request would be to decrease the retirement allowances of active and retired members of OCERS from that which had been authorized by the Board of Retirement.

- 23. Plaintiff is informed and believes, and on that basis alleges as follows: On or about February 10, 1998, a member of the Board of Supervisors of the County requested that the board agendize an executive session at the next regular board meeting so that County Counsel could advise the board as to its legal options on the Ventura matter. On February 24, 1998, the Board of Supervisors met in executive session in conference with County Counsel to consider initiation of litigation.
- 23. As of the date of the filing this Complaint, the Board has not altered the Board Resolution in response to the conflicting demands stated by Defendants Nolan, Snethen and the County.
- 24. An actual controversy has arisen and now exists between the Board of Retirement and Defendants, and each of them, as to whether the Board's adoption of Resolution 98-001 complies with applicable law governing the calculation of retirement allowances for OCERS' members. Defendants, and each of them, have expressed an actual controversy with OCERS by contesting certain provisions of the Board Resolution, in some cases in conflicting ways, and/or threatening to sue the Board of Retirement in the immediate future.

VERIFIED COMPLAINT

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25. The Board of Retirement desires a judicial determination that Resolution 98-001 complies with applicable law. Unless the Court makes a determination as to the controversies raised by the Defendants, all parties herein and all those similarly situated to them will be substantially harmed. The Retirement Board will be unable properly to carry out its statutory duty to administer OCERS, and may be subject to a multiplicity of costly legal challenges to Resolution 98-001 which could delay implementation of its terms; members of OCERS will not receive the correct amount of their retirement allowances or know the amount of contributions necessary for them to pay to OCERS; and the County and other districts participating in OCERS will not know the amount of contributions necessary for them to pay to OCERS or the amount of employee contributions to be deducted from active employees' salaries.

WHEREFORE, Plaintiff, the Board of Retirement for the Orange County

Employees Retirement System, prays for judgment in its favor and against Defendants, and each
of them, as follows:

PRAYER

- For a judicial declaration that the Board of Retirement properly adopted
 Resolution 98-001 and that the resolution complies with applicable law; and
 - 2. For costs of suit herein; and
 - For such other and further relief as the Court may deem just and proper.

Date: March 6, 1998

STEEFEL, LEVITT & WEISS A Professional Corporation

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Havey L Leiderman

Attorneys for Plaintiff BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

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VERIFIED COMPLAINT

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ONE IMMARCADERO CENTALA SOTA FLOOR - SAN FRANCISCO, CA 94111
Tolophore: 415788-0900 - Facsimile: 415788-2019

VERIFICATION

I, Thomas N. Fox, declare as follows:

I am the Chairman of the Board of Retirement of the Orange County Employees Retirement System, plaintiff in this action, and have been authorized to make this verification on its behalf.

I have read the foregoing Verified Complaint for Declaratory Relief and know the contents thereof. The matters stated in the Verified Complaint are true and correct as to my own personal knowledge, unless otherwise indicated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed on March 6, 1998, at Santa Ana, California.

Resolution No. 98-001 dopted by the Board of Retirement rebruary 6, 1998, Board Meeting

BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

RESOLUTION

- Subject: Action of the Board of Retirement With Regard to Implementing the Ventura Decision
- WHEREAS. On October 1, 1997, the decision of the California Supreme Court in the case, Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County Employees' Retirement Association (1997) 16 Cal.4th 483 ("Ventura") became final.
- WHEREAS. The Supreme Court in Ventura mandated a change in the method for calculating pension benefits for members and their beneficiaries by retirement systems governed by the County Employees Retirement Law of 1937 ("CERL"). " ...
- WHEREAS, On November 18, 1997, the Board of Retirement ("Board") of the Orange County Employees Retirement System ("OCERS") established an Ad Hoc Committee of the Board to analyze Ventura and its effect on the retirement system, and to make recommendations to the Board for implementing the mandate of the Supreme Court.
- WHEREAS. The Ad Hoc Committee analyzed Ventura, retained the services of independent legal counsel, its actuary and other advisors, conducted a series of open public hearings to consider the impact of Ventura on the retirement system, its members and their beneficiaries, the County of Orange and other plan sponsors, and adopted its Recommendations to this Board on January 21, 1998.
- WHEREAS. The Board of Retirement is charged with the responsibility for determining "compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retiring members, pursuant to Sections 31450, 31461, 31462 and 31462.1 of the Government Code.
- WHEREAS, The Board of Retirement finds that the proper exercise of its statutory duties under the Government Code requires it to prevent the improper manipulation of compensation for purposes of determining compensation earnable, and to avoid the artificial inflation of pension benefits.
- WHEREAS, After considering all of the information available to the Board, the Recommendations of the Ad Hoc Committee, and exercising its judgment in the matter.
- That the Board hereby adopts the following policies and guideline RESOLVED, (A) which shall be separate from the Board's Bylaws and the Board's Regulations: 106/965

JAMES MORELL 0326

copied by the Board of Retirement cebruary 6, 1998, Board Meeting

Elements to be Included in "Compensation Earnable". Esmuneration earned and receivable in cash (under applicable MOU) to the retiring employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be included in "compensation earnable", including but not limited to the following items of compensation, and others substantially similar to them:

Base Salary and Wages
Bilingual Premium Pay
Educational Incentive ("POST") Pay
Aircraft Rescue Firefighting
Paramedic Pay
Motorcycle Bonus
Emergency Dispatch Pay
'Field Training Officer Bonus
Shift differential pay
Confined Space Pay
Longevity Incentive
Automobile Allowance (paid in cash or to extent
automobile provided for personal use and
declared as income)
Uniform Allowance

Uniform Allowance
Uniform Maintenance Allowance

Payoffs of Vacation and Sick Leave and Holiday to the extent earned (pro-rated on a monthly basis), not taken as time off and permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually cashed-out

Employee Contributions to Deferred Compensation
Plan

"Overtime" required to be worked that is ordinarily worked by others in same grade/class/rate of pay

Compensatory Time (if not excluded as "true overtime" (see definition in section 2) and to the extent in excess of minimum required reserve)

"Madera" Pay

Additional Compensation for Scheduled Meal Periods

Flexible Benefits ("Cafeteria Plan") to the Extent paid in Cash (applicable to members retiring before January 1, 1991)

Resolution No. 98-001 dopted by the Board of Retirement rebrusry 6, 1998, Board Meeting

Elements to be Excluded From "Compensation Earnable". Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be excluded from "compensation earnable", including but not limited to the following items, and others substantially similar to them:

> True Overtime (amounts paid for working in excess of the time required and ordinarily worked by others in the same grade/class.)

Employer Contributions to Deferred Compensation

Employer Contributions to Retirement System
Employer "Pick-up" of Employee Contributions to
Retirement System

Payoffs of Vacation and Sick Leave and Holiday
Pay, to the extent neither earned nor permitted
to be cashed-out under the applicable MOU,
regardless of when actually cashed-out

Flexible Benefits ("Cafeteria Plan") provided In-kind Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991

Terminal ("Final") Pay, to the extent not included per Sec. 1, above

Expense Reimbursements

In-kind Advantages (e.g., food, lodging, board, laundry, fuel)

Fees, Licenses, Memberships provided to member by the employer

Calculation of "Compensation Eamable".

The retiring employee's compensation shall be "regularized" to what would have been received had the employee been paid for a normal work schedule during the Final Compensation Period. The Board shall calculate "compensation earnable" by creating a fraction, the numerator of which is the amount of the employee's qualifying compensation and the denominator of which is the number of ordinary work hours for which the employee was actually paid. The Board shall multiply that fraction by the number of paid hours ordinarily required to be worked by others in the same grade/class. The result shall be the retiring employee's "compensation earnable" for the Final Compensation Period.

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Resolution No. 98-001 Adopted by the Board of Retirement February 6, 1998, Board Meeting

Application of Policies and Guidelines.
The Board shall apply these policies and guidelines to all benefit payments to members and their beneficiaries due on and after October 1, 1994, as requested by members retiring before October 1, 1997, and automatically for all members retiring thereafter.

Changes in Contribution Rates. 5.

> The Board shall calculate on an actuarial basis the effect on the retirement system of any increases in anticipated final compensation going forward, and shall adopt appropriate adjustments to employer and employee contribution rates effective July 1, 1998.

Arrears Contributions of Active Members. 6

> The Board shall determine the shortfall, if any, in (1) each active member's Member Contribution Account, and, (2) in the future, the Member Contribution Account of each prior member returning to active status who wishes to purchase prior service. Effective July 1, 1998, the Board shall collect the shortfall by a lump-sum payment from a member, or through an extended payment program amortizing the shortfall over a period not to exceed five years. Any member who is allowed to extend the payment of arrears contributions must agree to toll the statute of limitations provided for in California Code of Civil Procedure section 338(d), as it applies to Board recovery of arrears contributions, during the period of any such extension (such agreement shall survive any revocation of the extension).

Interim Retirees' Final Compensation Period. 7.

The Board shall permit all members retiring during the period October 1, 1997 through February 10, 1998 to redesignate their Final Compensation Period by no later than March 31, 1998.

Arrears Contributions of Retirees. 8.

> To the extent there is a shortfall in a retiree's Member Contribution Account, the Board shall collect the shortfall from the member, either by payment in full, through a voluntary assignment and offset from the retiree's past-due benefits, or through an extended payment program requiring full application of the amount of the past-due benefit check payable plus not less than 2/3 of the increase in the amount of each future benefit payment until the full arrears contribution has been satisfied. Payment or satisfactory 72 arrangement for payment of arrears contributions thereon shall be a condition precedent to the payment of any increased benefits to a retiree.

Resolution No. 98-001 Topted by the Board of Retirement abruary 5, 1998, Board Meeting

Claims Procedure for Retirees, Recalculation of Benefits and Contributions.

The Board hereby directs the Administrator to establish a claims procedure for all existing retirees who wish to make a claim, for the purpose of facilitating adjustment of their monthly pension benefits. The Board shall offer the retirees the opportunity to have their final compensation recalculated, and have the Board calculate both the additional benefits, plus interest, due to them and the additional contributions, plus interest, that the Board must collect from them before they are entitled to receive the increased benefits. Adjustments in benefit payments due to retirees shall be paid as of July 1, 1998 or as soon thereafter as the retiree's claim can be processed.

10. Tolling of Statute of Limitations.

To the extent that a three-year period of limitations for commencing legal action under Section 338(a) of the California Code of Civil Procedure shall be applied to the claims of any member or member's beneficiaries concerning the calculation of such member's compensation earnable under these policies and guidelines, the Board hereby agrees to toll (suspend) the running of such period of limitations for the period October 1, 1997 to through June 30, 1998. After June 30, 1998, the running of the period of limitations shall recommence.

11 Member and Sponsor Education.

The Board shall make available to all members and plan sponsors these policies and guidelines, together with examples of how these policies and guidelines affect the pension benefits of typical members and their beneficiaries.

RESOLVED, (B) That this Resolution shall be effective immediately upon adoption.

the Orange County Employees Retirement System made and adopted this Resolution.

Raymond A. Fleming, Secretary to the

Board of Retirement

Orange County Employees Retirement System

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EPIGORS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FILED FOR THE COUNTY OF ORANGE DRANGE COUNTY SUPERIOR COURT

MAR 10, 1998

ORANGE COUNTY ATTORNEYS' ASSN., JAN J. NOLAN, AND ERIC W. SNETHEN,

Petitioners,

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BOARD OF RETIREMENT, ORANGE COUNTY RETIREMENT SYSTEM,

Respondent.

ALAN SI ATER EXECUTIVE ORICON CHICK

Case No. 791499

JUDGE JOHN C. WOOLLEY DEPT. 6

PETITION FOR WRIT OF MANDATE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1085

Reich, Adell, Crost, & Cvitan
A Professional Law Corporation
Paul Crost, Bar No. 40742
Attorney for Orange County Attorneys' Assn., Petitioner
501 Shatto Place, Suite 100
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Telephone (213) 386-3860

Jan J. Nolan, Bar No. 63999 Attorney In Pro Per, Petitioner P.O. Box 808 Santa Ana, CA 92702 Telephone (714) 834-3655

Eric W. Snethen, Bar No. 49791 Attorney In Pro Per, Petitioner 1600 Bermuda Dunes Dr. Boulder City, NV 89005 Telephone (702) 293-7065

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

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ORANGE COUNTY ATTORNEYS' ASSN., JAN J. NOLAN, AND ERIC W. SNETHEN,

Petitioners.

VS.

BOARD OF RETIREMENT, ORANGE COUNTY RETIREMENT SYSTEM,

Respondent.

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Petitioners allege:

- Petitioner, Orange County Attorneys' Association is comprised of Attorneys
 employed by Orange County in the agencies of the District Attorney, Public Defender, Alternate
 Defender, Associate Defender, and County Counsel.
- Petitioner, Jan J. Nolan, is an active member of the Orange County Employees'
 Retirement System, and is currently employed by the District Attorney's Office in the capacity of executive management.
- Petitioner, Eric W. Snethen, is a retired member of the Orange County Employees*
 Retirement System.
- 4. Respondent, Board of Retirement, Orange County Employees' Retirement System, is charged with the responsibility of applying the statutory definitions in determining "compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retired and retiring members, pursuant to Government Code, sections 31460' (attached as Exhibit 1), 31461 (attached as Exhibit 2), 31462 (attached as Exhibit 3), and 31462.1

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Unless otherwise indicated, all statutory references are to the Government Code.

Ensointion 90-1551 (attached as Exhibit 5), in a manner complying with the federal and state constitutions so as not to infringe on vested pension rights; and, is responsible for applying the language of the Memorandum of Understanding ("MOU") (attached as Exhibit 6) and the Personnel and Salary Resolution ("PSR") (attached as Exhibit 7) in accordance with the applicable Government Code sections.

- 5. On October 1. 1997, the California Supreme Court's unanimous opinion in Ventura County Deputy Sheriff's Assn. v. Board of Retirement (1997) 16 Cal.4th 483, became final. The Court held that county retirement boards have been misapplying the Government Code sections which govern the County Employees' Retirement Law ("CERL"). The Court directed the retirement boards to apply Government Code, sections 31460 and 31461 in a manner more favorable to the employee/pensioner and set forth how the statutes are to be construed.
- 6. On February 6, 1998, in response to the Supreme Court's Ventura decision, respondent passed a Resolution purporting to implement Ventura. (Attached as Exhibit 8.) Specific provisions of the Resolution; (A) fail to apply the construction of the retirement statutes as mandated by the Supreme Court; (B) violate the dictates of the federal and state constitutions with regard to vested pension rights; and, © fail to apply certain provisions of the Attorney Memorandum of Understanding and the Personnel and Salary Resolution in accordance with Government Code, sections 31460, 31461, 31462, and 31462.1.
- 7. Petitioners seek a writ of mandate commanding respondent to perform its duties to; (A) correctly apply "compensation" and "compensation earnable" in accordance with the Supreme Court's construction of Government Code, sections 31460, 31461, 31462, and 31462.1 as required in Ventura; (B) comply with the dictates of the federal and state constitutions with regard to vested pension rights; and, © apply the provisions of the MOU/PSR in accordance with the County Employees' Retirement Law.

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Government Code, section 31450 et seq.

- - 8. Petitioners have a beneficial interest in the issuance of the writ because their tension benefits are based on the calculation of "final compensation" which is determined by the definitions of "compensation" and "compensation earnable" contained in the Government Code as construed in *Ventura*; have a vested interest in pension benefits; and, are entitled to the application of the provisions of the MOU/PSR to comply with Government Code, section 31450 et seq. (CERL)
 - 9. Petitioners have performed all conditions precedent to the filing of this petition by written request of respondent to perform its duty to include cash payment made in the "measuring period" for all accrued leave, in the calculation of "final compensation" pursuant to the Ventura decision; include cash payment for the flexible benefit plan to all members employed prior to the effective date of Board of Supervisors' Resolution 90-1551, and who remained employed after its effective date; and, apply the language of the MOU/PSR which specifies the amount of vacation hours that can be cashed out in a calendar year to be included in the calculation of petitioners' "final compensation."
 - 10. Retired petitioner, Eric W. Snethen, has exhausted his administrative remedies by requesting a recalculation of his retirement benefits to comply with the mandates of Ventura, the federal and state constitutions, and the provisions of the Memorandum of Understanding as required by the Government Code.
 - 11. At all times herein mentioned, respondent has been able to perform the duties mentioned above. Notwithstanding such ability, and despite petitioners' demand for the performance of those duties, respondent continues to fail and refuses to perform such duties.
 - 12. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law to command respondent to perform its duties, other than the relief sought in this petition.

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WHEREFORE, petitioners pray:

- That this Court issue a peremptory writ in the first instance commanding respondent to perform its duty to include in the calculation of "final compensation;"
 - Cash payment for all accrued leave, paid in the measuring period;
 - B. Cash payment made pursuant to the flexible benefit plan, and apply Board
 - of Supervisors' Resolution 90-1551, which excludes flexible benefit plan payments from the definition of "compensation," only to members coming into the system after its effective date of January 1, 1991;
 - Cash payment for at least 160 hours of vacation leave paid in the measuring period, pursuant to the terms of the MOU/PSR and as required by CERL.
- That this Court, alternatively, first issue an alternative writ commanding respondent to perform the duties described above, or, in the alternative, show cause why it should not do so, and thereafter issue a peremptory writ commanding respondent to perform its duties as described above.
- 3. For costs of this proceeding, including attorney fees, and for such other and further relief as the court deems just and proper.

Dated this 10th day of March, 1998

REICH, ADELL, CROST, & CVITAN A Professional Law Corporation

Attorney for Petitioner

Orange County Attorneys' Assn.

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MV J. NOVAN thorney In Pro Per, Petitioner

ERIC W. SNEYHEN Attorney In Pro Per, Petitioner

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VERIFICATION

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We, Paul Crost, Jan J. Nolan, and Eric W. Snethen are duly licensed to practice law in all the courts of the State of California and are attorneys for petitioners in this matter. We have written and read the foregoing PETITION FOR WRIT OF MANDATE, and all the facts alleged therein, not otherwise supported by exhibits, or other documents, are true of our own personal knowledge.

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

Dated this 10th day of March, 1998

REICH, ADELL, CROST, & CVITAN A Professional Law Corporation

PAUL CROST, Attorney for Petitioner Orange County Attorneys' Assn.

AN JANGLAN, Attorney in Pro Per, Petitioner

ornes in Pro Per, Petitioner

ERIC W. SNETAEN Attorney In Pro Per, Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES BACKGROUND

The retirement system for county employees was created in 1937 and is governed by the County Employees' Retirement Law, which is codified in Government Code, section 31450 et seq. Twenty-two California Counties, including Orange County, have adopted the provisions of CERL. The system is funded by employer and employee contributions calculated as a percentage of employee compensation.

The Orange County Employees' Retirement System (OCERS) is governed by a Board of nine members of whom three are elected by the employees. An additional member is elected by the retired employees. Four members of the Board are appointed by the Orange County Board of Supervisors. The ninth member is the Treasurer of the County. Only the appointed Board members and the retired Board member receive compensation. The Board employs an Investment Counsel and an Actuary. All full-time, limited term full-time, and employees scheduled to work half-time or more are required to be participating members in OCERS. Certain elected officials have an option of being members, otherwise membership is mandatory.

Members receive pension allowances based upon age at retirement, number of years of service, and average monthly earnings. The pension cannot exceed 100% of the average monthly compensation.

Membership in OCERS consists of two Tiers. Employees hired prior to July 15, 1977 are Tier 1 members with higher contribution rates and more lucrative benefits. These members are entitled to retire at an earlier age, at a higher percentage of average earnings, receive cash payment for accrued sick leave, and can choose any 12 consecutive months of service upon which to base the calculation of "final compensation." Tier 2 members are those employees hired after July 15, 1977. "Final compensation" for Tier 2 members is based on average monthly earnings during any 36 consecutive months of service, and these members are not entitled to cash payment for accrued sick leave.



Employees' pension benefits are based on a percentage of the employee's "final compensation." "Final compensation" is the highest average monthly earnings during the "measuring period" selected by the employee. For Tier I employees the "measuring period" is 12 months, for Tier 2 employees, the "measuring period" is 36 months. The calculation of "final compensation" is dependent on the construction of the statutes which define "compensation" and "compensation earnable."

Orange County's Retirement Board, as well as other county retirement boards governed by CERL, historically has construed these statutes to exclude cash payment for benefits which exceed base salary in the calculation of "final compensation." As a result, the "final compensation" upon which employees' pension benefits are based, was incorrectly calculated, thereby reducing retirement benefits to the employee/pensioner.

Section 31462.1 defines "final compensation" as "the average annual compensation earnable by a member during any year elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the year immediately preceding his retirement." (See Exhibit 4).

Section 31460 of CERL defines "compensation" as "the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan...but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member." (See Exhibit 1).

Under section 31461, "[c]ompensation earnable by a member means the average compensation as determined by the Board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence" Amendments to section 31461 in 1993 and 1995 added: "Compensation, as defined in Section 31460, that has been deferred shall be deemed 'compensation carnable' when earned, rather than when paid." (See Exhibit 2).

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The Ventura County Sheriff's Association sued the Ventura County Retirement Board seeking mandate for the right to have cash payments received for certain benefits^b included in "final compensation" for purposes of calculating pension allowances. The trial court, relying on Guelfi v. Marin County Employees' Retirement Assn. (1983) 145 Cal. App.3d 297, ruled in favor of the retirement board. The Court of Appeal affirmed. In a unanimous opinion, the Supreme Court in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, reversed.

Ventura held that county retirement boards had erroneously construed the statutes defining "compensation" and "compensation earnable". The Supreme Court instructed that section 31460, defining "compensation", must be construed as a statute of inclusion, not a statute of exclusion. The court mandated that the statute be construed to include in the definition of "compensation" any cash payment for services which is not specifically excluded by the section. The Court further mandated that section 31461 be construed to include in the definition of "compensation earnable" all items of "compensation" paid in cash, with the exception of overtime pay. The Court's directive requires county retirement boards to include cash payment for benefits, over and above the base salary, in "final compensation" upon which pension allowances are based.

The determination of which benefits are payable in cash to the employee is governed by the provisions of the Attorneys' Memorandum of Understanding and Personnel and Salary Resolution.

STATEMENT OF FACTS

On February 6, 1998, in an effort to implement the Ventura decision, respondent passed a Resolution (Exhibit 8). The provisions of the Resolution set forth which benefits are to be paid

Bilingual pay; uniform maintenance allowance; educational incentive pay; call-back pay; annual leave accrual; holiday pay; motorcycle bonus; trainee deputy pay; longevity incentive bonus.



in cash to the employee under the terms of the applicable MOUs and, therefore, included in "final compensation," and which benefits cannot be cashed out and, therefore, excluded.

The Resolution acknowledges that cash payment for accrued sick, vacation, and compensatory leave is to be included in the definition of "compensation" and "compensation earnable" pursuant to the mandates of *Ventura*, and, therefore, included in "final compensation." However, respondent limits the amount of the cash payment for such leave included in "final compensation" by requiring the leave to be earned in the "measuring period."

The MOU/PSR allows Tier 1 employees to cash out all accrued sick leave at retirement regardless of when it was earned. The MOU/PSR also allows Tier 1 employees to cash out one-third of accrued sick leave each fiscal year, with the proviso that a certain number of hours remain on the books until retirement, at which time the remaining hours may be cashed out. Both Tier 1 and Tier 2 employees may cash out up to 400 hours of accrued vacation leave at retirement pursuant to the terms of the MOU/PSR, regardless of when it was earned. Further, all employees are allowed to cash out up to 80 hours of accrued vacation leave each fiscal year.

Notwithstanding the mandates of Ventura and the applicable provisions of the MOU/PSR, respondent has significantly limited the amount of cash payment for these benefits which will be included in "final compensation." By determining that cash payment for only the leave earned in the "measuring period" will be included in the definition of "compensation" and "compensation earnable," respondent reduces the pension allowances to which employees are entitled under the mandates of Ventura.

Although employees are entitled to cash payment for all accrued leave pursuant to the terms of the MOU/PSR, the provision of the Resolution allows for cash payment for only 96 hours of accrued sick leave to be included in "final compensation," and only 80 hours of accrued

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vacation leave to be included in "final compensation." Neither CERL nor Ventura require the accrued leave be earned in the "measuring period" in order to be included in the definitions of "compensation" and "compensation earnable."

The Resolution also excludes cash payment for the "flexible benefits compensation" for all members not retired prior to January 1, 1991.* T enfoncously based on a 1991 Board of Supervisors' Resolution.

The MOU/PSR permits the cash out of 80 hours of vacation leave each fiscal year. For Tier 1 employees this translates to 160 hours per calendar year. For Tier 2 employees this translates to 320 hours in a calendar three year period. Employees earn up to 200 hours per year. The Resolution allows cash payment for only 80 hours per calendar year be included in "final compensation."

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ISSUES AND ARGUMENT

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1. RESPONDENT DOES NOT HAVE UNFETTERED DISCRETION TO DETERMINE WHAT COMPENSATION IS EARNABLE AND WHEN SUCH COMPENSATION SHOULD BE VIEWED AS EARNABLE.

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If an item of compensation meets the CERL definition of "compensation" and
"compensation earnable," respondent is not free to exclude the item from the calculation of "final
compensation." The Court, in County of Marin Assn. of Firefighters v. Marin County Employees
Retirement Assn. (1994) 30 Cal.App.4th 1638, laid to rest the issue of the extent of a retirement

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Resolution, page 3, paragraph 2, "Flexible Benefits ('Cafeteria Plan')paid in cash to the extent paid to members retiring on and after January 1, 1991."

"Payoffs of Vacation and Sick Leave and Holiday Pay, to the extent neither earned nor permitted

to be cashed-out under the applicable MOU, regardless of when actually cashed-out."

Resolution, page 3, paragraph 2; "Elements to be Excluded in 'compensation earnable."

board's discretion. The board's authority is controlled by the guiding language contained in section 31461.

The Marin County Retirement Association in Firefighters' historically excluded holiday pay from "compensation" and "compensation earnable." When forced to include this pay in the calculation of "final compensation," it determined to apply the payment prospectively only. The Retirement Association in Firefighters' argued that section 31461 gave it the discretion to include holiday pay only prospectively in computing pension benefits. To support its contention, the Retirement Association cited Guelfi, and argued it authorized the retirement board to determine what compensation is earnable under section 31461, and when such compensation should be viewed as earnable.

The Court of Appeal in Firefighters' disagreed, and stated at page 1646:

"Implicit in the court's phrasing of the issue and its discussion, is that CERL would have entitled the police officers to have their benefits calculated on the basis of any items that met the statutory definition of '[c]ompensation earnable.' If, as Retirement Association contends, the Board has discretion to exclude items that meet the statutory definition, it would have been unnecessary for the court to determine whether the items at issue in Guelfi met that definition."

In answer to the Board's argument that such an interpretation would render superfluous the language of section 31461 which defines "compensation earnable" as "the average compensation as determined by the board, for the period under consideration . . . , " the court held at page 1646:

"As Guelfi explains, section 31461 'vest[s] the Board with authority to determine, according to the guiding language contained therein, which elements of compensation constitute 'compensation earnable' for purposes of inclusion or exclusion from the calculation of 'final compensation.' (Guelfi, supra, 145 Cal.App.3d at p. 305.)"

The Court continued:

"However, nothing in the statute gives a retirement board, having determined that an element of compensation meets the statutory definition of 'compensation earnable' for a particular year, the discretion to exclude that element in calculating benefits based on a retiree's compensation for that year." (Ibid.)

Respondent has rightfully concluded that it is bound by the mandates of Ventura's construction of section 31461. Respondent has determined that cash payment for accrued RR

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vacation and sick leave is "compensation" and "compensation earnable" and must be included in calculating final compensation. However, respondent apparently believes it has discretion to limit the amount of the cash payment which is to be included in final compensation by requiring the cashed out leave to be carned in the measuring period. The effect of this limitation is to exclude cash payment for accrued leave, not earned in the measuring period, from the definition of "compensation" and "compensation earnable." Such an exclusion is not authorized by CERL provisions nor any judicial opinion. In fact, it is an exclusion which the Court of Appeal in Firefighters advises is not within a retirement board's discretion.

As Guelfi and Firefighters make clear, respondent does not have unbridled, absolute discretion to determine what compensation is earnable, and when such compensation should be viewed as earnable. Its discretion is merely to determine if an element of compensation meets the statutory definition of "compensation" and "compensation earnable." If it does, respondent has no discretion to exclude that element, or any portion thereof, in calculating benefits based on the retiree's compensation for the selected measuring period. Unless specifically excluded by statute, the qualifying "compensation" must be included in the calculation of "final compensation."

2. CASH PAYMENT FOR ACCRUED SICK, VACATION, AND COMPENSATIONY LEAVE IS "COMPENSATION" AND "COMPENSATION EARNABLE" REQUIRING INCLUSION IN "FINAL COMPENSATION" WHEN CASH PAYMENT IS MADE IN THE "MEASURING PERIOD."

The Supreme Court in Ventura, exhaustively analyzed sections 31460 and 31461 which define "compensation" and "compensation earnable," and came to the conclusion that retirement boards had misconstrued these statutes. The Ventura Court set forth the proper construction and said at page 494:

"To constitute 'compensation,' a payment must be 'remuneration' which is not excluded from 'compensation' by that section." (Emphasis added.)

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The Ventura Court further held, at page 487:

"With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Emphasis added.)

The Supreme Court in Ventura specifically addressed the issue of cash payment for accrued vacation leave⁹ and held at page 497:

"We agree that both the longevity bonus and cashed-out accrued vacation are remuneration under section 31460 and, since neither is an excluded 'advantage,' both are 'compensation'."

The Court described the nature of the longevity bonus in footnote 11, at page 489:

"Employees in this category with five years of county service were entitled to a lump sum annual leave credit for eight hours per year for each year of service, not to exceed one hundred four hours. The credits could be accrued as annual leave or taken in the form of additional compensation." (Emphasis added.)

The Court continued at page 498:

"The 'longevity incentive' simply grants additional vacation hours to be accrued or cashedout. . . ."

In other words, the "longevity incentive" provision in the Ventura MOU is indistinguishable from the accrued vacation and sick leave allowed in Orange County's MOU and PSR. The longevity incentive and accrued vacation and sick leave are remuneration which must be included in "compensation" and "compensation earnable" when cashed out, and become part of the employee's "final compensation."

Looking at the facts set out in footnote 11 in Ventura, simple math tells the reader that to be entitled to "longevity incentive" pay, the employee would have to work thirteen (13) years

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Cash payment for sick leave accrual was not mentioned in the opinion but respondent agrees the Court's rationale applies equally to sick leave accrual. Ventura county's MOU may not have include this benefit.

to accumulate the maximum 104 hours. (104 [maximum accruable] divided by 8 [number of hours credited per year] equals 13 [the number of years needed to reach 104 hours].)10

From these facts, the Supreme Court clearly equated "compensation earnable" with the remuneration an employee received in cash, during the twelve month (or 36 month) measuring period, not with what that employee earned during the measuring period selected under section 31462.1.

Although there are many cases construing the Public Employees' Retirement Law (PERL)" which established the Public Employees' Retirement System (PERS) and governs state employees. Ventura is a Supreme Court case of first impression construing CERL. A comparison of PERL with that of CERL, provides strong support for the inclusion of cash payment, during the measuring period, for all accrued leave in the calculation of final compensation, regardless of when it was earned.

In stark contrast to the detailed definitions of "compensation" and "compensation earnable" in the PERS statutes, the Legislature very simply provided in CERL, that "compensation" means remuneration paid in cash, and "compensation earnable" means, "the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." (§ 31461).

If the Court intended that only the 8 hours earned in the measuring period be included in "final compensation", there would have been no need to describe the nature of this longevity bonus in such detail.

Government Code, section 20000 et seq.

The Ventura Court very simply construed CERL and said:

"To constitute 'compensation,' a payment must be 'remuneration' which is not excluded from 'compensation' by that section," and held that items of "compensation" paid in cash were required to be included in the "compensation earnable" and "final compensation."

PERS legislation, unlike CERL, is very definitive as to what is <u>included</u> and what is <u>excluded</u> with regard to "compensation" and "compensation earnable." PERS section 20636, subdivision (g)(4)(F) (attached as Exhibit 9), specifically excludes "Payments for unused vacation, sick leave, or compensating time off, whether paid in lump sum or otherwise," from the definition of "compensation earnable." CERL does not. Ventura requires the inclusion of cash payment for unused leave to be included in the definition of "compensation" and "compensation earnable" under CERL.

The Ventura Court specifically construed the CERL statute defining "compensation"

(§ 31460) as including all benefits which were not specifically excluded "by that section."

Had the Legislature intended the CERL definition of "compensation" be applied only to payments for accrued leave earned in the measuring period, rather than when paid in the measuring period, it would have said so, just as it did in the PERS statute. "The Legislature is presumed to be aware of other statutes on the same or analogous subject matter in which the same language is used."

The fact it made no such exclusion is just as binding on respondent, and this trial court, as it was on the Supreme Court Justices who wrote the Ventura decision and who refused to rewrite CERL to reflect the provisions of PERS.

12 Ventura, at page 494.

13 Ventura at page 487

It is important to note that the Supreme Court did not say "excluded by the retirement board." The same language, used at page 494, "not excluded from 'compensation' by that section" refers to section 31460.

15 Ventura, at page 504

The Ventura Court discussed the definition of "compensation earnable" as set forth in PERS when determining whether overtime should be calculated in final compensation. The Ventura Court was well aware of the PERS language in section 20630 (attached as Exhibit 10), defining "compensation," and section 20636 (attached as Exhibit 11), defining "compensation earnable." However, the Supreme Court recognized it could not rewrite CERL statutes to mirror PERS. Therefore, it disregarded the PERS language and construed CERL statutes in a manner resulting in a conclusion opposite that of the PERS definitions of "compensation" and "compensation earnable." The Court concluded that CERL includes cash payment for accrued sick and vacation leave in the definitions of "compensation" and "compensation earnable."

The Ventura Court stated at page 497: "CERL differs from the PERL¹⁷ legislation under consideration in that it excludes, rather than includes, the monetary value of an advantage provided in kind." In ruling that the monetary value of an "advantage provided in kind" becomes included in "compensation earnable" when paid in cash, under CERL, the Court specifically held at page 497:

"When paid in cash, the payment is remuneration and, as it is not excluded, it is compensation' under section 31460."

At page 487 the Court said:

"With the exception of overtime pay, items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (Emphasis added).

If respondent's position is correct, that cash payment for accrued leave is not "compensation earnable," unless the leave was <u>earned</u> in the measuring period, then the 1993 and 1995 amendments to section 31461 providing that compensation "that has been deferred shall be deemed 'compensation earnable' when earned, rather than when paid," would have been

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¹⁶ See the Coun's discussion of the specific PERS legislation at pages 504-505.

PERL stands for Public Employees' Retirement Law and is used interchangeably with the term, "PERS."



unnecessary. In other words, under CERL, compensation has always been deemed to be "compensation earnable" when paid, not when earned. Respondent has no authority or discretion to determine otherwise. To do so would not only rewrite CERL, but would rewrite the Ventura opinion as well. PERS applies only to state employees. CERL applies only to county employees.

When "compensation" becomes "compensation earnable" is pivotal to a proper calculation of "final compensation." The Ventura Court, in very plain language, held that a benefit becomes "compensation earnable" when paid, and, all "compensation carnable" must be included in "final compensation."

Contrary to respondent's conclusion, cash payment for accrued leave is not excluded from the definitions of "compensation" and "compensation cannable" simply because the leave was not earned in the measuring period. The cash payment for accrued leave becomes "compensation" and "compensation earnable" when it is paid, regardless of when the leave was earned.

Uncashed leave remains an in-kind advantage, excluded from "compensation," until the election is made by the employee to receive its cash equivalent. Once the election is made to receive cash in lieu of using the leave, whether the election is made at time of retirement, or during any other twelve or thirty-six month period which the employee chooses as the "measuring period," the cash payment must be included in "final compensation."

In summary, cash payment for leave not earned in the measuring period is not excluded from the definition of "compensation" and is, therefore, included. Cash payment for leave not earned in the measuring period is "compensation earnable" when paid in cash and must be included in final compensation.

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The function of respondent in construing the Ventura decision is identical to a court's in construing a statute. The Supreme Court stated at page 492:

"The function of the court in construing a statute 'is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . . .""

Respondent's conclusion that only cash payment for leave earned in the measuring period will be included in the definitions of "compensation" and "compensation earnable" is an erroneous construction of CERL and disregards the mandates of Ventura. Such a construction of CERL is beyond its authority and a clear abuse of its discretion.

THE INCLUSION IN "FINAL COMPENSATION" OF CASH PAYMENT FOR ACCRUED LEAVE DOES NOT "ARTIFICIALLY INFLATE" PENSION BENEFITS.

Respondent's rationale for continuing its erroneous construction of CERL, even in light of Ventura, is evidenced in the Resolution at page 1, "WHEREAS" [no. 6:] "The Board of Retirement finds that the proper exercise of its statutory duties under the Government Code requires it to prevent the manpulation (sic) of compensation for the purposes of calculating compensation earnable. (sic) and to avoid the artificial inflation of pension benefits."

Contrary to this provision of the Resolution, the only proper exercise of the Board's statutory duties under the Government Code¹⁸ is to construe CERL as mandated by the California Supreme Court. The definition of "artificial inflation" of pension benefits is absent from the Resolution, and the term is not used or defined in any statute. More importantly, the Ventura Court specifically held that not only is it appropriate to include cash payment for accrued leave in "final compensation," it is required under CERL. As evidenced by the Resolution, respondent has concluded that the inclusion of a portion of the cash payment for accrued leave in "final compensation" does not "artificially inflate" pension benefits. But in an action which

The Resolution does not cite to the Government Code(s) referenced.

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flies in the face of the Ventura decision, respondent has determined the inclusion of the entire cash payment would constitute an "artificial inflation." Absent legislation defining the term and setting forth standards upon which to make such a determination, respondent is not free to decree what does, and what does not, constitute "artificially inflating" pension benefits.

Respondent has no discretion to exclude an item of compensation from the definition of "compensation earnable" merely because it opines that it is the "equitable" thing to do in order to avoid "artificial inflation." (Firefighters', supra).

The legislature has a long-standing practice of not intruding into the county decision making process with regard to a county retirement system. This practice is quite evident from a reading of CERL, section 31450, et seq. Counties are free to establish a retirement system pursuant to the provisions of CERL, but are not required to do so. Amendments to CERL statutes and enactments of new statutes are not automatically operative in the counties. The legislature allows the county board of supervisors to determine whether to adopt such statutes, and it is only by a resolution passed by a majority vote of the board of supervisors that a statute becomes operative in a county. It is interesting to note that many sections of CERL were specifically enacted to apply only to specified counties. Presumably this is a result of a particular county's request for the enactment of a statute.

One purpose for the legislature's policy of not intruding into the counties' decision making process with regard to pension benefits, is probably due to the counties' ability to control the amount of pension benefits through the terms of the counties' various MOUs. Orange County's MOU/PSR are replete with instances where benefits are given to employees, in cash and otherwise, which, under respondent's long-standing construction of CERL, were excluded from the calculation of "final compensation" upon which retirement benefits were calculated. Had these benefits been given as salary increases, instead of under the guise of "car allowances," "cafeteria benefits", "longevity bonuses," and the like, the county would have been required to make retirement contributions on the benefits. By giving these "perks" instead of salary increases, the county profited, and the employees' pension benefits suffered.

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If respondent believes that following the mandates of the Supreme Court as set forth in Venturo results in "artificially inflating" pension benefits, it must seek the enactment of legislation, or a modification of the terms of the MOU. However, because of the County's longstanding practice of giving "perks," which at the election of the employee may be taken in cash. instead of giving salary increases, it is doubtful that even the legislature would denounce the Supreme Court's opinion as "artificially inflating" pension benefits.

Respondent has no authority or discretion to refuse to follow the unanimous opinion of the Supreme Court based on its own opinion of what constitutes "artificially inflating" pension benefits. The refusal to follow the Supreme Court's mandates constitutes a failure to perform its statutory duties under the Government Code.

THE EXCLUSION OF PAYMENT FOR THE "FLEXIBLE BENEFITS PLAN" IN "FINAL COMPENSATION" DENIES EMPLOYEES A VESTED PENSION RIGHT AND VIOLATES BOTH CONSTITUTIONS.

Pursuant to collective bargaining, the County provides to certain employees a "flexible" or "optional benefit" plan. The provisions of the plan allow the employee the option of taking all, or part of the money in cash, or applying all, or part of it, to pay for health insurance, membership fees, education, professional fees, and conferences. Management employees are provided the identical plan. On a yearly basis, the employee is allowed to re-designate the allocation of this money.

On December 18, 1990, the Board of Supervisors passed Resolution 90-1551, effective January 1, 1991, (Exhibit 5), adopting the provisions of newly enacted Government Code, section 31460.1. (Attached as Exhibit 12.) This legislation allowed the Board of Supervisors, by resolution, to exclude cash payments made pursuant to a flexible benefit plan from the

MOU, Article VII, Section 4, subdivision A-G. (Attached as Exhibit 13.)

definition of "compensation." This section was repealed in 1992, but the repealing legislation (attached as Exhibit 14), left intact the validity of the Board of Supervisor's resolution."

Respondent agrees that <u>cash payments</u> pursuant to this plan are "compensation" and "compensation earnable" and must be included in the computation of "final compensation" pursuant to the *Ventura* decision. However, using Resolution No. 90-1551, respondent has erroneously determined that only employees who retired prior to January 1, 1991, are entitled to have these payments calculated in "final compensation."

It is well-settled law that statutes are to be applied prospectively only. Therefore, Resolution 90-1551, adopting the provisions of now repealed section 31460.1, can only apply to members coming into the system after its effective date, i.e. January 1, 1991, and the Resolution cannot affect the rights of those members who have been receiving this "compensation" prior to, and after its effective date.

The Legislature recognized the prohibition of applying a statute in an ex-post facto manner when they enacted Government Code, section 31461.1. That statute excludes flexible or optional benefit plan payments from the definition of "compensation" or "compensation earnable."

Subdivision (c) provides:

"Except as provided in subdivision (d)²³, this section shall not be operative until the board of supervisors, by resolution adopted by a majority vote, makes this section operative with respect to any employee who becomes a member after the effective date of the resolution." (Emphasis added.)

This is a good example of who has authority to change CERL provisions and how it must be done. Retirement boards do not have the authority.

Resolution, page 3, paragraph #2, "Flexible Benefits ('Cafeteria Plan') paid in cash to the extent paid to members retiring on and after January 1, 1991."

This statute applies only to specific counties. Orange County is unaffected by this legislation.

Subdivision (d) applies to current management employees who agree to be bound by the Resolution.

Employees have a <u>vested contractual right</u> to retirement benefits. Those benefits can only be determined by applying the definitions of "compensation" and "compensation earnable" as contained in sections 31460 and 31461, as construed in *Ventura*. Prior to the effective date of Resolution 90-1551, cash payments for optional benefits <u>should</u> have been included in the definition of "compensation" pursuant to section 31460, and "compensation earnable" pursuant to section 31461 as construed by *Ventura*. This fact is not disputed as respondent's Resolution calculates these payments in the "final compensation" for all members who retired prior to January 1, 1991.

The United States Constitution, article I, section 10, prohibits any state from passing a law impairing the obligation of contracts. The parallel provision in the California Constitution is found in article I, section 9.

In Allen v. Board of Administration of the Public Employees' Retirement System (1983) 34 Cal.3d 114, at page 120, the Supreme Court said:

"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 entity." (Emphasis added.)

The Supreme Court continued:

"A constitutional bar against the destruction of such vested contractual pension rights, however, does not absolutely prohibit their modification. With respect to active employees, we have held that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages." (Emphasis added.)

Excluding optional benefit plan cash payments from the definition of "compensation" upon which the calculation of final compensation is based, is a definite disadvantage to employees because it reduces their pension benefit. Respondent has failed to identify any "comparable new advantages" which flow to the employee as a result of respondent's action which takes away a vested contract right.

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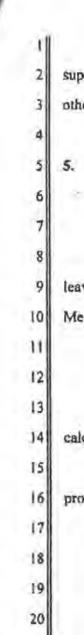
The Legislature could never have intended the enactment of now repealed section 31460.1, and any resolution adopting it, would apply to extinguish the vested contractual rights of current members. It is presumed the Legislature is familiar with the United States and California Constitutions. Indeed, it illustrated that familiarity when it enacted section 31461.1, which applies the exclusion of cafeteria benefits from the definition of "compensation" and "compensation earnable," only to new members entering the system, after the effective date of the Board's resolution adopting the section.

A statute may not be repealed when vested rights would be impaired and similarly, a new statute may not be applied in a manner which would impair vested rights. Board of Supervisors' Resolution 90-1551, if applied to members in the system prior to its effective date, would constitute an impairment of contractual rights in violation of article I, section 9, of the California Constitution and article I, section 10, of the United States Constitution. It would also constitute an ex post facto application of a statute. Based on the above, Resolution 90-1551 can only be applied to new members entering the system after its effective date, January 1, 1991. All other members, whether active or retired, are entitled to have these cash payments calculated as part of their final compensation pursuant to Ventura.

In 1977 when the county created the Tier 2 level of membership in the retirement system, the legislature enacted section 31483 to clarify the board's authority:

"Notwithstanding any other provision of law, whenever the governing body of a county or district has made a particular provision or provisions of this chapter applicable in such county or district through the adoption of an ordinance or resolution, such governing body may at any time thereafter adopt a further ordinance or resolution terminating the applicability of such provision or provisions as to employees of the county or district whose services commence after a given future date specified in the latter ordinance or resolution." (Emphasis added.)

²⁴ Valdes v. Cory (1983) 139 Cal.App.3d 773, 792.



This code section evidences the legislature's intent that retirement boards and boards of supervisors are not allowed to extinguish vested pension rights through resolutions or any by any other means.

5. THE PAYMENT OF 160 HOURS OF ACCRUED VACATION LEAVE MUST BE INCLUDED IN THE CALCULATION OF FINAL COMPENSATION, NOT JUST 80 HOURS AS DIRECTED BY RESPONDENT'S RESOLUTION.

Respondent's February 6, 1998, Resolution provides only the hours of cashed out vacation leave earned in the measuring period are to be included in the calculation of final compensation.

Memorandum of Understanding Section 2, subdivision "K." provides:

"During each fiscal year, an employee may request to be paid for accrued vacation in either two (2) separate increments of forty (40) hours each or one (1) increment of eighty (80) hours."

From this provision respondent has determined only 80 hours are to be included in the calculation of final compensation.

The Attorney Unit Memorandum of Understanding, Article V, Section 1, subdivision "C" provides in relevant part:

"Commencing with the pay period following that in which the employee completed ten (10) years of continuous full-time County service, an employee in a regular or limited-term position shall earn .0962 hours of vacation for each hour of pay during his or her regularly scheduled workweek" (approximately five [5] weeks per year). [Note: this is calendar year - not fiscal year]

Under subdivision "E.," a full-time employee with ten or more years of full-time continuous service can accumulate a maximum of 400 hours of vacation.

Section 2, subdivision "J." provides in relevant part:

"An employee who is separating from County service by way of paid County retirement may elect either to take time off for his or her vacation or to be paid for his or her vacation in a lump sum payment."

The provisions in the Personnel and Salary Resolution are identical.

While each calendar year and each fiscal year obviously include twelve months, there is a significant difference to the employee and retiree as to which measuring period is utilized in

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calculating final compensation. In fact, that is the very purpose recognized and codified by the Legislature in allowing, indeed, mandating that the employee is the one who selects which twelve (or thirty-six) months are to be used in calculating his or her "final compensation." Significantly, the Legislature did not empower the retirement boards with the authority to designate which months the employee must use in calculating his or her "final compensation." By adopting the Resolution, respondent has attempted to legislate an amendment to the CERL provisions. Such action is not only an abuse of discretion, it is clearly without any authority and contrary to wellestablished law.

During any particular twelve month period, an employee with ten years service earns five weeks vacation per year.25 That's two hundred (200) hours. During that same twelve month period, that same employee is entitled, under section 2, subd. "K", to receive cash payment for one hundred and sixty hours (160).

The following example is illustrative: Employee Jones decides to retire January 1, 1997 He selects as the twelve month period January 1, 1996 - December 31, 1996. Obviously, that twelve month period encompasses part of two fiscal years, July 1, 1995 to June 30, 1996, and July 1, 1996 through December 31, 1996. During the twelve months selected by employee Jones. he cashed-out 160 hours of vacation under the provisions of subdivision "K." Not only was 160 hours earned during the "measuring period" (actually 200 hours was earned) but it was also cashed during the measuring period. Therefore, payment for at least 160 hours, not just 80 hours, must be included in "compensation" and "compensation earnable" for purposes of calculating "final compensation."

"Final compensation" means "the average annual compensation earnable by a member during any YEAR elected by a member. . . . " (65 31462 and 31462.1.) "Year" is defined by Webster's to be a period of 365 days divided into twelve months.

MOU, Article V, section 1, subdivision C. (Attached as Exhibit 15.)

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Significantly missing from the statutory provision is the word "fiscal." That absence is binding upon respondent. Had the Legislature intended to use "fiscal" year, as the "measuring period," it would have done so. (See e.g., §§ 20751 [attached as Exhibit 16]; 20751.5 [attached as Exhibit 17]; 20828 [attached as Exhibit 18])

As can be seen from sections 20751, 20751.5, and 20828, cited above, the Legislature knows exactly how to designate the specific time frame, "fiscal year." By not using the specific word, "fiscal" in sections 31461, 31462, and 31462.5 (attached as Exhibit 19), the Legislature has foreclosed any retirement board from modifying the time frame which the employee/retiree selects as the period to be used in determining "final compensation."

As stated previously, the parties agree the Ventura Court relied very heavily on Ventura County's MOU. Orange County's MOU permits cashing out of 160 hours in a calendar year. Therefore, the member who selects a "measuring period" in which 160 hours of vacation was cashed out, (or 320 hours in 3 years for Tier 2 employees) is entitled to have the payment for that amount to be included in the calculation of final compensation. 36

Respondent's resolution provides that both active and retired members, along with the employer, will be required to pay arrears contributions plus the interest to fund the increased pension benefits. Petitioners agree to this principle.

When a member retires, he or she is entitled to cash all remaining accrued vacation which could be up to 400 hours. Under that scenario, all 400 hours paid at retirement would, like the longevity pay in *Ventura*, have to be included in "final compensation."

CONCLUSION

Ventura Court concluded its opinion by holding "Nothing in this record suggests that the burden on the county fise justifies either perpetuation of an erroneous construction of the applicable statutes or denying these plaintiffs the benefit of our decision."27

For all the above reasons, petitioners respectfully request this court, alternatively, first issue an alternative writ commanding respondent perform the duties outlined above, or, in the alternative, order respondent to show cause why it should not do so, and thereafter issue a peremptory writ commanding respondent to perform its duties as described above.

Respectfully submitted,

REICH, ADELL, CROST, & CVITAN A Professional Law Corporation

Attorney for Orange County Attorneys' Assn., Petitioner

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torney in Pro Per, Petitioner

21 ERIC W. SNETHE

22 Attorney In Pro Per Petitioner

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27 28 Ventura at page 507.

JAMES MORELL 0361



TABLE OF PETITIONERS' EXHIBITS

- 1. Government Code, section 31460
- 2. Government Code, section 31461
- 3. Government Code, section 31462
- 4. Government Code, section 31462.1
- Orange County Supervisors' Resolution 90-1551
- 6. Orange County Memorandum of Understanding
- 7. Orange County Personnel & Salary Resolution
- 8. Board Resolution of February 6, 1998
- 9. GOVERNMENT CODE, section 20636, subd. (G)(4)(F)
- 10. GOVERNMENT CODE, section 20630
- 11. GOVERNMENT, section 20636
- 12. Government Code, section 31460.1
- 13. MOU, Article VII
- 14. Repealing Legislation to 31460.1
- 15. MOU, Article V
- 16. Government Code, section 20751
- 17. Government Code, section 20751.5
- 18. Government Code, section 20828



PETITIONERS' EXHIBIT 1 GOVERNMENT CODE, SECTION 31460

§ 31460. "Compensation"

"Compensation" means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan established pursuant to Chapter 8 (commencing with Section 18310) of Part 1 of Division 5 of Title 2 or pursuant to Article 1.1 (commencing with Section 53212) of Chapter 2 of Part 1 of Division 2 of Title 5, but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member.

Added Stats 1947 ch 424 § 1; Amended Stats 1949 ch 1338 § 1; Stats 1951 ch 576 § 1; Stats 1959 ch 1184 § 1; Stats 1961 ch 1852 § 1; Stats 1972 ch 1370 § 10.

Prior Law: Based on Stats 1937 ch 677 § 8 p 1898.

Amendments:

1949 Amendment: Added (1) "(a)" at the beginning of the section; and (2) subd (b) which read: "In respect to employees of district as defined in subdivision (c) of Section 31468, 'compensation' means the remuneration paid in cash out of funds of the district plus the monetary value, as determined by the board, of board, lodging, fuel, laundry, and other advantages furnished to a member in payment for his services."

1951 Amendment: Added "and (d)" after "(c)" in subd (b) as added.

1959 Amendment: (1) Substituted "and shall not include the monetary value" for "plus the monetary value, as determined by the board," after "supervisors" in subd (a); (2) deleted "in payment for his services" at the end of subd (a); (3) substituted "and shall not include" for "plus" after "district" in subd (b); and (4) deleted "as determined by the board," after "monetary value" in subd (b).

1961 Amendment: Deleted (1) "(a)" at the beginning of the section; (2) "controlled by the board of supervisors" after "district funds"; and (3) former subd (b) as

added and amended.

1972 Amendment: (1) Inserted all that which follows "district funds" down to and including "Title 5,"; and (2) substituted "but does" for "and shall" before "not include".

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PETITIONERS' EXHIBIT 2 GOVERNMENT CODE, SECTION 31461

Compensation earnable"

compensation earnable" by member means the average competion as determined by the board, period under consideration upon the basis of the average number of days ordinarily worked by in the same grade or class of positions during the period, and at the same rate of pay. The sutation for any absence shall be based on the compensation of the position held by the member at spinning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be a "compensation earnable" when earned, rather than when paid.

mended Stats 1993 ch 396 § 3 (AB 1659); Stats 1995 ch 558 § 1 (SB 226).

pendments

93 Amendment: (1) Designated the former section to be subd (a); (2) substituted "the member" for "him" after "posiin held by" in subd (a); and (3) added subd (b).

'95 Amendment: (1) Deleted former subdivision designation (a); (2) substituted the period for "shall be based on the impensation of the position held by the member at the beginning of the absence" after "for any absence"; (3) added the st sentence; and (4) deleted former subd (b) which read; "(b) In a county of the first class, as defined by Section 28020, amended by Chapter 1204 of the Statutes of 1971, and Section 28022, as amended by Chapter 43 of the Statutes of 1961, addition to subdivision (a), compensation that has been deferred shall be deemed "compensation earnable" when earned, ther than when paid."

ote-Stats 1993 ch 396 provides:

ECTION 1. The Legislature hereby finds and declares that the Legislature, in enacting this act, does not intend in any anner to affect Chapter 45 of the Statutes of 1992.

PETITIONERS' EXHIBIT 3 GOVERNMENT CODE, SECTION 31462

§ 31462. "Final compensation"

"Final compensation" means the average annual compensation earna-

ble by a member during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the three years immediately preceding his retirement. If a member has less than three years of service, his final compensation shall be determined by dividing his total compensation by the number of months of service credited to him and multiplying by 12.

Added Stats 1947 ch 424 § 1; Amended Stats 1951 ch 572 § 1; Stats 1969 ch 416 § 1.

Prior Law: Based on Stats 1937 ch 677 § 9 p 1899.

Amendments:

1951 Amendment: Added "during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect,".
1969 Amendment: Added the second sentence.

PETITIONERS' EXHIBIT 4 GOVERNMENT CODE, SECTION 31462.1

§ 31462.1. "Final compensation": Applicability of section

"Final compensation" means the average annual compensation earnable by a member during any year elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the year immediately preceding his retirement.

This section shall not be operative in any county until such time as the board of supervisors shall, by resolution adopted by a majority vote, make the provisions of this section applicable in such county. Added Stats 1970 ch 316 § 1.

PETITIONERS' EXHIBIT 5 ORANGE COUNTY BOARD OF SUPERVISORS' RESOLUTION 90-1551

RESOLUTION OF THE BOARD OF SUPERVISORS OF ORANGE COUNTY, CALIFORNIA

December 18, 1990

On motion of Supervisor Roth, duly seconded and carried, the following Resolution was adopted:

BE IT RESOLVED this Board does hereby adopt the provisions of Government Code Section 31460.1 pertaining to the definition of Compensation in the County Employees Retirement Law of 1937, effective January 1, 1991.

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JAMES MORELL 0372

Chairman of the Board of Supervisors

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

CINDA D. RUTH

Clerk of the Board of Supervisors

of Orange County, California

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COUNTY COUNT

AYES: SUPERVISORS DON R. ROTH, GADDI M. VASQUEZ, ROGER R.

STANTON, HARRIETT M. WIEDER AND THOMAS F.

RILEY

NOES: SUPERVISORS NONE

ABSENT: SUPERVISORS NONE

STATE OF CALIFORNIA

COUNTY OF ORANGE

I, LINDA D. RUTH, Clerk of the Board of Supervisors of Orange County, California, hereby certify that the above and foregoing Resolution was duly and regularly adopted by the said Board at a regular meeting thereof held on the 18th day of December, 1990, and passed by a unanimous vote of said Board members present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 18th day of December, 1990.

Clerk of the Board of Supervisors of Orange County, California

JAMES MORELL_0373

PETITIONERS' EXHIBIT 6 ORANGE COUNTY ATTORNEY UNIT MEMORANDUM OF UNDERSTANDING

PETITIONERS' EXHIBIT 7 ORANGE COUNTY PERSONNEL & SALARY RESOLUTION

PETITIONERS' EXHIBIT 8 ORANGE COUNTY BOARD OF RETIREMENT FEBRUARY 6, 1998, RESOLUTION

Resolution No. 98-001 lopted by the Board of Retirement rebruary 6, 1998, Board Meeting

BOARD OF RETIREMENT ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

RESOLUTION

- Subject: Action of the Board of Retirement With Regard to Implementing the Ventura Decision
- WHEREAS. On October 1, 1997, the decision of the California Supreme Court in the case. Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County Employees' Retirement Association (1997) 16 Cal.4th 283 ("Ventura") became final.
- WHEREAS. The Supreme Court in Ventura mandated a change in the method for calculating pension benefits for members and their beneficiaries by retirement systems governed by the County Employees Retirement Law of 1937 ("CERL").
- WHEREAS. On November 18, 1997, the Board of Retirement ("Board") of the Orange County Employees Retirement System ("OCERS") established an Ad Hoc Committee of the Board to analyze Ventura and its effect on the retirement system, and to make recommendations to the Board for implementing the mandate of the Supreme Court.
- ITHEREAS. The Ad Hoc Committee analyzed Ventura, retained the services of independent legal counsel, its actuary and other advisors, conducted a series of open public hearings to consider the impact of Ventura on the retirement system, its members and their beneficiaries, the County of Orange and other plan sponsors, and adopted its Recommendations to this Board on January 21, 1998.
- "Compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retiring members, pursuant to Sections 31460, 31461, 31462 and 31462.1 of the Government Code.
- WHEREAS. The Board of Retirement finds that the proper exercise of its statutory duties under the Government Code requires it to prevent the improper manipulation of compensation for purposes of determining compensation earnable, and to avoid the artificial inflation of pension benefits.
- WHEREAS, After considering all of the information available to the Board, the Recommendations of the Ad Hoc Committee, and exercising its judgment in the matter.
- RESOLVED, (A) That the Board hereby adopts the following policies and guidelines, which shall be separate from the Board's Bylaws and the Board's Regulations:

lopted by the Board of Retirement ebruary 6, 1998, Board Meating

1. Elements to be Included in "Compensation Earnable". Remuneration earned and receivable in cash (under applicable MOU) to the retiring employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be included in "compensation earnable", including but not limited to the following items of compensation, and others substantially similar to them:

Base Salary and Wages
Bilingual Premium Pay
Educational Incentive ("POST") Pay
Aircraft Rescue Firefighting
Paramedic Pay
Motorcycle Bonus
Emergency Dispatch Pay
Field Training Officer Bonus
Shift differential pay
Confined Space Pay
Longevity Incentive
Automobile Allowance (paid in cash or to extent
automobile provided for personal use and
declared as income)

Uniform Allowance

Uniform Maintenance Allowance

Payoffs of Vacation and Sick Leave and Holiday to the extent earned (pro-rated on a monthly basis), not taken as time off and permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually cashed-out

Employee Contributions to Deferred Compensation
Plan

"Overtime" required to be worked that is ordinarily worked by others in same grade/class/rate of pay

Compensatory Time (if not excluded as "true overtime" (see definition in section 2) and to the extent in excess of minimum required reserve)

"Madera" Pay

Additional Compensation for Scheduled Meal Periods

Flexible Benefits ("Cafeteria Plan") to the Extent paid in Cash (applicable to members retiring before January 1, 1991)

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Resolution No. 98-001 opted by the Board of Retirement ebruary 6, 1998, Board Meeting

Elements to be Excluded From "Compensation Earnable". Remuneration or other value to the employee neither earned or payable in cash to the employee during the final compensation period for working the ordinary time required of other employees in the same grade/class shall be excluded from "compensation earnable", including but not limited to the following items, and others substantially similar to them:

True Overtime (amounts paid for working in excess of the time required and ordinarily worked by others in the same grade/class.)

Employer Contributions to Deferred Compensation
Plan

Employer Contributions to Retirement System
Employer "Pick-up" of Employee Contributions to
Retirement System

Payoffs of Vacation and Sick Leave and Holiday
Pay, to the extent neither earned nor permitted
to be cashed-out under the applicable MOU,
regardless of when actually cashed-out

Flexible Benefits ("Cafeteria Plan") provided in-kind Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991

Terminal ("Final") Pay, to the extent not included per Sec. 1, above

Expense Reimbursements

In-kind Advantages (e.g., food, lodging, board, laundry, fuel)

Fees, Licenses, Memberships provided to member by the employer

Calculation of "Compensation Earnable".

The retiring employee's compensation shall be "regularized" to what would have been received had the employee been paid for a normal work schedule during the Final Compensation Period. The Board shall calculate "compensation earnable" by creating a fraction, the numerator of which is the amount of the employee's qualifying compensation and the denominator of which is the number of ordinary work hours for which the employee was actually paid. The Board shall multiply that fraction by the number of paid hours ordinarily required to be worked by others in the same grade/class. The result shall be the retiring employee's "compensation earnable" for the Tipe Compensation Period.

Pesciution No. 98-001 pted by the Board of Retirement represent 6, 1998, Board Meeting

4. Application of Policies and Guidelines.

The Board shall apply these policies and guidelines to all benefit payments to members and their beneficiaries due on and after October 1, 1994, as requested by members retiring before October 1, 1997, and automatically for all members retiring thereafter.

Changes in Contribution Rates.

The Board shall calculate on an actuarial basis the effect on the retirement system of any increases in anticipated final compensation going forward, and shall adopt appropriate adjustments to employer and employee contribution rates effective July 1, 1998.

3. Arrears Contributions of Active Members.

The Board shall determine the shortfall, if any, in (1) each active member's Member Contribution Account, and, (2) in the future, the Member Contribution Account of each prior member returning to active status who wishes to purchase prior service. Effective July 1, 1998, the Board shall collect the shortfall by a lump-sum payment from a member, or through an extended payment program amortizing the shortfall over a period not to exceed five years. Any member who is allowed to extend the payment of arrears contributions must agree to toll the statute of limitations provided for in California Code of Civil Procedure section 338(d), as it applies to Board recovery of arrears contributions, during the period of any such extension (such agreement shall survive any revocation of the extension).

Interim Retirees' Final Compensation Period.

The Board shall permit all members retiring during the period October 1, 1997 through February 10, 1998 to redesignate their Final Compensation Period by no later than March 31, 1998.

Arrears Contributions of Retirees.

To the extent there is a shortfall in a retiree's Member Contribution Account, the Board shall collect the shortfall from the member, either by payment in full, through a voluntary assignment and offset from the retiree's past-due benefits, or through an extended payment program requiring full application of the amount of the past-due benefit check payable plus not less than 2/3 of the increase in the amount of each future benefit payment until the full arrears contribution has been satisfied. Payment or satisfactory arrangement for payment of arrears contributions there are shall be a condition precedent to the payment of any increased benefit payment are tiree.

Resolution No. 98-001 lopted by the Board of Retirement abruary 6, 1998, Board Meeting

9 Claims Procedure for Retirees; Recalculation of Benefits and Contributions.

The Board hereby directs the Administrator to establish a claims procedure for all existing retirees who wish to make a claim, for the purpose of facilitating adjustment of their monthly pension benefits. The Board shall offer the retirees the opportunity to have their final compensation recalculated, and have the Board calculate both the additional benefits, plus interest, due to them and the additional contributions, plus interest, that the Board must collect from them before they are entitled to receive the increased benefits. Adjustments in benefit payments due to retirees shall be paid as of July 1, 1998 or as soon thereafter as the retiree's claim can be processed.

10. Tolling of Statute of Limitations.

To the extent that a three-year period of limitations for commencing legal action under Section 338(a) of the California Code of Civil Procedure shall be applied to the claims of any member or member's beneficiaries concerning the calculation of such member's compensation earnable under these policies and guidelines, the Board hereby agrees to toll (suspend) the running of such period of limitations for the period October 1, 1997 to through June 30, 1998. After June 30, 1998, the running of the period of limitations shall recommence.

Member and Sponsor Education.

The Board shall make available to all members and plan sponsors these policies and guidelines, together with examples of how these policies and guidelines affect the pension benefits of typical members and their beneficiaries.

RESOLVED, (B) That this Resolution shall be effective immediately upon adoption.

the Orange County Employees Retirement System made and adopted this Resolution.

Raymond A. Fleming, Secretary to the

Board of Retirement

Orange County Employees Retirement System

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PETITIONERS' EXHIBIT 9 GOVERNMENT CODE, SECTION 20636, SUBD. (G)(4)(F)

- monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same grot class of employment and at the same rate pay, and is composed of the payrate and special compensation of the member. The computation for any sence of a member shall be based on the compensation earnable by him or her at the beginning of the absence and that for time prior to entering state service shall be based on the compensation earnable by him or her in that state service.
- (2) Notwithstanding subdivision (b), "payrate" for state members means the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. "Payrate" for state members shall include:
- (A) Any amount deducted from a member's salary for any of the following:
- (i) Participation in a deferred compensation plan established pursuant to Chapter 4 (commencing with Section 19993) of Part 2.6 * * * .
- 26 of the United States Code.
- Title 26 of the United States Code.
- ie Participation in a flexible benefits program.
- B: Any payment in cash by the member's employer to one other than an employee for the purpose of purchasing an annuity contract for a member under an annuity plan that meets the requirements of Section 403(b) of the Internal Revenue Code.
- C. Employer "pick up" of member contributions that meets the requirements of Section 414(h)(2) of Title 26 of the United States Code.
- D) Any disability or workers' compensation payments to safety members in accordance with Section 4800 of the Labor Code.
- (E) Temporary industrial disability payments pursuant to Article 4 (commencing with Section 19869) of Chapter 2.5 of Part 2.6.
- (F) Any other payments the board may determine to be within "payrate."
- (3) Norwithstanding subdivision (c), "special compensation" for state members shall mean all of the following:
- (A) The monetary value, as determined by the board, of living quarters, board, lodging, fuel, laundry, and other advantages of any nature furnished a member by his or her employer in payment for the member's services.
- (B) Any compensation for performing normally required duties, such as holiday pay, bonuses (for duries performed on regular work shift), educational incentive pay, maintenance and noncash payments, out-of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, POST certificate pay, and split shift differential.
- (C) Compensation for uniforms, except as provided in Section 20632.
- (D) Any other payments the board may determine to be within "special compensation."
- (4) Neither "payrate" nor "special compensation" for state members shall include any of the following:
- (A) The provision by the state employer of any medical or hospital service or care plan or insurance plan for its employees (other than the purchase of annuity contracts as described below in this subdivision), any contribution by the employer to meet the premium or charge for such a plan, or any payment into a private fund to provide health and welfare benefits for employees.
- (B) Any payment by the state employer of the employee portion of taxes imposed by the Federal Insurance Contribution Act.
- (C) Amounts not available for payment of salaries and that are applied by the employer for the purchase of annuity contracts including those that ment the requirements of Section 403(b) of the Internal Revenue Code.
- (D) Any benefits paid pursuant to Article 5 (commencing with Section 19878) of Chapter 2.5 of Part 26.

- (E) Employer payments that are to be credited as employee contributions for benefits provided by the system, or enloyer payments that are to be credited to enloyer accounts in deferred compensation plans provided, to the amounts deducted from a member's work of participation in a deferred compensation plan shall not be considered to be "employer payments."
- (F) Payments for unused vacation, sick leave, or compensating time off, whether paid in lump sum of otherwise.

(G) Final settlement pay.

(H) Payments for overtime, including pay in lieu of vacation or boliday.

- (I) Compensation for additional services outside regular duties, such as standby pay, callback pay, cour duty, allowance for automobiles, and bonuses for duties performed after the member's regular work shift
 (I) Amounts not available for payment of salaries and which are applied by the employer for any of the following:
- (i) The purchase of a retirement plan which meets the requirements of Section 401(k) of Title 26 of th United States Code.
- (ii) Payment into a money purchase pension plan and trust which meets the requirements of Section 401(a of Title 26 of the United States Code.
- (K) Payments made by the employer to or on behalf of its employees who have elected to be covered by flexible benefits program, where those payments reflect amounts that exceed the employee's salary.

(L) Any other payments the board may determine are not "payrate" or "special compensation."

- (5) If the provisions of this subdivision, including the board's determinations pursuant to subparagraph (F of paragraph (2) and subparagraph (D) of paragraph (3), are in conflict with the provisions of memorandum of understanding reached pursuant to Section 3517.5 or 3560, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of memorandum of understanding require the expenditure of funds, those provisions shall not become effective unless approved by the Legislature in the annual Budget Act. No memorandum of understanding reached pursuant to Section 3517.5 or 3560 may exclude from the definition of either "payrate" or "special compensation" a member's base salary payments or payments for time during which the member is excuse from work because of holidays, sick leave, vacation, compensating time off, or leave of absence. If any item of compensation earnable are included by memorandum of understanding as "payrate" or "special compensation" for retirement purposes for represented and higher education employees pursuant to the paragraph, the Department of Personnel Administration or the Trustees of the California State University shall obtain approval from the board for that inclusion.
- (6) (A) Subparagraph (B) of paragraph (3) of this subdivision prescribes that compensation earnab includes any compensation for performing normally required duties, such as holiday pay, bonuses (for duties performed on regular work shift), educational incentive pay, maintenance and noneash payments, ou of-class pay, marksmanship pay, hazard pay, motorcycle pay, paramedic pay, emergency medical technician pay, PQST certificate pay, and split shift differential; and includes compensation for uniforms, excert as provided in Section 20632; and subparagraph (I) of paragraph (4) excludes from compensation earnab compensation for additional services outside regular duties, such as standby pay, callback pay, court durishwance for automobile, and bonuses for duties performed after regular work shift.
- (B) Notwithstanding subparagraph (A) of this paragraph, the Department of Personnel Administratic shall determine which payments and allowances that are paid by the state employer shall be considere compensation for retirement purposes for any employee who either is excluded from the definition of staemployee in subdivision (c) of Section 3513, or is a nonelected officer or employee of the executive branc of government who is not a member of the civil service.
- (C) Notwithstanding subparagraph (A) of this paragraph, the Trustees of the California State Universishall determine which payments and allowances that are paid by the trustees shall be considered compensation for retirement purposes for any managerial employee, as defined in subdivision (1) of Section 3562, supervisory employee as defined in Section 35803.

Added Stats 1993 ch 1297 § 6 (SB 53), operative July 1, 1994, as Gov C § 20023. Repealed Stats 1995 ch 379 § 1 (S 541). Amended Stats 1995 ch 829 § 10 (SB 791), ch 830 § 1 (SB 159) (ch 830 prevails). Amended and renumbered Stats 1996 ch 906 § 3 (SB 1859).

Editor's Notes—State 1995 ch 379 § 6 contains a prevail clause. The amendment of Gov C § 20023 (2nd of 2) preva over ch 379's restractment of Gov C § 20023 as Gov C § 20636.

Former Sections

Former § 20636, similar to the present section, was added State 1995 ch 379 § 2 and repealed State 1996 ch 906 § 73.

1995 Amendments (1) Added ", and as limited by Section 21752.3" in subd (a): (2) added the second sentence of su (c)(2); (3) added "full" in subd (c)(4): (4) added subdivision designations (e)(1) and (e)(2); and (5) submittant m job duties" for "job similarities" in the first sentence of subd (e)(1); and (6) deleted "of Division 5" at the end of subb (a)(2)(E). (As amended State 1995 ch 830, compared to the section as it read prior to 1995. This section was also attend by an earlier chapter, ch 829. See Goy C 8 9605.)

by an earlier chapter, ch 829. See Gov C § 9605.)

1996 Amendment: (1) Substituted "Section 21752.5" for "Section 21752.3" in subd (a); (2) substituted "Section 2069 for "Section 20615" in subd (c)(4); (3) substituted "Section 2011 et seq. of Title 29 of the United States Code" for "Fair Labor Standards Act (29 U.S.C. Sees. 201-219), inclusive" in subd (c)(6); (4) amended subd (g) by (a) deleting Division 5 of Title 2" at the end of subd (g)(2)(A)(i); (b) substituting "Title 26 of the United States Code" for "the Internet Code" wherever it appears; and (c) substituting "Section 20632" for "Section 20022.1" in subds (g)(3)(C) a (g)(6)(A).

PETITIONERS' EXHIBIT 10 GOVERNMENT CODE, SECTION 20630

4 20630. "Compensation"

As used in this per compensation means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member's services performed during normal working hours or for time during which; the member is serviced from work because of: holldays; sick leave; industrial disability leave, during which; the personant to Sections 4800 and 4850 of the Labor Code or Article 4 (commencing with Section 2.5 of Part 2.6; vacation; compensatory time off; or leave of absence. When a reported to the board, the employer shall identify the pay period in which the compensation of the payment of

State Service

\$ 75.50 semilar to present Gov C § 20710, was added State 1945 ch 123 § 1, amended State 1949 ch 298 § 17, 200 ch 200 § 1. State 1961 ch 1000 § 3, operative October 1, 1961, State 1974 ch 1177 § 2, effective September 23, 200 cm 1572 cm 258 § 1, and repealed State 1993 ch 379 § 1.

Dervation

Factor: Gov C \$ 200722, as added State 1993 ch 1397 § 2.

955 ch 379 provides:

\$\frac{\pi}{200}\$ is the intent of the Legislature in enacting this act to reorganize the Public Employees' Retirement Law and the internal Revenue Code Compliance and Replacement Benefit Program in order to facilitate administration. It is not the Legislature to make any substantive change in the law. Thus, if, in the opinion of any court or administrative radicer, a different result under any provisions of Part 3 (commencing with Section 20000), or Part 3.4 (commencing with Section 21750) of Division 5 of Title 2 of the Government Code as read on December 31, 1995, would occur because if the enactment of this act, the provisions as read on December 31, 1995, shall be followed and the result shall be us to would have been on December 31, 1995. Further, it is the intent of the Legislature that no new or additional rights vest or any member, retired person, or beneficiary of a member as a result of the enactment of this act. No provision of this act may be interpreted to vest any new or additional right. No current or future benefit under this act shall be revised in any way because of this act.

PETITIONERS' EXHIBIT 11 GOVERNMENT CODE, SECTION 20636

- § 20636. Compensation carnable by retirement system member
- (a) "Comp tion earnable" by a member means the pr 'e and special compensation of the member. defined by divisions (b), (c), and (g), and as limited by section 24752.5.
- (b) (1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similar situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours. "Payrate" for a member who is not in a group or class means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules. If services rendered on a full-time basis during normal working hours, subject to the limitations of paragragical of subdivision (e).
- (2) The computation for any leave without pay of a member shall be based on the compensation earnal by him or her at the beginning of the absence.
- (3) The computation for time prior to entering state service shall be based on the compensation earnal by him or her in the position first held by him or her in state service.
- (c) (1) Special compensation of a member includes any payment received for special skills, knowledge abilities, work assignment, workdays or hours, or other work conditions.
- (2) Special compensation shall be limited to that which is received by a member pursuant to a labor polior agreement or as otherwise required by state or federal law, to similarly situated members of a group class of employment that is in addition to payrate. If an individual is not part of a group or class, specicompensation shall be limited to that which the board determines is received by similarly situated membein the closest related group or class that is in addition to payrate, subject to the limitations of paragrat (2) of subdivision (e).
- (3) Special compensation shall be for services rendered during normal working hours and, when report to the board, the employer shall identify the pay period in which the special compensation was earned.
- (4) Special compensation may include the full monetary value of normal contributions paid to the box by the employer, on behalf of the member and pursuant to Section 20691, provided that the employer labor policy or agreement specifically provides for the inclusion of the normal contribution payment compensation earnable.
- (5) The monetary value of any service or noncash advantage furnished by the employer to the membe except as expressly and specifically provided in this part, shall not be special compensation unless regultions promulgated by the board specifically determine that value to be "special compensation."
- (6) The board shall promulgate regulations that delineate more specifically and exclusively what constitut "special compensation" as used in this section. A uniform allowance, the monetary value of employed provided uniforms, holiday pay, and premium pay for hours worked within the normally scheduled regular working hours that are in excess of the statutory maximum workweek or work period applicate to the employee under Section 201 et seq. of Title 29 of the United States Code shall be included as specimpensation and appropriately defined in those regulations.
- (7) Special compensation does not include any of the following:
- (A) Final settlement pay.
- (B) Payments made for additional services rendered outside of normal working hours, whether paid lump sum or otherwise.
- (C) Any other payments the board has not affirmatively determined to be special compensation.
- (d) Norwithstanding any other provision of law, payrate and special compensation schedules, ordinand or similar documents shall be public records available for public scruting.

PETITIONERS' EXHIBIT 12 GOVERNMENT CODE, SECTION 31460.1

§ 31460.1. Repealed by Stats.1992, c. 45 (S.B.193), § 1, eff. May 11, 1992

Historical and Statutory Notes

The repealed section, added by Stats.1990, c. 142 (A.B. 3146), § 1, provided:

"'Compensation' shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [so in chaptered copy] their employees' sala-

This section shall not be operative in any county until the time the board of supervisors shall, by resolution storted by a majority vote, makes (sic) this section applicable in that county."

ARTICLE VIL

SECVEUSSEMENT EROGRAMS

Section : Maiaza Felchussement

- A. Subject to the current Vehicle Rules and Regulations established by the Board, an employee who is authorized to use a private automobile in the performance of duties shall be paid thirty-nine (39) dence per mile for mileage private ciring each monthly period.
- 3. At employed who is required by the County to furnish a privately owned vehicle for the performance of his or her makes small receive a minimum of ten (10) dollars in any month in which the actual mileage reimbursement would missive be less than ten (10) dollars. The minimum small are apply in any month:
 - 15 which the employee has not accually worked eighty 500 hours:
 - Inless the employee claims the ten (10) dollar minimum and the department certifies that the employee was required to use a privately owned vehicle on County business.

Section 2. Personal Property Reimbursement

Employees shall, in proper cases, be reimbursed for the regain or replacement of personal property damaged in the line of duty without fault of the employee. The amount of reimbursement for articles of clothing shall be the repreciated value based on the age and condition of the stricle. Reimbursement for a watch shall be limited to the functional value of the watch.

Section 3. Bar Fees

The County shall reimburse employees for the 1994, 1995 and 1996 California and Orange County Bar fees provided such employees are on the payroll on January 1, 1994, 1995 and 1996 respectively. Extra help employees who become regular during the bar year are eligible for bar fee reimbursement for that bar year.

Section 4. Attorney Optional Benefit Plan

A. An Attorney Optional Benefit Plan will be available in each year of the contract period. During 1993-94, it shall be effective beginning June 25, 1993 and ending June 23, 1994. During 1994-95, it shall be effective beginning June 24, 1994 and ending June 22, 1995. During 1995-96, it shall be effective beginning June 23, 1995 and ending June 20, 1996.

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B. Eligibility: A full-time regular, probationary or limited-term attorney is eligible to receive the Attorney Optional Benefit provided he or she is continuously employed in a regular full-time capacity in a designated class in the Attorney Unit. Actorneys working in a job-sharing assignment in full-time regular, probationary and limited-term positions will be eligible to receive the Attorney Optional Benefit in proportion to each employee's regularly scheduled hours.

Attracteys hired or promoted into the Attorney Unit after the commencement of a plan will be eligible for the Eptimal Benefit on a pro-rate basis the first day of the mind following the twenty-eighth (28th) day in a mesignated class in the Attorney Unit.

Attrineys, while on leave of absence, are not eligible to inter eligible expenses or to continue receiving the menefit on a pro-rata basis. When employees return from leave of absence, the benefit shall be provided as previously selected except that the pro-rata share of the benefit forfeited while on leave of absence may not be recaptured. The Attorney Optional Benefit will be pro-rated the first day of the month from the date they return to work on a full-time basis.

- Eligible attorneys shall be reimbursed for documented claims at the amount provided for Administrative Management employees with a minimum of fourteen hundred (1400) dollars and a maximum of fifteen hundred (1500) dollars from June 25, 1993 to June 23, 1994; during the benefit year 1994-1995; and during the benefit year 1995-96 for expenses incurred during the benefit year for any of the following items:
 - membership fees of job-related and professional organizations whose primary purpose is not collective bargaining (employee only);
 - professional conferences (employee only), including fees and other expenses incurred while accending;
 - health/accidental:
 - a. health programs (employee and/or dependents) such as stop smoking, stress reduction and physical, mental and/or emotional health related counseling for individual and/or family, not covered or partially covered through existing plans;
 - b. insurance premiums (employee and/or dependents) including employee share of payments to health plans available through the County. Also includes payment of Accidental Death and Dismemberment and disability coverage for employee and dependents available through the County;
 - health care (employee and/or dependents) includes uncovered or partially covered care ATT-38

available tarough extaning place. Also includes deductiones and eye care, lenses and frames.

- 4. legal and journals and periodicals (employee only);
- E. cssn:
- 2. Eligible Attorneys must allocate their benefic prior to receiving benefits. An employee who does not submit an Intent to Participate form prior to the effective date of the plan, shall receive a prorated benefit based on the months of eligibility remaining following the employees submission of the Intent to Participate form. Once this form is submitted, an employee may not change his allocation unless there has been a change in the family status through marriage, divorce, birth, or lessh of a spouse, child, or other dependent.
- The Director of Personnel shall administer the plan. The Director of Personnel shall notify the Auditor-Controller in writing of payments to be made to or in behalf of employees. Such notification shall constitute authorization for the Auditor-Controller to make payments.
 - F. The Personnel Director shall establish periods during and immediately following the contract year to pay reimbursement claims. The filing period immediately following the contract year will be, at a minimum, the remaining days in July. Any unclaimed portion of the Attorney Optional Benefit Plan shall remain County funds.
- G. Claims shall be made on forms provided by the County on which the claimant declares the category of service received as defined in the plan, the dates the expenses were incurred by the claimant or eligible dependents, by whom service was provided and the amount being claimed. The Auditor-Controller shall pay claims submitted with a declaration under penalty of perjury signed by the claimant, and approved by the Personnel Director. The Personnel Director will approve for payment only those claims which are accompanied by evidence of the sligible expense.

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PETITIONERS' EXHIBIT 14 REPEALING LEGISLATION TO SECTION 31460.1

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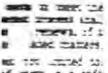
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1-1992 REGULAR SESSION

Ch. 45

This section shall remain in effect only until January 1, 1998, and as of that date is repeated. Shaes a later enacted statute, which is enacted before January 1, 1998, deletes or extends that date.

SEC 3 Section 2:516 in added to the Vehicle Code, to read:

217.6 Except as provided in Section 21115.1, no person shall operate a golf cart on any negroup except in a speed zone of 25 miles per hour or less.

The second second operative on January 1, 1998.

PUBLIC EMPLOYEES—RETIREMENT—EXCLUSIONS FROM COMPENSATION

CHAPTER 45

S.B. No. 193

AN ACT to repeal Section 31460.1 of the Government Code, relating to public employees, and declaring the argency thereof, to take effect immediately.

(Approved by Governor May 8, 1992.)

(Filed with Secretary of State May 11, 1992.)

LEGISLATIVE COUNSEL'S DIGEST

SB 193. C. Green. County employees: retirement: compensation.

A provision of the County Employees Retirement Law of 1937, which is optional to counties, excludes from the term "compensation," employer payments made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts which exceed their employees' salaries.

This bill would repeal that section and make related legislative findings and declara-

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 31460.1 of the Government Code is repealed.

SEC. 2. Nothing in this act is intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code, prior to the effective date of this act.

SEC. 3. The Legislature hereby finds and declares that:

(1) The County Employees Retirement Law has, since its original ensemment in 1937 by Chapter 677 of the Statutes of 1937, conferred upon the county retirement boards the duty and power to determine which of the items of compensation paid to county employees who are members of the county retirement associations or systems would constitute "compensation earnable," which, in turn, generally determines the amounts of the retirement allowances of retiring members (see Guelfi v. Marin County Employees' Retirement Asso., 145 Cal.App.3d 297 at pages 303, 305, and 307 fn.).

(2) It was in this setting that Chapter 142 of the Statutes of 1990 (Assembly Bill 3146 of the 1989-90 Regular Session) was enacted. That chapter added to the County Employees Retirement Law of 1937, Section 31460.1 of the Government Code. That section would apply to a county only if and when the board of supervisors elects to make the section applicable to the county. Section 31460.1 excludes from the term "compensation" employer payments made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts which exceed their employees' salaries.

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Ch. 45

STATUTES OF 1992

(3) Section 31460.1 has been erroneously construed as implicitly requiring counties maintaining retirement systems under the 1937 act to include in "compensation" those flexible benefits payments until the board of supervisors elect pursuant to that section to exclude those flexible benefits payments from "compensation.

(4) That interpretation was not intended by the Lagislature when it enacted that section. Had that been the intent of the Legislature when it anacted Assembly Bill 3146. it would have been a substantial departure from the long-standing practice of the Legislature of not intruding into the county decisionmaking process regarding compensation determinations with respect to those county retirement systems (see Sections 31460. and following, Government Code).

(5) Moreover, had that been the intent of the Legislature when it enacted that section, any resulting increased costs to affected counties would have constituted state-reimbursable, state-mandated local program costs and Assembly Bill 3146 would have included in its text the determination of the Legislature of how the state should respond to the resulting state-mandated local program costs. Assembly Bill 3145, however, did not, in its text. contain any such legislative determination.

(6) It was the intent of Assembly Bill 3146 merely to accord to each county board of supervisors, at its option, the power either to preclude its county retirement board from including those flexible benefits payments in "compensation," if the county retirement board had not previously taken such action, or to supersede any previous decision of their county retirement board to include those flexible benefits payments in "compensation."

(7) In order that the source of misconstruction of legislative intent regarding the enactment of Section 31460.1 of the Government Code may be eliminated at the earliest possible time, and that any county actions taken on the basis of that misconstruction may be reversed or terminated at the earliest possible time, the Legislature finds that it is necessary to repeal Section 31460.1 of the Government Code.

(8) Any reversal or termination on or after the effective date of this act, of county actions taken on the basis of misconstruction of the intent and meaning of Section 31460.1 of the Government Code would merely restrict county employees to those gains reasonably to be expected from their county retirement contracts and withhold unforeseen and windfall advantages which bear no relation to the fundamental theory and objective of the county retirement systems maintained pursuant to the County Employees Retirement Law of 1937 and would therefore, not constitute an unconstitutional impairment of the county retirement contract (see Allen v. Board of Administration, 34 Cal.3d 114, at pages 119-120, 122, and 124),

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that the source of misconstruction of legislative intent regarding the enactment of Section 31450.1 of the Government Code may be eliminated at the earliest possible time through the repeal of that section, it is necessary that this act take effect immediately.

FAMILY LAW-CHILD SUPPORT-GUIDELINES

CHAPTER 46

S.B. No. 370

AN ACT to amend the heading of Chapter 2 (commencing with Section 1720) of Title 5 of Part 5 of Division 6 of, to repeal and add Sections 1720, 1721, and 1722 of, and to repeal Sections 246, 4720.1, 4720.2, 4723, 4724, 4725, 4727, 4728, 47283, 1739, and 1738 of, the Civil Code, relating to child support, and declaring the segency thereof. In take effect immediately. (Approved by Governor May ft. 1992.)

[Filed with Secretary of State May 11, 1992.]

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AMES MORELL 0396

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PETITIONERS' EXHIBIT 15 MOU, ARTICLE V

ARTICLE V

VACATION

Secimulation of Vacation

- A few amployee in a full-time regular or limited-term position shall earn eighty (80) hours of vacation when the employee has accumulated two thousand eighty (2080) regularly scheduled paid hours. The employee shall earn a second eighty (80) hours of vacation when he or she has accumulated four thousand one hundred sixty (4160) regularly scheduled paid hours and a third eighty (80) nours vacation when he or she has accumulated six incusand two hundred forty (6240) regularly scheduled paid hours. The employee shall in addition earn .0193 hours of vacation for each hour of pay during the regularly scheduled workweek. Such additional credit shall be applied to the vacation accumulation account only upon completion of each pay period, with no credit to be applied during the progress of any pay period or for any portion of a pay period during which the employee terminates County service.
- S. After an employee in a regular or limited-term position has been paid for six thousand two hundred forty (6240) regularly scheduled hours, the employee shall earn .077 hours of vacation for each hour of pay during his or her regularly scheduled workweek (approximately four (4) weeks per year), but not to exceed credit for more than eighty (80) regularly scheduled hours in any pay period. Such credit shall be applied to the vacation accumulation account only upon completion of each pay period with no credit to be applied during the progress of any pay period or for any portion of a pay period during which the employee terminates County service.
- C. Commencing with the pay period following that in which the employee completed ten (10) years of continuous fulltime County service, an employee in a regular or limitedterm position shall earn .0962 hours of vacation for each hour of pay during his or her regularly scheduled workweek (approximately five (5) weeks per year), under the same terms and conditions as for the prior rate of accrual.
- D. A new employee in a part-time regular or limited-term position shall earn pro rata vacation in fifty-two (52) week segments. At the conclusion of fifty-two (52) weeks of employment, the ratio of regularly scheduled hours paid to two thousand eighty (2080) shall be determined. The same ratio shall be applied to eighty (80) hours to establish the amount of vacation to be credited to the employee's account as of the conclusion of the pay period in which the fifty-two (52) week period ended. The employee shall in addition earn .0193 hours of vacation for each hour of pay during his or her regularly scheduled workweek. Such additional credit shall be

applied to the resetton accumulation account only upon completion of each day period, with no credit to be placed to be progress of any pay period or for any set a day period during which the employee complete today service.

elicable vacation credit at any one (1) time for a filture employee with less than ten (10) years of the first inuous service shall be three hundred fill hours or a prorated amount equal to eight for allowable vacation for part-time employees. The filture employee with ten (10) or more years of full-time employee with ten (10) or more years of full-time employee with ten (10) weeks of vacation a first and amount equal to ten (10) weeks of vacation first time employees.

Series General Provisions

- in more than eighty (80) hours of paid time may be restited toward accumulation of vacation credit in any pay period.
- aforementioned ten (10) years (Article V, Section 1.C. and F.2.) of full-time County service to be postponed a number of calendar days equal to the Official Leave.
- When an employee's County service consists of part-time regular service or a combination of full-time regular and part-time regular service, both periods of service shall apply towards the required (10) years (Article V, Section 1.C. and F.) of County service, with the part-time service being applied proportionately to the appropriate full-time interval.
- Additional vacation earned during the period of vacation may be taken consecutively.
- E. In any use of vacation, an employee's account shall be charged to the nearest quarter hour.
- F. Vacation shall be scheduled for employees by their department; however, consideration shall be given to effectuating the wishes of those employees requesting specific vacation periods.
 - G. No scheduled vacation will be cancelled except in cases of emergency.
- H. Illness while on paid vacation will be charged to Sick Leave rather than vacation only under the conditions specified in Article IV, Section 1.B.5.
- I. No employee shall be permitted to work for compensation for the County in any capacity during the time of his or her paid vacation from the County service except as a

ATT-32 179/965 Fire Emergency Sheriff - Emergency Sheriff - Emergency States States Officer or Election Night Reip.

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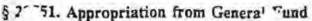
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Tiring each fiscal year, an amployee may request to be paid for account vacation in either two (2) separate increments of forty (40) hours each or one (1) increment of eighty (80) hours.

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PETITIONERS' EXHIBIT 16 GOVERNMENT CODE, SECTION 20751



From the General Fund in the State Treasury there is appropriated semiannually, six months in arrears, on January 1 and July 1 of each fiscal year, to the Retirement Fund the state's contribution for:

- (a) All state miscellaneous members and all other categories of members whose compensation is paid from the General Fund.
- (b) All university members whose compensation is paid from funds of, or funds appropriated to, the university.
- (c) All state miscellaneous members who are employed by the Department of Education or the Department of Rehabilitation and whose compensation is paid from the Vocational Education Federal Fund, the Vocational Rehabilitation Federal Fund, or any other fund received, in whole or in part, as a donation to the state under restrictions preventing its use for state contributions to the retirement system.

(d) All state miscellaneous members whose compensation is paid from the Senate Operating Fund or the Assembly Operating Fund or the Operating Funds of the Assembly and Senate.

Added Stats 1945 ch 123 § 1. Amended Stats 1949 ch 1215 § 2.7; Stats 1951 ch 1543 § 2. effective October 1, 1951; Stats 1953 ch 1745 § 1; Stats 1955 ch 241 § 1; Stats 1959 ch 1848 § 5; Stats 1970 ch 346 § 29; Stats 1990 ch 463 § 3 (SB 1809), effective July 31, 1990; Stats 1992 ch 707 § 2 (SB 1107), effective September 14, 1992.

Amendments:

1949 Amendment: Added "and all other categories of members" in subd (a).

1951 Amendment: Added subd (d).

1953 Amendment: Added (1) "or funds appropriated to" in subd (b); and (2) subd (e).

1955 Amendment: Deleted "the Division of Architecture Fund" before "the Water"

1959 Amendment: Added (1) ", until July 1, 1960" in subd (d); and (2) the second sentence in subd (d).

1970 Amendment: (1) Added "or the Department of Rehabilitation" in subd (c); (2) added "Federal" wherever it appears in subd (c); (3) deleted former subd (d) which read: "(d) All state miscellaneous members whose compensation is paid from moneys in the Waters Resources Revolving Fund, where such moneys were derived from an appropriation from the General Fund, until July 1, 1960. On and after July 1, 1960, the provisions of Section 20752 shall apply to the State's contributions for such members."; (4) redesignated former subd (e) to be subd (d); and (5) added "or the Contingent Funds of the Assembly and Senate" in subd (d).

1990 Amendment: Substituted "Senate Operating Fund or the Assembly Operating Fund or the Operating Funds" for "Senate Contingent Fund or the Assembly." Contingent Fund or the Contingent Funds" in subd (d).

1992 Amendment: Substituted "semiannually, six months in arrears, on January I and July 1 of each fiscal year," for "quarterly" in the introductory clause of subd (a).

Historical Derivation:

Stats 1931 ch 700 § 108 p 1457, as amended Stats 1933 ch 473 § 22 p 1244, Stats 1935 ch 152 § 7 p 785, Stats 1937 ch 806 § 18 p 2288, Stats 4th Ex Sess 1940 ch 3 § 2 p 356.

Legislative funds and administration: Gov C §§ 9131 et seq.

General Fund: Gov C §§ 16300 et seq.

Transfer, to State Pay Roll Revolving Fund, of contributions required by this section: Gov C § 16391.1.

Federal contributions: Gov C §§ 20780 et seq. Vocational Education Federal Fund: Ed C §§ 12055 et seq. Vocational Rehabilitation Federal Fund: W & I C §§ 19075 et seq.

Collateral References:

Cal Jur 3d Pensions and Retirement Systems § 11.

Attorney General's Opinions:

State's contributions with respect to employees paid out of Postwar Employment Reserve as chargeable under this section to Reserve itself rather thanks General Fund. 19 Ops Atty Gen 184.

JAMES MORELL 0402

PETITIONERS' EXHIBIT 17 GOVERNMENT CODE, SECTION 20751.5



(a) Notwithstanding Section 20751, the state's contributions for the

1991-92 fiscal year for the members specified in Section 20751 shall t appropriated semiannually, on January 31, 1992, and June 30, 1992.

(b) The Legislature finds and declares that this section will not affer the soundness of the Public Employees' Retirement Fund, in that the change to semiannual payments is on a one-time basis and any resultin loss to that fund will be accounted for by increased employer contributions in subsequent years.

Added Stats 1991 ch 83 § 33 (AB 702), effective June 30, 1991.

PETITIONERS' EXHIBIT 18 GOVERNMENT CODE, SECTION 20828

M 008 3101 STEEFEL LEVITT FRI 15:07 FAI 415 788 2019 03/13/98 HARVEY L. LEIDERMAN (State Bar No. 55838) 1 LISA MARIA CARVALHO (State Bar No. 161420) DRANGE COUNTY SUPERIOR COURT ASHLEY K. ILANGWA (State Bar No. 185014) 2 A Professional Corporation MAR 1 3 1993 One Embarcadero Center, 30th Floor 3 San Francisco, California 94111 Telephone: (415) 788-0900 ALAN SLATER, Executive Officer Mark 4 Attorneys for Plaintiff
BOARD OF RETIREMENT OF
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 5 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 FOR THE COUNTY OF ORANGE 9 ADDIO CENTER - 10TH-08 - SAN FRANCISCO, CA 94111 fettybox: 415/78-0900 : Facalonde: 415/785-2019 10 BY FAX NO. 791315 BOARD OF RETIREMENT OF 11 ORANGE COUNTY EMPLOYEES RETTREMENT SYSTEM, a local 12 MEMORANDUM OF POINTS AND public entity, AUTHORITIES IN SUPPORT OF EX 13 PARTE APPLICATION TO ENJOIN OR, Plainniff, ALTERNATIVELY, TO CONSOLIDATE OTHER PENDING ACTION ONE EMBARCADENO CENTER-30TH JAN V. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF C.C.P. § 526(a)(6); C.C.P. § 1048(a) 16 ORANGE, a political subdivision of the State of California, and DOES 1-30,000, Date: March 16, 1998 17 Time: 4:00 p.m. inclusive. Place: Department 7 18 Defendants. 19 20 21 1. Why This Action was Filed' 22 Plaintiff Board of Retirement (the "Board") is the governing body of the Orange 23 County Employees Retirement System ("OCERS"), whose 25,000 members are active and 74 8 75 25 Fax 8 75 76 retired employees of Orange County and several public districts within the County. The Board The facts set forth herein are established in OCERS' Verified Complaint and in the accompanying 27 Declaration of Harvey L. Leiderman. 28 150 ANDUM OF POINTS AND AUTHORIDE 965

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HARVEY L. LEIDERMAN (State Bar No. 55838) 1 LISA MARIA CARVALHO (State Bar No. 161420) ASHLEY K. ILANGWA (State Bar No. 185014) 2 STEEFEL, LEVITT & WEISS A Professional Corporation 3 One Embarcadero Center, 30th Floor San Francisco, California 94111 4 Telephone: (415) 788-0900 5 Attorneys for Plaintiff BOARD OF RETIREMENT OF 6 ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 9 FOR THE COUNTY OF ORANGE ONE EMBARCADERO CENTER: 30TH E-JOR: SAN FRANCISCO, CA 94111 10 BOARD OF RETIREMENT OF NO. 791315 11 Telephone: 415/738-0900 - Pacsimile: 415/738-2019 ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local 12 public entity. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX 13 PARTE APPLICATION TO ENJOIN OR, Plaintiff. ALTERNATIVELY, TO CONSOLIDATE OTHER PENDING ACTION 15 JAN V. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF C.C.P. § 526(a)(6); C.C.P. § 1048(a) 16 ORANGE, a political subdivision of the State of California, and DOES 1-30,000, 17 Date: March 16, 1998 inclusive. Time: 4:00 p.m. Place: Department 7 18 Defendants. 19 20 21 1. Why This Action was Filed! 22 Plaintiff Board of Retirement (the "Board") is the governing body of the Orange 23 24 County Employees Retirement System ("OCERS"), whose 25,000 members are active and retired employees of Orange County and several public districts within the County. The Board 25 26 27 The facts set forth herein are established in OCERS' Verified Complaint and in the accompanying Declaration of Harvey L. Leiderman. 28 151 JAMES_MORELOROGOM OF POINTS AND AUTHOR THES

IN SUPPORT OF EX PARTE APPLICATION

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has the exclusive authority to administer the retirement system for the benefit of its members, their survivors and beneficiaries, under the provisions of the County Employees Retirement Law of 1937 (Government Code Secs. 31450, et seq.) ("CERL") and Article XVI, Section 17 of the California Constitution.

On October 1, 1997, the decision of the California Supreme Court in Ventura

County Deputy Sheriff's Association v. Board of Retirement of Ventura County, (1997) 16

Cal. 4th 483 ("Ventura") became final. Ventura mandated a method for determining employee retirement benefits that differed from the method previously utilized by the Board of Retirement. If applied to OCERS' members, Ventura would require a substantial increase in their individual retirement benefits. However, Ventura was silent as to whether and to what extent the ruling was to apply to CERL-governed counties other than Ventura County.

Accordingly, in November 1997, the Board established a careful and painstaking procedure for analyzing Ventura and other applicable retirement laws, conducting public hearings to consider its impact and developing a method for implementing its mandate, if applicable to OCERS.

On February 6, 1998, the Board conducted a duly noticed, open public meeting to discuss and act upon a resolution implementing Ventura in Orange County and to hear public comment thereon. At the conclusion of the February 6, 1998 open public meeting, the Board of Retirement, by a vote of 7-2, adopted Resolution No. 98-001 (the "Resolution"), setting forth a series of policies and guidelines by which, inter alia, the Board of Retirement would (a) apply the law of Ventura in calculating the retirement benefits of all members of OCERS, and (b) obtain the payment of employer and employee pension contributions necessary to pay for increases in retirement allowances attributable to the new calculation method.

Although almost universally greeted in the County as a proper, fair and reasonable application of the newly enunciated benefit rules, certain individuals and the County immediately attacked the Board's Resolution as either granting too little or too much.

Defendants Nolan and Snethen, senior attorneys in the District Attorney's Office, vocally

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asserted that the Board had not gone far enough in increasing their retirement benefits. In contrast, the County asserted that the Board went too far. Each side threatened suit to force the Board to adopt its own particular view of Ventura. Faced with present threats of litigation from at least three quarters, and the likelihood of more in the near future, the Board filed this action to obtain a Court declaration to resolve all possible disputes over its Resolution 98-001.

2. The Multiplicity of Lawsuits

The Board filed its Complaint for Declaratory Relief in this action on March 6, 1998. After learning of the suit, defendants Nolan and Snethen, and the association that represents them and other county attorneys, did not proceed to respond to the Complaint. Instead, on March 10, 1998, they filed a second action in this Court, Civil No. 791499, styled as a "Writ of Mandate", but based on the precisely the same facts and law as OCERS' complaint. The second suit asks the Court to grant the specific plaintiffs there—the attorneys for the County-what they want for their own personal retirement benefits, but seeks to resolve nothing for all the other 25,000 members of the retirement system. If that suit remains pending, there will be no stopping dozens of other individualized actions against OCERS, and no uniformity in the application of the rule of Ventura to all members of the retirement system.

It is the Board's intent in this action to join as party defendants persons of all competing interests who seek to contest portions of Resolution 98-001, so that one court can hear the evidence and arguments once, can rule once, and can bind all the affected parties to its decision. OCERS is a public entity that must apply the retirement law uniformly to all its members. It should not be subjected to the cost and risk of multiple suits and multiple, possibly conflicting, rulings.

Civil No. 791499 is a related case to this one, under the provisions of Rule 804, California Rules of Court, because the case essentially involves the same parties, is based on the same or similar claims, involves the same events, and involves the same facts and the same questions of law². The allegations found in the Petition in the second action are exactly those set forth in paragraphs 20 and 21 of the Verified Complaint in this action. The whole purpose of a complaint for declaratory relief, to resolve actual controversies between parties, would be confounded if each of the defendants could thereafter file its own suit on the same issues and proceed independently from the first action. Particularly where the plaintiff is a public entity, exposure to an unnecessary multiplicity of actions is contrary to the public interest.

Every party should have its day in court. The Board does not ask the Court to dismiss Case No. 791499. Either the action should be enjoined, so that the first-filed case may proceed unfettered, or that action should be consolidated with this action so that all interested and necessary parties can be joined and a single court may hear and decide all the common issues.

Section 526 of the Code of Civil Procedure allows this Court to enjoin Case No. 971499 until the completion of this proceeding:

- (a) An injunction may be granted in the following cases:
- (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings.

See Aldrich v. Transcontinental Land Etc. Co. (1955) 131 Cal. App. 2d 788, 797 (affirming injunction against second action). Aldrich quoted Pomeroy's Equity Jurisprudence for the following principles that are applicable here: "Where it is essential to promote the ends of

OCERS has filed Notices of Related Cases in each action, in accordance with Rule 804, California Rules of Court.

justice that an entire controversy should be determined in one proceeding, so that, the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon the same facts or principles." Id.

In the alternative, Section 1048(a) of the Code of Civil Procedure affords this

Court the discretion to consolidate the two proceedings, providing in part:

Where actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

See Peters v. Binnard (1933) 219 Cal. 141, 149 (affirming lower court's consolidation of two cases in which, as here, parties who were plaintiffs in the first action were defendants in the other action and the two actions involved common questions of law and fact).

Plaintiff Board respectfully requests that the Court grant its application to enjoin further proceedings in Civil No. 791499, or, alternatively, to consolidate that action with this one.

Date: March 13, 1998

STEEFEL, LEVITT & WEISS A Professional Corporation

Harvey L. Leiderman

Attorneys for Plaintiff
BOARD OF RETIREMENT OF
ORANGE COUNTY EMPLOYEES
RETIREMENT SYSTEM

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IN SUPPORT OF EX PARTE APPLICATION

JAN J. NOLAN Bar No. 63999 Date: 3/16/98 P.O. Box 808 Dept.: 7 Santa Ana, Ca 92702 Time: 4:00 p.m. Attorney In Pro Per, Defendant 3 ERIC W. SNETHEN Bar No. 49791 1600 Bermuda Dunes Boulder City, NV 89005 Attorney In Pro Per, Defendant 6 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 IN AND FOR THE COUNTY OF ORANGE 10 BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public 11 Case No. 791315 entity. 12 Plaintiff. DEFENDANTS' OPPOSITION 13 TO EX PARTE MOTION 14 JAN J. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF ORANGE, a political 15 subdivision of the State of California, and DOES 1-30,000, inclusive, 16 17 Defendants 18 19 20 Through this ex parte application, plaintiff seeks to enjoin defendants JAN J. NOLAN 21 (NOLAN) and ERIC W. SNETHEN (SNETHEN) from proceeding on their previously filed 22 Petition for Writ of Mandate, Case No. 791499 in which plaintiff, BOARD OF RETTREMENT, 23 ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM (BOARD OF RETIREMENT) 24 is the named Respondent. In the alternative, plaintiff seeks to consolidate the two cases.

JAMES_MORELL_0412 exigent circumstances, and a showing of good cause, the request for such an ex parte offer is

Defendants object to the ex parte application and allege: (a) plaintiff is required to bring

a noticed motion for an order enjoining defendants and for consolidation of the actions; (b) absent

28 improper, (c) the two cases are not pending before this Court; (d) consolidation is premature as

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defendants have not answered, demurred, or otherwise plead regarding the merits of the complaint;

(e) consolidation is inappropriate as this Court has no way of evaluating whether there are

common issues of law or fact; (f) the two cases are not appropriate for consolidation as they do

not involve the same parties, all the same questions of law, or all the same questions of fact.

By responding to this ex parte application, defendants do not waive their objections nor are they making a general appearance in the action.

MEMORANDUM OF FOINTS AND AUTHORITIES STATEMENT OF FACTS

On February 6, 1998, plaintiff passed Resolution 98-001 which sets forth the policies and guidelines upon which Orange County employees' retirement benefits will be calculated. Defendants NOLAN and SNETHEN objected, orally and in writing, to the BOARD OF RETIREMENT regarding three, of the approximately 33 provisions of the Resolution, which do not comply with applicable statutes and case law. On February 11, 1998, defendant NOLAN sent a letter to the BOARD OF RETIREMENT, with a copy to its attorney, seeking to exhaust her administrative remedies as a condition precedent to filing her lawsuit and requested a response by March 2, 1998. (Attached as Exhibit 1.) On February 17, 1998, defendant SNETHEN sent a similar letter to each member of the Board. (Attached as Exhibit 2.) In response, plaintiff's attorney requested a meeting with defendants which took place on March 5, 1998.

At the conclusion of this two hour meeting, plaintiff's attorney informed defendants that he did not have the authority to determine whether we had exhausted our administrative remedies, and only the Board could make that decision. He also told defendants he did not have authority to accept service of a lawsuit on the Board's behalf. He said the Board did not want litigation. Plaintiff's attorney stated that although we were entitled to bring a lawsuit, if we did, we would be responsible for the pensioners not receiving the increase in their pension benefits which were provided for under the terms of the newly passed Resolution. He stated he would get an

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"injunction" to stop payment of the increased pensions and it would be defendants' fault that the pensioners would not receive the additional \$200 or \$300 in their monthly checks. He stated they would have to continue "shopping at Lucky's rather than Farmer's Market." He said that if we brought a lawsuit, he would file a lawsuit and name each of us as defendants as well as naming the County of Orange. He did not state what the nature of the lawsuit would be, nor describe its substance.

Plaintiff's attorney then asked if we intended to bring a lawsuit to which defendant NOLAN responded, "probably." He requested to be notified prior to the filing of any lawsuit and defendants agreed to this courtesy request.

On March 6, 1998, defendants sent another letter to the Retirement Board seeking to exhaust administrative remedies requesting a reply by March 16, 1998. (Attached as Exhibit 3.)

On March 9, 1998 at approximately 5:30 p.m., defendant SNETHEN received a telephone call from plaintiff's attorney advising him the BOARD OF RETIREMENT had filed a Complaint for Declaratory Relief naming NOLAN, and SNETHEN, as individuals, and the COUNTY OF ORANGE as defendants. The lawsuit was filed March 6, 1998, the day following the meeting with plaintiff's attorney.

On March 10, 1998, defendants filed a Petition for Writ of Mandate naming as respondent, the BOARD OF RETIREMENT. (Case No. 791499.) At 4:05 p.m. on March 10, 1998, a copy of the Petition for Writ of Mandate was served on Mr. Thomas Fox, Chairman of the Retirement Board, and the proof of service was filed with the court at approximately 9:00 a.m. on March 11, 1998. (Attached as Exhibit 4.) Defendants were not served with plaintiff's summons and complaint until March 11, 1998, at approximately 9:40 a.m.

ISSUES AND ARGUMENT

1. AN EX PARTE APPLICATION TO ENJOIN DEFENDANTS FROM PROCEEDING ON THEIR PETITION FOR WRIT OF MANDATE, WHICH IS ASSIGNED TO DEPT. 6, IS IMPROPER

"The general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse party." (McDonald v. Severy (1936) 6 Cal.2d 629, 631. (Emphasis added).)

An order denying defendants' right to proceed as petitioners in the Petition for Writ of Mandate, which is legally pending before the Honorable John C. Woolley in Department 6, will definitely affect the due process rights of these defendants. The additional effect of such an order would be to enjoin another Superior Court Judge from hearing and ruling on a matter validly before him. It is doubtful this Court, either through an ex parte application or noticed motion, could enjoin another Superior Court Judge from hearing a case assigned to him.

Plaintiff has requested both cases be assigned to Department 6 and defendants have no objection if this Court desires to reassign plaintiff's Complaint for Declaratory Relief to Department 6. Absent such assignment, however, this Court does not have the power to issue an order which not only enjoins defendants, but the Honorable Judge Woolley as well.

Additionally, there are no grounds upon which to enjoin defendants. The filing of defendants'/petitioners' Petition for Writ of Mandate was perfected prior to plaintiff's Complaint for Declaratory Relief and is, therefore, first in time. The Petition for Writ of Mandate was filed and served on respondent on March 10, 1998, with service effected the same day and completed on March 11, 1998, at approximately 9:00 a.m. by filing a copy of the proof of service with the court. Plaintiffs did not serve defendants with the summons and complaint for declaratory relief until March 11, 1998, at approximately 9:40 a.m. Plaintiff has set forth no valid grounds upon which to issue an ex parte order to enjoin defendants from proceeding on their Petition.

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2. AN EX PARTE MOTION FOR CONSOLIDATION OF CASES IS INAPPROPRIATE.

Only limited forms of relief are available ex parte. For the most part, these are authorized by statute. The following are the most common situations in which ex parte orders may be obtained: to shorten or extend time to plead; to appoint a guardian ad litem; to amend a pleading by substituting the name of a fictitiously-named party; to authorize service by publication; to authorize discovery by plaintiff during the 20 day "hold"; to control deposition scheduling; dismissal for failure to amend a complaint after sustaining of a demurrer.

California Code of Civil Procedure, section 1048 allowing for consolidation of actions, does not specifically authorize ex parte applications, nor does it specifically require a "noticed motion." However, California Practice Guide, Civil Procedure Before Trial at page 12(1)-67 [12:355] provides: "The regular noticed motion procedure is followed to obtain an order for consolidation." Code of Civil Procedure, section 1048 provides: (a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions. . . ." Defendants'/Petitioners' Case No. 731499 is not pending before this Court and this Court has no way of knowing whether the Petition for Writ of Mandate and Complaint for Declaratory Relief involve a common question of law or fact.

The same <u>California Practice Guide</u> at page 12(1)-68, section, [12:357] provides: "The motion to consolidate should not be made until the various cases are "at issue," because until then the court may not be able to determine whether consolidation would be appropriate (i.e., how important the "common" issues vs. others in the cases)."

The party seeking relief must show good cause why it should be granted ex parte relief rather than proceeding by way of noticed motion. Plaintiff's only allegation of good cause or "exigency" is that plaintiff/respondent would be required to respond to defendants'/petitioners' Petition for Writ of Mandate by today's date. Code of Civil Procedure, section 1107 provides in relevant part: "Within five days after service and filing of the application, . . . respondent. . . may

serve upon the applicant and file with the court points and authorities in opposition to the granting of the writ."

There is no requirement that an opposition be filed within five days. The Petition for Writ of Mandate requests either the granting of a peremptory writ in the first instance, or an alternative writ. Both requests could be denied. If Judge Woolley grants an alternative writ, which is more likely than a peremptory writ, plaintiff/respondent will be served with an Order to Show Cause and given time to respond. Therefore, plaintiff's showing of "good cause" is lacking.

3. CONSOLIDATION OF THE TWO CASES IS IMPROPER AND PREMATURE.

Defendants have until April 11, 1998, to answer, demur, or bring a motion to strike the pleading. In the event defendants successfully demur to, or strike plaintiff's complaint, obviously there could be no consolidation. In this respect, plaintiff's application for order to consolidate the actions is premature. It is defendants' contention that several grounds exist for filing a demur to the complaint and, perhaps, a motion to strike the pleadings.

In any event, consolidation of the cases is inappropriate for the following reasons:

(A) The two actions do not involve the same parties.

The Petition for Writ of Mandate names as petitioners the Orange County Attorneys'

Assn., Nolan and Snethen. Respondent is the Board of Retirement, Orange County Retirement

System. There are no "DOE" respondents.

The Complaint for Declaratory Relief names the Board of Retirement as a Plaintiff.

Defendants are NOLAN, and SNETHEN, as individuals, and the COUNTY OF ORANGE along with 30,000 "DOES."

The complaint does not name The Orange County Attorneys' Assn. as a

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Presumably, these "DOES" represent each employee of Orange County, active or retired. Although plaintiff alleges the identities of these DOE defendants are unknown to it, plaintiff actually has the name of each retired member, and plaintiff also has the name of the individual employers and agencies within the Orange County Retirement System. Plaintiffs ignorance of true names must be real and not feigned. (General Motors Corp. v. Superior Court (1996) 48 Cal. App. 580.)

defendant. The Petition for Writ of Mandate does not name the County of Orange as a respondent. Although plaintiff could make a motion to amend the complaint to name the Orange County Attorneys' Assn. as a defendant, defendant/petitioner could not name the County of Orange as a respondent in the Petition for Writ of Mandate because the County has not refused to perform a duty.

(B) The Complaint for Declaratory Relief asks the court for "a judicial determination that Resolution 98-001 complies with applicable law."

There are approximately 33 "elements" of "compensation" which are to be included or excluded in the definition of "compensation earnable" pursuant to the Resolution.

Defendants'/Petitioners' Petition for Writ of Mandate addresses just three.

The "judicial determination" requested by plaintiff would require a judge to evaluate over a thousand "pay codes" used by the County and compare them to the Memorandums of Understanding and Personnel and Salary Resolutions of numerous county agencies and bargaining units, and review all other information plaintiff relied upon to formulate and adopt Resolution 98-001. Additionally, other provisions of the Resolution address actuarial calculations, contributions arrearage, calculation of "compensation earnable," retroactivity, and the statute of limitations. Because plaintiff's request is so broad, this Court would have to address each issue, whether or not certain provisions of the Resolution were being challenged. It would seem this Court would then be required to grant each agency, bargaining unit, and individual affected by this Court's determination, the opportunity to be heard before entering any final order regarding the Resolution "complied with applicable law." If any judge was actually willing to take on such a burden, it would take years before a determination could be made on plaintiff's Complaint for Declaratory Relief.

Plaintiff's complaint seeks judicial approval of its Resolution which contains approximately 33 separate potential provisions (issues). Only three issues have any commonality to the Petition for Writ of Mandate. A consolidation of the actions would cause unnecessary and significant delay, as well as hardship to defendants/petitioners.

The Government Code charges the Board of Retirement with the responsibility for determining the "final compensation" of retiring members under specific sections of the Government Code. Plaintiff, under the guise of a Complaint for Declaratory Relief, seeks to shift its responsibilities under the Government Code to this Court, and requests this Court to substitute its judgment for the statutorily mandated discretionary duties of the Retirement Board. This is not the purpose for which Declaratory Relief was designed, and therefore, the consolidation of plaintiff's Complaint with defendants'/petitioners' Petition for Writ of Mandate is inappropriate.

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Multiplicity of Lawsuits

Plaintiff alleges without any factual support that "[A]though almost universally greeted in the County as proper, fair and reasonable application of the newly enunciated benefit rules, certain individuals and the County immediately attacked the Board's Resolution as either granting too little or too much." (Page 2, lines 24-27.) In contrast to this statement, plaintiff alleges at page lines 15 -18, "[I]f that suit remains pending, there will be no stopping dozens of other individualized actions against OCERS, and no uniformity in the application of the rule of Ventura to all members of the retirement system."

Plaintiff is speculating as to the number of lawsuits which can and will be brought. Not even the County has brought a lawsuit at this time, and there is no allegation by plaintiff that any other individuals or agencies have brought or are threatening to bring a lawsuit.

The elements of the Resolution do not universally affect all employees. Each agency and bargaining unit have individualized Memorandums of Understanding upon which the elements of various provisions of the Resolution are based. Defendants'/Petitioners' Writ of Mandate

addresses only three elements of the Resolution which apply to the Attorney's Memorandum of Understanding and Personnel and Salary Resolution. CONCLUSION For all the above reasons, defendants respectfully request plaintiff's ex parte application for order enjoining defendants/petitioners, and consolidating the actions, be denied. Dated this 16th day of March 1998. Respectfully submitted, Defendant ERIC W. SNET Defendant

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DECLARATION AND AFFIDAVIT OF JAN J. NOLAN AND ERIC W. SNETHEN

- We, JAN J. NOLAN, and ERIC W. SNETHEN, declare that we are attorneys, duly licensed to practice law in all the courts of the State of California and are defendants in this matter.
- 2. On February 6, 1998, plaintiff passed Resolution 98-001 which sets forth the policies and guidelines upon which Orange County employees' retirement benefits will be calculated. We both objected, prior to and after the adoption of said Resolution, orally and in writing, to three specific provisions of the Resolution as not complying with applicable statutes and case law.
- On February 11, 1998, I, Jan J. Nolan, sent a letter to the BOARD OF RETIREMENT, with a copy to its attorney, Mr. Harvey Leiderman, seeking to exhaust my administrative remedies as a condition precedent to filing a lawsuit and requested a response by March 2, 1998. (Attached as Exhibit 1.)
- On February 17, 1998, I, Eric W. Snethen sent a letter to the Board seeking to exhaust my administrative remedies. (Attached as Exhibit 2.)
- 5. In response, Mr Leiderman requested a meeting with us on March 5, 1998. At the conclusion of this two hour meeting, Mr. Leiderman informed us that he did not have the authority to tell us whether we had exhausted our administrative remedies, and only the Board could make that determination. He also told us he did not have authority to accept service of our lawsuit on the Board's behalf.
- 6. Mr. Leiderman said the Board did not want litigation. He told us that although we were entitled to bring a lawsuit, if we did, we would be responsible for the pensioners not receiving the increase in their pension benefits which were contemplated under the terms of the newly passed Resolution. He stated he would get an "injunction" to stop payment of the increased pensions and it would be our fault that the pensioners would not receive the additional \$200 or \$300 in their monthly benefit checks. He said they would have to continue "shopping at Lucky's rather than at Farmer's Market." Mr. Leiderman told us if we brought a lawsuit, he would file his

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own lawsuit and name each of us as defendants as well as the County of Orange. He did not state what the nature of the lawsuit would be, nor describe its substance.

- Mr. Leiderman than asked if we intended to bring a lawsuit to which I, Nolan, responded, "probably." He requested to be notified prior to the filing of any lawsuit and I agreed to this courtesy request.
- On March 6, 1998, we sent another letter to the Retirement Board seeking to exhaust administrative remedies and requested a reply by March 16, 1998. (Attached as Exhibit 3.)
- On March 9, 1998, at approximately 5:30 p.m., I, Eric W. Snethen, received a
 telephone call from plaintiff's attorney advising me the BOARD OF RETIREMENT had filed a
 complaint for declaratory relief naming NOLAN, and SNETHEN, as individuals, and the
 COUNTY OF ORANGE as defendants.
- According to documents served on declarants, the lawsuit was filed March 6, 1998,
 the day following our meeting with Mr. Leiderman.
- On March 10, 1998, I, Eric W. Snethen, filed a Petition for Writ of Mandate naming the Orange County Attorneys' Assn, Nolan, and Snethen as petitioners, and, the BOARD OF RETIREMENT as respondent.
- 12. Later that same day, on March 10, 1998, we accompanied an individual not a party to the action, to the offices of the Board of Retirement where the Petition for Writ of Mandate was served on Mr. Thomas Fox, Chairman of the Retirement Board. I, Eric W. Snethen, filed the proof of service with the court at approximately 9:00 a.m. on March 11, 1998. (Attached as Exhibit 4.)
- I, Eric W. Snethen, accepted service of the plaintiff's summons and complaint on March 11, 1998, at approximately 9:40 a.m. I also accepted substitute service for Nolan with her authorization.

We have personal knowledge of the foregoing and declare under penalty of perjury, under the laws of the State of California, that it is true and correct. Executed this 16th day of March, 1998, at Santa Ana, California. Respectfully Submitted, JAN J. NOE Defendant Defendant

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DEFENDANTS' EXHIBIT 1 FEBRUARY 11, 1998, LETTER FROM JAN J. NOLAN

Jan J. Nolan P.O. Box 808 700 Civic Center Dr. Santa Ana, Ca 92701

February 11, 1998

Mr. Thomas Fox, Chairman
Orange County Board of Retirement
2223 Wellington Ave.
Tustin, Ca 92701

Dear Mr. Fox:

On February 6, 1998, the Board of Retirement passed a resolution implementing the <u>Ventura</u> decision. As part of the Board's action in passing the resolution, it excluded the following from "compensation earnable":

- "Payoffs of vacation and sick leave and holiday pay, to the extent neither earned nor permitted to be cashed-out under the applicable MOU, regardless of when actually cashed-out";
- 2. "Flexible Benefits ("Cafeteria Plan") paid in cash to the extent paid to members retiring on and after January 1, 1991";2
- 3. "Payoffs of Vacation and Sick Leave and Holiday to the extent earned (pro-rated on a monthly basis), not taken as time off and permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually cashed-out".³

Because there is a legal requirement that all administrative remedies must be exhausted prior to filing a Petition for Writ of Mandate, and in an effort to exhaust administrative remedies, the following request is made:

That the Board of Retirement, Orange County Employees' Retirement System, reverse its action excluding from "compensation earnable", the above listed items and take new action to include the following in "compensation" and "compensation earnable":

Resolution, pg. 3, para. 2.

²Resolution pg. 3, para. 2.

- All accumulated unused leave for which cash payment has been made in the measuring period elected, regardless of when the leave was earned;
- 2. Cash payment for flexible benefits (cafeteria plan) for all employees who were employed prior to the effective date of Board of Supervisors Resolution #90-1551, and have retired or will retire prior to and after January 1, 1991. The effect of the Board's action would make the resolution applicable only to members entering the system on or after January 1, 1991;
- Cash payment for not less than 160 hours of vacation leave, rather than just 80 hours vacation leave, pursuant to the MOU/PSR.

My letters to you dated January 29, and February 3, 1998, are attached which set forth the legal principles upon which this request is made.

If other administrative remedies exist, please advise me so that appropriate steps can be taken to exhaust all administrative remedies as soon as possible. In the interest of expediency and efficiency, we could enter into a stipulation that all administrative remedies have been exhausted.

A speedy response is respectfully requested. If I do not hear from you or the Board's counsel by March 2, 1998, I will presume my request for Board Action has been denied and there are no other administrative remedies which I need exhaust.

Thank you for your time and attention to this matter.

Very truly yours,

Jan J. Nolan

cc: Mr. Raymond A. Fleming, Secretary to the Board of Retirement

Mr. Harvey Leiderman, Esq.

DEFENDANTS' EXHIBIT 2 FEBRUARY 17, 1998, LETTER FROM ERIC W. SNETHEN

February 17, 1998

Mr. Ray Fleming, Secretary
Orange County Employees' Retirement System Board
2223 Wellington Ave.
Santa Ana, CA 92701

Dear Mr. Fleming,

I began my retirement on October 1, 1997. As you no doubt know, the Supreme Court handed down its opinion on August 14,1997, in Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County 16 Cal.4th 483, (Ventura). I immediately took steps to implement its provisions. On September 8, 1997, by letter I requested this Board recalculate my retirement benefits applying the recent California Supreme Court Ventura opinion. Significant events have transpired since then.

Based upon the information I obtained at the Ad Hoc Committee meeting on January 21, 1998, and this Board's February 6, 1998, meeting, I am again requesting recalculation of my retirement benefits. It is my belief, based upon the actions taken at those two meetings and this Board's adoption of the Resolution, that you have failed to accurately apply Ventura. It appears that this Board has determined, as did the Board in Ventura, to force the members, who you represent and to whom you owe a fiduciary duty to fairly apply the retirement laws, to institute a lawsuit.

In applying the Supreme Court's decision to the Orange County Attorney's Memorandum of Understanding, it cannot be seriously, or legally disputed that the below-listed items of remuneration, paid in cash to me during my selected measuring period of October 1, 1996 through September 30, 1997, must be included in the calculation of "Compensation," "Compensation Earnable," and "Final Compensation" which will then be used to determine my retirement benefit.

For your convenience, I have included the specific references to the MOU where relevant.

Retirement Board Recalculation Letter Page 2

- 1. Base Salary, including amounts I paid into the Deferred Compensation Plan;
- 2. Attorney Optional Benefit (Art. VII, §4):
- 3. Attorney Special duty pay (Art. I, §2);
- 4. Vacation cash out of 66.07 hours (Art. V, §2, subdivision J);
- 5. Sick Leave cash out of 328.5 hours (Art. IV, §1, subdivisions D.3.a and D.3.b.);
- 6. Mileage allowance (taxable);

I have also attached a copy of the break-down of the various items of remuneration I received in my designated, selected period, i.e., October 1, 1996 through September 30, 1997. The "final compensation" of \$129,090.37 is the amount I believe should be used to calculate my retirement benefit. If you have any questions concerning any of the items, please do not hesitate to call me at any time.

It is my belief that having filed my previous request and the instant request, considering this Board's Resolution which apparently is to take effect July 1, 1998, I have exhausted all the administrative remedies available prior to instituting legal action. However, in an effort to avoid a costly legal battle, I am requesting this Board to reconsider its adoption of the Resolution and to modify same in accordance with the principles set out in the letters to you from Jan Nolan on January 29, 1998, and February 3, 1998, which I believe accurately apply the Ventura decision to our M.O.U.

If you believe there are any additional steps necessary for my administrative remedies to have been exhausted, I request that you agree to stipulate they have been performed.

Sincerely,

Eric W. Snethen Soc. Sec. No. 1600 Bermuda Dunes Dr. Boulder City, NV 89005 (702) 293-7065

DEFENDANTS' EXHIBIT 3 MARCH 6, 1998, LETTER FROM DEFENDANTS

210/965

March 6, 1998

Mr. Ray Fleming, Secretary
Mr. Thomas N. Fox, Chairman
Orange County Employees' Retirement System Board
2223 Wellington Ave.
Santa Ana, CA 92701

Dear Mr. Fleming,

We have previously addressed the Retirement Board concerning the Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County 16 Cal.4th 483, (Ventura) case both in person and by letter. In those letters, we requested modification of the Retirement Board's February 6, 1998, Resolution in that we did not believe this Board had correctly applied the Supreme Court's directives regarding CERL determinations of retirement benefits. In addition, we requested that if the Board did not believe we had exhausted our administrative remedies concerning this Board's implementation of Ventura, that we be so advised.

On Thursday afternoon, March 5, 1998, we met with Harvey Leiderman and his associate Ashley Ilangwa, regarding Ventura, the Board's Resolution, and the letters we had addressed to the Board. At the conclusion of that meeting, Mr. Leiderman told us that he had no authority to indicate we had exhausted our administrative remedies and implied the Retirement Board may still be considering our requests to modify the Resolution. Based upon our research into what remedies are available regarding a retirement board's actions, it is our belief that there is no additional administrative step which could be taken prior to the filing of legal action in the superior court. However, if there are indeed additional administrative steps which you believe are available, it is our sincere desire to use all avenues, short of filing a lawsuit, to come to an amicable resolution of this situation.

Additionally, we found it not a little disturbing when Mr. Leiderman, while acknowledging our right to bring a lawsuit, suggested to us that if we did file a lawsuit in an attempt to obtain what we sincerely believe is a proper application of Ventura, he would take steps to bring into our lawsuit all other agencies in the county as well as the County itself. He further suggested that perhaps we would not want the stigma of having caused delay of the implementation of the current Resolution as he would definitely request the trial court to place a hold on

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Exhaustion of Administrative Remedies Page 2

implementation of any of the provisions the Board deemed appropriate by the Resolution. Thus delaying receipt of any of the benefits which would flow from the Resolution.

Unless we hear from you on or before March 16, 1998, we will presume the Board agrees with us that there are no other administrative avenues available and the Board is standing by the Resolution. Finally, we would request that the Board agree to stipulate that we have exhausted any and all administrative remedies.

Jan J. Nolai	n	
Eric W. Sn	ethen	
Little vv. Dill	cuicii	

DEFENDANTS' EXHIBIT 4 PROOF OF SERVICE, MARCH 10, 1998

SUPERIOR COURT OF THE STATE OF CALIFORNIA 2 FOR THE COUNTY OF ORANGE MAR 1 1 1998 3 4 ORANGE COUNTY ATTORNEYS' ASSN., JAN J. NOLAN, AND ERIC W. SNETHEN, Case No. 791499 5 Petitioners, 6 PROOF OF SERVICE 7 BOARD OF RETIREMENT, 8 ORANGE COUNTY RETIREMENT SYSTEM, 9 Respondent. 10 11 12 PROOF OF SERVICE FOR 13 PETITION FOR WRIT OF MANDATE 14 15 Reich, Adell, Crost, & Cvitan 16 A Professional Law Corporation Paul Crost, Bar No. 40742 Attorney for Orange County Attorneys' Assn., Petitioner 17 501 Shatto Place, Suite 100 18 Los Angeles, CA 90020 Telephone (213) 386-3860 19 Jan J. Nolan, Bar No. 63999 20 Attorney In Pro Per, Petitioner P.O. Box 808 21 Santa Ana, CA 92702 Telephone (714) 834-3655 22 Eric W. Snethen, Bar No. 49791 23 Attorney In Pro Per, Petitioner 1600 Bermuda Dunes Dr. 24 Boulder City, NV 89005 Telephone (702) 293-7065 25 26

214/965

JAMES_MORELL_0434

DECLARATION OF PERSONAL SERVICE 2 CASE NAME: ORANGE COUNTY ATTORNEY'S ASSN., JAN J. NOLAN, AND 3 ERIC W. SNETHEN VS. BOARD OF RETIREMENT, ORANGE COUNTY RETIREMENT SYSTEM CASE NO .: 791499 5 I declare that: 6 I am 18 years of age or older and not a party to the above-entitled case. 8 On March 10, 1998, I personally served the attached: 9 PETITION FOR WRIT OF MANDATE 10 on the following by personally delivering to and leaving a true copy of the aforesaid at the following address: 11 Mr. Thomas Fox 12 Board of Retirement, Orange County Retirement System 2223 Wellington Avenue Santa Ana, CA 92705 13 I declare under penalty of perjury the foregoing is true and 14 correct, and that this declaration was executed on March 10, 1998, 15 at Santa Ana, County of Orange, California. 16 17 18 19 20 21 22 23 24 25 26

JAMES MORELL 0435

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215/965

JAN J. NOLAN Bar No. 63999 P.O. Box 808 Santa Ana, Ca 92702 Telephone (714) 834-3655 Attorney In Pro Per, Defendant FILED ORANGE COUNTY SUPERIOR COUNTY

APR 0 1 1998

ALAN SLATER, Executive Officer/Clerk

BY T.V. TALLABAS

ERIC W. SNETHEN Bar No. 49791 1600 Bermuda Dunes Telephone (702) 293-7065 Boulder City, NV 89005 Attorney In Pro Per, Defendant

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

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BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local

public entity.

Plaintiff,

VS.

JAN J. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive,

Defendants

Case No. 791315

DEFENDANTS GENERAL DEMURRER TO COMPLAINT FOR DECLARATORY RELIEF

(CCP § 430.10)

MEMORANDUM OF POINTS AND AUTHORITIES

Date: April 21, 1998 Dept. 7 Judge: Ronald C. Kline Time: 1:30 p.m.

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Defendants, JAN J. NOLAN (NOLAN) and ERIC W. SNETHEN (SNETHEN), demur to plaintiff's Complaint for Declaratory Relief on the ground it fails to state facts sufficient to constitute a cause of action in that: (1) a judicial declaration is not necessary or proper at this time because there is another action pending; (2) it seeks an advisory opinion; and (3) the element of justiciable actual controversy is lacking because no affirmative relief is sought or possible against any of the defendants.

This demurrer is based on the attached memorandum of points and authorities, all of the

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pleadings in this matter, the pleadings in case number 791499, and oral argument presented at time of the hearing in this matter. Defendants NOLAN and SNETHEN respectfully request the general demurrer be granted without leave to amend, that plaintiff's complaint for declaratory relief be dismissed, and defendants be awarded costs. Dated: Respectfully Submitted, AN J. MC Defendant Attorney In Pro Per Defendant Attorney In Pro Per

pleadings in this matter, the pleadings in case number 791499, and oral argument presented at time of the hearing in this matter. Defendants NOLAN and SNETHEN respectfully request the general demurrer be granted without leave to amend, that plaintiff's complaint for declaratory relief be dismissed, and defendants be awarded costs. Dated: Respectfully Submitted, Attorney In Pro Per ERIC W. SIVE IN Defendant Attorney In Pro Per

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On February 6, 1998, plaintiff passed Resolution 98-001 which sets forth the policies and guidelines upon which Orange County employees' retirement benefits will be calculated. Defendants, NOLAN and SNETHEN, believing that three, of the approximately thirty-three provisions of the Resolution, do not comply with applicable statutes and case law, filed a Petition for Writ of Mandate, along with the ORANGE COUNTY ATTORNEYS' ASSN., against this plaintiff, BOARD OF RETIREMENT. The Petition for Writ of Mandate addresses only three narrow issues.

Plaintiff filed a Complaint for Declaratory Relief requesting a declaration from this Court that the entire Resolution, not just the three provisions challenged by defendants/petitioners, complies with applicable law. Plaintiff named NOLAN, SNETHEN, and the COUNTY OF ORANGE, as defendants.

ISSUES AND ARGUMENT

THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS FROM JUDICIALLY NOTICED MATTER THAT A JUDICIAL DECLARATION OR DETERMINATION IS NOT NECESSARY OR PROPER AT THIS TIME UNDER ALL THE CIRCUMSTANCES BECAUSE THERE IS ANOTHER ACTION PENDING WHICH WILL RESOLVE THE ISSUES BETWEEN THESE PARTIES.

Defendants, NOLAN and SNETHEN, request this Court take judicial notice of its own file, case number 791499, pending in Department 6 of this Court.

The court may refuse declaratory relief in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. (California Code of Civil Procedure, section 1061).

The objection that a declaratory judgment is not necessary or proper at the time under all the circumstances, where this fact appears from the face of the complaint (or from matter of which the court must or may take judicial notice), may be made by demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Moss v. Moss (1942) 20 Cal.2d 640, 642).

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Where another action is pending between the same parties in which the issue sought to be adjudicated in the declaratory relief action can be finally adjudicated, declaratory relief is properly denied. (Hagan v. Fairfield (1965) 238 Cal.App.2d 197, 202).

Defendants, NOLAN and SNETHEN, as well as the ORANGE COUNTY ATTORNEYS'
ASSN., are petitioners in a Writ of Mandate action filed and served on March 10, 1998. Plaintiff,
BOARD OF RETIREMENT, is named as respondent in the Petition for Writ of Mandate, case
number 791499. The Writ seeks to resolve whether the Board of Retirement has a duty to include
three specifically identified elements of pay in the calculation of employees' "final compensation,"
which have been excluded by plaintiff's Resolution. The remaining thirty elements and provisions
in the Resolution, either do not apply to these defendants/petitioners, or are not in dispute between
plaintiff and these defendants. The disputed issues between plaintiff and defendants, NOLAN and
SNETHEN, can be adjudicated with finality by a ruling on the Petition for Writ of Mandate.

Courts have held that if a plaintiff or cross-complainant has other means of seeking a determination of their rights, then a trial judge may sustain a general demurrer to a declaratory relief claim. In California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal. App.3d 1617, 1624, the appellate court held, "The availability of another form of relief that is adequate will usually justify refusal to grant declaratory relief."

A judicial declaration is not necessary or proper at this time under all the circumstances. Defendants, NOLAN and SNETHEN request the demurrer be granted on the ground there is another action pending which will resolve the dispute as to defendants NOLAN and SNETHEN.

- 2. THE COMPLAINT FOR DECLARATORY RELIEF FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION IN THAT IT APPEARS ON ITS FACE THAT THERE IS NO ACTUAL JUSTICIABLE CONTROVERSY RELATING TO THE LEGAL RIGHTS AND DUTIES OF THE RESPECTIVE PARTIES.
 - THE COMPLAINT SEEKS AN ADVISORY OPINION FROM THE COURT.

"Actual controversy," as used in Code of Civil Procedure, section 1060, is a controversy which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion on a particular or hypothetical state of

facts. The judgment must decree, not suggest, what the parties may or may not do. (Selby Realty Co. v. San Buenaventura (1973) 10 Cal.3d 110, 117).

Plaintiff's complaint for declaratory relief requests this Court declare that Resolution 98-001 was "properly adopted" and is in compliance with the law. In other words, plaintiff is asking this Court to advise plaintiff if each of its decisions, which form the basis of the Resolution, and determines what is, and what is not, "compensation" and "compensation earnable," is the correct decision under the applicable statutes and case law. The complaint does not request a declaration as to what any of the parties may or may not do. Nor does plaintiff seek a judgement declaring what the specific rights and duties are of each of the parties.

The "judicial determination" requested by plaintiff would require a judge to evaluate over a thousand pay codes used by the County, and compare them to each of the Memorandums of Understanding and Personnel and Salary Resolutions, or other agreements, of numerous county agencies and bargaining units, and review all information plaintiff relied upon in determining what elements of pay constitute "compensation" and "compensation earnable," which must be included in the "final compensation" of each employee.

Other provisions of the Resolution, which would require court scrutiny under the relief requested, address actuarial calculations, contributions arrearage, calculation of "compensation earnable," retroactivity, and the various statutes of limitations. Because plaintiff's request is so broad, this Court, in order to grant the relief requested, would need to address each and every provision and element of the Resolution, regardless of whether or not it was being challenged, to determine if each complied with the law. It follows that this Court would then be required to grant each agency, bargaining unit, and the 30,000 DOES' named in the complaint, the opportunity to be heard before entering any final order declaring that the Resolution "complies with applicable law."

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^{&#}x27;The "DOES" ostensibly represent each current and retired employee of the county. Since the nine members of the Retirement Board are either current or retired employees of the county, these individuals are defendants in this action and being sued by their own entity. Each member of the County Counsel's Office is a current employee of the county. Therefore, the individual County Counsel who is representing defendant, County of Orange, in this lawsuit, is also a defendant in the same lawsuit. Moreover, attorneys of the County Counsel's office are members of the Orange County Attorneys' Assn. and are, therefore, petitioners in the Petition for Writ of Mandate in which the Board of Retirement is respondent. The words "conflict of interest" immediately come to mind.

This process could take years to complete.

 Plaintiff's requested relief is not within the field of judicial administration. Therefore, defendants NOLAN and SNETHEN request the demurrer be granted on the ground the complaint fails to state facts sufficient to constitute a cause of action in that it seeks an advisory opinion.

B. PLAINTIFF DOES NOT SEEK AFFIRMATIVE RELIEF AGAINST ANY OF THE DEFENDANTS, NOR CAN ANY OF THE DEFENDANTS GRANT ANY RELIEF.

The element of a justiciable controversy is lacking when a complaint for declaratory relief seeks no affirmative relief against the defendant, and the defendant has no power to grant plaintiff any affirmative relief. (See Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal.App.4th 1430, 1436-1437; Duffy v. Superior Court (1992) 3 Cal.App.4th 425, 428; Weisman v. Odell (1970) 3 Cal.App.3d 494, 498). "The fundamental basis for declaratory relief is the existence of an actual, present controversy over a proper subject." (Californians for Native Salmon etc. Assn. v. Department of Forestry (1990) 221 Cal.App.3d 1419, 1427) "It is fundamental that a person should not be compelled to defend himself in a lawsuit when no relief is sought against him." (Pinnacle Holdings, Inc., supra, at 1437).

Plaintiff has sought no affirmative relief against defendants NOLAN and SNETHEN, nor has it sought any affirmative relief against defendant, COUNTY OF ORANGE. The only request for relief is "for a judicial declaration that the Board of Retirement properly adopted Resolution 98-001 and that the resolution complies with applicable law."

None of these defendants has the power to grant plaintiff the relief it seeks in the complaint, or any other affirmative relief. The Court, in *Pinnacle Holdings Inc.*, *supra*, held at page 1437: "Pinnacle has requested no relief from respondents, nor can respondents grant any relief. Those facts are dispositive." (Emphasis added). In the instant case, the fact that no affirmative relief has been requested against any defendant, nor can defendants grant any relief, is likewise dispositive and requires granting defendants' demurrer without leave to amend.

A complaint for declaratory relief that fails to allege the existence of an actual justiciable controversy between the parties fails to state facts sufficient to constitute a cause of action.

(Wilson v. Transit Authority (1962) 199 Cal.App.2d 716, 722-724).

The only allegation in plaintiff's complaint of a justiciable controversy between plaintiff and defendants NOLAN and SNETHEN, is that these defendants are intending to bring a lawsuit regarding three specific elements contained in the Resolution. The fact these defendants have actually filed a lawsuit challenging the three provisions, still does not provide the element of a "justiciable controversy" as required in the context of a complaint for declaratory relief. Since a declaratory judgment must decree what the parties may or may not do, the failure to seek affirmative relief against any of the defendants, demonstrates a lack of a "justiciable controversy."

The inability to seek any affirmative relief against any defendants, also emphasizes the fact plaintiff is requesting an advisory opinion rather than a declaration of the rights and duties of the respective parties. Plaintiff's failure to seek such declaration of rights and duties, demonstrates plaintiff's own recognition that none of the defendants has any rights or duties which this Court can resolve or direct in this lawsuit.

Defendants request the demurrer be granted, without leave to amend, on the ground that there is no justiciable controversy relating to the legal rights and duties of the respective parties as no affirmative relief has been, or can be sought against any of the named defendants.

3. SEPARATION OF POWERS DOCTRINE

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Article III, section 3 of the California Constitution)

Plaintiff, BOARD OF RETIREMENT, has been delegated legislative powers, pursuant to Government Code, section 31461, and is statutorily mandated to determine what is "compensation" and "compensation earnable" pursuant to Government Code, sections 31460 and 31461, as those statutes are construed by judicial decisions. Plaintiff proceeded to make that determination, and subsequently incorporated its decision into Resolution 98-001. Plaintiff,

Complaint's First Cause of Action, paragraph 20 (a)(b)(c).

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BOARD OF RETIREMENT, then acted in its legislative capacity, and performed the legislative act of adopting Resolution 98-001. This legislative branch of government now asks the judicial branch of government whether it made the correct decision when it determined, prior to the passage of the Resolution, that the decisions contained therein, complied with applicable law.

While a complaint for declaratory relief could be the appropriate vehicle by which to test the constitutionality of a statute, a Petition for Writ of Mandate is a proper vehicle by which a court can require a public entity to properly perform its duties. However, for a legislative body to use an action for declaratory relief to ask a court to review its legislative decision making process, and to advise if the action taken is in compliance with the law, gives a whole new meaning to the declaratory relief statute, creating a new avenue of prior judicial review of legislation, and totally ignores the separation of powers doctrine.

In the case of Mike Moore's 24-Hour Towing v. City of San Diego (1996) 45 Cal. App.4th 1294, the court stated: "In general, due to separation of powers considerations, the judiciary confines evaluation of a statute to the terms of the legislation itself and will eschew inquiry into what motivated or influenced those who voted on the legislation. This judicial reluctance to inquire into legislative thought processes has led to a refusal to inquire into whether legislators did or did not consider certain documents, and when they formed their opinions."

The court continued at page 1297: "In summary, once exercised, legislative discretion is, absent special circumstances, not subject to judicial control and supervision. Any decision made in the exercise of that legislative authority would involve the use of discretion. As a consequence, the steps to be undertaken, the method selected, and the decision reached in the course thereof, in the absence of fraudulent or arbitrary action, would not be interfered with by the courts," (Emphasis added.)

See for example, Frazier v. Tulare County Board of Retirement (1974) 42 Cal. App.3d 1046, 1049. Howard Jarvis Taxpayer's Assn. V. Board of Supervisors (1996) 41 Cal. App.4th 1363, 1376.

CONCLUSION

The lack of any authority supporting plaintiff's request, suggests this is a new twist on the use of the declaratory relief statute. Because there is no "definitive and conclusive relief" which could be granted, defendants' demurrer to the complaint should be sustained.

For all the above reasons, defendants NOLAN and SNETHEN, respectfully request this court to grant the demurrer without leave to amend, and dismiss the complaint on the ground the complaint fails to state facts sufficient to constitute a cause of action in that it seeks an advisory opinion; fails to allege an actual justiciable controversy as no affirmative relief is sought against defendants; and a judicial declaration is not necessary or proper at this time because there is another action pending.

Defendants further request this Court order plaintiff to pay costs as determined by this Court.

Dated: April 1, 1998

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Respectfully submitted,

19 JAN J. MOLAN 20 Defendant

Attorney In Pro Per/

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Defendant Attempt In Par

Attorney In Pro Per

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1	DEC	LARATION OF SERVICE BY MAIL		
2	County of Orange State of California) ss		
3	Case Name:	BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity vs.		
5		JAN J. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive		
7	Case Number:	791315		
8	I declare that:			
و	I am 18 years of age	or older and not a party to the above-entitled case.		
10	On April 1, 1998,	I served the attached:		
11	Notice of Hearing, Demurrer, and Memorandum of Points and Authorities			
13	in the above-referenced case, by placing a true copy thereof enclosed in a scaled envelope with postage thereon fully prepaid in the United States mail at Santa Ana, County of Orange, California, addressed as follows:			
15 16 17 18 19 20	MR. HARVEY LEII STEEFEL, LEVITT ONE EMBARCADE SAN FRANCISCO, COUNTY COUNSE HALL OF ADMINIS 10 CIVIC CENTER P.O. BOX 1379 SANTA ANA, CA 9 ATTN: MR. TOM A	& WEISS CRO CENTER, 30th FLOOR CA 94222-3784 L STRATION PLAZA		
21	I declare under pena executed on April I	Ity of perjury the foregoing is true and correct, and that this declaration was 1998, at Santa Ana, County of Orange, California.		
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AURENCE WATSON, COUNTY COUNSEL THOMAS C. AGIN, ASSISTANT (State Bar No. 98892) 10 Civic Center Plaza, 4th Floor Post Office Box 1379

Santa Ana, California 92702-1379 Telephone: (714) 834-5133

Facsimile:

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(714) 834-2359

Attorneys for Defendants, County of Orange.

Exempt From Filing Fees Pursuant to Gov't Code § 6103

ORANGE COUNTY SUPERIOR COURT

APR 0 8 1998

ALAM SLATER, Executive Officer/ Clerk Canha

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity,

Case No. 79-13-15

ANSWER

Plaintiff,

ASSIGNED FOR ALL PURPOSES TO JUDGE RONALD C. KLINE **DEPARTMENT 7**

JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive

Defendants.

In response to the Complaint filed in this matter by plaintiff Board of Retirement of the Orange County Employees Retirement System (the "Retirement Board"), defendant County of Orange (the "County") for itself and itself only answers as follows:

- 1. With regard to the allegations contained in paragraphs 1; 4; 6; 7; 8; 10; 11; 12; 24 and 25 of the Complaint, the County admits the allegations contained in those paragraphs.
- 2. With regard to the allegations contained in paragraph 9 of the Complaint, the County admits that Government Code Sections 31460, 31461, 31462 and 31462.1 speak for themselves and that their effect in this action is a matter of statutory interpretation for the Court to determine. The County denies any allegation contained in paragraph 9 that has not been specifically admitted.

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- 3. With regard to the allegations contained in paragraphs 2; 3; 5; 13; 20; 21; and the second paragraph numbered 23 (lines 20 through 23 on page 7) of the Complaint, the County lacks sufficient information upon which to admit or deny those allegations and on that basis denies the allegations contained in those paragraphs.
- 4. With regard to the allegations contained in paragraph 14 of the Complaint, (a) the County admits that public meetings were held at which some interested parties spoke on some of the matters under consideration in this action; (b) the County denies that anyone was authorized to speak or did speak on behalf of the County; (c) the County lacks sufficient information to admit or deny any of the other allegations contained in paragraph 14 and on that basis denies any allegation not specifically admitted.
- 5. With regard to the allegations contained in paragraphs 15 and 17 of the Complaint, (a) the County admits that a public meetings were held on or about January 21 and February 6, 1998, at which some interested parties spoke on some of the matters under consideration in this action; (b) the County denies that anyone was authorized to speak or did speak on behalf of the County; (c) the County lacks sufficient information to admit or deny any of the allegations contained in paragraphs 15 and 17 and on that basis denies any allegation not specifically admitted.
- With regard to the allegations contained in paragraph 16 of the Complaint, the County denies those allegations.
- 7. With regard to the allegations contained in paragraph 18 of the Complaint, the County admits that members of the Retirement Board voted 7-2 in favor of purported Resolution No. 98-001 and that a copy of the purported resolution is attached to the Complaint as Exhibit A; (b) the County denies that the Retirement Board acted in a lawful manner to adopt any Resolution regarding the matters under consideration in this action; (c) the County denies that all of the policies and guidelines contained in the purported Resolution are mandated by any applicable law.
- 8. With regard to the allegations contained in paragraph 19 of the Complaint, the County admits, denies and otherwise responds as above to the allegations contained in paragraphs 1 through 18 of the Complaint.
- With regard to the allegations contained in paragraph 22 of the Complaint, (a) the County denies
 that the Retirement Board has taken any lawful action to authorize retirement allowances related to the

matters under consideration in this action; (b) the County admits the other allegations contained in 1 2 paragraph 22. 10. With regard to the first paragraph numbered 23 (lines 14 through 19 on page 7) in the 3 Complaint, (a) the County admits the allegations contained in the first sentence of that paragraph; (b) the 4 County further admits that the Board of Supervisors of the County of Orange met in closed session on February 24, 1998, however the subject of that closed session is a confidential matter under principles of 6 7 attorney-client privilege. FIRST AFFIRMATIVE DEFENSE 8 9 11. As a first separate and distinct affirmative defense the County alleges that the Complaint does not state facts sufficient to constitute any cause of action against the County. 10 SECOND AFFIRMATIVE DEFENSE 11 12 12. As a second separate and distinct affirmative defense the County alleges that purported Resolution 98-001 is void as a matter of law because members of the Retirement Board who voted to adopt 13 14 it had and continue to have significant personal conflicts of interest regarding the outcome of that matter which were neither disclosed nor resolved prior to their consideration of it. 15 16 THIRD AFFIRMATIVE DEFENSE 17 13. As a third separate and distinct affirmative defense the County alleges that purported Resolution 98-001 is unlawful and in violation of Article 16 Section 6 of the California Constitution in that 18 it purports to define "compensation earnable" as including the value of certain remuneration not paid in 19 cash but in the form of an automobile provided to an employee for personal use which definition is contrary 20 to Government Code Sections 31460 and 31461 as interpreted in applicable case law. 21 22 23 24 25 26 27 28

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FOURTH AFFIRMATIVE DEFENSE

14. As a fourth separate and distinct affirmative defense the County alleges that purported Resolution 98-001 is unlawful and in violation of Article 16 Section 6 of the California Constitution in that it purports to extend certain monetary benefits to retired members and to require the County to fund those benefits retroactively without legal authorization for such action.

DATED: April 8, 1998

LAURENCE M. WATSON, COUNTY COUNSEL THOMAS C. AGIN, ASSISTANT

Thomas C. Agin, Assistant

Attorneys for Defendants, County of Orange

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PROOF OF SERVICE I do hereby declare that I am a citizen of the United Sates employed in the County of Orange, over 18 years old and that my business address is 10 Civic Center Plaza, 4th Floor, Santa Ana, California. I am 3 not a party to the within action. On April 8, 1998, I served the foregoing ANSWER on all other parties to this action by placing a 4 true copy of said document in a sealed envelope in the following manner: 5 (BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California following our ordinary business practices. I am readily familiar with this office's 6 practice for collecting and processing correspondence for mailing. On the same day that correspondence is 7 placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. 8 (BY AIRBORNE EXPRESS) I placed such envelope(s) addressed as shown below for collection 9 and delivery by Airborne Express with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by Airborne Express. 10 (BY FACSIMILE) I caused such document to be telefaxed to the addressee(s) and number(s) shown 11 below, wherein such telefax is transmitted that same day in the ordinary course of business. 12 (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith. 13 [X] (STATE) I declare under penalty of perjury under the laws of the State of California that the 14 foregoing is true and correct. 15 (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. 17 18 19 NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE 20 Attorneys for Plaintiff, Board of Retirement Harvey L. Leiderman Ashley K. Ilangwa of the Orange County Employees Retirement System 21 STEEFEL, LEVITT & WEISS A Professional Corporation 22 One Embarcadero Center, 30th Floor San Francisco CA 94111 23 Jan J. Nolan, Esq. Attorney In Pro Per, Defendant 24 P.O. Box 808 Santa Ana CA 92702 25 Attorney In Pro Per, Defendant Eric W. Snethen, Esq. 26 1600 Bermuda Dunes Boulder City NV 89005 27 28

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SHOWN UNDER THE RULES SET FORTH IN ORANGE COUNTY RULES OF COURTS SHOWN UNDER PLEADING MUST INCLUDE THE ASSIGNED JUDGE DESIGNATION SHOWN UNDER THE CASE NUMBER OF THIS DOCUMENT, PURSUANT TO ORANGE UNITY SHEET OF THE COUNTY SHEET OF THE COUNT

(34330 LAURENCE M. WATSON, COUNTY COUNSEL THOMAS C. AGIN, ASSISTANT (State Bar No. 98892) 10 Civic Center Plaza, 4th Floor

Post Office Box 1379

Santa Ana, California 92702-1379 Telephone: (714) 834-5133

Facsimile:

(714) 834-2359

Attorneys for Cross-Complainant and Defendant, County of Orange.

Exempt From Filing Fees Pursuant to Gov't Code § 6103

FILED **DRANGE COUNTY SUPERIOR COURT**

APR 0.8 1998

ALAN SLATER, Executive Officers Clerk J. Cambon BY J. GAMBOA

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity,

Plaintiff,

JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive

Defendants.

COUNTY OF ORANGE, a political subdivision of the State of California,

Cross-Complainant and Defendant,

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity,

Cross-Defendants and Plaintiff.

Case No. 79-13-15

CROSS-COMPLAINT FOR DECLARATORY RELIEF

ASSIGNED FOR ALL PURPOSES TO JUDGE RONALD C. KLINE DEPARTMENT 7

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27 28 Cross-Complainant and Defendant, County of Orange, alleges as follows:

- The County of Orange (the "County") is a political subdivision of the State of California
 and a local public entity existing under the laws and Constitution of the State of California. The County
 was and is the employer of the majority of the retired and active members of the Orange County Employees
 Retirement System ("OCERS").
- 2. Cross-defendant and plaintiff Board of Retirement of the Orange County Employees Retirement System (the "Retirement Board") is the governing body of OCERS, a local public entity. At all times relevant to this action, OCERS was and is a public retirement system operating under the provisions of the County Employees Retirement Law of 1937 ("CERL") as codified in Government Code Section 31450 et seq. The members of OCERS were and are employees of the County and certain public districts situated within Orange County which have elected to participate in OCERS.
- OCERS is situated in Orange County, California and maintains its principal place of business in Santa Ana, Orange County, California.
- 4. On February 6, 1998 the Retirement Board purported to adopt Resolution No. 98-001 concerning policies and guidelines to be used in the calculation of "compensation" and "compensation earnable" to determine "final compensation" under CERL for all members of OCERS and in the calculation of both employer and employee contributions necessary to support payment of any increases in retirement allowances attributable to calculating "final compensation" under the purported new policies and guidelines.
- 5. The County contends that purported Resolution 98-001 is void as a matter of law because members of the Retirement Board who voted to adopt it have and continue to have significant personal conflicts of interest regarding the outcome of that matter which were neither disclosed nor resolved prior to their consideration of it.
 - 6. The County contends that purported Resolution 98-001 is unconstitutional in that:
- (a) It violates Article 16 Section 6 of the California Constitution by defining "compensation" and "compensation earnable" as including the value of certain remuneration not paid in cash but in the form of an automobile provided for personal use which definition is contrary to Government Code Sections 31460 and 31461.

1		(b) It violates Article 16 Section 6 of the California Constitution by extending certain					
2.	monetary benefits to retired members and requiring the County to fund those benefits retroactively without						
3	legal authorization for such action.						
4	7.	The County contends that the Retirement Board will enforce the policies and guidelines					
5	contained in the void and unconstitutional Resolution 98-001 and require the County to pay to support						
6	inappropriate retirement benefits calculated on the basis of those illegal policies and guidelines.						
7	8.	The County desires a declaration of its rights with respect to the validity, constitutionality					
8	and application of the purported policies and guidelines and asks the Court to make a declaration of such						
9	rights, duties and responsibilities and to make a declaration as to the validity and constitutionality of the						
10	purported policies and guidelines. Such declaration is necessary and appropriate at this time. There are n						
11	administrative remedies available to the County.						
12	9.	A timely declaration by this Court is urgent because the Retirement Board is in the process					
13	of using the purported policies and guidelines to calculate retirement benefits and the contributions requir						
14	from the County to pay to support those benefits.						
15	10.	Unless declaratory relief is granted the County, numerous other local public bodies and the					
16	public at larg	e will suffer irreparable and lasting injury caused by the diversion of County funds from					
17	programs serving the public safety, health and welfare into illegal retirement benefits.						
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WHEREFORE, the County prays for a declaratory judgment as follows:

- That the Court declare the respective rights, duties and responsibilities of the County and the 1. Retirement Board under CERL and applicable case law with regard to purported Resolution 98-001 and the policies and guidelines contained in it and by its declaration and judgment the Court declare that the Resolution and the policies and guidelines cannot be enforced and that the Resolution is void and unconstitutional;
 - For costs of suit incurred by the County in this action; and
 - For such other and further relief as the Court deems proper.

DATED: April 8, 1998

LAURENCE M. WATSON, COUNTY COUNSEL THOMAS C. AGIN, ASSISTANT

Thomas C. Agin, Assistant

Attorneys for Cross-Complainant and Defendant, County of Orange

1 PROOF OF SERVICE I do hereby declare that I am a citizen of the United Sates employed in the County of Orange, over 2 18 years old and that my business address is 10 Civic Center Plaza, 4th Floor, Santa Ana, California. I am not a party to the within action. 3 4 On April 8, 1998, I served the foregoing CROSS-COMPLAINT FOR DECLARATORY RELIEF on all other parties to this action by placing a true copy of said document in a sealed envelope in the following manner: 5 (BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is 7 placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. 8 9 (BY AIRBORNE EXPRESS) I placed such envelope(s) addressed as shown below for collection and delivery by Airborne Express with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the 10 following day by Airborne Express. 11 (BY FACSIMILE) I caused such document to be telefaxed to the addressee(s) and number(s) shown below, wherein such telefax is transmitted that same day in the ordinary course of business. 12 13 (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith. 14 (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. 15 (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court 16 at whose direction the service was made. 17 18 19 NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE 20 Attorneys for Plaintiff, Board of Retirement Harvey L. Leiderman 21 Ashley K. Ilangwa of the Orange County Employees Retirement System STEEFEL, LEVITT & WEISS 22 A Professional Corporation One Embarcadero Center, 30th Floor 23 San Francisco CA 94111 24 Jan J. Nolan, Esq. Attorney In Pro Per, Defendant P.O. Box 808 25 Santa Ana CA 92702 26 Eric W. Snethen, Esq. Attorney In Pro Per, Defendant 1600 Bermuda Dunes 27 Boulder City NV 89005 28

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04/14/98 TUE 15:35 PAX 415 788 0222 3002 STEEFEL LEVITT Q1002 HARVEY L. LEIDERMAN (State Bar No. 55838) DRANGE COUNTY SUPERIOR COURT LISA M. CARVALHO (State Bar No. 161420) 2 ASHLEY K. ILANGWA (State Bar No. 185014) APR 1 4 1998 STEEFEL, LEVITT & WEISS 3 A Professional Corporation One Embarcadero Center, 30th Floor ALAN SLATER, Executive OfficenClark San Francisco, California 94111 Telephone: (415) 788-0900 5 Attorneys for Plaintiff. 6 BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 7 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 COUNTY OF ORANGE STEEFEL, 1. ITT & WEISS
AMOUGHER, MITHOUN SAMMASCO, CA 9111 10 791315 BY FAX 11 BOARD OF RETIREMENT OF CASE NO. 791314 ORANGE COUNTY EMPLOYEES 12 RETIREMENT SYSTEM, a local public PLAINTIFF'S OPPOSITION TO entity, DEFENDANTS JAN J. NOLAN AND ERIC 13 W. SNETHEN'S DEMURRER TO COMPLAINT 14 PLAINTIFF. Date: April 21, 1998 15 Time: 1:30 p.m. Dept: 16 Judge: Hon. Ronald C. Kline JAN J. NOLAN, an individual, ERIC W. 17 SNETHEN, an individual, COUNTY OF Date of Filing: March 6, 1998 ORANGE, a political subdivision of the Trial Date: No Date Set State of California, and DOES 1-30,000, 18 inclusive. 19 20 DEFENDANTS. 21 22 AND RELATED CROSS-ACTION. 23 24 INTRODUCTION 1. On February 6, 1998, plaintiff, the Board of Retirement ("Board") of the Orange County Employees Retirement System ("OCERS") adopted Resolution 98-001, setting forth how 26 27 the Board would carry out its duty under law to pay increases in retirement benefits to OCERS' members and their beneficiaries. Immediately thereafter, each of the named defendants 28 PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S Page ! DEMURRER TO COMPLAINT

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threatened to sue the Board to force the Board to adopt its own view of the Board's duties. Simply stated, defendants Nolan and Snethen want the Board to pay more in benefits than the Board determined it was obligated to pay, and defendant County of Orange wants the Board to pay less. Because Resolution 98-001 most be implemented by July 1, 1998, the Board commenced this action for a full and speedy adjudication of the legal rights and duties of the respective parties.

Defendants Nolan and Snethen now demur to the Board's Verified Complaint, contending that there is no "actual controversy" between the parties.

Defendants are flat wrong. That there is an "actual controversy" between the parties to this action is evident from the following:

- Four days after the Board filed this action, defendants Nolan and Snethen filed a separate action (No. 791499), alleging all of the items of dispute previously identified in the Board's Verified Complaint (97 20, 21) in this action.
- Defendant County of Orange has answered the Board's complaint, and has cross-complained for a declaration that the Board's actions are null and void, carrying out the very threat previously identified in the Board's Verified Complaint (¶ 22) in this action.

The Board, charged with paying retirement benefits to over 25,000 active and retired employees, made a decision which is now under siege from all sides. How more appropriate scenario could there be for declaratory relief?

By this action, the Board seeks a judicial declaration of its obligation to pay certain benefits to defendants Nolan and Snethen. Other defendants, named and to be named, raise other, justiciable controversies that also require judicial declaration. This is precisely the relief contemplated under Code of Civil Procedure Section 1060.

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2. ARGUMENT

Declaratory Relief Is Proper to Resolve Disputes Between all Interested Parties and to Avoid a Multiplicity of Actions and Multiple, Possibly (a) Conflicting, Rulings.

Code of Civil Procedure sec. 1060 provides, in relevant part, that "any person . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights or duties of the respective parties, bring an original action . . . in superior court . . . for a declaration of his or her rights or duties " Moreover, an action for declaratory relief is proper when "the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law. [Citations omitted.]" Alameda County Land Use Assn. v. City of Hayward (1995) 38 Cal. App. 4th 1716, 1723 (overruling demurrer, court held that plaintiffs' complaint for declaratory and injunctive relief challenging adoption of a memorandum of understanding between two cities, a county and their respective agencies demonstrated a genuine controversy between the parties).

Here, the Board has a fundamental disagreement with Nolan and Snethen regarding OCERS' duty to provide certain retirement benefits to each of them, and their alleged rights to receive such benefits. As set forth in paragraphs 20, 21, 23 and 24 of the Board's Verified Complaint, Nolan and Snethen contend that the Board is obliged to provide them with certain specific retirement benefits. By its adoption of Resolution 98-001 (the "Resolution"), the Board has indicated its intention not to do so. Meanwhile, the non-demurring third defendant in this action, the County of Orange, contends not only that the additional benefits Nolan and Snethen request should continue to be excluded from the calculation of retirement benefits, but also that the Board should not provide certain other benefits authorized by the Resolution.

Notably, the County is not and cannot be made part of Nolan and Snethen's "other action." Nolan and Snethen's demurrer, based on the pendency of their later-filed "other action," ignores the fact that were this Court to grant their demurrer, this action would continue between the Board and the County (and likely other parties to be joined), addressing the very same issues -- and more - raised by Nolan and Snethen in the "other action."

PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S DEMURRER TO COMPLAINT

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California law provides that an action for declaratory relief is particularly appropriate where "the use of declaratory relief will avoid a multiplicity of suits that may ensue if a different remedy is pursued." Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47

Cal.App.3d 678, 684; see Californians for Native Salmon etc. Assn. V. Dept. Of Forestry (1990)

221 Cal.App.3d 1419, 1430 ("[t]here is authority for the use of declaratory relief to avoid multiple actions. As against the piecemeal review of similar issues by individual THP challenges, the present action appears singularly economical").

Notan and Snethen's claim that their "other action" provides them adequate relief and thus that their demurrer to this action should be sustained is incorrect and misses the point. Not only does the "other action" fail to provide an "adequate remedy" in lieu of this action — because it does not include the County — but it also encourages multiple actions in different departments of the same Court on the same issues. If the Board is obliged to defend the County's cross-complaint against it in this action, as well as Nolan and Snethen's Petition against it in the "other action," the Board would end up in the unworkable position of simultaneously litigating two cases, on largely the same questions of fact and law, integrating the same statutory and case law authorities, all of which likely would result in conflicting rulings. In one action, Nolan and Snethen would argue for greater benefits than the Board has determined they should receive, while in this action, the County would argue for fewer benefits than the Board has determined its members should receive. The threat of inconsistent decisions to a public body charged with uniformly applying the law to 19 plan sponsors and 25,000 individual members would needlessly consume resources and confuse the standards by which OCERS must operate.

The cases Nolan and Snethen cite for their "other pending action" argument are inapposite. In <u>Hagen v. Fairfield</u> (1965) 238 Cal.App.2d 197, the Court of Appeal determined that the plaintiff and the individual demurring defendant could resolve their disputes in that action collectively with other issues they had litigated in a series of long-pending legal actions between them. By sustaining the defendant's demurrer, the <u>Hagen</u> court effectively moved all disputes

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between the plaintiff and the defendant to the same courtroom.\(^1\) In contrast, here, the issues in dispute involve, at a minimum, the Board and the three named defendants in this action. The County, which has recently answered and cross-claimed for declaratory relief in this action, has a present interest in participating in the resolution of these issues. The County, however, is not, and cannot be, a party in Nolan and Snethen's "other action." The Board cannot adequately resolve its disputes with the three named defendants as to all pending issues in two lawsuits at once.

Also distinguishable is California lns. Guarantee Assn. v. Superior Court (1991)

231 Cal.App.3d 1617, which involved entirely different factual and legal considerations than those involved here. In California Ins., the trial court had determined that an underlying tort action should proceed before the insurer's coverage dispute regarding the same incident was determined. The trial court therefore stayed the insurer's action regarding coverage pending resolution of the tort action. The Court of Appeal concluded that "[g]iven the prospect of inconsistent verdicts with respect to factual issues common to both matters," the trial court had not abused its discretion in staying the coverage action. Nolan and Snethen's citation of this case in their brief is puzzling because, while irrelevant to their argument for demurrer, California Ins. is applicable to the Board's pending motion to enjoin or, alternatively, to consolidate Nolan and Snethen's later-filed action with this one. The issues in controversy in this action make it properly the "lead action," because the Court will be able to determine in this action, based upon the arguments of all interested parties (including the County), the rights and duties of those parties vis-a-vis the Board's Resolution. After the resolution of this action, if Nolan and Snethen's later-filed action is not by then moot, the Court would be able to determine whether the Board is obliged to perform any duties it has not performed with regard to Nolan and Snethen specifically.

Because actual controversies presently exist between all three named defendants and the Board as to several issues addressed in this action, and in Nolan and Snethen's other

PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S DEMURRER TO COMPLAINT

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On April 8, 1998, the Board filed a Motion to Enjoin or, Alternatively, to Consolidate Nolan and Snathen's other action into this one to achieve the same purpose as the <u>Hagen</u> court. The Board's Motion is scheduled to be heard on April 28, 1998 by this Court.

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action, and because the non-demurring defendant County is not included within the "other action," declaratory relief is both proper and necessary in this action as to all defendants.

- (b) The Complaint Seeks this Court's Resolution of Specific Issues in Controversy Between the Board and the Three Named Defendants.
 - (i) Plaintiff Board Seeks A Judicial Decree As To Its Duties Toward The Three Named Defendants And Their Rights To Receive Or Obligation To Pay For Certain Benefits.

A complaint for declaratory relief is "legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties . . . and requests that these rights and duties be adjudged by the court." Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 753, 760. The purpose of a declaratory judgment is "to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." Maguire v. Hibernia (1944) 23 Cal. 2d 719, 729.

As set forth in paragraphs 20, 21, and 22 of the Verified Complaint, the three named defendants dispute largely the same provisions of the Resolution: i) whether and to what extent "compensation" earned and received by active members prior to October 1, 1997 must be included in "compensation earnable"; ii) whether and to what extent a County automobile allowance should be included in "compensation earnable"; and iii) whether and to what extent flexible ("cafeteria plan") benefits should be included in "compensation earnable". Notan and Snethen's Petition for Writ of Mandate, Case Number 791499, of which Notan and Snethen request in their demurrer that this Court take judicial notice, simply replicates the same issues in another form. Despite the parties' plain conflict on these issues, Notan and Snethen here falsely contend that the Board's Verified Complaint <u>fails</u> to set forth an "actual controversy between the parties."

Moreover, Nolan and Snethen's contention that their disputes with the Board are limited to "three specifically identified elements of pay" and that the "remaining thirty elements and provisions in the Resolution, either do not apply to these defendants/petitioners, or are not in dispute between plaintiffs and these defendants," misconstrues the nature of the declaratory relief that that Board seeks and is misleading as to the scope of the relief Nolan and Snethen seek.

PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S

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In paragraph 25 of its Verified Complaint, the Board requests that the Court make a determination as to the specific controversies raised by defendants. Presently, the only parties who have raised actual controversies as to the Board's legal duties and their legal rights are defendants Nolan, Snethen and the County of Orange.² Therefore, unless and until other parties create an actual controversy so as to require the Board to amend its Verified Complaint to add additional defendants, those issues are the only issues to be resolved in this dispute. Nolan and Snethen's parade of horribles as to the "over a thousand pay codes" and corresponding Memoranda of Understanding that this Court allegedly would be required to review thus is unfounded. The issues in this declaratory relief action are straightforward. To be resolved properly, however, all parties that have competing interests in those specific issues should be heard, in this action. Once every side is heard and this Court makes a determination as to the duties of the Board and rights and/or obligations of the defendants as to the specific issues in dispute, that declaratory relief should both quiet the controversy as to the Resolution and stabilize the legal relationship among the parties.

The Board thus seeks no "advisory opinion" from this Court, but rather a complete and final determination of the specific issues in dispute. At any rate, the case that Nolan and Snethen cite for the proposition that courts should not make "advisory opinions" misses the mark. Selby Realty Co. V. San Buenaventura ((1973) 10 Cal.3d 110) involved a corporate property owner's dispute with a provision in the county's "general plan" that proposed constructing a road over the corporation's property without providing it with compensation. The Selby Court determined that because a general plan is "by its very nature . . . tentative and subject to change," there was no concrete dispute between plaintiff and the county that allowed "definitive and conclusive judicial relief." Id. at 117-118. In contrast, here, the Board has adopted the Resolution and has resolved that implementation shall occur beginning July 1, 1998. There is no further action the Board must take on this issue to give it force of law or to further affect the

PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S DEMURRER TO COMPLAINT

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The Orange County Attorneys' Assn. has aligned itself with Nolan and Snothen in case no. 791499.

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parties' rights and interests. As such, unlike the "general plan" in Selby, the Resolution is the parties' rights and interests.

Importantly, declaratory relief may "be brought to determine and declare rights before any actual invasion of those rights." Californians for Native Salmon, 221 Cal.App.3d at 1426. The fact that actual payments of benefits and receipt of contributions pursuant to the Resolution are to commence on July 1, 1998, thus does not preclude present declaratory relief as to the manner in which such payments will be calculated. Rather, now is the most appropriate time for such declaratory relief, so that the rights and duties of the parties may be determined before any violation of them in the course of paying benefits.

 (ii) The Adjudication Of the Present Controversy Requires Declaratory Relief As To Nolan And Snethen; "Affirmative Relief" Is Irrelevant.

Pursuant to the express language of Code of Civil Procedure § 1060, any person who desires "a declaration of his or her rights or duties with respect to another" may bring an action for declaratory relief against that other, so long as an "actual controversy" exists. Thus, by the very terms of the declaratory relief statute, the defendants in a declaratory relief action need not be able to provide "affirmative" relief to plaintiff. While certainly a person should not be compelled to defend himself in a lawsuit where no controversy exists as to him, here declaratory relief is sought as to an actual controversy — payments that are or are not due to Nolan and Snethen and contributions that they must make to support any increases in anticipated retirement benefits.

The cases that Nolan and Snethen cite to support their "affirmative relief" argument are inapposite. In <u>Pinnacle Holdings</u>, Inc. v. Simon (1995) 31 Cal.App.4th 1430, the plaintiff mobile home park property owner filed a petition for writ of mandate against a rent review board and the city government that had denied his application for a discretionary rent increase. The plaintiff joined as a defendant class on his declaratory relief cause of action certain of his tenants who earlier had voiced opposition to the proposed rent increase. The Court sustained the tenants' demurrer to the complaint because no relief was sought against or could be given by the defendant tenants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S DEMURRER TO COMPLAINT

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Pinnacle is both factually and legally distinguishable from this case. In contrast to the defendant tenants in Pinnacle, who generally complained about a proposed rent increase without any right to a particular rental rate, defendants Nolan and Snethen here claim particular rights to a certain computation of retirement benefits, in which they claim a vested right as County employees. Also unlike the Pinnacle defendant tenants, who could not have sued the property owner if he had raised their rents following approval by the rent review board, defendants Nolan and Snethen have sued the Board as to certain matters covered in the Board-approved Resolution. Consistent with these fact patterns, the Pinnacle defendant tenants presumably could have filed a petition for writ of mandate against the rent review board if that board had wrongfully approved the plaintiff property owner's requested rent increase. Such is precisely the type of complaint against the Board raised here by Nolan and Snethen. The resolution of that dispute properly requires declaratory relief.

Similarly, in <u>Duffey v. Superior Court</u> (1992) 3 Cal.App.4th 425, the disputants were two sets of homeowners – one homeowner who sought to build, and two others who sought to prevent the building. The plaintiff homeowners' association, which was responsible for enforcing the CC&R's of the association, took no position on the dispute. Rather, it sought declaratory relief as to the interpretation of the CC&R's, and joined all three homeowners in the suit. The Court of Appeal reversed the trial court's denial of the motion for judgment on the pleadings of the defendant homeowners who objected to the building, holding that those homeowners were not proper defendants because they could afford the plaintiff no relief.

In contrast to <u>Duffey</u>, in this action, the Board has taken an affirmative position as to retirement benefits policies and has resolved that it will pay certain amounts to, and collect other amounts from, members of OCERS. Following that determination, defendants Nolan and Snethen affirmatively challenged the Board's Resolution. Unlike <u>Duffey</u>, where the plaintiff homeowner's association had no actual controversy with the defendant neighbor homeowners, there is a present, actual controversy between the Board, on the one hand, and Nolan and Snethen, on the other. Unlike the plaintiff in <u>Duffey</u>, the Board is not merely faced with the prospect of ruling on a dispute between two factions of County employees. Rather, the Board has taken an <u>PLAINTIEF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S</u>

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DEMURRER TO COMPLAINT

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affirmative position that is now being challenged from at least two different sides, including Nolan and Snethen. As such, unlike the plaintiff in <u>Duffey</u>, the Board seeks relief vis-a-vis each named defendant – it requests a determination of how much to pay them, and how much to collect from them. Duffey simply is inapplicable to the facts presented here.

Weisman v. Odell (1970) 3 Cal.App.3d 494 also is inapplicable. Most notably, it was not a declaratory relief action; rather, the plaintiff brought an action for dissolution of a corporation. The Court determined that the trial court had the power to dissolve the corporation, but the corporation's shareholders could not be compelled to appear as party defendants. The Weisman court's analysis of that issue, however, turned on basic principles of corporate law, and had nothing to do with the law of declaratory relief. Moreover, the Weisman court noted that the shareholder defendants had no particular dispute with the shareholders seeking dissolution of the corporation that would not already be subsumed in the general dissolution action. Weisman fails to support Nolan's and Snethen's position here; these defendants affirmatively challenge the Resolution and seek for themselves a particular calculation of retirement benefits.

Nolan and Snethen are not passive recipients of the Board's decisions – rather they are obliged to contribute to OCERS and in return they receive retirement benefits. Nor are Nolan and Snethen unwilling litigants. They have filed their <u>own</u> action against the Board on the very same issues previously stated in this action. As set forth above, two lawsuits on the same issues are wasteful and duplicative – and the other action will not fully resolve the issues contested among all parties here. The rights and duties of all parties properly should be resolved in this action.

(c) The Board Properly Requests Judicial Review of its Challenged Quasi-Legislative Act.

The Board's adoption of the Resolution required an interpretation of the applicable provisions of the Government Code and the judicial decisions construing them, as well as an application of that law to facts particular to OCERS and its members. It is well-settled that a Court may provide declaratory relief when parties disagree over the construction of particular legislation, or when they dispute whether a public entity has established policies in violation of PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S

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applicable law. See Alameda County Land Use Assn. v. City of Hayward, 38 Cal.App.4th 1716. Here, the parties disagree over the construction of Government Code sections 31460, 31461, 31462 and 31462.1. The Board adopted the Resolution in conformance with such statutes and now defendants are contesting certain provisions of the Resolution. As to matters of law, this Court would construe the statutory provisions de novo. As to the decisions that the Board adopted that relied on factual determinations and exercise of the Board's discretion, this Court, as Nolan and Snethen point out, may review them only for fraudulent or arbitrary action. See Mike Moore's 24-Hour Towing and City of San Diego (1996) 45 Cal.App.4th 1294. The Board seeks no more and no less.

(d) The Demurrer Should be Taken Off Calendar Because of Defendants' Failure to Meet and Confer.

Pursuant to Orange County Local Rule 504, Nolan and Snethen, as parties in proper, were required to arrange a conference with counsel for the Board to meet and confer to resolve issues raised by their demurrer. Such conference had to occur before today, such that the parties could file meet and confer statements by today (i.e., five court days before the April 21, 1998 hearing). Accordingly, the demurrer should be taken off calendar and the Court should not rule thereon. See Pepperell v. Scottsdale Ins. Co. (1998) 1998 Cal. App. LEXIS 272 (Court did not rule on motion for continuance because the motion was taken off calendar when moving party failed to file a meet and confer statement).

PLAINTIFF'S OFFOSITION TO DEFENDANTS NOLAN AND SNETHEN'S DEMURRER TO COMPLAINT

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Given this etrict standard of review, if Nolan and Snethen are correct that this Court may not entertain this action because it could only review a "legislative" act for fraud or arbitrariness, then their "other action" must fail as well, since they do not allege there that the Board acted fraudulently or arbitrarily.

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04/14/98 TUE 15:39 FAX 415 788 0222 3002 STEEFEL LEVITT CONCLUSION For the foregoing reasons, the demurrer of defendants Jan J. Nolan and Eric W. 2 Snethen should be overruled. Alternatively, at a minimum, if the Court finds that the Board has 3 not alleged facts sufficient to support any of its claims in the Complaint, the Board respectfully 4 requests that it be granted leave to amend the Complaint. 5 6 Date: April 14, 1998 STEEFEL, LEVITT & WEISS A Professional Corporation 7 8 9 Ashley K. Jangwa Attorneys for Plaintiff CHEEJARANDERO CENTRE-1974 FLOOR: SAN FRANCISCO, CA 1411 10 BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT 11 SYSTEM ITT & WEISS 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 Plaintiff Board, at the very least, should have leave to amend its pleading. McDonald v. Superior Court 27 (1986) 180 Cal.App.3d 296, 304. ("Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance " (citation omitted)). 28 PLAINTIFF'S OPPOSITION TO DEFENDANTS NOLAN AND SNETHEN'S DEMURRER TO COMPLAINT 11408:13445,1

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2303 STREFEL, LEVITT 04/24/98 FRI 13:21 FAX 415 758 2018 2000g HARVEY L. LEIDERMAN (State Bar No. 55838) 1 LISA M. CARVALHO (State Bar No. 161420) ASHLEY K. ILANGWA (State Bar No. 185014) 2 STEEFEL, LEVITT & WEISS ORANGE COUNTY SUPERIOR COUNTY 3 A Professional Corporation One Embarcadero Center, 30th Floor San Francisco, California 94111 4 APR 24 1998 Telephone: (415) 788-0900 ALAN SLATER, Executive Officer 5 mercia Attorneys for Plaintiff BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES BY D. MACIAS 6 RETIREMENT SYSTEM 7 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 COUNTY OF ORANGE BY FAX ž 10 ONE EMEANCADERO CENTRE - 1973 FLOOR - 5AN FRANCECO, CA. TORES FRAN 11 BOARD OF RETTREMENT OF CASE NO. 791315 ORANGE COUNTY RETIREMENT VITT & WEISS 12 SYSTEM, a Local Public Entity, REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S 13 MOTION TO ENJOIN OR, ALTERNATIVELY, TO PLAINTIFF. CONSOLIDATE LATER-FILED ACTION 14 April 28, 1998 Date: 15 JAN J. NOLAN, an Individual; ERIC W. Time: 1:30 p.m. SNETHEN, an Individual; COUNTY OF Dept: STEFFE 16 ORANGE, a Political Subdivision of the Hon. Ronald C. Kline Judge: State of California; and DOES 1-30,000, Date Action Filed: March 6, 1998 17 inclusive, Trial Date: None Set 18 DEFENDANTS. 19 AND RELATED CROSS-ACTION. 20 21 I. INTRODUCTION 22 In the short time since Plaintiff filed this motion, two additional parties have leveled claims against the Board of Retirement's Resolution 98-001: 23 On April 9, 1998, defendant County of Orange filed a Cross-Complaint for 24 25 Declaratory Relief against the Board in this action, seeking to invalidate the entire Resolution. ED RY PAT On April 20, 1998, the Board received a demand from the Orange County 26 27 Employees Association ("OCEA") (not a party to either this action or defendant Nolan and Ē 28 Snethen's Mandamus Action), that the Board calculate OCEA's 10,000 members' retirement REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO ENION, ETC. Page 1

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benefits in a manner contrary to Resolution 98-001, raising all the same issues raised by defendants Nolan and Snethen. (See Exhibit A to Declaration of Dolores J. Kramer served and filed herewith ("Kramer Declaration.".)

Defendants Nolan and Snethen oppose this motion, criticizing the Board of Retirement's fear of a multiplicity of actions attacking Resolution 98-001. Plaintiff's fears are well-founded, however. If defendants' Mandamus Action is not stayed or consolidated with this action, where all contests to the Board's Resolution can be resolved, there will be at least three actions over the Resolution pending in different departments of this court.

These recent developments underscore the urgency of the Board's request to have the ever-growing retirement benefits controversy between the Board, on the one hand, and various Orange County employers, employees and employees' groups, on the other, be resolved in one lawsuit, under the supervision of one judge of this Court, to dispose of all issues that are or are to be raised. Contrary to defendants' suggestion, it is irrelevant that the perties and issues in this action, when compared to defendants Nolan's and Snethen's Mandamus Action, are not precisely "the same;" it suffices that this action subsumes the parties and issues in the Mandamus Action and any other action that has been or may yet be brought by any party affected by the Resolution. Because this action is structured broadly enough to encompass all possible challenging parties and issues, it should be the lead case in this developing litigation. The Mandamus Action should be enjoined or, alternatively, consolidated into this action.

THE BOARD'S MOTION SHOULD BE GRANTED П.

Defendants' opposition to the Board's Motion to Enjoin or, Alternatively, to Consolidate Later-Filed Action serves to support, rather than defeat, the Board's Motion. Defendants detail the numerous parties potentially affected, and claims and issues potentially implicated, by the Board's Resolution relating to its calculation of retirement benefits for all

The "Introduction" section of defendants' brief contains several factual misstatements and mischaracterizations. See Supplemental Declaration of Harvey L. Leiderman in Support of Ex Parte Application to Enjoin, or Alternatively to Consolidate Other Pending Action, filed March 16, 1998. Because defendant's introduction is irrelevant to this Motion, however, the Board will not re-address their misstatements here.

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO ENJOIN, ETC. 11408:22447.1

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Orange County employees (see Defendants' opposition brief, pages 3-4), forming a compelling argument for consolidating all such interests and parties into one action. Defendants then assert that the Board's concern regarding the potential for many lawsuits relating to the Resolution is mere "speculation" (opposition brief, page 7, line 17). Speculation has become reality, however, now that the County has cross-sued the Board in this action to invalidate the entire Resolution 98-001 and the largest employee association in the county, OCEA, threatens its own action against the Board for the very items of relief sought by Nolan and Snethen. (See Exhibit A to the Kramer Declaration, served and filed herewith.)

This latest demand, by an association claiming to represent "more than 10,000 employees" of the County, is precisely the sort anticipated by the Board that informed its decision to commence this declaratory relief action. It also precisely illustrates the need for the relief requested by this motion: to gather into one case, before one judge of this Court, on one pre-trial, briefing and trial schedule, all the parties, claims and issues that are raised in opposition to the Resolution. The Board's request is a practical, not a tactical, one; one which will serve efficiently to employ this Court's resources. Moreover, this approach will most effectively bind the Board and all retirement system plan sponsors and members as a matter of law. The Board is obligated to apply the law of retirement benefits uniformly to all of its plan sponsors and members. Only a single case that adjudicates all the rights and duties of all interested parties may ensure a consistent, binding resolution.

Contrary to defendants' assertions, the Board does not here seek sweeping, generalized judicial approval of Resolution 98-001. Rather, as the Board has set forth in its pleading herein, and as is discussed in detail in its opposition to defendants' demurrer herein (set for hearing on the same date as this motion), the Board only seeks the Court's determination on issues that actually are in controversy between the Board and those who contest portions of the Board's Resolution. Those aspects of the Board's Resolution which no party challenges will not require judicial review in this action. The specific controversies to be determined here are only those raised by defendants and their association in the Mandamus Action, the identical (and additional) issues raised by OCEA, and the issues raised by the County in its Answer and Cross-REPLY BRIEF IN SUPPORT OF PLAINTIFP'S MOTION TO BNJOIN, ETC.

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Complaint. By this motion, the Board requests that the Court ensure that this action alone will address all of these and any other specific controversies that urise in the event additional parties challenge specific aspects of the Resolution.²

Defendants would rather have the Court try their issues in their Mandamus Action in Department 6, the County's issues in Department 7, OCEA's issues in a third department yet to be determined, and each other complainant in yet additional departments of this court.

Defendants offer no valid explanation for this form of Balkanized justice, or why a public agency attempting to apply a single law should be so exposed to multiple and potentially conflicting rulings.

III. CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court grant its Motion to Enjoin or, Alternatively, to Consolidate the Leter-Filed Mandamus Action with this action.

Date: April 24, 1998

STEUFEL, LEVITT & WEISS A Professional Corporation

Harvey L Leiderman

Attorneys for Plaintiff

BOARD OF RETTREMENT OF ORANGE COUNTY EMPLOYEES RETTREMENT

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In continuing to press the misleading argument that the Board's Verified Complaint herein improperly seeks the Court's approval of each and every aspect of the Resolution, defendants mischaracterize the Complaint and ignore the Board's detailed response to this claim, as set forth in the Board's briefing on the demurrer. Moreover, defendants' argument contradicts defendant Noian's own "meet and confer" declaration on the demurrer, in which Noian acknowledged the Board's counsel's willingness to limit the relief the Board seeks in this action "to those elements of the resolution which are contested either by the defendant County or defendants Noian and Snethen."

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO ENJOIN, ETC. 11408-22447.1

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JAN J. NOLAN Bar No. 63999 P.O. Box 808 Santa Ana, CA 92702 Telephone: (714) 834-3655 Attorney In Pro Per, Defendant

ERIC W. SNETHEN Bar No. 49791 1600 Bermuda Dunes Telephone (702) 293-7065 Boulder City, NV 89005 Attorney In Pro Per, Defendant

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity.

Plaintiff.

JAN J. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive,

Defendants.

AND RELATED CROSS-ACTION

Case No. 791315

ASSIGNED FOR ALL PURPOSES TO JUDGE RONALD C. KLINE, DEPT. 7.

DEFENDANTS NOLAN AND SNETHEN'S VERIFIEDANSWER TO COMPLAINT FOR DECLARATORY RELIEF

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100 Defendants JAN J. NOLAN ("NOLAN") and ERIC W. SNETHEN ("SNETHEN") answer plaintiff's Complaint for Declaratory Relief as follows:

- Defendants admit the allegations contained in paragraphs 1; 2; 3; and 4 of the 1. Complaint.
 - Defendants deny the allegations contained in paragraph 5 of the Complaint. 2.
- Defendants admit the allegations contained in paragraphs 6; 7; and 8 of the 3. Complaint.
- Defendants neither admit nor deny the allegations contained in paragraph 9 of the Complaint. Government Codes Sections 31460, 31461, 31462 and 31462.1 speak for themselves

and their effect in this action is a matter of statutory interpretation for the Court to determine.

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- Defendants admit the allegations contained in paragraph 10 of the Complaint.
- 6. Defendants admit in part and deny in part, the allegations contained in paragraph 11 of the Complaint. Defendants admit the first sentence in paragraph 11 but deny that the <u>Ventura</u> decision is silent as to whether and to what extent the ruling was to apply to active and former employees of other counties and public districts not before the Court in <u>Ventura</u>.
- Defendants lack sufficient information upon which to admit or deny the allegations contained in paragraphs 12; 13; and 14 of the Complaint and on that basis deny those allegations.
 - 8. Defendants admit the allegations contained in paragraph 15 of the Complaint.
 - Defendants deny the allegations contained in paragraph 16 of the Complaint.
 - 10. Defendants admit the allegations contained in paragraph 17 of the Complaint.
- 11. Defendants admit in part and deny in part, the allegations contained in paragraph 18 of the Complaint. Defendants admit the Resolution was adopted by a vote of 7-2, and a copy is attached to the Complaint. Defendants deny the Resolution was adopted in a lawful manner and deny that the policies and guidelines contained in the purported Resolution are mandated by applicable law. All allegations not specifically admitted are denied.
- Defendants admit, deny and otherwise respond as above to the allegations contained in paragraph 19 of the complaint.
 - Defendants admit the allegations contained in paragraphs 20 and 21 of the Complaint.
- 14. Defendants deny the allegation in paragraph 22 that the Retirement Board has taken any lawful action to authorize retirement allowances related to matters under consideration in this action; and lack sufficient information upon which to admit or deny the other allegations contained in paragraphs 22 of the Complaint and on that basis deny those allegations.
- 15. Defendants lack sufficient information upon which to admit or deny the allegations contained in first paragraph numbered 23 of the Complaint and on that basis deny those allegations.
- Defendants admit the allegations contained in the second paragraph numbered 23 of the Complaint.
 - 17. Defendants admit the allegations contained in paragraph 24 of the Complaint.
 - 18. Defendants deny the allegations contained in paragraph 25 of the Complaint.

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FIRST AFFIRMATIVE DEFENSE

19. As a first separate and distinct affirmative defense defendants NOLAN and SNETHEN allege that the Complaint does not state facts sufficient to constitute a cause of action as it seeks an advisory opinion.

SECOND AFFIRMATIVE DEFENSE

20. As a second separate and distinct affirmative defense, NOLAN and SNETHEN allege the Complaint does not state facts sufficient to constitute a cause of action as the relief sought violates the Separation of Powers Doctrine.

THIRD AFFIRMATIVE DEFENSE

21. As a third separate and distinct affirmative defense, NOLAN and SNETHEN allege the Complaint does not state facts sufficient to constitute a cause of action as there is no actual controversy which admits of definitive and conclusive relief by judgment within the field of judicial administration.

FOURTH AFFIRMATIVE DEFENSE

22. As a fourth separate and distinct affirmative defense, NOLAN and SNETHEN allege the Complaint does not state facts sufficient to constitute a cause of action as there is another action pending which has not been enjoined.

FIFTH AFFIRMATIVE DEFENSE

23. As a fifth separate and distinct affirmative defense, NOLAN and SNETHEN allege the purported Resolution 98-001 is void as a matter of law because the Retirement Board is not statutorily authorized to pass of Resolution of this nature and content.

SIXTH AFFIRMATIVE DEFENSE

24. As a sixth separate and distinct affirmative defense, NOLAN and SNETHEN allege the purported Resolution 98-001 is unlawful because it limits the definition of "compensation" and "compensation earnable" to only those cash payments for accrued leave which was earned in the final period, in violation of Government Code Sections 31460, 31461, 31462, and 31462.1 as construed by Ventura.

SEVENTH AFFIRMATIVE DEFENSE

25. As a seventh separate and distinct affirmative defense, NOLAN and SNETHEN allege the purported Resolution 98-001 is unlawful because it excludes cash payment for the "flexible benefit plan" in violation of the United States Constitution, article I, section 10; and the California Constitution, article I, section 9.

EIGHTH AFFIRMATIVE DEFENSE

26. As an eighth separate and distinct affirmative defense, NOLAN and SNETHEN allege the purported Resolution 98-001 is unlawful because it is contrary to the terms of the Attorneys' Memorandum of Understanding and Personnel and Salary Resolution with regard to the number of hours of vacation which may be cashed on an annual basis and qualify for retirement credits and, therefore, violates Government Code sections 31460, 31461, 31462, and 31462.1.

NINTH AFFIRMATIVE DEFENSE

27. As a ninth separate and distinct affirmative defense, NOLAN and SNETHEN allege the purported Resolution 98-001 is unlawful because it erroneously applies the statute of limitations to limit the retroactive effect of the <u>Ventura</u> decision and is, therefore, in violation of the applicable law.

TENTH AFFIRMATIVE DEFENSE

As a tenth separate and distinct affirmative defense. NOLAN and SNETHEN allege the purported Resolution 98-001 is unlawful because it includes the manetary value of an in-kind benefit, not paid in cash, in the form of the personal use of an automobile provided to certain employees. Such monetary value of an in-kind benefit is specifically excluded from the definition of "compensation" in Government Code Section 31460. The inclusion of this benefit constitutes a gift of public funds in violation of the California Constitution and other statutes.

DATED: May 6, 1998

JAN J. MOLAN, Defendant In Pro Per

ERIC W. SNETHEN, Defendant in Proper

VERIFICATION

We, Jan J. Nolan, and Eric W. Snether, are duly licensed to practice law in all the courts of the State of California and are attorneys for petitioners in this matter. We have written and read the foregoing ANSWER, and all the facts alleged therein, not otherwise supported by exhibits, or other documents, are true of our own personal knowledge.

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

Dated this 6th day of May 1998

IAN J. NOVAN, Attorney In Pro Per, Petitioner

ERIC W. SNETHEN

Attorney In Pro Per, Petitioner

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1	DEC	DECLARATION OF SERVICE BY MAIL					
2	County of Orange State of California	ss					
3	0.55						
4	Case Name:	BOARD OF RETIREMENT OF ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity vs.					
5		JAN J. NOLAN, an individual; ERIC W. SNETHEN, an individual; COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive					
7	Case Number:	791315					
8	I declare that:						
9	I am 18 years of age or older and not a party to the above-entitled case.						
10	On May 6, 1998,	I served the attached:					
11							
12	DEFENDAN	IT'S VERIFIED ANSWER TO COMPLAINT					
13	in the above-referenced case, by placing a true copy thereof enclosed in a sealed envelope with						
14	addressed as follows	prepaid in the United States mail at Santa Ana, County of Orange, California,					
15	MR HARVEY L LEIDERMAN, ESQ.						
16	STEEFEL, LEVITT & WEISS ONE EMBARCADERO CENTER, 30th FLOOR SAN FRANCISCO, CA 94111						
17		1. COMMA					
18	THOMAS AGIN, A COUNTY COUNSE	SL .					
19	HALL OF ADMINISTRATION 10 CIVIC CENTER PLAZA, 4th FLOOR						
20	P.O. BOX 1379 SANTA ANA, CA 9	22702					
21							
22	I declare under penalty of perjury the foregoing is true and correct, and that this declaration was						
23	executed on May 6	, 1998, at Santa Ana, County of Orange, California					
24	Curpower (Carrel					
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JAMES_MORELL_0480

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STEPHEN H. SILVER, ESQ. California State Bar No. 38241 ELIZABETH SILVER TOURGEMAN, ESO. California State Bar No. 193114 SILVER, HADDEN & SILVER 1428 Second Street P.O. Box 2161 Santa Monica, CA 90407-2161 (310) 393-1486

ORANGE COUNTY SUPERIOR COURT

MAY 2 9 1998 ALAN SLATER, Executive Officer Clark

BY A. KNOX

Attorneys for Intervenor Orange County Employees' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity

Plaintiff,

JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000. inclusive

Defendants,

COUNTY OF ORANGE, a political subdivision of the State of California,

> Cross-Complainant and Defendant,

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,

> Cross-Defendant and Plaintiff.

CASE NO. 791315

COMPLAINT IN INTERVENTION

DATE: N/A N/A TIME:

DEPT:

JUDGE: JOHN C. WOOLLEY

TRIAL DATE: NOT SET COMPLAINT FILED: MARCH 6, 1998 CROSS-COMPLAINT FILED: APRIL 8, 1998

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ORANGE COUNTY EMPLOYEES' ASSOCIATION,

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Intervenor and Cross-Petitioner,

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity.

Cross-Respondent, Plaintiff and Cross-Defendant.

COUNTY OF ORANGE, 9

Real Party in Interest, Defendant and Cross-Complainant.

Cary

Pursuant to the Order of this Court granting Intervenor Orange County Employees'
Association (OCEA) leave to file a Complaint in Intervention in accordance with California
Code of Civil Procedure Section 387(a), Intervenor hereby submits its First Amended
Complaint in Intervention which (1) answers the Complaint for Declaratory Relief; (2)
answers the Cross-Complaint for Declaratory Relief; and (3) Cross-Petitions for a Writ of
Mandate against Plaintiff and Cross-Defendant (the Board), as follows:

A. INTERVENOR'S ANSWER TO ALLEGATIONS CONTAINED IN THE VERIFIED COMPLAINT FOR DECLARATORY RELIEF.

- Intervenor admits the allegations contained in paragraph 1.
- 2. Intervenor lacks sufficient information or belief to enable it to answer the allegation that Defendant Nolan has publicly announced her pending intention to retire from active, full-time employment with the County and, based upon that lack of information or belief, Intervenor denies that allegation. Intervenor admits the remaining allegations contained in paragraph 2.
 - 3. Intervenor admits the allegations contained in paragraph 3.
 - 4. Intervenor admits the allegations contained in paragraph 4.

- Intervenor lacks sufficient information or belief to enable it to answer the allegations contained in paragraph 5 and, based upon that lack of information or belief, denies those allegations.
 - 6. Intervenor admits the allegations contained in paragraph 6.
 - Intervenor admits the allegations contained in paragraph 7.
 - 8. Intervenor admits the allegations contained in paragraph 8.
- 9. Intervenor admits that the Board of Retirement has the statutory authority to make the determinations described in paragraph 9 in accordance with the provisions of the CERL and, particularly, Sections 31460, 31461, 31462 and 31462.1 of the California Government Code.
- Intervenor denies that the effective date of the <u>Ventura</u> decision was October
 1, 1997, and admits the remainder of the allegations in paragraph 10. Intervenor affirmatively alleges that its effective date was August 14, 1997.
- Answering paragraph 11, Intervenor admits that the Court in the <u>Ventura</u> decision stated that it "need not decide whether [its] decision applies retroactively to any other county" and that the Court mandated a method for determining "final compensation" under the CERL which differed from that previously utilized by the Board of Retirement.
 - Intervenor admits the allegations contained in paragraph 12.
 - Intervenor admits the allegations contained in paragraph 13.
 - 14. Intervenor admits the allegations contained in paragraph 14.
 - Intervenor admits the allegations contained in paragraph 15.
- 16. Intervenor lacks sufficient information or belief to enable it to answer the allegations contained in paragraph 16 and, based upon this lack of information or belief, denies the allegations set forth in paragraph 16.
 - 17. Intervenor admits the allegations contained in paragraph 17.
- 18. Intervenor admits the allegations contained in paragraph 18 except that Intervenor affirmatively alleges that, subsequent to its February 6, 1998 meeting, the Board of Retirement modified the action taken in Resolution 98-001, and particularly paragraphs 6

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and 8, to provide that the Retirement Board no longer would be collecting any alleged shortfall from any member but, instead, would be providing any necessary funding out of its own reserves.

- 19. Intervenor realleges and incorporates herein by reference the contents of paragraphs 1 through 18 above.
- 20. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 20 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 20.
- 21. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 21 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 21.
- 22. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 22 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 22.
- Intervenor lacks sufficient information or belief to enable it to answer the 23. allegations set forth in paragraph 23 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 23.
- 24. Intervenor admits the allegations contained in paragraph 24. Intervenor affirmatively alleges that an additional actual controversy has arisen and now exists between Intervenor and the Board of Retirement and between Intervenor and the County, as more particularly alleged hereinafter in Section C of this Complaint in Intervention.
- 25. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 25 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 25. Intervenor affirmatively desires a judicial determination regarding all of the controversies existing in this proceeding, including those issues raised by Intervenor in this Complaint in Intervention.

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B. INTERVENOR'S ANSWER TO ALLEGATIONS CONTAINED IN THE CROSS-COMPLAINT FOR DECLARATORY RELIEF.

- 26. Intervenor admits the allegations contained in paragraph 1.
- 27. Intervenor admits the allegations contained in paragraph 2.
- 28. Intervenor admits the allegations contained in paragraph 3.
- 29. Intervenor admits the allegations contained in paragraph 4, except that Intervenor affirmatively alleges that, subsequent to its February 6, 1998 meeting, the Board of Retirement modified the action taken in Resolution 98-001, and particularly paragraphs 6 and 8, to provide that the Retirement Board no longer would be collecting any alleged shortfall from any member but, instead, would be providing any necessary funding out of its own reserves.
- 30. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 5 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 5.
- 31. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 6 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 6.
- 32. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 7 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 7.
- 33. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 8 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 8. Intervenor affirmatively desires a judicial determination regarding all of the controversies existing in this proceeding, including those issues raised by Intervenor in this Complaint in Intervention.
 - Intervenor admits the allegations contained in paragraph 9.
- Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 10 and, based upon this lack of information or belief,

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27 28 Intervenor denies the allegations contained in paragraph 10.

C. ALLEGATIONS IN SUPPORT OF INTERVENOR'S CROSS-PETITION FOR WRIT OF MANDATE.

- 36. At all times herein mentioned, Const-Respondent, Plaintiff and CrossDefendant Board of Retirement, Orange County Retirement System (hereinafter referred to
 as the Board) was, and now is, the entity specified by the County Employees' Retirement
 Law (CERL) of 1937 (California Government Code Section 31450, et seq.) as being vested
 with the power and obligation to manage the Orange County Retirement System (hereinafter
 referred to as the "System") in accordance with the provisions of Section 31520 of the
 California Government Code.
- 37. At all times mentioned herein, Intervenor Orange County Employees'
 Association was, and now is, an employee organization recognized by Real Party in
 Interest, Defendant and Cross-Complainant, the County of Orange (hereinafter referred to
 as the "County"), as the exclusive representative of several units of representation
 established by the County which are comprised of numerous County employees, all of
 whom are members of the System, as defined in Sections 31470 and 31552 of the
 California Government Code. As a recognized employee organization, Intervenor has
 standing and authorization to take appropriate action to secure retirement benefits entitled to
 individuals it was, or now is, recognized to represent.
- 38. One of the primary responsibilities of the Board is to ascertain and calculate the "final compensation" of members of the System in order to determine the amount of retirement benefits to which they are or will be entitled.
- 39. At all times herein mentioned, the final compensation for certain members of the System was and is defined in Section 31462.1 of the California Government Code in pertinent part as follows:
 - "'Final compensation' means the average annual compensation by a member during any year elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the year immediately

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preceding his retirement."

40. At all times herein mentioned, the final compensation for the remaining members of the System who were not covered by the definition described above in paragraph 39 was and is defined in Section 31462 of the California Government Code in pertinent part as follows:

"'Final compensation' means the average annual compensation earnable by a member during any three years elected by a member at or before the time he files an application for retirement or, if he fails to elect, during the three years immediately preceding his retirement...."

41. At all times herein mentioned, the "compensation earnable" of all members of the System was, and is, defined in Section 31461 of the California Government Code in pertinent part as follows:

"'Compensation earnable' by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by him at the beginning of the absence."

42. At all times herein mentioned, the "compensation" of all members of the System was, and now is, defined in Section 31460 of the California Government Code in pertinent part as follows:

"'Compensation' means the remuneration paid in cash out of County...funds,...but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member."

43. The County is obligated by the CERL to make employer-required retirement contributions which are calculated on the basis of the "compensation earnable" of each employee. Consequently, the County will be adversely affected if Intervenor is successful in this proceeding. Therefore, the County is a real party in interest in this proceeding.

44. On March 28, 1995, a Petition for Writ of Mandate was filed in the Ventura County Superior Court by a recognized employee organization and three members of the System who had retired on or after March 30, 1992. That lawsuit challenged the manner in which the Ventura County Board of Retirement was calculating the "compensation", "compensation earnable", "final compensation", and resulting pensions, of the three named individuals and employees in job classifications represented by the recognized employee organization. Those proceedings were ultimately resolved by the opinion of the California Supreme Court in Ventura County Deputy Sheriffs' Ass'n. v. County of Ventura (1997) 16 Cal.4th 483, 66 Cal.Rptr.2d 304 (hereinafter referred to as the "Ventura decision"). The Ventura decision determined that, except for deferred compensation contributions from the employer, all remuneration paid in cash out of County funds in return for services rendered by the member during the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the period under consideration must be included in the member's "compensation earnable".

One item of remuneration which the Supreme Court specifically held to be included within that definition was any cash payment received during the period under consideration for relinquishing annual leave or vacation benefits earned within that measuring period.

The <u>Ventura</u> decision was applied retroactively with respect to the three named members as well as those members represented by the recognized employee organization who retired between the time the action was commenced and the date of the decision.

45. On or about February 6, 1998, the Board adopted a Resolution to implement the <u>Ventura</u> decision. A true and correct copy of that Resolution is attached as Exhibit "A" to the Verified Complaint for Declaratory Relief filed by the Board, and incorporated by reference as though set forth in full. The action taken in paragraphs 6 and 8 of that Resolution were subsequently modified by the Board so that the Board would not collect any asserted shortfall from any member. Instead, it would fund any asserted shortfall out of its own reserve funds. Intervenor supports the action taken by the Board, except that in the following respects the Board neglected to recalculate the definitions of compensation,

compensation earnable and final compensation in the manner required by the CERL, as interpreted by the <u>Ventura</u> decision:

- (A) The Board neglected to include in the definitions of compensation earnable and final compensation for affected active and retired members (including beneficiaries) cash payments received during the period under consideration that were not specified in an applicable collective bargaining agreement, including payments received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that measuring period;
- (B) The Board neglected to include in the definitions of "compensation earnable" and "final compensation" for members (including beneficiaries) who retired prior to January 1, 1991 the remuneration paid in cash out of County funds to insurance providers during the applicable measuring period, whether directly, or through a Flexible Benefits (or Cafeteria) Plan, which cash remuneration was paid in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period, to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependents.
- (C) The Board neglected to include in the definitions of "compensation earnable" and "final compensation" for affected active and retired members (including beneficiaries) who were employed prior to, on and after January 1, 1991 the remuneration paid in cash out of County funds during the applicable measuring period in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period to a Flexible Benefits Plan (or Cafeteria Plan) maintained for the benefit of the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to

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receive a cash payment and/or to purchase other valuable benefits.

Following the Ventura decision, representatives of Intervenor requested the

2 3 Board to include in the compensation earnable, final compensation and resulting pensions of 4 all retired members (including beneficiaries) who were receiving pension payments within 5 three years prior to the time of the Ventura decision, both prospectively and retroactively 6 for all pension payments made within three years prior to the Ventura decision, and of all 7 8 9 10 11 12 13 14 15 16 17 18 19 20

active members then employed by the County and future members (a) all cash payments received during the final compensation period, including any received in connection with separation from employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the applicable measuring period; (b) remuneration paid in cash out of County funds to insurance providers during the final compensation period for services rendered by a member who retired prior to January 1, 1991 to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependents, whether directly, or through a Flexible Benefits (or Cafeteria) Plan; and (c) remuneration paid in cash out of County funds to a Flexible Benefits (or Cafeteria) Plan maintained for the benefit of any member employed prior to, on and after January 1, 1991 during the period under consideration for services rendered by the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits, but the Board refused to do so. Instead, it took the action described in paragraph 45. Therefore, there are no further administrative remedies available to Intervenor to compel the Board to correct the action described above in paragraph 45. Consequently, Intervenor has exhausted all available administrative remedies.

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47. Unless the Board is commanded by this Court to include in the "compensation earnable", "final compensation" and resulting pensions of retired members (including beneficiaries) who were receiving pension payments within three years prior to the time of the Ventura decision, both prospectively and retroactively with respect to all

pension payments made within three years prior to the Ventura decision, and of all active members (including future members) (a) all cash payments received during the applicable measuring period, including any received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the applicable measuring period, (b) remuneration paid in cash out of County funds to insurance providers during the period under consideration for services rendered by a member who retired prior to January 1, 1991 to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependents, whether directly, or through a Flexible Benefits (or Cafeteria) Plan; and (c) remuneration paid in cash out of County funds to a Flexible Benefits (or Cafeteria) Plan maintained for the benefit of any member employed prior to, on and after January 1, 1991 during the period under consideration for services rendered by the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits, Intervenor and the individuals it represents will suffer great and irreparable injury in that they will receive inferior benefits to those entitled them under the provisions of the CERL and thereby will be deprived of their vested statutory and contractual rights.

- 48. Intervenor does not have an adequate remedy at law in that the relief requested by it cannot be measured or satisfied by monetary damages.
- 49. The prosecution of this action, if successful, will result in the enforcement of an important right affecting the public interest in that (a) significant retirement benefits will have been conferred on a large class of persons, i.e., all present and future members of the System; (b) the necessity and financial burden of private enforcement of these rights are such as to make the award appropriate; and (c) attorneys' fees should not, in the interest of justice, be paid out of any monetary recovery obtained through this action. As a result, Intervenor is entitled to an award of attorneys' fees pursuant to the provisions of Section 1021.5 of the California Code of Civil Procedure.

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27 28 50. The successful prosecution of this proceeding will constitute the reversal by this Court of the denial by the Board of an application for a retirement allowance or for a claim based on a claimed pension right or benefit. Consequently, Intervenor is entitled to reasonable attorneys' fees in accordance with the provisions of Section 31536 of the California Government Code.

WHEREFORE, Intervenor prays that:

A. Following a duly noticed hearing, this Court grant Intervenor's Motion and Application for Peremptory Writ of Mandate commanding the Board to include in the "compensation earnable", "final compensation" and resulting pensions of members (including beneficiaries) who were receiving pension payments on or after August 14, 1994, both prospectively and retroactive to August 14, 1994, and of all active members (including future members) (a) all cash payments received during the applicable measuring period, including any received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the applicable measuring period; (b) remuneration paid in cash out of County funds to insurance providers during the period under consideration for services rendered by a member who retired prior to January 1, 1991 to satisfy the member's obligation to pay premiums for himself and eligible dependents, whether directly, or through a Flexible Benefits (or Cafeteria) Plan; (c) remuneration paid in cash out of County funds to a Flexible Benefits (or Cafeteria) Plan maintained for the benefit of any member employed prior to, on and after January 1, 1991 during the period under consideration for services rendered by the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits.

B. This Court declare that the action heretofore taken by the Board was in compliance with and required by the CERL, except as set forth above in Paragraph A of this Prayer.

-1	C. This Court award to Intervenor its costs of suit herein.		
2	D. This Court award to Intervenor reasonable attorneys' fees incurred by it in		
3	accordance with Section 31536 of the California Government Code and Section 1021.5 of		
4	the California Code of Civil Procedure.		
5	E. This Court award such other and further relief as it deems necessary and proper.		
6	Respectfully submitted,		
7	DATED: May 27, 1998 SILVER, HADDEN & SILVER		
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9	By: STEPHEN H. SILVER Attorneys for Intervenor		
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STATE OF CALIFORNIA, COUNTY OF CRAFTE			
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	and know its contents.		
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a party to this action, and am authorized to make the verificance for any reason. I am informed and believe and no that grant along that true. I The matters stated in the foregoing document are true if any stated on information and belief, and as to those mattern. Be not the I am one of the attorneys for Intervenor OPANIES C	the mattern mated in the foregoing document are in another extent as to those matters which are not to those matters which are CONTY EMPLOYEES! ASSOCIATION		
a party to this action. Such party is absent from the county of eformacid a this verification for and on behalf of that party for that reason. I am infi the matters stated in the foregoing document are true. Executed on May 26, 1998, at Sant	ormed and believe and on that ground allege that		
I declare under penalty of perjury under the laws of the State of Cali	•		
r desire that point, of perjuly mate the time of the sixth of cent			
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ELIZABETH SILVER TOURGEMAN	If her X Lougena		
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STATE OF CALIFORNIA, COUNTY OF			
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t am over the age of 18 and not a party to the within action; my bu			
On, 19, 1 served the foregoing document of	described as		
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by placing the true copies thereof enclosed in sealed envelopes address			
by placing I the original I a true copy thereof enclosed in sealed cr	nvelopes addressed as follows:		
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BY MAIL +I deposited such envelope in the mail at	. California.		
The envelope was mailed with postage thereon fully prepaid.	, Camornia.		
As follows: I am "readily familiar" with the firm's practice of co	election and processing correspondence for mailing.		
Under that practice it would be deposited with U.S. postal service on the			
party served, service is presumed invalid if postal cancellation date or posteposit for mailing in affidavit.			
**(BY PERSONAL SERVICE) I delivered such envelope by hand			
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Executed on	, California.		
(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct. (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.			
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PROOF OF SERVICE

B

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On May 27, 1998. I served the foregoing document described as COMPLAINT IN INTERVENTION, on the parties in this action by placing ___ an original(s) _X a true copy(s) thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED MAILING LIST

I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 27, 1998, at Santa Monica, California.

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

___ FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHERYL L. MITCHELL

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CHERTL L. MITCHELL

JAMES MORELL 0495

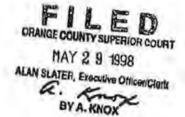
MAILING LIST 2 3 Harvey L. Leiderman, Esq. (Courtesy Copy via Facsimile 415-2019) Ashley K. Ilangwa, Esq. 4 STEEFEL, LEVITT & WEISS One Embarcadero Center 5 30th Floor San Francisco, CA 94111 6 7 Laurence M. Watson, County Counsel Thomas C. Agin, Assistant County Counsel 10 Civic Center Plaza, 4th Floor 8 P.O. Box 1379 9 Santa Ana, CA 92702-1379 10 Jan Nolan (Courtesy Copy via Pacsimile 714-834-5706) 11 P.O. Box 808 Santa Ana, CA 92702 12 13 Eric Snethen 1600 Bermuda Dunes Drive Boulder City, NV 89005 14 15 16 17 18 19 20 21 22 23 24 25 25 27 28

JAMES MORELL 0496

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WILL

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1	STEPHEN H. SILVER, ESQ.	
ü	California State Bar No. 38241	O
2	ELIZABETH SILVER TOURGEMAN, ESO.	
	California State Bar No. 193114	ALA
3	SILVER, HADDEN & SILVER	ALA
А	1428 Second Street	
4	P.O. Box 2161	
	Santa Monica, CA 90407-2161	
5	(310) 393-1486	
اء	Letter 1 Letter 2 Let	
6	Attorneys for Intervenor Orange County Employees' A	ssociation



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, a local public entity

Plaintiff,

JAN J. NOLAN, an individual, ERIC W. SNETHEN, an individual, COUNTY OF ORANGE, a political subdivision of the State of California, and DOES 1-30,000, inclusive

Defendants.

COUNTY OF ORANGE, a political subdivision of the State of California,

Cross-Complainant and Defendant,

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BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,

Cross-Defendant and Plaintiff. CASE NO. 791315

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR'S CROSS-PETITION FOR WRIT OF MANDATE [C.C.P. SECTION 1085]

DATE: N/A TIME: N/A DEPT: 6

JUDGE: JOHN C. WOOLLEY

TRIAL DATE: NOT SET COMPLAINT FILED: MARCH 6, 1998 CROSS-COMPLAINT FILED: APRIL 8, 1998

277/9651 -

ORANGE COUNTY EMPLOYEES'
ASSOCIATION.

Intervenor and Cross-Petitioner,

BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,

Cross-Respondent, Plaintiff and Cross-Defendant.

COUNTY OF ORANGE.

Real Party in Interest, Defendant and Cross-Complainant.

I. INTRODUCTION.

On August 14, 1997, the California Supreme Court rendered its decision in Ventura

County Deputy Sheriffs' Ass'n. v. County of Ventura (1997) 16 Cal.4th 483, 66

Cal.Rptr.2d 304 (hereinafter referred to as the "Ventura decision"). The Court initially held (at 497-98, 66 Cal.Rptr.2d 312-13) that the definition of "compensation" contained in the County Employees' Retirement Law (CERL), as set forth in Section 31460 of the California Government Code, includes all remuneration paid in cash out of county funds for services rendered by the member, including cash allowances to purchase in-kind advantages such as uniforms.\(^1\) The opinion also determined (at 505, 66 Cal.Rptr.2d 318) that the definition of "compensation earnable" set forth in Section 31461 included all compensation attributable to the average number of days ordinarily worked by employees in the same grade or class of positions and at the same rate of pay during the applicable measuring period. One of the specific ingredients of compensation held to be encompassed within this

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¹The only exception acknowledged by the Court was with respect to employer-paid deferred compensation contributions. That exception was based upon specific statutory language. <u>id.</u> at 494-95, 66 Cal.Rptr.2d 310-11.

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definition was a cash payment provided in return for relinquishing paid leave benefits that were earned during the applicable measuring period. The opinion further acknowledged that "final compensation", the base upon which pension benefits are calculated, represented the "compensation earnable" of a member during the designated time period. id. at 491-92, Cal. Rptr.2d 308-09.

The decision recognized that, with one exception not applicable to this case,² these provisions of the CERL had remained virtually unchanged since their inception in 1937.

id. at 501-04, 66 Cal.Rptr.2d 315-17. The decision specifically ordered the prospective and retroactive recalculation of pensions for members who had already retired, especially the three named members who had retired prior to the commencement of that action. id. at 507, 66 Cal.Rptr.2d 319.

In the present case, the Board of Retirement deviated from the principles enunciated in the <u>Ventura</u> decision in the following respects. Initially, it improperly excluded from these definitions (and resulting pensions where appropriate) cash payments not specified in a collective bargaining agreement that were received during the prescribed measuring period for relinquishing paid leave benefits which were earned within that time period. In particular, the Board failed to include those cash payments made in connection with separation.

The Board also improperly deviated from the principles enunciated in the <u>Ventura</u> decision by refusing to include in the definitions the remuneration paid in cash out of County funds to third parties in return for services rendered by the member to satisfy debts or obligations of the member. In particular, the Board declined to include cash payments made by the County to insurance providers to satisfy the commitment of the member to pay insurance premiums necessary to provide insurance coverage for the member and eligible dependents. It further excluded with respect to individuals employed prior to and after January 1, 1991 remuneration paid in cash out of County funds toward a Flexible Benefit

²The monetary value of in-kind benefits furnished by the employer.

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(or Cafeteria) Plan maintained by the County from which the employee could purchase insurance and/or other valuable benefits and or receive a cash payment.

ANY CASH PAYMENT RECEIVED DURING THE FINAL COMPENSATION PERIOD, INCLUDING THOSE MADE IN CONNECTION WITH SEPARATION, FOR RELINOUISHING PAID LEAVE BENEFITS EARNED DURING THAT MEASURING PERIOD MUST BE INCLUDED IN FINAL COMPENSATION.

The Ventura decision expressly held (at 497-98, 66 Cal. Rptr.2d 304) that, when an employee elects to receive cash in return for relinquishing paid leave benefits, "the cash, like the [paid leave] the employee would otherwise receive, is part of the employee's 'remuneration' for past services," and is includible in the "compensation earnable" and "final compensation" on which the employee's pension is calculated. For some unexplained reason, the Board refused to extend this holding any such cash payment not specified in a collective bargaining agreement, and particularly payments received in connection with the separation of employment for relinquishing benefits earned during the final compensation measuring period. Ventura did not condition inclusion of the annual cashout upon the existence of a provision in a collective bargaining agreement expressly authorizing it. Likewise, just like the annual cashout expressly allowed in Ventura, that portion of the terminal payment described above represents compensation received during the period under consideration (the final compensation period) in return for services rendered based upon the average number of days ordinarily worked by employees in the same grade or class of positions and at the same rate of pay within that measuring period. Whether those paid leave benefits were relinquished for cash remuneration at the beginning of the final compensation period, in the middle or at its very end is of no consequence.

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B. REMUNERATION PAID IN CASH OUT OF COUNTY FUNDS FOR
SERVICES RENDERED BY THE MEMBER TO THIRD PARTIES TO
SATISFY OBLIGATIONS OF THE MEMBER MUST BE REGARDED AS
COMPENSATION.

Section 31460 of the Government Code defines "compensation" as "the remuneration paid in cash out of county...funds...." The <u>Ventura</u> decision held (at 495-99, 66 Cal.Rptr.2d 311-13) that this definition included any cash payment afforded by the County in return for services rendered by the member. Neither the statute nor the <u>Ventura</u> decision imposed any requirement whatsoever that the cash payment must be paid directly to the employee in order for it to qualify.

The Board nevertheless has elected to exclude from the definition of compensation (and therefore the definitions of compensation earnable and final compensation as well) cash payments made by the County in return for services rendered by the member to insurance providers, either directly or through a Flexible Benefit (or Cafeteria) Plan, which satisfy the member's obligation to pay for insurance coverage afforded to him and eligible dependents. These payments squarely fit the definition of compensation under Section 31460. They are remuneration paid in cash out of County funds in return for services rendered by the member. Again, the fact that the money is paid directly to a third party instead of first being given to the member to transmit to the third party is of no consequence.

Respondent cannot justify its position on the grounds that these cash payments constitute the provision of in-kind advantages which are excluded from compensation under Section 31460. The County is not affording free of charge the medical care or the other benefits provided by the insurance carriers through its own doctors and facilities, etc. Instead, it simply is making cash payments to third parties on behalf of the member to ensure that the benefits covered by the insurance policy will be available if and when needed.

This conclusion is fortified by the existence of Section 31461.1 and former Section 31460.1 of the California Government Code. Section 31461.1 was enacted in 1993 to

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become effective January 1, 1994. It allowed the Los Angeles County Board of Supervisors to remove from the definitions of compensation and compensation earnable cafeteria or flexible benefit plan contributions with respect to individuals who thereafter became members of the Retirement System. The following year, it was amended to allow the removal of those contributions "with respect to any member not represented by a certified employee organization who makes an irrevocable election to [that effect]".

This enactment clearly demonstrates a legislative intent that, absent this special grant of authority, payments made to third parties on behalf of the member in return for services rendered, such as cafeteria plan contributions, fall within the definitions of compensation and compensation earnable. Had the Legislature intended otherwise, there would have no need for this provision.

Our position is further supported by former Section 31460.1 of the California Government Code which took effect January 1, 1991. It read as follows:

"Compensation" shall not include employer payments, including cash payments, made to, or on behalf of, their employees who have elected to participate in a flexible benefits program, where those payments reflect amounts that exceeds [sic] their employees' salaries. This Section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in that county."

Like current Section 31461.1, this provision allowed a county to elect to omit from the retirement base payments made to or on behalf of employees participating in a flexible benefit program.³ Again, the only possible inference to be drawn from this legislation is that, prior to its enactment and absent a valid election thereafter, payments to third parties on behalf of members must have been included in the retirement calculations. Otherwise there would have been no need to enact this provision.

³ The County took advantage of this provision by adopting the prescribed Resolution, as more particularly discussed in the ensuing Section of this Argument.

The repeal of Section 31460.1, effective May 11, 1992, by S.B. 193 does not alter the analysis. While S.B. 193 sought to re-create the legislative history of Section 31460.1, it did not purport to change the requirements of Sections 31460 or 31461.

Therefore, the expressions of legislative intent in S.B. 193 regarding the construction of the statutes adopted in previous legislative sessions are meaningless. The appropriate ways to have prescribed that cash payments to flexible benefit plans would only be included in the retirement computations if the county retirement board were to elect to do so would have been either (1) to amend Sections 31460 or 31460.1 to say so or (2) to enact a new provision to that effect. The failure to take that action precludes any claim that Section 31460 should be so interpreted based upon the legislative pronouncements to that effect in S.B. 193.

This result is especially true because the plain and unequivocal language of Section 31460 and former Section 31460.1 requires that these payments be included in the definition of compensation. Legislative interpretations have no effect when, as here, the statute is clear and unambiguous. Honey Springs Homeowners' Association v. Board of Supervisors (1984) 157 Cal.App.3d 1122, 1137, 203 Cal.Rptr. 886, 894; People v. Martinez (1987) 188 Cal.App.3d 1254, 1259, 233 Cal.Rptr. 877, 880.

In Peralta Community College Dist. v. FEHC (1990) 52 Cal.3d 40, 52, 276

Cal.Rptr. 114, 121, the California Supreme Court addressed the issue of whether the State Fair Employment and Housing Commission (FEHC) was empowered by law to award punitive damages. In support of the FEHC's claim that it possessed this authority, it cited subsequent legislation expressly allowing it to do so that described itself as "clarifying and declaratory of existing law" (ibid). The Court disregarded that "after the fact" expression

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It recited that (1) the CERL has always granted county retirement boards the duty and power to determine what items may be included in retirement calculations, (2) Section 31460.1 was erroneously construed to require the inclusion of flexible benefit payments until a contrary election occurred, as that interpretation was not intended by the Legislature when Section 31460.1 was enacted and (3) any reversal of prior actions of retirement boards resulting from the repeal of Section 31460.1 would not impair any contractual rights.

 of legislative intent, stating (ibid):

"The declaration of a later legislature is of little weight in determining the intent of the legislature that enacted the law (citations omitted). This is especially true when, as here, such declared intent is without objective support in either the language or history of the legislation...."

In our case, the declarations of intent in S.B. 193 regarding the meaning of Sections 31460 and 31460.1 not only are totally devoid of any "objective support in either the language or history" of those earlier enactments, they directly contravene that objective information. According to the legislative expression in S.B. 193, the earlier promulgations empowered a county retirement board to decide whether to include cash payments to flexible benefit plans. However, Sections 31460 and 31460.1 did not vest those boards with that discretion. To the contrary, those payments were required to be included in the definition of compensation, unless a board of supervisors lawfully adopted a Resolution to the contrary in accordance with Section 31460.1. Therefore, the legislative expressions in S.B. 193 are of no value and must be disregarded by the Court.

Interestingly, the sole authority cited in S.B. 193 for the proposition that, since its original enactment in 1937, the CERL has conferred upon the county retirement boards the duty and power to determine which of the items of compensation paid to members would constitute compensation and compensation earnable is <u>Guelfi v. Marin County Employees'</u>

<u>Retirement Ass'n, supra, 145 Cal.App.3d 297, 193 Cal.Rptr. 343. However, as we noted in an earlier Argument (ante. pp.5-6), Guelfi was expressly disapproved by the California Supreme Court in the <u>Ventura</u> decision. Therefore, the legislative pronouncements were based upon a faulty understanding of the intent of the earlier legislature that enacted the CERL.</u>

Finally, the interpretation of legislation is exclusively "a judicial task". Honey

Springs Homeowners' Association v. Board of Supervisors, supra, 188 Cal.App.3d at 1137,

203 Cal.Rptr. at 895, quoting Del Costello v. State of California (1982) 135 Cal.App.3d

887, 893, 185 Cal.Rptr. 582, 586. Therefore, S.B. 193 cannot substitute for this Court's

interpretation of the relevant statutes.

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C. THE EXCLUSION FROM THE RETIREMENT CALCULATIONS OF
ANY PORTION OF CONTRIBUTIONS TO A FLEXIBLE BENEFITS
(CAFETERIA) PLAN IMPROPERLY DEPRIVED MEMBERS WHO
WERE EMPLOYED BY THE COUNTY PRIOR TO, ON AND AFTER
JANUARY 1, 1991 OF A VESTED FUNDAMENTAL RIGHT.

Respondent included in the definitions of compensation, compensation earnable and final compensation of members who retired prior to January 1, 1991 only that portion of the County's contribution to a Flexible Benefits (Cafeteria) Plan that was received in cash.⁵ However, with respect to existing members who did not retire prior to that date, Respondent refused to include any part of the Plan contribution in those definitions. The impetus for this action was the enactment by the Legislature in 1990 of Section 31460.1 which stated as follows:

"'Compensation' shall not include employer payments, including cash
payments, made to, or on behalf of, their employees who have elected to
participate in a flexible benefits program, where those payments reflect
amounts that exceeds [sic] their employees' salaries.

This section shall not be operative in any county until the time the board of supervisors shall, by resolution adopted by a majority vote, makes [sic] this section applicable in that county.

Shortly thereafter, the Board of Supervisors of the County adopted a Resolution

⁵In the preceding Argument, we demonstrated that Respondent erroneously excluded from those definitions the portion of the contributions to the Plan which was used to satisfy obligations of the member or to purchase other valuable benefits for him. Accordingly, it is our position that the vested right asserted in this Argument to have Plan contributions included in the retirement calculations of members employed prior to January 1, 1991 encompasses the entire amount of the contributions, not just the part paid in cash to the member.

making Section 31460.1 applicable in the County effective January 1, 1991.6 The County's Resolution could preclude Flexible Benefits (or Cafeteria) Plan contributions made with respect to employees hired after that date from being included in the definitions of compensation, compensation earnable and final compensation. However, it could not lawfully deprive individuals who were already employed at the time of its enactment of the opportunity to receive the enhanced pensions resulting from the continued inclusion of those contributions in the retirement calculations.

The law is well settled that this promulgation by the County could not divest members employed at the time of its enactment of contractual rights already earned to have the contributions to the Flexible Benefits (or Cafeteria) Plan included in their retirement calculations. In <u>United Firefighters v. Los Angeles</u> (1989) 210 Cal. App.3d 1101, 1102, 259 Cal. Rptr. 65, 66 (Rev. den; Cert. den, 110 S.Ct. 843), the Court of Appeal struck down an attempt to reduce pension benefits of retirees and potential retirement benefits of current employees. The Court determined that the employees had acquired a vested contractual right to the particular level of benefits available before the reduction, which right was earned as part of the consideration provided for services already rendered. The opinion concluded that the attempted impairment of these rights violated the "contract clause" of the federal and state Constitutions (U.S. Const., art. I, §10, cl. 1; Cal. Const. art. I, §9).

Pension benefits are a form of deferred compensation designed to induce individuals to remain in public employment. Kern v. City of Long Beach (1947) 29 Cal.2d 848, 179 P.2d 799. In Kern, the opinion observed that where services are performed at a time when the employees are entitled by statute to certain pension benefits the provisions of that statute become part of the compensation for those services and, thus, are integrated into the employment contract. This result applies to statutory benefits available when employment

⁶In 1992, Section 31460.1 was repealed. However, the repealing legislation specifically related that it was not "intended to, or shall be construed to, affect the validity of any action taken by a county pursuant to Section 31460.1 of the Government Code prior to the effective date of this act".

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commenced as well as those added thereafter. Betts v. Board of Administration (1978) 21 Cal.3d 859, 867, 148 Cal.Rptr. 158, 163.

In Kern, a retired firefighter brought a Petition for Writ of Mandate against his former employer to compel it to provide him with pension benefits. At the time he commenced employment, the City Charter promised a retirement allowance to persons in his classification who retired after twenty years of service. Shortly before he completed twenty years, his employer repealed the Charter to eliminate the obligation to afford pension benefits with respect to all persons not then eligible for retirement. The California Supreme Court granted a Peremptory Writ of Mandate compelling the employer to supply the promised retirement payments that would have been made but for the repeal of the Charter. In reaching that conclusion, the Court held that the employee had acquired a vested right which could not be abrogated without impairing the employer's obligation of contract.

The opinion emphasized (at 852, 179 P.2d 801) that promised pension benefits in existence when services are rendered "become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." The opinion proceeded to quote with approval the following language contained in a New York Court of Appeal decision:

"Pension annuities *** are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful services." (ibid.)

The Court rejected the employer's claim that the individual did not acquire any vested right because he did not complete the prescribed period of service prior to the repeal of the pension entitlement. In that regard, the opinion recited the following quote from an earlier Supreme Court decision (<u>Dryden v. Board of Pension Com'rs</u>, 6 Cal.2d 575, 579, 59 P.2d 104, 106):

"It has been clearly held that the pension provisions of the city charter

are an integral portion of the contemplated compensation set forth in the contract of employment between the City and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant.* (Emphasis added) (ibid.)

The Court next explained (at 852-53, 179 P.2d 802) that this principle applied with equal force to at-will employees because even they have a vested right to receive compensation already earned for services previously rendered which cannot thereafter be destroyed without impairing a contractual obligation. The opinion elaborated on this concept by making the following pertinent observation (at 855, 179 P.2d 803):

"...[A public employee] is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights.

To hold otherwise would defeat one of the primary objectives in providing pensions for government employees, which is to induce competent persons to enter and remain in public employment. (Citations omitted) It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits and the promise of a pension annuity would

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either <u>become</u> ineffective as an inducement to public employees or it would become merely <u>a snare and a delusion to the unwary</u>. (Citations omitted)* (Emphasis added)

Kern recognized that, while the promised pension benefits could not be repealed, they could be modified. However, the subsequent California Supreme Court decisions of Abbot v. City of Los Angeles (1958) 50 Cal.2d 438, 449, 326 P.2d 484, 489, and Allen v. City of Long Beach (1955) 45 Cal.2d 128, 131, 287 P.2d 765, 767, clarified that any such modifications must be reasonable. According to Allen, "[t]o be sustained as reasonable, 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." (ibid.) In Abbot, the Court emphasized that it was the "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....." See also California League of City Emp. Ass'ns. v. Palos Verdes Library District, supra, 87 Cal.3d 135, 150 Cal.Rptr. 739.

As a result of the foregoing, the County could not divest individuals who were employed as of January 1, 1991 of their earned right to include the Flexible Benefits (or Cafeteria) Plan contributions in their retirement calculations. The County could no more lawfully take away that property interest than it could legally either (1) take back salary payments already received or (2) refuse to pay compensation already earned for services previously rendered. Consequently, the attempt to invoke the elective exclusion set forth in Section 31460.1 to take away that vested right must be invalidated with respect to all individuals who had rendered services prior to the passage of the Resolution.⁷

⁷This case does not present any claim that the affected employees acquired vested rights to continue to receive these cash contributions to the Plan beyond the term of existing contracts until retirement, or to have them included in their retirement base if they are not received during the time period eventually selected for measuring final compensation. See Miller v. State of California (1977) 18 Cal.3d 808, 817, 135 Cal.Rptr. 386. This action merely

 Finally, the decision of Respondent directly contravenes the intent of the Legislature as expressed in the CERL when, as here, a county has enacted a Resolution terminating the applicability of one of the provisions of the CERL. In particular, Section 31483 provides as follows:

"Notwithstanding any other provision of law, whenever the governing body of a county or district has made a particular provision or provisions of this chapter [the CERL] applicable in such county or district through the adoption of an ordinance or resolution, such governing body may at any time thereafter adopt a further ordinance or resolution terminating the applicability of such provision or provisions as to employees of the county or district whose services commence after a given future date specified in the latter ordinance or resolution." (emphasis added)

While the enactment pursuant to former Section 31460.1 did not technically render inapplicable a provision of the CERL that previously had been adopted by the County, it accomplished exactly the same purpose. The County's Resolution rendered inapplicable the prior requirement that Flexible Benefits (or Cafeteria) Plan contributions be included in the definitions of compensation, compensation earnable and final compensation. Accordingly, Section 31483, which has been in effect since 1977, mandated that the Resolution terminate the applicability of this requirement only with respect to employees of the County whose services were to commence thereafter.

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addresses the principle that once the right to include the payments in the definition of compensation has vested they must be included so long as they continue to be provided.

П. CONCLUSION. For all the reasons set forth above, it is respectfully urged that the Cross-Petition for Writ of Mandate be granted. DATED: May 27, 1998 SILVER, HADDEN & SILVER Attorneys for Petitioners 00067.pld/shs/rlg

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On May 27, 1998, I served the foregoing document described as MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF INTERVENOR'S CROSS-PETITION FOR WRIT OF MANDATE [CCP \$1085], on the parties in this action by placing ____ an original(s) _X a true copy(s) thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED MAILING LIST

I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 27, 1998, at Santa Monica, California.

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

____ FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHERYL L. MITCHELL

Mitchell

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Richard S. Rockwell, Esq. - SBN 52742 Paula E. Meyer, Esq. - SBN 109622 ROCKWELL & MEYER 315 Centennial Way Tustin, California 92780 (714) 731-9299 5 Attorneys for Intervenor and Cross-Petitioner THE RETIRED EMPLOYEES 6 ASSOCIATION OF ORANGE COUNTY, INC., a non-profit corporation 7 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 FOR THE COUNTY OF ORANGE 10 11 BOARD OF RETIREMENT OF THE ORANGE) CASE NO. 791315 EMPLOYEES RETIREMENT) COUNTY 12 SYSTEM, a local public entity JUDGE JOHN C. WOOLLEY **DEPARTMENT 6** 13 Plaintiff. 14 COMPLAINT IN INTERVENTION OF THE RETIRED EMPLOYEES 15 ASSOCIATION OF ORANGE JAN J. NOLAN, an individual, ERIC W.) 16 COUNTY, INC. TOGETHER WITH SNETHEN, an individual, COUNTY OF) ANSWERS TO ALLEGATIONS OF 17 ORANGE, a political subdivision of the State of) COMPLAINTS ON FILE California, and DOES 1-30,000, inclusive 18 Defendants. 19 20 COUNTY OF ORANGE, a political subdivision of the State of California. 21 Cross-Complainant and 22 Defendant, 23 24 BOARD OF RETIREMENT OF THE ORANGE 25 COUNTY EMPLOYEES' RETIREMENT 26 SYSTEM, a local public entity. 27 Cross-Defendant and Plaintiff. 28

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1	ORANGE COUNTY EMPLOYEES"		
2	ASSOCIATION,		
3	Intervenor and Cross-Petitioner,		
4			
5	v.		
в	BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT		
7	SYSTEM, a local public entity,		
3	Cross-Respondent, Plaintiff and		
9	Cross-Defendant.		
0			
i	THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC., a non-profit		
S	corporation,		
3	Intervenor and Cross-Petitioner.		
1	v.		
3	BOARD OF RETIREMENT OF THE ORANGE		
3	COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,		
3	Cross-Respondent, Plaintiff, and Cross-Defendant.		
,	-		
	COUNTY OF ORANGE,		
1	Real Party in Interest, Defendant		
,	and Cross-Complainant.		
,			
	Pursuant to the Order of this Court of		

Pursuant to the Order of this Court granting Intervenor THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. ("REAOC") leave to file a Complaint in Intervention in accordance with California Code of Civil Procedure Section 387(a). Intervenor hereby submits its Complaint in Intervention which (1) answers the Complaint for Declaratory Relief: (2) answers the

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Cross-Complaint for Declaratory Relief; and (3) Cross-Petitions for a Writ of Mandate against Plaintiff and Cross-Defendant (the "BOARD"), as follows:

A. INTERVENOR'S ANSWER TO ALLEGATIONS CONTAINED IN THE VERIFIED COMPLAINT FOR DECLARATORY RELIEF

- I. Intervenor admits the allegations contained in paragraph 1.
- 2. Intervenor lacks sufficient information or belief to enable it to answer the allegations that Defendant NOLAN has publicly announced her pending intention to retire from active, full-time employment with the County and, based upon that lack of information or belief, Intervenor denies that allegation. Intervenor admits the remaining allegations contained in paragraph 2.
 - 3. Intervenor admits the allegations contained in paragraph 3.
 - Intervenor admits the allegations contained in paragraph 4.
- Intervenor lacks sufficient information or belief to enable it to answer the allegations
 contained in paragraph 5 and, based upon that lack of information or belief, denies those allegations.
 - Intervenor admits the allegations contained in paragraph 6.
 - Intervenor admits the allegations contained in paragraph 7.
 - Intervenor admits the allegations contained in paragraph 8.
- Intervenor admits that the Board of Retirement has the statutory authority to make the determinations described in paragraph 9 in accordance with the provisions of the CERL and, particularly, Sections 31460, 31461, 31462, and 31462.1 of the California Government Code.
- 10. Intervenor denies that the effective date of the <u>Ventura</u> decision was October 1, 1997, and admits the remainder of the allegations in paragraph 10. Intervenor affirmatively alleges that its effective date was on or before August 14, 1997.
 - 11. Answering paragraph 11, Intervenor admits that the Court in the Ventura decision stated

that it "need not decide whether [its] decision applies retroactively to any other county" and that the Court mandated a method for determining "final compensation" under the CERL which differed from that previously utilized by the Board of Retirement.

- 12. Intervenor admits the allegations contained in paragraph 12.
- 13. Intervenor admits the allegations contained in paragraph 13.
- 14. Intervenor admits the allegations contained in paragraph 14.
- 15. Intervenor admits the allegations contained in paragraph 15.
- 16. Intervenor lacks sufficient information or belief to enable it to answer the allegations contained in paragraph 16 and, based upon this lack of information or belief, denies the allegations set for in paragraph 16.
 - 17. Intervenor admits the allegations contained in paragraph 17.
- 18. Intervenor admits the allegations contained in paragraph 18 except that Intervenor affirmatively alleges that, subsequent to its February 6, 1998 meeting, the Board of Retirement modified the action taken in Resolution 98-001, particularly with respect to paragraphs 6 and 8, to provide that the Retirement Board no longer would be collecting any alleged shortfall from any member but, instead, would be providing any necessary funding out of its own reserves.
- Intervenor realleges and incorporates herein by referenced the contents of paragraphs 1
 through 18 above.
- 20. Intervenor lacks sufficient information or belief to enable it to answer the allegations set for in paragraph 20 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 20.
- Intervenor lacks sufficient information or belief to enable it to answer the allegations set 260
 forth in paragraph 21 and, based upon this lack of information or belief, Intervenor denies the allegations

contained in paragraph 21.

- 22. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 22 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 22.
- 23. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 23 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 23.
- 24. Intervenor admits the allegations contained in paragraph 24. Intervenor affirmatively alleges that an additional actual controversy has arisen and now exists between Intervenor and the Board of Retirement and between the BOARD and the County, and between the BOARD and others as more particularly alleged hereinafter in Section C of this Complaint in Intervention.
- 25. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 25 and, based upon this lack of information or belief, Intervenor denies the allegations contained in paragraph 25. Intervenor affirmatively desires a judicial determination regarding all of the controversies existing in this proceeding, including those issues raised by Intervenor in this Complaint in Intervention.

B. INTERVENOR'S ANSWER TO ALLEGATIONS CONTAINED IN THE CROSS-COMPLAINT FOR DECLARATORY RELIEF

- Intervenor admits the allegations contained in paragraph 1.
- 27. Intervenor admits the allegations contained in paragraph 2.
- 28. Intervenor admits the allegations contained in paragraph 3.
- Intervenor admits the allegations contained in paragraph 4, except that Intervenor affirmatively alleges that, subsequent to its February 6, 1998 meeting, the Board of Retirement modified

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the action taken in Resolution 98-001, particularly with respect to paragraphs 6 and 8, to provide that the Refirement Board no longer would be collecting any alleged shortfall from any member but, instead. would be providing any necessary funding out of its own reserves.

- Intervenor lacks sufficient information or belief to enable it to answer the allegations set 30. forth in paragraph 5 and, based upon this lack of information and belief, Intervenor denies the allegations contained in paragraph 5.
- 31. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 6 and, based upon this lack of information and belief, Intervenor denies the allegations contained in paragraph 6.
- 32. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 7 and, based upon this lack of information and belief, Intervenor denies the allegations contained in paragraph 7.
- 33. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 8 and, based upon this lack of information and belief, Intervenor denies the allegations contained in paragraph 8. Intervenor affirmatively desires a judicial determination regarding all of the controversies existing in this proceeding, including those issues raised by Intervenor in this Complaint in Intervention.
 - 34. Intervenor admits the allegations contained in paragraph 9.
- 35. Intervenor lacks sufficient information or belief to enable it to answer the allegations set forth in paragraph 10 and, based upon this lack of information and belief, Intervenor denies the allegations contained in paragraph 10.

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C. ALLEGATIONS IN SUPPORT OF INTERVENOR'S CROSS-PETITION FOR WRIT OF MANDATE

- 36. At all times herein mentioned, Plaintiff, Cross-Defendant, and Cross-Respondent BOARD OF RETIREMENT, ORANGE COUNTY RETIREMENT SYSTEM (hereinafter referred to as the "BOARD") was, and now is, the entity changed by the County Employees' Retirement Law ("CERL") of 1937 (California Government Code §31450, et seq.) with the duty to manage the Orange County Retirement System (hereinafter referred to as "SYSTEM") in accordance with the provisions of Section 31520 of the California Government Code, and to apply the statutory definitions of "compensation" and "compensation earnable" for the purpose of calculating the "final compensation" of retired and retiring members, pursuant to Govt. Code §§ 31460, 31461, 31462, and 31462.1.
- 37. At all times mentioned herein. Intervenor THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. was, and now is, a California non-profit corporation representing retired County of Orange employees consisting of approximately 6,900 retired persons. all of whom are members of the SYSTEM, as defined in sections 31470 and 31552 of the California Government Code. As such, Intervenor has standing and authorization to take appropriate action to secure retirement benefits to which its members are and were entitled to.
- 38. One of the primary responsibilities of the BOARD is to ascertain and calculate the "final compensation" of members of the SYSTEM in order to determine the amount of retirement benefits to which they are or will be entitled.
- 39. At all times herein mentioned, the final compensation for certain members of the SYSTEM was and is defined in section 31462.1 of the California Government Code as follows:

"Final compensation" means the average annual compensation by a member during any year elected by a member at or before the time he

files and application for retirement, or, if he fails to elect, during the year immediately preceding his retirement."

40. At all times herein mentioned, the final compensation for the remaining members of the SYSTEM who were not covered by the definition described above in paragraph 39 was and is defined in Section 31462 of the California Government Code which declares in pertinent part:

> "Final compensation' means the average annual compensation carnable by a member during any three years elected by a member at or before the time he files an application for retirement or, if he fails to elect, during the three years immediately preceding his retirement..."

41. At all times herein mentioned, the "compensation earnable" of all members of the SYSTEM was, and is, defined in Section 31461 of the California Government Code in pertinent part as follows:

"Compensation earnable' by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by him at the beginning of the absence."

42. At all times herein mentioned, the "compensation" of all members of the SYSTEM was. and now is, defined in Section 31460 of the California Government Code in pertinent part as follows: "Compensation" means the remuneration paid in cash out of County...funds, ...but does not include the monetary value of the board.

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lodging, fuel, laundry, or other advantages furnished to a member."

- 43. The COUNTY is obligated by the CERL to make employer-required retirement contributions which are calculated on the basis of the "compensation earnable" of each employee.
 Consequently, the COUNTY will be adversely affected if Intervenor is successful in this proceeding.
- Superior Court by a recognized employee organization and three members of the SYSTEM who had retired on or after March 30, 1992. That lawsuit challenged the manner in which the Ventura County Board of Retirement was calculating the "compensation," "compensation earnable," "final compensation," and resulting pensions, of the three named individuals and employees in job classifications represented by the recognized employee organization. Those proceeding were ultimately resolved by the opinion of the California Supreme Court in Ventura County Deputy Sheriffs' Ass'n v. County of Ventura (1997) 16 Cal.4th 483, 66 Cal.Rptr. 2d 304 (hereinafter referred to as the "Ventura decision"). The Ventura decision determined that, except for deferred compensation contributions from the employer, all remuneration paid in cash out of County funds in return for services rendered by the member during the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the period under consideration must be included in the member's "compensation earnable."

One item of remuneration which the Supreme Court specifically held to be included within that definition was any cash payment received during the period under consideration for relinquishing annual leave or vacation benefits earned within that measuring period.

The <u>Ventura</u> decision was applied retroactively with respect to the three named members as well as those member represented by the recognized employee organization who retired between the time the action was commenced and the date of the decision, and should be applied retroactively with respect to

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COUNTY OF ORANGE retirees.

- On or about February 6, 1998, the BOARD adopted a Resolution to implement the 45. Ventura decision. A true and correct copy of that Resolution is attached as Exhibit 1 to the Verified Complaint for Declaratory Relief filed by the BOARD, and is incorporated herein by reference as though set forth in full. The action taken in paragraphs 6 and 8 of that Resolution were subsequently modified by the BOARD so that the BOARD would not collect any asserted shortfall from any member. Instead. it would fund any asserted shortfall out of its own reserve funds. Intervenor supports the action taken by the BOARD, except that in the following respects the BOARD did not recalculate the definitions of compensation, compensation earnable and final compensation in the manner required by the CERL, as interpreted by the Ventura decision:
- The BOARD did not include in the definitions of compensation earnable and final compensation for affected active and retired members (including beneficiaries) cash payments received during the period under consideration that were not specified in any applicable collective bargaining agreement, including payments received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that measuring period;
- The BOARD did not include in the definitions of "compensation earnable" and "final compensation" for members (including beneficiaries) who retired prior to January 1, 1991 the remuneration paid in cash out of County funds to insurance providers during the applicable measuring period, whether directly, or through a Flexible Benefits (or Cafeteria) Plan, which cash remuneration was paid in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period. to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible

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dependants;

- (c) The BOARD did not include in the definitions of "compensation earnable" and "final compensation" for affected active and retired members (including beneficiaries) who were employed prior to, on and after January 1, 1991 the remuneration paid in cash out of County funds during the applicable measuring period in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period to a Flexible Benefit Plan (or Cafeteria Plan) maintained for the benefit of the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits; and
- (d) The BOARD did not make its adjustments retroactive to August 1994 nor did it provide for interest on a liquidated sum from that date.
- earnable, final compensation and resulting pensions of all retired members (including beneficiaries who were receiving pension payments within three years prior to the time of <u>Ventura</u> decision, both prospectively and retroactively for all pension payments made within three years prior to the <u>Ventura</u> decision, and for all active members then employed by the County and future members (a) all cash payments received during the final compensation period, including any received in connection with separation from employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the applicable measuring period; (b) remuneration paid in cash out of County funds to insurance providers during the final compensation period for services rendered by a member who retired prior to January 1, 1991 to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependents, whether directly, or through a flexible benefits (or

Cafeteria) Plan; and (c) remuneration paid in cash out of County funds to a flexible Benefit (or Cafeteria)

Plan maintained for the benefit of any member employed prior to, on and after January 1, 1991 during
the period under consideration for services rendered by the member to be used to pay premiums for
insurance coverage for the member and eligible dependants and/or to receive a cash payment and/or
purchase other valuable benefits, but the BOARD refused to do so. Instead, it took the action described
in paragraph 45. Therefore, there are no further administrative remedies available to compel the
BOARD to correct the action described above in paragraph 45. Consequently, all available
administrative remedies have been exhausted.

47. Unless the BOARD is commanded by this Court to include in the "compensation earnable", "final compensation" and resulting pensions of retired members (including beneficiaries) who were receiving pension payments within three years prior to the time of the Ventura decision, both prospectively and retroactively with respect to all pension payments made within three years prior to the Ventura decision (plus interest), and of all active members (including future members) (a) all cash payments received during the applicable measuring period, including any received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the applicable measuring period, (b) remuneration paid in cash out of County funds to insurance providers during the period under consideration for services rendered by a member who retired prior to January 1, 1991 to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependents, whether directly, or through a Flexible Benefits (or Cafeteria) Plan: and (c) remuneration paid in cash out of County funds to a Flexible Benefits (or Cafeteria) Plan maintained for the benefit of any member employed prior to, on and after January 1, 1991 during the period under consideration for services rendered by the member to be used to pay premiums for insurance coverage

for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits, Intervenor and the individuals it represents will suffer great and irreparable injury in that they will receive inferior benefits to those to which they are entitled under the provisions of the CERL and thereby will be deprived their vested statutory and contractual rights.

- 48. Intervenor does not have an adequate remedy at law in that the relief requested by it is unique, constitutional and vested, and cannot be measured or satisfied by monetary damages alone.
- 49. The prosecution of this action, if successful, will result in the enforcement of an important right affecting the public interest in that (a) significant retirement benefits will have been conferred on a large class of persons, i.e., all present and future members of the SYSTEM; (b) the necessity and financial burden of private enforcement of these rights are such as to make the award appropriate: and (c) attorneys' fees should not, in the interest of justice, be paid out of any monetary recovery obtained through this action. As a result, Intervenor is entitled to an award of attorneys' fees pursuant to the provisions of section 1021.5 of the California Code of Civil Procedure.
- 50. The successful prosecution of this proceeding will constitute the reversal by this Court of the denial by the BOARD of an application for a retirement allowance or for a claim based on a claimed pension right or benefit. Consequently, Intervenor is entitled to reasonable attorneys' fees in accordance with the provisions of Section 31536 of the California Government Code.

WHEREFORE, Intervenor prays that:

1. That this Court issue a peremptory writ in the first instance commanding Respondent to perform its duty to include in the "compensation earnable," "final compensation" and resulting pensions of members (including beneficiaries) who were receiving pension payments on or after August 14, 1994, and of all active members (including future members) (a) all cash payments received during the applicable measuring period, including any received in connection with separation of employment, for

relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within the applicable measuring period; (b) remuneration paid in cash out of county funds to insurance providers during the period under consideration for services rendered by a member who retired prior to January 1, 1991 to satisfy the member's obligation to pay premiums for himself and eligible dependents, whether directly, or through a Flexible Benefits (or Cafeteria) Plan; (c) remuneration paid in cash out of County funds to a Flexible Benefits (or Cafeteria) Plan maintained for the benefit of any member employed prior to, on and after January 1, 1991 during the period under consideration for services rendered by the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits, (d) retroactively to August 1994, and (e) interest on all such payments from the date such payments were due;

- That this Court, alternatively, first issue an alternative writ commanding Respondent to
 perform its above-described duties, or in the alternative, show cause why it should not do so, and
 thereafter issue a peremptory writ commending Respondent to perform its duties as described above;
- This Court declare that the action heretofore taken by the BOARD was in compliance with and required by the CERL, except as set forth above in Paragraph 1 of this Prayer:
 - This Court award to Intervenor its costs of suit herein;
- This Court award to Intervenor reasonable attorneys' fees incurred by it in accordance with Section 31536 of the California Government Code and Section 1021.5 of the California Code of Civil Procedure; and

This Court award such other and further relief as it deems necessary and proper. 6. Dated: June 9, 1998 Respectfully submitted. ROCKWELL & MEYER Richard S. Rockwell, Attorneys for THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. REAO\Pleading\Cmplt.new

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1	VERIFICATION				
2	STATE OF CALIFORNIA, COUNTY OF ORANGE				
3	STATE OF CALIFORNIA, COUNTY OF ORANGE				
4	I have read the foregoing <u>COMPLAINT IN INTERVENTI</u> <u>EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. TOGE</u>	the state of the s			
5	TO ALLEGATIONS OF COMPLAINTS ON FILE and known its con	tents.			
6	[X] CHECK THE APPLICABLE PARAGRAP	H			
7	[] I am a party to this action. The matters stated in the foregoing de	nonment are true of my own			
8	knowledge except as to those matters which are stated on information matters I believe them to be true.				
10)	(P) 1 - (P) - (P) - (P) - (P) - (P)	C DETIDED CAN OVER			
10	[X] I am [X] an Officer [] a partner [] a of TH ASSOCIATION OF ORANGE COUNTY, INC., a non-profit corpo	ration, a party to this action,			
11	and am authorized to make this verification for and on its behalf, an that reason. [] I am informed and believe and on that ground allege				
12	foregoing documents are true. [] The matters stated in the forego	ing document are true of my			
13	own knowledge except as to those matters which are stated on info those matters I believe them to be true.	rmation and belief, and as to			
14	II I I I I I I I I I I I I I I I I I I				
15	I am one of the attorneys for, a party to this from the county of aforesaid where such attorneys have their offices				
16	for and on behalf of that party for that reason. I am informed an allege that the matters stated in the foregoing document are true.	d believe and on that ground			
17	Executed on June 10, 1998 at Tustin, California.				
5-1	I declare under penalty of perjury under the laws of the State of Ca	alifornia that the foregoing is			
19	true and correct.	^			
20	2/1	101			
21	H. William Kirkwood Signature	- And			
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PROOF OF SERVICE STATE OF CALIFORNIA, COUNTY OF ORANGE 3 I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 315 Centennial Way, Tustin, California 92780. 5 On June 10, 1998, I served the foregoing document described as COMPLAINT IN 6 INTERVENTION OF THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. TOGETHER WITH ANSWERS TO ALLEGATIONS OF COMPLAINTS ON FILE in this action by placing a true copy thereof in a sealed envelope addressed as follows: 8 Harvey L. Leiderman, Esq. Eric W. Snethen, Esq. 9 STEEFEL, LEVITT & WEISS 1600 Bermuda Dunes One Embarcadero Center, 30th Floor Boulder City, NV 89005 10 San Francisco, California 94111 11 Stephen H. Silver, Esq. Laurence M. Watson, County Counsel SILVER, HADDEN & SILVER 12 Thomas A. Agin, Assistant County Counsel 1428 Second Street 10 Civic Center Plaza, 4th Floor Post Office Box 2161 13 Post Office Box 1379 Santa Monica, California 90407-2161 14 Santa Ana, California 92702-1379 15 Jan J. Nolan, Esq. Post Office Box 808 16 Santa Ana, California 92702 17 I am "readily familiar" with the firm's practice of collecting and processing correspondence for 18 mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Tustin, California in the ordinary course of business. I am aware that on 19 motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more that one day after date of deposit for mailing in affidavit. 20 21 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. 22 Executed on June 10, 1998 at Tustin, California. 23 24 25 26 27 28

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MLL 1 Richard S. Rockwell, Esq. - SBN 52742 2 Paula E. Meyer, Esq. - SBN 109622 ROCKWELL & MEYER 3 315 Centennial Way Tustin, California 92780 4 (714) 731-9299 8 Attorneys for Intervenor and Cross-Petitioner THE RETIRED EMPLOYEES 6 ASSOCIATION OF ORANGE COUNTY, INC., a non-profit corporation 7 8 9 10 11 12 BOARD OF RETIREMENT OF THE ORANGE) 13 COUNTY EMPLOYEES RETIREMENT) SYSTEM, a local public entity 14 Plaintiff, 18 16 17 JAN J. NOLAN, an individual, ERIC W.) SNETHEN, an individual, COUNTY OF) 18 ORANGE, a political subdivision of the State of) 19 California, and DOES 1-30,000, inclusive 20 Defendants, 21 COUNTY OF ORANGE, a political subdivision 22 of the State of California, 23 Cross-Complainant and Defendant, 24 25 26 BOARD OF RETIREMENT OF THE ORANGE EMPLOYEES' RETIREMENT COUNTY 27 SYSTEM, a local public entity, 28 Cross-Defendant and Plaintiff.

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PILED DRANGE COUNTY SUPERIOR COURT

JUN 1 n 1998

ALAN Sarah Marana Diffeet Clark

DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CASE NO. 791315

JUDGE JOHN C. WOOLLEY DEPARTMENT 6

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE OF THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.

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1	ORANGE COUNTY EMPLOYEES'
2	ASSOCIATION,
3	Intervenor and Cross-Petitioner,
4	v.
5	POARD OF BETTBELENE OF THE OR ANGE
6	BOARD OF RETIREMENT OF THE ORANGE COUNTY EMPLOYEES' RETIREMENT
7	SYSTEM, a local public entity,
8	Cross-Respondent, Plaintiff and Cross-Defendant.
9	Cross-Derendant.
10	THE RETIRED EMPLOYEES ASSOCIATION
11	OF ORANGE COUNTY, INC., a non-profit
12	corporation,
13	Intervenor and Cross-Petitioner,
14	v.
15	BOARD OF RETIREMENT OF THE ORANGE
18	COUNTY EMPLOYEES' RETIREMENT SYSTEM, a local public entity,
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18	Cross-Respondent, Plaintiff, and Cross-Defendant.
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80	COUNTY OF ORANGE,
21	Real Party in Interest, Defendant
22	and Cross-Complainant.
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THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC., a non-profit corporation ("RETIRED EMPLOYEES" or "REAOC") submits its Memorandum of Points and Authorities in support of its Complaint in Intervention (Petition for Writ of Mandate):

1

INTRODUCTION

Intervenor RETIRED EMPLOYEES brings this action on behalf of its members, retired employees of the COUNTY OF ORANGE, who receive retirement benefits under a retirement system established by the County Employees' Retirement Law of 1937 (CERL) (Gov.Code, §31450); Code of Civ. Pro. § 382.

RETIRED EMPLOYEES contend that the Board of Retirement, which has the duty to ascertain and calculate the "final compensation" of members of the retirement system in order to determine the amount of retirement benefits for each retiree, erred in not including: (a) The BOARD did not include in the definitions of compensation earnable and final compensation for affected active and retired members (including beneficiaries) cash payments received during the period under consideration that were not specified in any applicable collective bargaining agreement, including payments received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that measuring period; (b) The BOARD did not include in the definitions of "compensation earnable" and "final compensation" for members (including beneficiaries) who retired prior to January 1, 1991 the remuneration paid in cash out of County funds to insurance providers during the applicable measuring period, whether directly, or through a Flexible Benefits (or Cafeteria) Plan, which cash remuneration was paid in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions

and at the same rate of pay within that period, 'co satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependents; (c) The BOARD did not include in the definitions of "compensation earnable" and "final compensation" for affected active and retired members (including beneficiaries) who were employed prior to, on and after January 1, 1991 the remuneration paid in cash out of County funds during the applicable measuring period in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period to a Flexible Benefit Plan (or Cafeteria Plan) maintained for the benefit of the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits; and (d) The BOARD did not make its adjustments retroactive to August 1994 nor did it provide for interest on a liquidated sum from that date as "compensation earnable" to be figured in the calculation of RETIRED EMPLOYEES retirement benefits. RETIRED EMPLOYEES bring this action to compel the RETIREMENT BOARD's recalculation of their pension rights, and immediate payment of the benefits to which COUNTY OF ORANGE retirees are entitled, with interest, from at least August 14, 1994.

RETIRED EMPLOYEES action is based on the California Supreme Court decision of August 14, 1997 in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483. The California Supreme Court held in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 487, that payments by the County in excess of the basic salary must be included in the "compensation earnable" and "final compensation" on which an employee's retirement benefits are based, pursuant to Gov. Code § 31460 (the statute which defines compensation), Gov. Code § 31461 (which defines "compensation earnable"), and Gov. Code §§ 31462 or 31462.1 (which define a retiring employee's "final compensation" in calculating the amount of a pension).

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In February, 1998, the RETIREMENT BOARD passed Resolution no. 98-001 allegedly to comply with the Ventura decision, but failed to include: (1) The BOARD did not include in the definitions of compensation earnable and final compensation for affected active and retired members. (including beneficiaries) cash payments received during the period under consideration that were not specified in any applicable collective bargaining agreement, including payments received in connection with separation of employment, for relinquishing paid leave benefits that were earned based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that measuring period; (2) The BOARD did not include in the definitions of "compensation earnable" and "final compensation" for members (including beneficiaries) who retired prior to January 1, 1991 the remuneration paid in cash out of County funds to insurance providers during the applicable measuring period, whether directly, or through a Flexible Benefits (or Cafeteria) Plan. which cash remuneration was paid in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period, to satisfy the member's obligation to pay premiums for insurance coverage for himself and eligible dependants; (3) The BOARD did not include in the definitions of "compensation earnable" and "final compensation" for affected active and retired members (including beneficiaries) who were employed prior to, on and after January 1, 1991 the remuneration paid in cash out of County funds during the applicable measuring period in return for services rendered by the member based upon the average number of days ordinarily worked by persons in the same grade or class of positions and at the same rate of pay within that period to a Flexible Benefit Plan (or Cafeteria Plan) maintained for the benefit of the member to be used to pay premiums for insurance coverage for the member and eligible dependents and/or to receive a cash payment and/or to purchase other valuable benefits; and (4) The BOARD did not make its adjustments retroactive to August 1994 nor did it provide

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C. PFICED OF ROCKWELL & MEYER 312 CENTEMPIAL WAY TURTIN, CA 92780-571A for interest on a liquidated sum from that date.

To date, the BOARD OF RETIREMENT OF THE COUNTY OF ORANGE ("RETIREMENT BOARD") has paid no such benefits to retirees.

Instead, while the RETIREMENT BOARD resolved to recalculate retirement benefits based on some of the remuneration paid employees, after receiving demands for inclusion of all benefits to which retirees are entitled under the law, the RETIREMENT BOARD filed a Complaint for Declaratory Relief and has paid COUNTY retirees no additional sums to which they are clearly entitled under the law.

11

ARGUMENT

A. MANDATE MUST ISSUE IN THIS CASE

Mandamus is sought to compel the BOARD OF RETIREMENT OF THE ORANGE COUNTY

EMPLOYEES RETIREMENT SYSTEM to perform its legal duty to (1) recalculate retirement benefits
in accordance with the ruling of the California Supreme Court in Ventura County Deputy Sheriffs' Assn.

v. Board of Retirement (1997) 16 Cal.4th 483, 490, and (2) immediately pay retirees, or their heirs and
assigns or beneficiaries the sums that should have been paid from and after August, 1994.

Pursuant to Code of Civil Procedure § 1086, the writ of mandate, "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law..."

In Santa Clara County Counsel Attorneys Ass'n v. Woodside (1994) 7 Cal.4th 525, 539-540, the Court noted that, "[w]hat is required to obtain writ relief is a showing by a petitioner of (1) A clear, present and usually ministerial duty on the part of the respondent...; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty..."

Mandamus will lie to, "compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as 'ministerial'

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or 'legislative.'" Santa Clara County Counsel Attorneys Ass'n v. Woodside (1994) 7 Cal.4th 525, 539-540. In Santa Clara County Counsel Attorneys Ass'n v. Woodside (1994) 7 Cal.4th 525, 539, the California Supreme Court noted that, "[t]he availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized."

Mandamus properly issues to, "compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law." Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 442.

Mandate will lie for the failure to pay benefits to which retirees are entitled. Glendale City Employees Ass'n v. City of Glendale (1975) 15 C.3d 328, 343-344. In Glendale City Employees Ass'n v. City of Glendale (1975) 15 C.3d 328, 343, in the similar context of a public agency failure to pay wages, the California Supreme Court explained that, "often the payment of the wages of a public employee requires certain preliminary steps by public officials; in such instances, the action in contract is inadequate and mandate is the appropriate remedy."

The retirement payments at issue in this case are significant. In Ventura the Court recognized that:

> "Which payments to a county employee other than base pay must be included when determining an employee's final compensation is a question crucial to the proper administration of a CERL pension system, including the ability of the county to anticipate and meet its funding obligation." Id. at 490.

Nor can the interests of the RETIRED EMPLOYEES, "abide the standard timetable of ordinary litigation without damage." Angela Rivera v. Division of Industrial Welfare (1968) 265 Cal. App.2d 576, 581.

In Great W. Sav. & Loan Ass'n v. City of Los Angeles (1973) 31 C.A.3d 403, 413, the Court acknowledged that, "[w]here a statute...clearly defines the specific duties or course of conduct that a

governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." Since the RETIREMENT BOARD's duty relative to the recalculation of RETIRED EMPLOYEES is ministerial as defined by the California Supreme Court in <u>Ventura County Deputy Sheriffs' Assn. v. Board of Retirement</u> (1997) 16 Cal.4th 483, under Code of Civil Procedure § 1085, the issuance of a writ of mandate is the proper procedure to compel the BOARD OF RETIREMENT to perform its ministerial act.

A clear and present duty on the part of the RETIREMENT BOARD to recalculate the RETIRED EMPLOYEES retirement benefits consistent with <u>Ventura</u>, and the beneficial right of members of RETIRED EMPLOYEES to the performance of such duty cannot be questioned in light of the California Supreme Court decision in <u>Ventura County Deputy Sheriffs' Assn. v. Board of Retirement</u> (1997) 16 Cal.4th 483, 490.

Any doubt with respect to such payments, and there can be no doubt following the California Supreme Court decision in Ventura, must be decided in favor of the RETIRED EMPLOYEES. In Dewayne Hudson v. Board of Administration of the Public Employees' Retirement System (1997) 59 Cal. App. 4th 1310, 1324, the Court noted that, "[w]e acknowledge the principle, recently applied by the Supreme Court, that "any ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner...(Ventura County Deputy Sheriffs' Ass'n v. Board of Retirement, supra, 16 Cal. 4th 483, 490.)"

Recalculation by the RETIREMENT BOARD of the retirement benefits as sought by the RETIRED EMPLOYEES is also consistent with Art. XVI, § 17, of the California Constitution, which declares in part concerning the duty of the BOARD OF RETIREMENT:

> "(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

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benefits to, participants and their beneficiaries... A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty."

As in Santa Clara County Counsel Attorneys Ass'n v. Woodside (1994) 7 Cal.4th 525, the COUNTY and the RETIREMENT BOARD:

"cites no authority for the proposition that, once the Legislature has created a duty in a public agency, a court may limit, on public policy grounds, the availability of a writ of mandate to enforce that duty. It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through normal judicial means. What public policy reasons there are against enforcement of a statutory duty are reasons against the creation of the duty ab initio, and should be addressed to the Legislature." Id. at 540.

The Retirement Board was to first determine whether various payments by the County over and above the basic salary paid to employees in the same job classification are 'compensation' within the meaning of § 31460, which defines compensation. Section 31460 of the Government Code declares:

"'Compensation" means the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan established pursuant to Chapter 8 (commencing with Section 18310) of Part 1 of Division 5 of Title 2 or pursuant to Article 1.1 (commencing with Section 53212) of Chapter 2 of Part 1 of Division 2 of Title 5, but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member."

Next, the Retirement Board was to determine whether such payments are "compensation earnable" as defined by § 31461 of the Government Code, and "thus part of a retiring employee's 'final compensation' (§ 31462 or 31462.1) for purposes of calculating the amount of a pension." Ventura County Deputy Sheriffs' Assn. v. Board of Retirement (1997) 16 Cal.4th 483, 487. Government Code § 31461 defines 'compensation earnable' as follows:

""Compensation earnable" by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily

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worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid."

'Final compensation' is defined by Government Code §31462 as follows:

"Final compensation" means the average annual compensation earnable by a member during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the three years immediately preceding his retirement. If a member has less than three years of service, his final compensation shall be determined by dividing his total compensation by the number of months of service credited to him and multiplying by 12.

Contrary to the law as construed by the California Supreme Court in <u>Ventura County Deputy</u>

<u>Sheriffs' Assn. v. Board of Retirement</u> (1997) 16 Cal.4th 483, and to the detriment of retirees, the

Retirement Board failed to determine the payments at issue were "compensation earnable" and thus part

of the retirees final compensation for purposes of calculating the amount of a pension.

THE RELIEF GRANTED THE RETIRED EMPLOYEES MUST BE RETROACTIVE TO AT LEAST AUGUST 14, 1994, AND MUST INCLUDE INTEREST

The RETIRED EMPLOYEES are entitled to the immediate payment of such benefits retroactively, and are entitled to prejudgment interest pursuant to Civil Code § 3287. In Austin v. Board of Retirement (1989) 209 Cal.App.3d 1528, the Court explained:

"The Board contends Austin is not entitled to prejudgment interest on retirement benefits retroactive to his last day of service, as the Legislature did not provide in the Retirement Act of 1937 for interest during the administrative process, and the Board was prevented by law from awarding retirement benefits prior to its decision following the referee's hearing....The question whether Austin is entitled to interest from his last day of service on the retroactive portion of his award of retirement benefits is one of law, concerning which we exercise our independent judgment. (Estate of Madison (1945) 26 Cal.2d 453, 456 [159 P.2d 630].) Pertinent to our discussion is subdivision (a) of Civil Code

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section 3287: "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.]" (Olson v. Cory (1983) 35 Cal.3d 390, 402 [197 Cal.Rptr. 843, 673 P.2d 720].)... As the court stated in Tripp: "The same public policy that favors the award of retroactive benefits, would appear to favor the award of prejudgment interest on such benefits." (Tripp v. Swoap, supra, 17 Cal.3d 671, 683.) nl

2. RETIRED EMPLOYEES ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES

Additionally, the RETIRED EMPLOYEES should recover their attorneys' fees in the instant action. For example, in Austin v. Board of Retirement (1989) 209 Cal.App.3d 1528, the Court explained:

> "Section 1021.5 "authorizes a court to compel the losing party to pay attorney fees to a prevailing party when all four of the following criteria are met. First, it must be an 'action which has resulted in the enforcement of an important right affecting the public interest ' Secondly, 'a significant benefit, whether pecuniary or non-pecuniary,' must have 'been conferred on the general public or a large class of persons, . . . 'Thirdly, 'the necessity and financial burden of private enforcement' must be 'such as to make the award appropriate, . . . ' and fourthly, 'such fees should not in the interest of justice be paid out of the recovery, if any.' (Code Civ. Proc., @ 1021.5.)" (Los Angeles Police Protective League v. City of Los Angeles (1986) 188 Cal. App.3d 1, 6 [232 Cal. Rptr. 697].)"

Also see Mass v. Board of Educ. (1964) 61 C.2d 612, 624, and Goldfarb v. Civil Serv. Comm'r. (1990) 225 C.A.3d 633, 635.

3. ANY FISCAL IMPACT OF COMPLIANCE WITH THE LAW IS NOT A VALID EXCUSE FOR FAILURE TO COMPLY WITH THE LAW

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LA. _FFICEB OF TOCKWELL & MEYER 318 CKHIENHIAL WAY Nor is any financial inconvenience or impact on the part of the RETIREMENT BOARD or the COUNTY a legal excuse to performance under the law. In <u>Ventura</u>, the California Supreme Court acknowledges that, "[n]othing in this record suggests that the burden on the county fisc [sic] justifies either perpetuation of an erroneous construction of the applicable statutes or denying these plaintiffs the benefit of our decision." <u>Id.</u> at 507; also see <u>Jenkins v. Knight</u> (1956) 46 Cal.2d 220, 224; <u>May v. Board of Directors</u> (1949) 34 Cal.2d 125, 130.

Consistently, in Ledora Whitfield et al. v. Board of Supervisors of Alameda County (1991) 227

Cal. App.3d 451, the Court discussing a statute requiring a county to relieve and support all indigent persons, stated, "[s]ection 17000 imposes a mandatory duty to relive and support its indigents, and the excuse that it cannot afford to do so is unavailing."

B. ANY CASH PAYMENT RECEIVED DURING THE FINAL COMPENSATION PERIOD,
INCLUDING THOSE MADE IN CONNECTION WITH SEPARATION, FOR
RELINQUISHING PAID LEAVE BENEFITS EARNED DURING THAT MEASURING
PERIOD MUST BE INCLUDED IN FINAL COMPENSATION

Intervenor RETIRED EMPLOYEES incorporates by reference herein the argument of Intervenor ORANGE COUNTY EMPLOYEES ASSOCIATION, INC. at p.3:3-28 of the "Memorandum of Points and Authorities in Support of Intervenor's Cross-Petition for Writ of Mandate" filed in the above-entitled action.

C. REMUNERATION PAID IN CASH OUT OF COUNTY FUNDS FOR SERVICES

RENDERED BY THE MEMBER TO THIRD PARTIES TO SATISFY OBLIGATIONS OF

THE MEMBERS MUST BE REGARDED AS COMPENSATION

Intervenor RETIRED EMPLOYEES incorporates by reference herein the argument of Intervenor ORANGE COUNTY EMPLOYEES ASSOCIATION, INC. at p.4:5-28, 5:1-28, 6:1-28, 7:1-

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28, and 8:1, of the "Memorandum of Points and Authorities in Support of Intervenor's Cross-Petition for Writ of Mandate" filed in the above-entitled action.

D. THE EXCLUSION FROM THE RETIREMENT CALCULATIONS OF ANY PORTION OF CONTRIBUTIONS TO A FLEXIBLE BENEFITS (CAFETERIA) PLAN IMPROPERLY DEPRIVED MEMBERS WHO WERE EMPLOYED BY THE COUNTY PRIOR TO, ON AND AFTER JANUARY 1, 1991 OF A VESTED FUNDAMENTAL RIGHT

Intervenor RETIRED EMPLOYEES incorporates by reference herein the argument of Intervenor ORANGE COUNTY EMPLOYEES ASSOCIATION, INC. at p.8:2-28, 9:1-28, 10:1-28, 11:1-28, 12:1-28, and 13:1-28, of the "Memorandum of Points and Authorities in Support of Intervenor's Cross-Petition for Writ of Mandate" filed in the above-entitled action.

III

CONCLUSION

THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. respectfully requests that the Court grant Petitioner's Petition for Writ of Mandate. Retirees do not have a speedy or adequate remedy at law to prevent the deprivation of their retirement rights other than by mandamus. RETIRED EMPLOYEES pray that mandamus issue enforce the RETIREMENT BOARD's duty to recalculate retirement benefits consistent with the findings of the California Supreme Court in the Ventura decision.

Date: June 10, 1998

Respectfully submitted,

KWELL & MEYER

Richard S. Rockwell, Attorneys for THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.

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PROOF OF SERVICE

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STATE OF CALIFORNIA, COUNTY OF ORANGE

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I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 315 Centennial Way, Tustin, California 92780.

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On June 10, 1998, I served the foregoing document described as MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE OF THE RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC. in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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AW OFFICES OF ROCHWELL & MEYER Harvey L. Leiderman, Esq. STEEFEL, LEVITT & WEISS

One Embarcadero Center, 30th Floor San Francisco, California 94111

Laurence M. Watson, County Counsel Thomas A. Agin. Assistant County Counsel 10 Civic Center Plaza, 4th Floor Post Office Box 1379 Santa Ana, California 92702-1379

Jan J. Nolan, Esq. Post Office Box 808 Santa Ana, California 92702 Eric W. Snethen, Esq. 1600 Bermuda Dunes Boulder City, NV 89005

Stephen H. Silver, Esq. SILVER, HADDEN & SILVER 1428 Second Street Post Office Box 2161 Santa Monica, California 90407-2161

I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Tustin, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more that one day after date of deposit for mailing in affidavit.

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

Executed on June 10, 1998 at Tustin, California.

JAMES MORELL 0548

I have served as Administrator of OCERS since December 9, 1996. As

- 3. On or about November 18, 1997, the Board established an Ad Hoc Committee of less than a quorum of members of the Board, comprised of both elected and appointed members, (the "Ad Hoc Committee") to analyze the California Supreme Court's decision in Ventura County Deputy Sheriff's Assoc. v. Board of Retirement of Ventura County, (1997) 16 Cal.4th 483 ("Ventura"), and to determine its effect, if any, on OCERS, its members, their beneficiaries, and the employers of its members ("Plan Sponsors"). The Ad Hoc Committee was charged with the duty of making recommendations to the Board as to whether and how to implement the rules enunciated in Ventura. I was present at the November 18, 1998 meeting, and heard the statements made by all persons present.
- 4. With the assistance of independent legal counsel, OCERS' actuary, and other advisors, the Ad Hoc Committee analyzed the relevant provisions of CERL, Ventura and other applicable law, the governing employment agreements and salary resolutions between members of OCERS and their employers (collectively, "MOUs"), and other relevant documents, and conducted a series of duly noticed, open public meetings to consider the effect, if any, of the Ventura decision and other laws on OCERS' calculation of pension benefits for its current and future retired members and its collection of contributions therefor. I was present at each public meeting, and heard the statements made by all persons at the meetings.
- On January 21, 1998, at a duly noticed, open public meeting, the Ad Hoc
 Committee presented its findings and conclusions and unanimously voted to adopt a series of

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recommendations to be made to the full Board for action by the Board ("Ad Hoc Committee Recommendations"). I was present at this public meeting, and heard the statements made by all persons present. A true and correct copy of the minutes of the January 21, 1998 meeting, as regularly maintained in OCERS' books and records, is attached hereto as Exhibit A.

- On February 6, 1998, the Board conducted a duly noticed, open public meeting to discuss and act upon the Ad Hoc Committee Recommendations and to hear public comments thereon. At this meeting, the Board considered the Ad Hoc Committee Recommendations, presentations by independent legal counsel and OCERS' actuary, and the comments of members of the public present. At the conclusion of the February 6, 1998 meeting, the Board, by a vote of 7-2, adopted Resolution No. 98-001, setting forth a series of policies and guidelines by which the Board would comply with Ventura. I was present at the February 6, 1998 public meeting, and heard the statements made by all person present. A true and correct copy of the minutes of the February 6, 1998 meeting, as regularly maintained in OCERS' books and records, is attached hereto as Exhibit B.
- 7. In addition, among the books and records of OCERS are the originals of all Resolutions that the Board of Retirement adopts. A true and correct copy of Resolution 98-001 is attached hereto as Exhibit C.
- 8. On May 4, 1998, the Board conducted a duly noticed, open public meeting to discuss the possibility of funding of Ventura benefit payments due to OCERS' members who retired before October 1, 1997. At this meeting, the Board considered presentations by OCERS' actuary and independent legal counsel and comments of members of the public. OCERS' actuary advised the Board that as of December 31, 1997, OCERS had sufficient earnings to pay for all Ventura- related benefits owed to current retirees, to require no arrears contributions from any members, and to decrease the amount of contributions required of the County and other Plan Sponsors. I was present at the May 4, 1998 public meeting, and heard the statements made by all persons at the meeting. A true and correct copies of the minutes of the May 4, 1998 meeting, as regularly maintained in OCERS' books and records, is attached hereto as Exhibit D.

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	9.	At the May 4, 1998, the Board adopted Resolution 98-009, by a vote of 8-1.
	3.	At the May 4, 1976, the Boate adopted resolution 70-007, by a fold of 6-1,
direc	ong the	it I transfer all excess earnings of the system, other than the \$130 million reserve, to
coun	ty adva	nce reserves, in order to pay for Ventura-related benefits. A true and correct copy of
Rose	lution 9	98-009, as regularly maintained in OCERS' books and records, is attached hereto as
Exhi	bit E.	

- At the May 4, 1998 meeting, the Board also adopted, by a vote of 8-1, new
 employer contribution rates for the 1998-99 fiscal year.
- 11. It is the ordinary course and scope of OCERS' business to keep and maintain records containing information about the retired and active members of the retirement system, and its assets and liabilities. The records are prepared by personnel under my direction and supervision. Based upon my review of the books and records of OCERS, as of December 31, 1997, the membership of OCERS included 6,914 retired employees of the County and other districts participating in OCERS, and their beneficiaries; and 20,189 active employees of the County and the other districts (of the 20,189 active employees, 1,426 had in fact terminated employment with the County or other districts, but they were in a "pending" or "deferred" status and had not yet become eligible for pension benefit checks). As of December 31, 1997, the net assets held in trust for pension plan benefits amounted to approximately \$ 3.84 billion.

I declare under penalty of perjury that the foregoing is true and correct under the laws of California and that this declaration was executed on June 10, 1998 at Santa Ana, California.

Raymond A. Fleming, Administrator

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ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM 2223 WELLINGTON AVENUE, SANTA ANA, CA 92701

AD HOC COMMITTEE SPECIAL MEETING WEDNESDAY, JANUARY 21, 1998

MINUTES

The Chairman called the meeting to order at 10:31 a.m. Attendance was as follows:

Members present:

Thomas N. Fox, Chairman Thomas J. Lightvoet Bruce A. Moore Bert Scott

Others in attendance were:

Raymond A. Fleming, Administrator; Thomas Bogdan, Assistant Administrator; Harvey Leiderman and Ashley Ilanwga of Steefel, Levitt & Weiss; Tim Marnell, Actuary, of Towers Perrin; Robin M. Schachter of Jeffer, Mangels, Butler & Marmaro LLP; Jean Pearce, Management Analyst; James Buck, Retirement Program Supervisor; Alicia Maiden, Benefits; Anthony Beltran, Data Processing; Javier Lara, Audio/Visual Technician; and Dolores Kramer. Recording Secretary.

Mr. Fox stated that for meeting protocol, the Committee would adhere to the five-minute rule as contained in OCERS' Bylaws. After going through the presentations, public comments would be taken and speakers would be held to no longer than five minutes. Mr. Fox said attendees would be allowed to make public comments or ask questions of the sitting Committee. counsel, or the actuary; however, Mr. Fox said he would not allow a legal debate to develop over the legal analysis and opinion being heard this morning.

Mr. Fox said the Committee now has an implementation plan, and they have approximately 95% of the pay elements classified. The remaining 5% will be clarified in the very near future.

Mr. Fox reminded everyone of the Committee's opening remarks about fairness and objectivity made on November 20, 1997, at the first meeting. He said he believes the Committee has done that and further stated that our findings are fair, objective and equitable to all parties.

Mr. Fox said the summary being presented this morning would start with the legal analysis by Mr. Leiderman, and then the meeting would be turned over to Mr. Mamell of Towers Perrin who would explain the actuarial side of the matter. Mr. Fox further advised that following public comments, he would read the four-page Resolution into the record. Once adopted by the Ad Hoc Committee, the Resolution would be sent to the full Board for ratification.

Mr. Fox stated that during these presentations, all of the critical dates would be covered, and the Committee would be putting out information in the near future to all retirees and active members covering all of those critical dates so that nobody will miss any of them. 296

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Mr. Fox said he didn't feel it was necessary for staff to go through all the various pay code elements during the meeting today. He said there were too many and it would put everyone to sleep if we were to go into each of them. Mr. Fox said he intended to have staff send our completed work product back to the plan sponsors for review and comment before implementation

Mr. Fox then introduced his colleagues, Bruce Moore, Bert Scott, Tom Lightvoet, and the Executive Officer Ray Fleming. Further, we have Mr. Harvey Leiderman and Ms. Ashley Ilangwa from Steefel, Levitt & Weiss; Mr. Robin Schachter of Jeffer, Mangels, Butler & Marmaro, and Tim Marnell from Towers Perrin, who has worked with us for quite some time as our actuary. With that I would like to turn the floor over to Mr. Harvey Leiderman.

Mr. Leiderman stated he had been asked to discuss the new infamous Ventura Decision, and the analysis and conclusions of this Committee and recommendations it intends to make to the Board of Retirement. And, of course, what all this is about is how the Ventura Decision affects the pensions for the public employees, both active and retired, for Orange County. For the benefit of the attendees, Mr. Leiderman requested that the resolution mentioned previously by Mr. Fox be projected on the screens in the Board Room Continuing, Mr. Leiderman said the Ventura County Decision was a decision involving the Deputy Sheriffs' Association and three retired Deputy Sheriffs in Ventura County. It is, in fact, the California Supreme Court's first declaration on the proper method of determining pension benefits under the 1937 Act that governs this system and nineteen others throughout the counties of California.

Mr. Leiderman said that in looking at this issue, he would like everyone to understand there are certain guiding principles of interpretation that we, as counsel, have applied and have encouraged the Ad Hoc Committee to apply. Of course, counsel has looked at the law as it is stated both in the cases, specifically the Ventura case, and in the statutes. As important as that is looking at what we call equity; i.e., stepping back and seeing just what is fair and equitable not only to individual retirees and active members, but as between the participants in the System and with the System, itself. So as we go though this, you should constantly be asking yourself, is this fair and is this the fair approach. The Committee believes that this approach is fair to all and is a fair reading of the law as it exists. Frankly, the other element simply put is plain old common sense and practicality. It makes no sense to interpret a ruling of the Supreme Court of this state in a way that causes twists and turns that were never intended by either the Legislature or the other courts and the Supreme Court in going through it. The Ventura Decision is complicated; it is a bit mysterious in places, and it leaves some blanks in other places. The Committee has attempted to use its common sense and good judgment in filling in those blanks and making this thing work in a practical manner for everyone who is affected by it. I also want to make a point that where Ventura does not address certain things, other cases do and other statutes do, and the Ventura Decision by the Supreme Court relied in great part on the PERS statute, for example, and on other cases interpreting the PERS statute where it is consistent with the 37 Act that governs this system. For those areas where Ventura does not provide an answer, but gives support to prior cases in law, we have looked to those, as well.

Let's take a quick look at the fundamental law. I am not going to make this a legal lecture, but you need to know what the basic building blocks are. They come out of the statute297 334/965

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Section 31460 defines compensation, and the important language here is that compensation is remuneration paid in cash - and that is very critical. It also includes amounts deducted from a member's wages for participating in a 457 plan, but essentially the guiding light here is going to be what is paid, or in some cases payable, in cash to the employee. This definition of compensation then is plugged into something called compensation earnable. This is one of the statues that is complicated and difficult. The language is not terrific, it has been amended a few times, and the easiest thing to do is to step back and ask what do the words "compensation earnable" really mean. Essentially, what compensation earnable means is just that compensation that is cash compensation that is earnable during a particular period of time by an employee. If we keep that in mind, that will help guide our further review of the Ventura case. Note also that we are talking about compensation that is calculated in the manner that is measured by that which people in the same class and grade ordinarily work, and that will also guide further consideration. Once you determine what the elements of compensation are, and whether they are earnable during the particular measuring period of time, the statute goes to what is called final compensation. This is essentially the development of the number on which the retirement benefit is calculated. For Tier 1, it is the one year period selected by the member at the time he or she applies for retirement, and for Tier II it is a three-year period. Notice that the language of the statute, itself, talks about compensation that falls within the period of employment - not at termination - but within the period of employment. Now what does Ventura say about all this? In Ventura, the Supreme Court basically affirms what the statute says - that compensation means remuneration paid in cash and any amounts paid for a deferred comp plan that are deducted from the member's wages. What Ventura says about compensation earnable is a change from what prevailed in the minds of all the twenty 37 Act Counties in the past. Ventura says that putting the compensation into compensation earnable, you are averaging the monthly pay, excluding overtime, received by the retiring employee, and now here is this period that has to be normalized. The average number of days worked in a month by employees in the same job classification at the same base pay level. The difference here is that up until the Ventura case came down, previous cases, including one in Marin County called Gwalfi found that you didn't include in compensation any of the employee's earnings that were not also earned by every other employee in the same class or grade. Ventura changes that. Ventura says you first look to the individual's compensation and then you determine what that person would have received had he or she worked the ordinary number of days that all employees in that classification would work. What that does is give us some big categories of things that we can exclude right away from what goes into compensation camable. First is true overtime. I mean to distinguish true overtime from what may be for payroll purposes called overtime. Some people work 8 1/2 hour days as part of their regular ordinary work week. That is not overtime. That half hour over an 8 hour day is not overtime under Ventura. True overtime is that which is worked beyond the amount that is ordinarily worked by employees in the same grade or class. So if your classification or your pay grade requires you to work an 8 1/2 hour day instead of an 8 hour day, that is not overtime. Nor is it overtime if it is characterized as overtime only for FLSA purposes. For example, for firefighters who work extended hours, but under FLSA get some of that characterized as overtime premium pay. If it is expected and ordinarily worked by employees in the class or grade, it would not be excluded from your compensation that goes into the analysis, but true overtime is excluded.