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8 individually and on behalf of a class of
9 others similarly situated

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

12 ROBERT MARZEC, an individual; RACHEL) Case No.: BC 461887
13 HEALY, an individual; BENJAMIN) [Consolidated with BC 480695]
14 ESPARZA, an individual; JEFFREY E.)
15 ANDERT, an individual; NEIL MacLAREN,) **CLASS ACTION**
16 an individual; RANDY SLAUGHTER, an) (Assigned to the Hon. Maren E. Nelson,
17 individual; and HENRY BROWN, an) Department 307, for all purposes)
18 individual; and on behalf of a class of others)
19 similarly situated,)
20) **DECLARATION OF JOHN MICHAEL**
21) **JENSEN IN SUPPORT OF PLAINTIFFS'**
22) **MOTION FOR CLASS CERTIFICATION**
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I, JOHN MICHAEL JENSEN, declare as follows:

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

2. I am over 18 years old.

1 3. I am counsel of record for Plaintiffs herein and have been since before this lawsuit
2 was filed.

3 4. I make this declaration in support of Plaintiffs' *Motion for Class Certification*.

4 **Discovery Served on CalPERS, and CalPERS' Responses**

5 5. I have previously served CalPERS with Special Interrogatories and Requests for
6 Production of Documents, and have received responses from CalPERS. The history of that
7 discovery and CalPERS' responses is set forth immediately below to establish the foundational
8 history of the discovery.

9 6. On November 6, 2015, I served CalPERS with a first set of Special
10 Interrogatories, Nos. 1 through 35. A true and correct copy of those Special Interrogatories is
11 attached to the concurrently filed *Notice of Lodging* as **Exhibit 1**.

12 7. The Special Interrogatories were designed (a) to determine the number of safety
13 members who invested in military/airtime at any time since 2003, were later retired due to
14 industrial disability, and who suffered complete or partial losses of their investments and (b) the
15 amount of money those safety members invested in military/airtime; and (c) to identify
16 documents relating to any warnings or disclosures that CalPERS gave to safety members about
17 the risk of loss or offset of the members' military/airtime investments if they retired with
18 Industrial Disability Retirement ("IDR") after contracting.

19 8. On November 6, 2015, I also served CalPERS with a second set of Requests for
20 Production of documents, requesting copies of all documents identified in Special Interrogatories
21 Nos. 18 through 35. A true and correct copy of those Requests for Production of Documents is
22 attached to the *Notice of Lodging* as **Exhibit 2**.

23 9. In addition, I previously made several Public Records Act requests on CalPERS
24 related to issues central to this case.

25 10. CalPERS has produced thousands of pages of documents in response to the PRA
26 requests and to the November 6, 2015 Requests for Production of documents. I have reviewed
27 those documents and am familiar with their content.

28 11. CalPERS provided an initial Excel chart responding to Special Interrogatories

1 Nos. 1 through 17. After Plaintiffs filed a motion to compel further responses from CalPERS,
2 and after further meet and confer and a ruling by the Court, on December 23, 2016 CalPERS
3 provided updated discovery responses in a chart in Excel format.

4 12. A true and correct copy of CalPERS' December 23, 2016 discovery chart is
5 concurrently lodged conditionally under seal because of a protective order covering its disclosure
6 that was previously granted by the Court.

7 13. I will address some of the implications and conclusions I have drawn from
8 CalPERS' discovery responses later in this declaration.

9 **Legislative History of Issues Related to Plaintiffs' Harms and Claims**

10 14. On May 3, 2012, CalPERS requested judicial notice from the Court of certain
11 legislative history involving the Public Employees' Retirement Law ("PERL") concerning
12 investment of monies for military/airtime by CalPERS members, and whether such investors
13 were able to seek refunds of the monies invested if they retired with IDR.

14 15. A true and correct copy of CalPERS' request for judicial notice is attached to the
15 *Notice of Lodging* as **Exhibit 3**. It includes Exhibit 1 (the history of Senate Bill 394, introduced
16 in February 1979 and later enacted by the Legislature, which permitted the refund of investment
17 monies from January 1, 1979 through January 1, 1984); Exhibit 2 (the history of Assembly Bill
18 1146, introduced in March 1991 but not enacted by the Legislature, which would have again
19 permitted the refund of such investments); and Exhibit 3 (the history of Senate Bill 268,
20 introduced in February 2003 and later enacted by the Legislature, which permitted the
21 suspension of prospective installment payments on such investments but denied refunds of any
22 monies already paid toward such investments).

23 16. The Court granted judicial notice of the aforesaid documents at the time. Plaintiffs
24 are renewing the request for judicial notice of the documents in their concurrently filed *Request*
25 *for Judicial Notice* filed in support of Plaintiffs' *Motion for Class Certification*.

26 17. I believe that the legislative history demonstrates that CalPERS has been aware of
27 the potential loss of funds invested in military/airtime by safety officers since at least 1991, if not
28 sooner. I further believe that this legislative history put CalPERS on notice, at least as of 1991,

1 that its fiduciary and trustee duties required it to notify potential investors of those losses before
2 they contracted to invest, but that CalPERS has not done so. The legislative history filed by
3 CalPERS demonstrates the following:

4 18. **Refunds permitted between 1979 and 1984.** Senate Bill 394 was introduced and
5 passed by the Legislature in 1979. (*Request for Judicial Notice*, CalPERS' "Exhibit 1" of **Exhibit**
6 **3.**)

7 19. Senate Bill 394 shows that CalPERS knew that members who had invested in
8 prior military service time were permitted to seek refunds of the monies they had paid for those
9 investments after they had been retired with IDR for the five year period of January 1, 1979
10 through January 1, 1984, when the legislation sunsetted and refunds were no longer allowed.

11 20. I previously served CalPERS with Requests for Production of Documents seeking
12 copies of all documents from 2003 to present describing or relating to any notifications or
13 disclosures that CalPERS gave to members investing in military/airtime that they might lose
14 their investment, or not get refunds of their monies.

15 21. **Review all CalPERS documents produced and CalPERS member files,**
16 **finding that CalPERS distributed standardized documents across the class, containing**
17 **material misrepresentation and omissions.** I have reviewed all of the documents produced by
18 CalPERS and do not find any such notifications or disclosures from CalPERS, other than the
19 form contracts, publications and other documents which were provided to Plaintiffs and are
20 attached to their respective declarations, or essentially identical versions of the same
21 standardized contracts, publications and other documents. I have reviewed all of the documents
22 provided by the named Plaintiffs, including in their CalPERS member files, and do not find any
23 such notifications or disclosures, other than the form contracts, publications and other documents
24 which were provided to Plaintiffs and are attached to their respective declarations, or essentially
25 identical versions of the same standardized contracts, publications and other documents. In
26 reviewing CalPERS' production and the documents, including the CalPERS form standardized
27 documents in each named Plaintiff's CalPERS member file, I see that CalPERS uses the same or
28 similar language and forms throughout, and across the named class representatives, and that

1 CalPERS continued using and distributing the standardized forms with the same of similar terms
2 in the same or similar manner even in different form versions and in different years. In all of
3 CalPERS' documents, I saw only that CalPERS used (A) the one sentence that contained the
4 same or similar language, "If you are considering a disability retirement, this service credit may
5 not benefit you," which is placed in a single sentence in a cover letter of a multi-page
6 standardized nonnegotiable form contract and (B) for those seeking to suspend payment of
7 installements after the fact (and which was not provided before contracting or to others),
8 CalPERS' form waiver for suspension of installment payments after the fact that quotes
9 *Government Code* section 21039 and seeks to waive refunds. Other than those two instances, I
10 have reviewed all of the documents produced by CalPERS and find:

- 11 (i) No notice of the risk of loss of the investment money,
- 12 (ii) No information specific to safety members about any risks associated with future
13 injuries or industrial disability retirement,
- 14 (iii) No information about the risk to safety members in investing before age 50,
- 15 (iv) No information about any risks to safety members of investing before being eligible
16 for service retirement,
- 17 (v) No information about the IDR or the risk of IDR funding offset,
- 18 (vi) No information about risk of the transfer of the investment funds to the employer,
- 19 (vii) No information about no refunds except in the after-the-fact attempted waiver in the
20 suspension of installment payments after the IDR,
- 21 (viii) No information specific to safety members about their IDR rights or how they may
22 be effected,
- 23 (ix) No information that "present value" of future payments included a risk of no
24 payments at all if you retire on IDR,
- 25 (x) No information about CalPERS' adversity or that CalPERS was acting in self-interest
26 or the employer's interest,
- 27 (xi) No information about the potential loss of increases except in the after-the-fact
28 attempted waiver in the suspension of installment payments after the IDR,

1 (xii) No information about the transformation of the monies into normal contributions,
2 (xiii) No mention of *Government Code* section 21039 except after the fact in the waiver
3 in the suspension of installment payments after the IDR,
4 (xiv) No information about the risk of no refunds before contracting, and
5 (xv) no notice of the other material risk to safety members described in the Third
6 Amended Complaint, the Declarations, and the Points and Authorities in Support of the
7 Motion for Class Certification.

8 In particular, I saw that CalPERS did not make the waiver available before contracting or to
9 anyone other than those seeking to suspend installment payments after the fact of IDR. CalPERS
10 used "present value", "increases", "considering", "may not benefit you" and other terms in an
11 ambiguous, misleading, and non-standard manners. After a review of all of CalPERS documents
12 received in production and from the seven named class representatives' member files, I conclude
13 that CalPERS distributed standardized nonnegotiable documents and contracts across the class
14 which contained material misrepresentations and omissions since 1991 to the present.

15 22. I specifically have not found any such notifications or disclosures made to
16 members at any point at all (with the two exceptions mentioned above about the waiver and the
17 "considering" "may not benefit" sentence), including after the expiration of the law enacted by
18 Senate Bill 394 after January 1, 1984.

19 23. **Failed legislation to authorize refunds beginning in 1991.** Assembly Bill 1146
20 was introduced in 1991, but failed to pass and was not enacted by the Legislature. (*RJN*,
21 CalPERS' "Exhibit 2" of **Exhibit 3**.)

22 24. Assembly Bill 1146 would have permitted CalPERS to make refunds to CalPERS
23 members of monies they invested in military/airtime if those members retired with IDR and did
24 not benefit from the monies they invested.

25 25. That legislation was introduced in 1991, but failed and was not enacted by the
26 Legislature. CalPERS was aware of the fact that the proposed legislation failed.

27 26. I believe this demonstrates that CalPERS knew that safety members investing in
28 military/airtime faced the potential loss of their investments if they retired with IDR.

1 27. I believe that the failure of this legislation also demonstrates that CalPERS'
2 fiduciary and trustee duties required it to notify potential investors of the possibility of such
3 losses before they contracted to invest.

4 28. **2003 legislation barring refunds of investments.** Senate Bill 268 was
5 introduced and passed by the Legislature in 2003 and enacted as *Government Code* section
6 21039. (*RJN*, CalPERS' "Exhibit 3" of **Exhibit 3**.)

7 29. *Government Code* section 21039 addresses the question of refunds for monies
8 invested by CalPERS members for military/airtime who later retire with IDR and do not receive
9 an increased retirement allowance based on their investments.

10 30. Section 21039 permits CalPERS to suspend prospective installment payments still
11 due and owing on such investments, but prohibits CalPERS from refunding any monies already
12 paid toward such investments.

13 31. Again, I believe this demonstrates that CalPERS knew that safety members
14 investing in military/airtime faced the potential loss of some or all of their investments if they
15 retired with IDR, and that CalPERS' fiduciary and trustee duties required it to notify potential
16 investors of the possibility of such losses before they contracted to invest.

17 **Numbers of Putative Class Members**

18 32. CalPERS' December 23, 2016 Excel chart containing further responses to
19 Plaintiffs' Special Interrogatories Nos. 1 through 17 is concurrently lodged under seal because
20 the information it contains may be subject to the Court's protective order, but has been lodged
21 because Plaintiffs wish to make it available for the Court's review.

22 33. After receiving those responses, I performed various sortings of the Excel data
23 contained therein to determine the approximate numbers of individuals identified with complete
24 or partial losses, and the approximate amount of money they appear to have invested.

25 34. There appear to be some discrepancies in the updated responses, including
26 because of the way CalPERS chose to disclose the data.

27 35. However, based on my examination of the information provided by CalPERS, it
28 appears that there are at least 177 individuals who suffered complete losses of their investments,

1 most of them under age 50 and a smaller number age 50 or older.

2 36. Those "complete loss" individuals appear to have invested approximately
3 \$18,850,000, not including any interest accrued since the dates of payment.

4 37. Based on my examination of the data provided by CalPERS, it also appears that
5 there are at least 70 individuals who suffered partial losses of their investments.

6 38. Those "partial loss" individuals appear to have invested approximately
7 \$6,900,000, not including any interest accrued since the dates of payment.

8 39. On November 6, 2015, I propounded Special Interrogatories Nos. 1 through 17
9 (**Exhibit 1**) on CalPERS requesting information from CalPERS that would allow Plaintiffs to
10 determine those people who invested in military/airtime at any time since 2003, were later retired
11 due to industrial disability, and who suffered complete or partial losses of their investments

12 40. Complete and partial losses were defined so that it would include anyone who
13 invested a specific sum of money in the expectation of receiving an increase in their retirement
14 pension attributable to a specific percentage of their highest salary, but then received a pension
15 that included no or only part of the expected increase.

16 41. The exact number of putative class members is hard to determine because
17 CalPERS has only produced data on individuals who retired with IDR from 2003 onward, while
18 Plaintiffs plead a class going back to 1991.

19 42. However, In 2011, CalPERS published and made available to the public its "A
20 Guide to CalPERS Pension Facts, 2010-2011." That publication estimates that as of June 30,
21 2011, nearly 50,000 members invested in airtime between the start of the program and 2011,
22 20% of them (nearly 10,000 people) state and local safety members.

23 43. A true and correct copy of that publication which was downloaded on September
24 28, 2017, at <http://www.nasra.org/files/State-Specific/California/Pension-facts%20CalPERS.pdf>
25 is attached to the *Notice of Lodging* as **Exhibit 4**.

26 **Industrial Disability Retirement Rights and Benefits**

27 44. **Entitlement to IDR from the start of employment.** Pursuant to *Government*
28 *Code* section 21151(a), all CalPERS' state and local safety officers and others engaged in

1 dangerous occupations with a higher danger of disabling on-the-job injuries than other CalPERS
2 members are eligible for Industrial Disability Retirement.

3 45. IDR is available for such members who are "incapacitated for the performance of
4 duty as a result of an industrial disability." (*Gov't Code*, §21151(a).)

5 46. Unlike regular or ordinary disability which is available to all other CalPERS
6 members but provides lower benefits but is only available after the member has accrued at least
7 five years of CalPERS employment, safety members acquire vested IDR rights immediately
8 upon employment. Section 21151(a) mandates that safety members eligible for IDR "shall be
9 retired for disability, pursuant to this chapter, regardless of age or amount of service." (*Ibid.*)

10 47. **No inherent value to "service credit"**. I am familiar with the PERL and with its
11 definitions of "service credit". Service credit is accrued over the course of a member's
12 employment in a CalPERS-contracting job. The member may make very different amounts of
13 pay for each period he or she accrues service credit, and therefore the amounts of service credit
14 do not correlate with specific financial contributions to CalPERS.

15 48. Service credit itself has no financial value in itself; instead, it is used as a
16 multiplier in calculating a member's pension benefits based on the member's highest "final
17 compensation" amount.

18 49. Further, service credit has no value at all in the context of IDR. IDR provides an
19 injured safety member with monthly payments for life in the amount of 50% of highest salary, as
20 a tax-free tort recovery for the physical injury. (*Gov't Code*. §§21411, *et seq.*) The 50%
21 allowance is paid regardless of the amount of service credit a member has accrued at that point.
22 (*Ibid.*)

23 50. **Funding for IDR benefits; limited funding from members**. IDR benefits are
24 funded by the employer and from contributions made in that safety job and administered solely
25 by CalPERS. (*Gov't Code*, §21418.)

26 51. CalPERS has represented to its membership that the only monies they are
27 obligated to pay for CalPERS' retirement benefits, which include service retirement and IDR, are
28 the set percentages taken from their salaries pursuant to statute, with the balance of the cost of

1 retirement benefits borne by CalPERS and by the employers.

2 52. For example, CalPERS' member Handbooks for state and local safety members
3 between 2005 and 2011 all state the following:

4 *How Your Retirement Is Funded*

5 Three sources fund a defined benefit retirement plan like CalPERS. First,
6 employees generally make contributions into the System. The percentage of your
7 contribution is fixed by employer contract and varies from about 5 to about 9
8 percent of your earnings, depending on the plan type and whether you are covered
9 by Social Security. The second source of funding is earnings from the investment
10 of System assets in stocks, bonds, real estate, and other investment vehicles. The
11 amount contributed from this source fluctuates from year to year. The balance of
the funding is provided by employer contributions. Employer contributions
decline when investment returns rise and increase when investment returns
decline.

12 (See *What You Need to Know About Your Local Safety Benefits*, Pub 9, for
13 January 2011 pages 5-6 (*RJN*, Exhibit 5).

14 53. I have reviewed the publications *What You Need to Know About Your Local*
15 *Safety Benefits*, Pub. 9, for April 2005 and February 2009, and *What You Need to Know About*
16 *Your State Safety Benefits*, Pub 7, for April 2005, January 2009, and January 2011, and have
17 found they contain essentially identical language about the source of retirement benefit funding.

18 54. Nothing is said in those member handbooks, or in any other official CalPERS
19 publications that I have seen which were made available to safety members, which states that
20 IDR or other retirement benefits are also paid for in part by safety members' money invested in
21 military/airtime.

22 **No Written Notice to Safety Members About the Risk of Loss or Offset of Military/Airtime**
23 **Investments, CalPERS' Failure to Provide Increases, No Refunds**

24 55. I have reviewed all of the documents produced by CalPERS in response to Public
25 Records Act requests that I have made, as well as specific Requests for Production of
26 Documents.

27 56. I have also assisted the named Plaintiffs in obtaining copies of their CalPERS
28 member files from CalPERS and have reviewed all of the documents contained in those files.

1 57. The Requests for Production of Documents contained in **Exhibit 2** attached to the
2 *Notice of Lodging* specifically requested copies of all CalPERS documents prepared from 2003
3 to the present which describe or relate to any notifications or disclosures that CalPERS gave to
4 members investing in military/airtime that they might lose their investment, that their investment
5 might offset IDR or other benefits, that they might not get the benefit promised in exchange for
6 the investments, or that they might not get refunds of their monies.

7 58. I have examined all of the documents that CalPERS has produced to Plaintiffs in
8 response to both the PRA's and the Requests for Production of Documents in **Exhibit 2**, as well
9 as all the documents in the named Plaintiffs' CalPERS member files, and I do not find any such
10 notifications or disclosures given to safety members who invested in military/airtime other than
11 (a) the form contracts, publications and other documents which were provided to Plaintiffs and
12 are attached to their respective declarations, or (b) essentially identical versions of the same
13 standardized contracts, publications and other documents.

14 59. Based on my review of all of the documents that CalPERS has provided to
15 Plaintiffs, including those in the named Plaintiffs' CalPERS member files, I have not been able to
16 find any documents that provide "specific notice" to members investing in military/airtime
17 before or at the time of contracting that provide specific notice of the material terms relating to
18 risk, offset, loss of investments, no receipt of promised increases, or no refunds.

19 60. Based on my review of all of the documents that CalPERS has provided to
20 Plaintiffs, including those in the named Plaintiffs' CalPERS member files, I have not been able to
21 find any documents that demonstrate that CalPERS informed members investing in
22 military/airtime prior to and at the time of contracting that CalPERS was acting adverse to such
23 members' interests.

24 61. Based on my review of all of the documents that CalPERS has provided to
25 Plaintiffs, including those in the named Plaintiffs' CalPERS member files, I have not been able to
26 find any documents that demonstrate that members investing in military/airtime did not rely on
27 CalPERS' standardized written contracts and other documents in the course of investing in
28 military/airtime.

1 **No Verbal Notice to Safety Members About the Risk of Loss or Offset of Military/Airtime**
2 **Investments, CalPERS' Failure to Provide Increases, No Refunds**

3 62. Plaintiffs have alleged that CalPERS transacted all of the investments based on
4 standardized form documents, with no substantive oral discussion of any issues relating to the
5 investments between CalPERS' representatives or employees and Plaintiffs other than to direct
6 them to the written standardized documents.

7 63. Plaintiffs have also alleged that any verbal communications by CalPERS'
8 representatives or employees with Plaintiffs about investments in military/airtime, to the extent
9 any took place, are irrelevant in that (1) such verbal communications cannot alter the written
10 representations in CalPERS' contracts and other documents pursuant to the Parol Evidence Rule,
11 and (ii) Plaintiffs have the right to rely, and are presumed to have relied, on the standardized
12 written documents.

13 64. Nevertheless, Special Interrogatories Nos. 34 and 35 (included in **Exhibit 1** to the
14 *Notice of Lodging*) requested CalPERS to identify all telephone scripts or other standardized
15 statements that CalPERS would provide or communicate to safety members about
16 military/airtime. CalPERS did not identify any such documents.

17 65. Requests for Production Nos. 37 and 38 (included in **Exhibit 2** to the *Notice of*
18 *Lodging*) requested CalPERS to produce copies of the documents identified in Special
19 Interrogatories Nos. 34 and 35. Although CalPERS did not identify any such documents, I have
20 examined all of the documents that CalPERS has produced to Plaintiffs in response to both the
21 PRA's and the Requests for Production of Documents in **Exhibit 2** and I do not find any
22 telephone scripts or statements to be provided or communicated to safety members about
23 military/airtime.

24
25 **CalPERS Did Not Develop Military/Airtime Contracts or Documents Directed Specifically**
26 **to Safety Members**

27 66. CalPERS used the same form contract for safety members entitled to IDR as for
28 members who could never be entitled to IDR.

1 67. For example, attached as **Exhibit 5** to the *Notice of Lodging* is a true and correct
2 copy of CalPERS documents sent to a CalPERS non-safety member for investment in airtime in
3 2008-2009.

4 68. I can authenticate the documents as true and correct because I represent that
5 individual in unrelated litigation with CalPERS. The documents were located in the individual's
6 CalPERS member file which I obtained at the time I began representing him.

7 69. The member's non-safety status is verified by the fact that his retirement formula
8 is specified as "2% @ Age 55 (PA Misc)" and that he was employed at the time of his
9 investment by the Special District Risk Management Authority which has no safety members or
10 other members eligible for IDR.

11 70. The CalPERS form documents sent to that miscellaneous member are identical to
12 documents that CalPERS employed in the military/airtime investments made by Plaintiffs.
13 (Compare **Exhibit 5** with the documents attached to the *Declarations* of all of the named
14 Plaintiffs concurrently filed with the Court.)

15 71. The CalPERS form documents sent to that miscellaneous member contain the
16 same phrases about safety members as those sent to the named Plaintiffs, including:

- 17 • "If you are a safety member, your retirement benefit allowance cannot increase
18 above the maximum 'benefit cap' for your retirement formula (i.e., State Safety
19 3% at 50 formula has a maximum benefit cap of 90 percent of final
20 compensation."
- 21 • "For Safety Members purchasing safety service, keep in mind that the percentage
22 of retirement allowance to which you will be entitled under the Safety formula is
23 limited to a percentage of your average CalPERS compensation at the time of
24 retirement."

25 72. The CalPERS form documents sent to that miscellaneous member also contain the
26 same phrase about "If you retire on disability, this additional service credit may not benefit you"
27 as that sent to the named Plaintiffs, even though the named Plaintiffs were eligible for IDR while
28 the miscellaneous member was only eligible for regular or ordinary disability.

1 **CalPERS' Duty to Provide "Complete and Unambiguous" Information**

2 73. CalPERS has adopted the Administrative Law Judge's *Proposed Decision* in the
3 case of *In re Smith* as one of CalPERS' precedential decisions. In discussing CalPERS' fiduciary
4 duties, *In re Smith* quotes from the case of *Hittle v. Santa Barbara Cnty. Empl. Retire. Assn.*
5 (1985) 39 C3d 374, and then says that CalPERS' "duty to inform and deal fairly with members
6 also requires that the information conveyed be complete and unambiguous".

7 74. I believe that by adopting the *Proposed Decision* in *In re Smith* as precedential,
8 such that it should govern CalPERS' decisions and actions in similar cases, CalPERS has
9 acknowledged that it owes fiduciary duties to its membership to fully inform them and to deal
10 fairly with them by providing them with complete and unambiguous information in matters
11 related to those members' pension rights and benefits.

12 75. Plaintiffs have alleged that CalPERS has breached its fiduciary duties, including
13 the "duty to inform and deal fairly with members", by failing to disclose the risk of loss or offset,
14 risk of receiving no promised increase, and risk of no refund of putative class members'
15 military/airtime investments prior to CalPERS contracting with those members.

16 **Right to Rescission of the Military/Airtime Contracts**

17 76. Putative class members who received no benefit or advantage from their
18 military/airtime investment have lost everything they thought they were contracting for, and
19 gained no advantage at all in return.

20 77. I believe and that such putative class members would have no reason not to seek
21 rescission of their contracts, with restitution of the monies they paid to CalPERS plus interest
22 from the dates of deposit.

23 78. Putative class members who received only partial benefit or advantage from their
24 military/airtime investment have lost a portion of what they thought they were contracting for,
25 and gained only partial advantage from the investment.

26 79. The contracts signed by those putative class members apportioned by increases or
27 intervals, with advantage gained only for an incremental portion of their total investment. Thus,
28 the contract is severable or divisible.

1 80. Plaintiffs who suffered partial losses should be allowed to rescind the part of the
2 contracts for which they receive no increase or advantage.

3 **CalPERS' Post-Contract "Waiver" Indicates Knowledge of the Lack of Informed Consent**
4 **at the Time of Contracting**

5 81. As indicated in the concurrently filed Motion for Class Certification and the
6 declarations of named Plaintiffs Andert and Brown, some Plaintiffs who invested on installment
7 payments had not finished paying off their investment at the time they retired with IDR.

8 82. CalPERS provided those Plaintiffs with the opportunity to elect suspension of
9 future installment payments because CalPERS had calculated that those individuals' investments
10 in military/airtime would provide them with no advantage in their pension allowance. See, for
11 example, *Andert Declaration*, Exh. 21, 23, and *Brown Declaration*, Exh. 14, 15.

12 83. However, CalPERS only offered to suspend future installments if those Plaintiffs
13 completed, signed and returned to CalPERS a two-page letter and "waiver" requesting the
14 suspension and purportedly consenting to not getting any refund of the monies they had already
15 paid. (*Ibid.*) CalPERS did not supply this information before contracting to any one of the named
16 Plaintiffs. This language, this waiver and the mention of no refunds was not provided and not
17 available before contracting.

18 84. CalPERS also instructed those receiving the two-page letter and waiver that they
19 were required to sign and return the document to CalPERS within 14 days or CalPERS would
20 continue to take the remaining installment payments out of the individuals' IDR pension
21 warrants, even though CalPERS had determined that the individuals would get no benefit or
22 advantage from continuing to make those payments.

23 85. The language in the two-page letter and "waiver" is far more expansive than
24 anything included in any of the military/airtime documents that I have seen in the documents
25 CalPERS has provided to Plaintiffs, as well as the documents included in the named Plaintiffs'
26 CalPERS member files.

27 86. I believe that CalPERS' presentation of that "waiver" to those with remaining
28 installment payments indicates recognition that no such language was included in the original

1 "contract" documents, and represents a belated attempt to obtain a defective "waiver" from those
2 individuals after the fact.

3 87. Furthermore, it is apparent from the face of the two-page letter and warrant that
4 such a document was only sent to a minority of the putative class who were still making
5 installment payments, so no such notice, albeit a belated one, was set to those who had invested
6 by lump sums or had paid off their installment contract.

7 **Plaintiffs' Counsel's Ability to Act as Counsel for the Class**

8 88. I have the significant experience litigating retirement benefits cases for over ten
9 years. I am one of the few attorneys in the state who litigates these retirement cases on a regular
10 basis.

11 89. I am counsel in the following published cases involving retirement benefits:

- 12 i. *Matus v. Bd. of Admin. of California Pub. Employees' Ret. Sys.*, 177 Cal.
13 App. 4th 597, 99 Cal. Rptr. 3d 341, 343 (2009);
- 14 ii. *Molina v. Bd. of Admin., California Pub. Employees' Ret. Sys.*, 200 Cal.
15 App. 4th 53, 132 Cal. Rptr. 3d 435, 438 (2011)
- 16 iii. *Chaidez v. Bd. of Admin. of California Pub. Employees' Ret. Sys.*, 223 Cal.
17 App. 4th 1425, 169 Cal. Rptr. 3d 100, 101 (2014), as modified (Feb. 27,
18 2014), review denied (May 14, 2014) and
- 19 iv. *Marzec v. California Pub. Employees Ret. Sys.*, 236 Cal. App. 4th 889
20 (2015)

21 90. I have the following experience as attorney in class actions: I am counsel for
22 Plaintiffs in (1) *Kesterson, et al. v. CalPERS*, LASC Case No. BC502628, now on appeal in
23 Court of Appeal case no. B284977; (2) *Jackson, et al. v. CalPERS*, LASC Case No. BC661500;
24 and (3) *Heinz, et al. v. CalPERS*, LASC Case no. BC664844.

25 91. I am capable of representing the proposed class and I am willing and able to serve
26 as attorney for the class in this action. The named Plaintiffs assert claims reasonably expected to
27 be raised by the members of the class.

28 92. I possess sufficient resources to litigate the matter.

1 93. I have reviewed the claims of the named class representatives and I have had
2 extensive discussion with each of them about this matter, about acting as a class representative,
3 and about the nature of their claims and whether they wish to be, and satisfy the requirements of
4 being, a class representative. I understand and believe that each named Plaintiff would be an
5 adequate and active class representative. I understand and believe that each of the named
6 Plaintiffs possess the same interest and suffer the same injury as other class members. I believe
7 that each of the named Plaintiffs claims are each typical of other claims, including where
8 CalPERS delays payment of a matured right but fails to pay interest. The damages that each of
9 the name Plaintiffs suffer in failing to receive interest are typical.

10 94. I understand the fiduciary obligation that being the attorney for a class
11 representative imposes. I have explained the fiduciary obligation of being a class representative
12 to the named Plaintiffs and they have each accepted the duties and obligations of being a
13 fiduciary and class representative. I assume a fiduciary obligation to the members of the class,
14 possess the motivation to litigate on behalf of all class members, including that I will not settle
15 the other class members' claims for my individual gain.

16 95. I agree to fairly and adequately represent and protect the interests of the members
17 of the class. I have no conflict of interest with the class, no interests adverse to the class, and no
18 interests that are antagonistic to the class.

19 **Trial Management Plan**

20 96. The statistics part of this case has been developed with statistical expertise in
21 class actions.

22 97. The trial management plan allows CalPERS as a defendant to assert its defenses
23 individually and to the class and provides due process, and allows CalPERS to impeach the
24 statistical model if necessary.

25 98. The initial population to be sampled is safety members entitled to IDR before
26 contracting that investigated military/airtime by requesting an estimate from CalPERS. This
27 would be the group that received at least some standardized form(s) about the investment from
28 CalPERS and could have some relevant information if there is no presumption of reliance, etc.

1 99. The initial assessment of variability is that all of the safety members in the
2 population had low variability with respect to the issues involved in contracting for the
3 investment on CalPERS forms, all of the forms had low or no meaningful variance between
4 each, all of the information given out by CalPERS was the same or similar with little variability
5 between it, all of the Election documents were the same or similar on the material terms with
6 little or no variability between them, all of the investments were processed in the same or similar
7 manner with little variability between them, and CalPERS' practices with regard to the
8 investments were standardized such that there was little or no variability between transactions,
9 and that CalPERS informed and transacted the investments on CalPERS' standardized forms that
10 were the same or similar across the class for that period of time.

11 100. Since the variability in safety members entitled to IDR who sought imore
12 information from CalPERS about investing is small with respect to the relevant factors about
13 investing in form contracts and waivers, the *Duran* requirements are satisfied. The variability in
14 the population is small as all safety members are entitled to IDR before investing, and all safety
15 members are similarly situated as far as each would be provided the same or similar form
16 contract by CalPERS. The overall population is fairly uniform and standardized regarding the
17 characteristics that are relevant for purposes of determining any factual issues in this case.

18 101. Regarding other issues of potential variability, Plaintiffs recognize that there
19 could be some variability in population of safety members entitled to IDR before contracting that
20 investigated military/airtime by requesting a service credit estimate, but most or all of the
21 variability in the population is not relevant. For example, there could be variability in the way
22 that Plaintiffs subjectively understood the terms of the investment, there could be some
23 variability in whether or how badly each class member was injured prior to contracting, there
24 could be some variability in how badly they were injured after contracting, there could be some
25 variability in how much money they lost, there could be some variability in the ability of the
26 Plaintiffs to work at all, and there could be some variability in other aspects, however if so, that
27 variability is irrelevant and not legitimate for purposes of inquiring into rescission.

28 102. The overall population of safety members entitled to IDR before contracting that

1 investigated military/airtime by requesting a service credit estimate is fairly uniform and
2 standardized regarding the characteristics that are relevant for purposes of determining any
3 relevant factual issues in this case. The variability in the population of safety members entitled to
4 IDR before contracting that investigated military/airtime by requesting a service credit estimate
5 with respect to rescission of the CalPERS form contract is small as all safety members are
6 entitled to IDR before investing, and all safety members are similarly situated as far as CalPERS
7 made available and provided only the same or similar form contract by CalPERS.

8 103. There is a fairly large population of safety members entitled to IDR before
9 contracting that investigated military/airtime by requesting an estimate and this population can
10 be ascertained from CalPERS' records of who requested information, and then sampled such that
11 sufficient sample size available. It is believed that at least 10,000 safety employees invested in
12 airtime alone from 2003 to 2011. (See *Notice of Lodging*, **Exhibit 4**.)

13 104. The uniformity of the population is high, the uniformity of the information
14 provided is high, and the relevant variances in the population is low. The relevant variability in
15 the form contract is small, because while there were some changes in the form from 1991 to the
16 present, and some differences between military time and airtime, the relevant inquiry includes
17 issues such as whether the "increase "terms", the "present value" , "no refunds" and other
18 misrepresentations or omission are present in each.

19 105. The population size is sufficiently large to provide a large uniform pool, and
20 random sampling is sufficiently without bias as to provide accurate samples. The use of random
21 samples will reduce bias, and the reliability of random sampling of the population of safety
22 members entitled to IDR with respect to the CalPERS' forms is high.

23 106. Plaintiffs assert that the parties can agree to reasonable survey terms and
24 questions or with the Court's assistance that will present any survey to the group in a non-biased
25 neutral manner so that the results will be accurate across the class. With respect to a statistical
26 analysis of this group, if necessary, then a survey could be written that would be able to gain
27 sufficient factual insights into the common view and traits of any group of safety members with
28 respect to their intent in the investment, the ambiguity of the terms in the contracts, and related

1 issues.

2 107. First, the sample is sufficiently large to provide reliable information about the
3 population, sampled group, stratified group, and class.

4 108. It is easy to make a simple random sample of a member in the selected population
5 which means that each has an equal chance of being selected. A stratified random sample would
6 be more appropriate using one of the groups described in pages 1 through 50 of the proposed
7 Trial Methodology Plan could be sampled or surveyed. This would avoid the problems of the
8 sample not being truly random or biased.

9 109. This method and technique will produce an acceptable margin of error. Although
10 the *Duran* court did not provide any bright-line guidance as to how high, the margin of error
11 could still be acceptable. A sampling method pursuant to this method will produce low margins
12 of error and a high indicia of reliability.

13 110. Plaintiffs propose a random sample of population to gain insight and admissible
14 evidence in disputed facts including but not limited to (1) their understanding of terms in the
15 contract, (2) whether a risk of loss of money was disclosed, (3) whether the risk of no refunds
16 was disclosed, (4) whether all of the material terms were clear, (5) whether the terms were
17 ambiguous, (6) whether the terms such as "present value", "service credit", "considering" ,
18 "considering a disability retirement this service credit may not benefit you", "may not benefit
19 you", and other terms in the contract or CalPERS' material are ambiguous or understood; and
20 other issues of fact, including relating to any of CalPERS' legitimate relevant defenses.

21 111. The survey, sample, statistical evidence, and resulting information from this
22 method can be fairly extrapolated to the entire class.

23 112. Plaintiffs assert that there certain assumptions that can be safely made. For
24 example, it is safe to assume no person in the greater population wished to make a gift of large
25 amounts of their retirement monies to the state or their employer.

26 113. The survey, sample, statistical evidence, and resulting information from this
27 method will contain sufficient indicia of reliability for the evidence to be useful across the larger
28 class.

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

4
5 DATED: October 2, 2017

6 _____
7 John Michael Jensen, SBN 176813
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