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

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

ROBERT MARZEC, an individual; RACHEL )	Case No.: BC 461887
HEALY, an individual; BENJAMIN )	[Consolidated with BC 480695]
ESPARZA, an individual; JEFFREY E. )	
ANDERT, an individual; NEIL MacLAREN, )	<b><u>CLASS ACTION</u></b>
an individual; RANDY SLAUGHTER, an )	(Assigned to the Hon. Maren E. Nelson,
individual; and HENRY BROWN, an )	Department 307, for all purposes)
individual; and on behalf of a class of others )	
similarly situated, )	
Plaintiffs, )	<b>MEMORANDUM OF POINTS AND</b>
vs. )	<b>AUTHORITIES IN SUPPORT OF</b>
CALIFORNIA PUBLIC EMPLOYEES' )	<b>MOTION FOR CLASS CERTIFICATION</b>
RETIREMENT SYSTEM )	Date: TBD
(CalPERS),BOARD OF ADMINISTRATION )	Time: TBD
OF CALIFORNIA PUBLIC EMPLOYEES' )	Department: 307
RETIREMENT SYSTEM, )	Trial Date: None
Defendants. )	Complaint Filed: May 18, 2011

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## I. INTRODUCTION

Plaintiffs Robert Marzec, Rachel Healy, Benjamin Esparza, Jeffrey Andert, Randy Slaughter, Neil MacLaren and Henry Brown seek to certify a class of CalPERS safety officers who are entitled to rescind "agreements" that purported to invest their private funds with CalPERS for future increases. CalPERS' standardized promotional material and form contracts for the optional "military time" or "Additional Retirement Service Credit" ("military/airtime") investments omitted, misrepresented, and hid special significant risks of loss, no refund, adversity, transfer, and offset that CalPERS knew was material to safety members under age 50.

Each class member is required to enroll in CalPERS. CalPERS is the sole source of official information on CalPERS benefits and the sole pension administrator. CalPERS employees did not talk or advise about the investments, but instead told Plaintiffs to read and rely on CalPERS' standardized forms, which were the sole avenue of information. CalPERS sent nonnegotiable standardized written forms and contracts to everyone in the class. Consent on material terms is required to form a contract. CalPERS' standardized forms and contracts omitted, misrepresented, and failed to disclose material terms including a risk of loss, no refunds, no increase, IDR offset, transfer to CalPERS or the employer, and CalPERS' adversity. CalPERS used "present value" and other terms in an ambiguous, misleading, and non-standard manner. CalPERS knew the forms were incomplete, ambiguous, or omitted terms. CalPERS required that Plaintiffs sign the form contracts. Plaintiffs were factually and legally mistaken. Plaintiffs did not consent. Consideration failed. Each Plaintiff invested tens of thousands of personal funds, yet received little or nothing in return. CalPERS retained an undisclosed adverse financial position to Plaintiffs. CalPERS took advantage. The forms breach CalPERS' fiduciary and trust duties and allow class members to rescind. (*Hittle v. Santa Barbara Cnty. Empl. Retire. Assn.* (1985) 39 C3d 374.) Partial rescission is also available for each separate increment of investment.

CalPERS' conduct shows that it was aware of Plaintiffs' legal mistake and lack of consent before contracting. Not only did CalPERS not fix the mistake by providing better information before contracting, instead CalPERS took advantage. *For the first time, after* some Plaintiffs retired on IDR, CalPERS forced a two-page waiver that newly purported to deny "refunds,"



1 trying to *add new terms after their injury*. (See *Andert Decl.*, Exh. 21, 23; *Brown*, Exh. 14, 15.)  
2 The existence of CalPERS two-page form waiver and CalPERS' *first use of it after injury* shows  
3 CalPERS knew that none of the Plaintiffs consented to "no refunds" in the original contracts.

4 Plaintiffs are firefighters, police officers, and other safety members who perform  
5 dangerous jobs at the state and local level. (*Marzec*, 11-13; *R.Healy*, 10-22; *Esparza*, 13-14;  
6 *Andert*, 15-17; *MacLaren*, 8-15; *Slaughter*, 17-18; *Brown*, 13-16.) CalPERS owes and breached  
7 a number of fiduciary duties to Plaintiffs. CalPERS knew since at least 1991 of the specific risks  
8 (see discussion *infra*), but CalPERS' standard practice, policy, and documentation omits,  
9 misrepresents, and hides material terms that would disclose the risks before contracting.

10 CalPERS' policy and practice caused mistake, lack of consent, loss, and damage across  
11 the class. Plaintiffs seek a "class period" from 1991 onward. Through partial discovery, Plaintiffs  
12 ascertained the identity of at least 177 safety officers who similarly suffered total losses of  
13 approximately \$11,250,000 from 2003 to 2014, without including interest. (*Jensen*, 35-36.)  
14 CalPERS provided them no advantage, no increase, and no benefit from the optional investment.  
15 CalPERS also used the same practice and policy to cause at least another 70 officers to suffer  
16 partial losses of \$6,900,000 from 2003 to 2014, without including interest. (*Jensen*, 37-38.)  
17 Partial rescission is available for these incremental contracts. (*Infra*.) Plaintiffs seek interest too.

18 To put each class member back in the position that they would have been but for  
19 CalPERS' wrongs, each class member is entitled to rescission of the investment contract,  
20 restitution, interest from date of deposit, damages, attorney fees, and costs. Each named Plaintiff  
21 returned everything of value he/she received under the contract, which is nothing. (*Marzec*, 246;  
22 *R.Healy*, 248; *Esparza*, 239; *Andert*, 332; *MacLaren*, 237; *Slaughter*, 234; *Brown*, 252.)

## 23 **II. NATURE OF CLASS-WIDE CLAIMS AND FACTUAL OVERVIEW**

24 **Background to investment.** Since the 1970s, CalPERS allowed members with prior  
25 military service to invest their private money to bring one to four years of military service into  
26 CalPERS to increase their pension. Until 1984, CalPERS expressly allowed refunds of these  
27 investments if the safety member retired with IDR. (*Jensen*, 18-22.) After 1984, CalPERS no  
28 longer allowed refunds. After 1984, CalPERS was required to inform potential investors before

1 contracting of the risk of loss or "no refunds" and get consent to those terms. But CalPERS did  
2 not inform or warn safety members of these risks, even though it knew a lot of safety members  
3 invested. (*Ibid.*)

4 In 1991, legislation was introduced to again permit refund if investments did not provide  
5 increases after IDR. While the reason the 1991 legislation did not pass is unclear, it put CalPERS  
6 on notice *again* that members contracted mistakenly and suffered losses if they retired with IDR  
7 before age 50 or with insufficient years of service. (*Jensen*,23-27.) Before 2003, CalPERS' forms  
8 still had no warnings of risks at all. (*Slaughter*, Exh. 5; *Marzec*, Exh. 3.)

9 Starting in the 1990's, the principal to be invested was calculated as the "present value" of  
10 the future increases. CalPERS calculated the present value. (*Gov't Code*, §§21024, *et seq.*)

11 In 2003, CalPERS allowed all members, including safety members, to also invest the  
12 "present value" of the future increases in an investment called Additional Retirement Service  
13 Credit ("airtime"). (*Gov't Code*, §20909.) About 10,000 CalPERS safety members invested in  
14 airtime between 2004 and 2011. (*Jensen*, 42-43, *RJN*, Exh. 4.)

15 **IDR rights.** Before contracting for the optional "present value" investment, Plaintiffs had  
16 pre-existing rights to industrial disability coverage. (*Gov't Code*, §§21151.) IDR provides an  
17 injured safety member with monthly payments for life in the amount of 50% of last salary, as a  
18 tax-free tort recovery for the physical injury. (*Gov't Code*, §§21411, *et seq.*) IDR is funded by the  
19 employer and from contributions made in that safety job and administered solely by CalPERS.  
20 (*Gov't Code*, §21418; *Jensen*, 50-54.) CalPERS did not inform Plaintiffs that it could use the  
21 investment principal to pay or offset the employer's responsibility to pay the IDR.

22 **Plaintiffs' accounts at CalPERS; CalPERS as source of official information.** Each  
23 class member had money in specific accounts with CalPERS (*Marzec*, 23-24; *R. Healy*, 32;  
24 *Esparza*, 20; *Andert*, 33; *MacLaren*, 124; *Slaughter*, 37; *Brown*, 19.) CalPERS is the sole official  
25 source of information about all CalPERS pension benefits, including the military/airtime  
26 investments, IDR, and service retirements. (*Marzec*, 156-160, 167-169; *R.Healy*, 137-139, 171-  
27 177; *Esparza*, 32-38, 126-128; *Andert*, 36-42, 180-183; *MacLaren*, 124-128, 137-139; *Slaughter*,  
28 113-115, 161; *Brown*, 27-30, 129-132.). Plaintiffs actually relied on CalPERS, including when

1 signing the putative contracts for increases. (*Ibid.*)

2 **Terms: "present value," solely at members' cost, promised increases.** Plaintiffs  
3 received the same or similar standardized form contracts and publications that CalPERS used  
4 across the class in promoting and transacting military/airtime investments. (*Marzec*, 69-70, 143-  
5 146; *R.Healy*, 56-57, 214-215; *Esparza*, 68, 97-98; *Andert*, 53, 169-170; *MacLaren*, 116-117,  
6 184-187; *Slaughter*, 91-100; *Brown*, 31, 83.) Plaintiffs were instructed by CalPERS to only use  
7 and rely on its standardized writings and non-negotiable form contracts. (*Ibid.*) The writings  
8 were CalPERS' official channel of communication. (*Ibid.*) In multiple steps in sequence,  
9 CalPERS required all the Plaintiffs to use the same or similar forms, requiring each individual to  
10 read, complete and sign the forms. (*Ibid.*)

11 **Present value.** In same or similar policy and use of forms, CalPERS presented the  
12 investment as a no-risk or "present value" contribution for increases commensurate with the  
13 amount of Plaintiffs' investments (*Ibid.*) CalPERS promised larger increases for larger invest-  
14 ments. (*Ibid.*) Investing at "present value" or without risk, Plaintiffs were informed that they  
15 would contribute money that will be invested by CalPERS to fund the monthly increases over the  
16 individual's lifetime, with no contribution by CalPERS or the employers. (*Ibid.*; *Jensen*, 51-54.)

17 **Contracted for increases.** Plaintiffs invested for future increased payments. (*Ibid.*)  
18 CalPERS allowed Plaintiffs to invest by lump sum or installments. (*Marzec*, Exh. 11; *Healy*,  
19 Exh. 17; *Esparza*, Exh.8; *Andert*, Exh.6; *MacLaren*, Exh.8; *Slaughter*, Exh. 7; *Brown*, Exh. 7.)  
20 CalPERS charged interest on installments, indicating to Plaintiffs that it was a financial  
21 investment where CalPERS bore the investment risks. (*Ibid.*) Plaintiffs could only negotiate the  
22 amount of investment and installment. (*Marzec*, 289; *R.Healy*, 215; *Esparza*, 270; *Andert*, 101-  
23 103; *MacLaren*, 187; *Slaughter*, 92; *Brown*, 31.)

24 **Acted consistent with increases.** Some Plaintiffs mortgaged their homes, others rolled  
25 over their 457 accounts, and others planned financially and relied on the increases. (*Marzec*, 153-  
26 154; *R.Healy*, 122-125; *Esparza*, 99-100; *Andert*, 99-102; *MacLaren*, 119; *Slaughter*, 100, 123-  
27 129; *Brown*, 107-108.)

28 **No warnings about risk of loss or offset, lack of promised increases, no refunds.**

1 When Plaintiffs called or visited CalPERS' office, CalPERS' employees regularly would not talk  
2 or advise orally and instead told Plaintiffs to read CalPERS written materials. (*Marzec*, 69, 146;  
3 *R.Healy*, 54; *Esparza*, 108-111; *Andert*, 85; *MacLaren*, 43, 152; *Slaughter*, 68; *Brown*, 50-51.)  
4 CalPERS' standardized information was inadequate, inaccurate, and misleading. In same or  
5 similar policy and use of standardized forms, CalPERS omitted, misrepresented, and failed to  
6 disclose the significant risk of loss, no refunds, IDR offset, transfer to employer, and other  
7 significant risks that CalPERS knew were particular to safety member. (*Marzec*, 305-307;  
8 *R.Healy*, 90-99; *T.Healy* 57-75; *Esparza*, 161-163; *MacLaren*, 66-74; *Slaughter*, 80-90.)  
9 CalPERS used the same form contract for safety members entitled to IDR as for members who  
10 could never be entitled to IDR. (*Jensen*, 66-72.) CalPERS' forms did not mention IDR. (*Marzec*,  
11 151-158; *R.Healy*, 90-99; *T.Healy*, 57-75; *Esparza*, 161-175; *Andert*, 93-94, 112-113; *MacLaren*,  
12 66-74; *Slaughter*, 95; *Brown*, 86-88.) CalPERS failed to disclose that retiring with IDR could  
13 cause the loss of the monetary value of the investment. (*Ibid.*) CalPERS failed to disclose that it  
14 was adverse or that it or the employers could receive some of the funds (*Marzec*, 159-179;  
15 *R.Healy*, 127-146; *Esparza*, 119-135; *Andert*, 172-190; *MacLaren*, 129-146; *Slaughter*, 225-249;  
16 *Brown*, 119-140.) Plaintiffs were not informed, did not understand, and did not agree to assume a  
17 risk of loss, no refunds, the IDR offset, the transfer to employer, no "present value" increases,  
18 and other material adverse terms. (*Ibid.*)

19 **Object of contract.** CalPERS misrepresented or failed to disclose the object of the  
20 contract. Plaintiffs invested for increases without risk. CalPERS now argues that it sold  
21 something substantially different i.e., "service credit" that it transferred into "normal  
22 contributions." Even after investing, CalPERS accounted to Plaintiffs that it deposited the money  
23 in Plaintiffs' account. (*Marzec*, 157, 180-182; *R.Healy*, 122-126; *Esparza*, 99-105; *Andert*, 114-  
24 115; *MacLaren*, 119-122; *Slaughter*, 102, 129; *Brown*, 108-110.) Service credit has no financial  
25 value in itself, and no value at all in the context of IDR. (*Jensen*, 47-49; *Gov't Code*, §21151(a).)<sup>1</sup>

26 **Ambiguous terms.** CalPERS used ambiguous terms or used terms differently than

27  
28 <sup>1</sup> Apparently CalPERS did not turn the money into valueless "service credit" until Plaintiffs  
were later determined industrially disabled.

1 generally understood. Plaintiffs found CalPERS' terms "present value", "contribution", "service  
2 credit", "considering" and others to be ambiguous or contrary to common understanding.  
3 (*Marzec*, 110-127; *R.Healy*, 103-118; *T.Healy* 77-80; *Esparza*, 167-175; *Andert*, 93-94;  
4 *MacLaren*, 100-112; *Slaughter*, 264-265; *Brown*, 65-76.) In the multi-page adhesion contracts  
5 used after 2003, CalPERS wrote a single ambiguous sentence with this or similar language: "If  
6 you are considering disability retirement, this service credit may not benefit you." This sentence  
7 failed to inform them of a risk of loss of their money, loss of the increases, no refund, IDR offset,  
8 a transfer to their employer, or other material adverse terms. (*Ibid.*)

9 **Read and signed CalPERS' form contracts.** Plaintiffs read and signed CalPERS'  
10 nonnegotiable form contract. (*Marzec*, 153. Exh. 11; *R.Healy*, 122-123, Exh. 17; *Esparza*, 99-  
11 100, Exh. 8; *Andert*, 111, 225, Exh. 6; *MacLaren*, 119, Exh. 8; *Slaughter*, 100, 134, Exh.  
12 7; *Brown*, 101-108, Exh. 8.) CalPERS required each Plaintiff to sign the same or similar  
13 standardized form contracts when each invested between \$17,500 and \$91,000. (*Ibid.*)

14 **No consent to adverse terms.** Plaintiffs did not agree to or assume the risks which were  
15 inconsistent with "present value" and "increases" terms. (*Marzec*, 159-179; *R.Healy*, 127-146;  
16 *Esparza*, 119-135; *Andert*, 172-190; *MacLaren*, 129-146; *Slaughter*, 225-249; *Brown*, 119-140.)  
17 Each Plaintiff did not consent to and did not assume a risk of loss of their money, a loss of the  
18 increases, no refund, a transfer to CalPERS or their employer, an IDR offset, or a loss if retired  
19 with IDR before age 50, and other adverse terms. (*Ibid.*) Their IDR was already fully vested.

20 **Mistake.** Plaintiffs were mistaken as to the material terms. Each Plaintiff was mistaken  
21 as to the facts, including the increases and no refunds terms. (*Ibid.*) Each Plaintiff was legally  
22 mistaken, including about no refunds, which CalPERS knew but did not correct. (*Ibid.*)

23 **Plaintiffs' injury, losses, and harm.** Sometime after investing, Plaintiffs were physically  
24 injured on the job. (*Marzec*, 183-188; *R.Healy*, 147-155; *Esparza*, 136-142; *Andert*, 191-202;  
25 *MacLaren*, 147-151; *Slaughter*, 153-161; *Brown*, 141-143.) Each injury was deemed to be  
26 industrial. (*Ibid.*) Each Plaintiff retired with IDR. (*Ibid.*) As a result of retiring with IDR before  
27 age 50, each named Plaintiff receives only the 50% IDR payment that each was entitled to before  
28 contracting. No refunds of their investments were provided. They receive no increase, no

1 advantage and no benefit for the money invested. (*Marzec*, 196-208; *R.Healy*, 187-191; *Esparza*,  
2 180-187; *Andert*, 220-227; *MacLaren*, 191-197; *Slaughter*, 163-173; *Brown*, 152-179.)

3 **No notice of harm.** At the time of investment through retiring, CalPERS did not provide  
4 Plaintiffs any notice about the loss, transfer, IDR offset, or risks. (*Marzec*, 151-179; *R.Healy*, 90-  
5 99. 127-146; *T.Healy* 57-75; *Esparza*, 119-13, 161-175; *Andert*, 112-113, 172-190; *MacLaren*,  
6 66-74, 129-146; *Slaughter*, 95, 225-249; *Brown*, 86-88. 119-140.) At retirement, CalPERS  
7 provided no explanation, no due process, and no appeal rights. (*Marzec*, 227-231; *R.Healy*, 216-  
8 219; *Esparza*, 196-199; *Andert*, 291-296; *MacLaren*, 204-208; *Slaughter*, 186-191; *Brown*, 216-  
9 222.) By receipt of a 50% IDR check, Plaintiffs did not recognize they were harmed. (*Marzec*,  
10 196-220; *R.Healy*, 187-191; *Esparza*, 180-195; *Andert*, 230-238; *MacLaren*, 164-169; *Slaughter*,  
11 171-178; *Brown*, 152-157.) CalPERS provided no explanation of what happened to their money.  
12 (*Ibid.*) After the fact, CalPERS offered some of those on installment plans a forced waiver of the  
13 right to refunds to suspend future payments (*Andert*, Exh. 21, 23; *Brown*, Exh. 14, 15.)

14 **CalPERS' attempt to force waiver of refunds after the fact.** After the IDR process  
15 was complete, then CalPERS *for the first time* wrote to those who still had unpaid installments,  
16 adding new terms in a 2-page waiver *after the fact*:

17 ...Government Code 21039 is clear in stating that the payments are suspended  
18 on a prospective basis meaning there will be no refund of payments that were  
19 made prior to this election. ...

20 I understand there will be no refund of payments already made.  
21 [*CalPERS' request for Plaintiffs' signature and date*]

22 (*Andert*, Exh. 21, 23; *Brown*, Exh. 14, 15)

23 CalPERS did not disclose these terms *before* contracting. (*Andert*, 230-248; *Brown*, 152-  
24 157.) This far more expansive language in the 2-page waiver shows how ambiguous, defective,  
25 and misleading CalPERS' original contract language was. (Compare *Andert*, Exh. 21, 23, and  
26 *Brown*, Exh. 14, 15, with contract disclosures in *Marzec*, Exh. 11; *R.Healy*, Exh. 17; *Esparza*,  
27 Exh. 8; *Andert*, Exh. 6; *MacLaren*, Exh. 8; *Slaughter*, Exh. 7; *Brown*, Exh. 8.)

28 Compounding the wrong, CalPERS only gave this information to Plaintiffs making  
installment payments. CalPERS threatened that "failure to sign ..." would cause CalPERS to

1 deduct still more money out of the reduced IDR check each month, for nothing. (*Andert*, Exh.  
2 21; *Brown*, Exh. 14.) Taking advantage, CalPERS benefitted from forcing a waiver of refunds.

3 **Plaintiffs' request for rescission, interest, and fees.** Each Plaintiff seeks rescission of  
4 the investment contract and restitution of their investment. (*Marzec*, 261; *R.Healy*, 254; *Esparza*,  
5 259; *Andert*, 349 *MacLaren*, 248; *Slaughter*, 253; *Brown*, 265.) Each seeks to be made whole.  
6 (*Ibid.*) Each seeks restitution, interest from the date of deposit of the funds, consequential  
7 damages, as well as attorney fees and other costs and relief to make them whole. (*Ibid.*) Those  
8 who signed the waiver seek rescission of it. (*Andert*, 367; *Brown*, 281.)

9 **Plaintiffs assert delayed discovery, delayed accrual.** Plaintiffs' discovery of the harm  
10 and accrual of the causes of action is delayed. (*Marzec*, 212-220, 256; *R.Healy*, 234-240;  
11 *Esparza*, 183-195; *Andert*, 272-278, 344; *MacLaren*, 199-203; *Slaughter*, 171-185; *Brown*, 210-  
12 215, 257-261.) CalPERS was the sole source of official information, sole administrator of their  
13 retirement benefits. Plaintiffs were ignorant of the harm which was disguised and hidden by  
14 CalPERS as a fiduciary and as a result of mistake. (*Ibid.*) Plaintiffs understood that CalPERS  
15 told them that they had not suffered harm. (*Ibid.*) Plaintiffs relied on CalPERS, including to not  
16 sue. Others justifiably relied or were presumed to rely on CalPERS, including not to sue. (*Ibid.*)  
17 Plaintiffs had invested for increases at age 50, and none were yet 50. (*Marzec*, 213; *R.Healy*,  
18 190; *T.Healy*, 81; *Esparza*, 147, 180; *Andert*, 284; *MacLaren*, 69; *Slaughter*, 183; *Brown*, 159-  
19 162.) The hidden and opaque nature of CalPERS' accounting of the investment and retirement  
20 allowance, the lack of notice, the mistake, and the difficulty to discover the nature of the harm,  
21 delayed the discovery and accrual of the cause of action. (*Marzec*, 212-220, 256; *R.Healy*, 234-  
22 240; *Esparza*, 183-195; *Andert*, 272-278, 344; *MacLaren*, 199-203; *Slaughter*, 171-185; *Brown*,  
23 210-215, 257-261.) Plaintiffs relied on and were presumed to rely on CalPERS until notified by  
24 it that they suffered harm or that CalPERS was adverse to them. CalPERS gave no notice.

### 25 **III. COMMON ISSUES OF LAW**

#### 26 **A. Rescission is a Remedy Available on Class Action, Especially in a Fiduciary Context**

27 Rescission is available as a remedy in class actions. (*Vasquez v. Superior Court* (1971) 4  
28 C3d 800; accord, *Richmond v. Dart Industries, Inc.* (1981) 29 C3d 462.) The "[p]rotection of

1 unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost  
2 priority in contemporary society." (*Vasquez*, at 808; *People v. Boehringer Ingelheim*  
3 *Pharmaceuticals, Inc.* (C.D. Cal., July 31, 2017, No. SACV1700923AGKSX) 2017 WL  
4 3269074, at \*3.) Class actions for rescission of standardized adhesion contracts that omit or  
5 misrepresent material terms are authorized. (*Vasquez*; *Occidental Land, Inc. v. Sup. Ct.* (1976)  
6 18 C3d 355; *Massachusetts Mutual Life Ins. Co. v. Sup.Ct.* (2002) 97 CA4th 1282.) Class actions  
7 allow rescission based on recurring pattern evidence, such as standardized contracts. Anyone  
8 who received no advantage from the investment would have no reason not to rescind. (*Jensen*,  
9 76-77.) Those who receive partial increases are entitled to a rescission of the incremental part of  
10 the contract that does not provide advantage. (*Jensen*, 78-80.)

11 **Plaintiffs seek rescission.** Class members may rescind the investment contract as  
12 CalPERS omitted, misrepresented, and failed to disclose material terms so that their putative  
13 consent was given by mistake and obtained through duress, menace, fraud, or undue influence  
14 exercised by CalPERS, including through breach of its fiduciary duties. (*Hittle, supra.*) The  
15 adhesion contracts are rescindable across the class for undue influence, misrepresentation, breach  
16 of fiduciary duties, omission, lack of consent, mistake, no consideration, and other defects.

17 Factually and legally, Plaintiffs were mistaken. Rescission for a mistake, such as  
18 Plaintiffs believing in increases with no risk of loss, is authorized. CalPERS knew of the risks,  
19 had reason to know of Plaintiffs' mistake, yet CalPERS did not correct but instead took  
20 advantage. Even if CalPERS had no reason to know of Plaintiff's mistake, the Plaintiffs across  
21 the class establish the following facts to obtain rescission:

- 22 • Each safety officer under 50 was entitled to full information about the  
23 risks from CalPERS and could not take into account the risk of loss that was not  
24 disclosed, so he/she necessarily made a mistake regarding a basic assumption of  
receiving increases at the time of contracting;
- 25 • The mistake about not knowing and not being able to take into  
26 consideration the risk of loss on IDR has a material effect upon the agreed  
exchange of performances that is adverse to the class member;
- 27 • The safety member investing in increases is a mistaken party who does not  
28 bear the risk of loss on IDR because the class member is already entitled to  
fiduciary duties of full information, and is also already fully entitled to the 50%  
IDR before investing; and



- 1           •       The effect of the mistake is to make the class member lose his/her  
2 investment, to pay for a share of IDR that he/she would not otherwise have to pay,  
3 and to suffer loss, increase, and the value of their money, such that enforcement  
4 of the contract would be unconscionable.

5           Rescission is a statutory and legal remedy. It is not personal and not an equitable action.  
6 No balancing is required. (4 Witkin, Cal.Proc. 5<sup>th</sup> (2008), *Pleading*, 541, p. 668.) Class members'  
7 motive in choosing rescission is irrelevant (*Conlin v. Osborn* (1911) 161 C 659; *Siegel v. Lewis*  
8 (1946) 74 CA2d 86.) No plaintiff waived the right to rescind. Each rescinded promptly. Any  
9 delay was caused by CalPERS' acts or omission.

10           **CalPERS used standard practice and policy forms.** *CalPERS followed the same or*  
11 *similar policies, procedures, and processes with everyone* who invested in military/airtime.  
12 CalPERS sent each class member the same or similar standardized information. CalPERS  
13 required each class member to read and sign the same or similar form contract that omitted or  
14 misrepresented material terms. All are presumed to rely on CalPERS. All class members are  
15 similarly situated. The only "difference" is the *amount* of restitution and interest, which is readily  
16 determined from CalPERS' records. The different amounts are irrelevant for certification.

17           **Elements of rescission.** The elements authorizing rescission are met:

- 18           •       Nondisclosure/misrepresentation of material terms, heightened in importance when  
19 the party writing the contract (CalPERS) is a fiduciary; or  
20           •       Lack of consent by the Plaintiffs; or  
21           •       Mistake by the Plaintiffs; or  
22           •       Unconscionability of the contract; or  
23           •       Failure to provide consideration to Plaintiffs.

24           **Partial rescission is available.** The contract is apportioned by increases or intervals.  
25 Partial rescission is available as it is a severable or divisible contract. (*IMO Develop. Corp. v.*  
26 *Dow Corning Corp.* (1982) 135 CA3d 451; *Howell v. Courtesy Chevrolet, Inc.* (1971) 16 CA3d  
27 391.) Plaintiffs who suffered partial losses should be allowed to rescind the part of the contracts  
28 for which they receive no increase. (*Simmons v. Cali Institute of Tech* (1949) 34 C2d 264.)

**B.       Contract Law Applies**

1 Before contracting, Plaintiffs' money was their own and free of any restrictions. A  
2 putative agreement to transfer that money to CalPERS must satisfy contract law. Since the  
3 investments were optional, consent to material terms is required. Consent is not mutual unless all  
4 the parties agree to the same thing in the same sense. (*Chalmak v. H.J. Lucas Masonry, Inc.*  
5 (1976) 55 CA3d 124, 127.) CalPERS and Plaintiffs did not agree to the same things in the same  
6 way. CalPERS cannot attempt to omit material terms and then say that those terms are included  
7 because they exist in the PERL. The PERL applies only by contract, even to contracting agencies  
8 such as cities. CalPERS' conduct in seeking a waiver *after the fact* shows that CalPERS thought  
9 that (i) it needed a contract and (ii) it did not get consent to the "no refunds" terms in the original  
10 contract. No contract formed. The contract is rescindable, with restitution.

11 **C. Existence of Waiver**

12 The existence of a form waiver that CalPERS first used *after some injured Plaintiffs*  
13 *retired with IDR* also shows that CalPERS knew that the original contract did not include all  
14 material terms and was defective. The existence of the waiver shows that CalPERS was aware of  
15 Plaintiffs' legal and factual mistake and lack of consent at the time of the original contract, and  
16 tried to "fix it" piecemeal after the fact *in CalPERS favor*. **The waiver establishes the grounds**  
17 **for legal mistake and rescission across the class.** The "no refunds" language cannot be inserted  
18 after IDR. Lacking consideration and consent, the waiver is rescindable and cannot retroactively  
19 impose new terms. As a fiduciary and sole provider of the IDR, CalPERS' contract and waiver  
20 are both unconscionable, without consent,<sup>2</sup> and voidable.

21 **D. No Formation, No Consent, No Contract, Rescission Under Civil Code §1566**

22 Plaintiffs were not informed, did not agree, and did not consent to the material terms of  
23 risk, loss, risk of no increases, no refund, IDR offset, transfer to CalPERS or the employer, and  
24 other material terms that are expressly contrary to "increases" and "present value" in the original  
25 "contract". There is no contract until there has been a meeting of the minds on all material points.

26 \_\_\_\_\_  
27 <sup>2</sup> The waiver itself is misleading. It was supposedly a request to suspend future installments,  
28 but the waiver language also sought something very different, an agreement to deny "refunds" of  
prior paid money.

1 (*American Employers Group, Inc.* (2007) 154 CA4th 836; *Elyaoudayan v. Hoffman* (2003) 104  
2 CA4th 1421.) If there is no consent, rescission is appropriate. (*Civ. Code*, §1566.)

3 **Ambiguous object of investment, ambiguous term.** CalPERS informed Plaintiffs it offer-  
4 ed "present value" or risk-free investments for future increases. Plaintiffs invested for increases.  
5 "The object of a contract is the thing that it is agreed to on the part of the party receiving the  
6 consideration, to do or not to do." (*Civ. Code*, §1595.) CalPERS says Plaintiffs are not entitled to  
7 increases after taking IDR. But "[w]here a contract has but a single object, and such object is  
8 unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely  
9 expressed as to be wholly unascertainable, the entire contract is void." (*Civ. Code*, §1598.)

10 If CalPERS sold Plaintiffs time instead of increases, that would be a misrepresentation of  
11 the terms explicitly promising "present value" or risk-free "increases." CalPERS may say that it  
12 sold service credit, but "service credit" is not included in IDR. (*Gov't Code*, §21151(a).) Normal  
13 contributions fund IDR (*Gov't Code*, §21418), but there was no disclosure that all Plaintiffs were  
14 investing in was "normal contributions," much less that their investments would fund their IDR.

15 **Adhesion contract.** The standardized forms were adhesion contracts that CalPERS  
16 imposed, and were drafted by the party of superior bargaining strength. (*Perdue v. Crocker Nat'l*  
17 *Bank* (1985) 38 C3d 913; *Poublon v. C.H. Robinson Company*, 846 F.3d 1251 (9<sup>th</sup> Cir. 2017).)  
18 Ambiguous terms must be construed against CalPERS as the preparer of the contract. (*United*  
19 *Multiple Listing Service, Inc. v. Bernstein* (1982) 134 CA3d 486.) It may also be necessary to  
20 call the weaker party's attention to the contractual provision that would defeat the strong  
21 expectation of the weaker party. (*Penilla v. Westmont Corp.* (2016) 3 CA5th 205.)

22 **Subjective understanding is not relevant.** Plaintiffs' subjective understanding of the  
23 form contracts and related documents is irrelevant, including as the objective language controls.  
24 (*Marzec v. CalPERS* (2015) 236 CA4th 889, 914-916.) Further, Plaintiffs' actions or under-  
25 standings are irrelevant because inquiry notice is not the correct standard. (*Hittle, supra*, at 394.)

26 **E. CalPERS' Breach of Its Fiduciary Duties on Standardized Forms and Contracts**

27 As a retirement system, CalPERS owed fiduciary duties to each class member, including  
28 duties of loyalty, to not act adverse, and to adequately inform, especially if CalPERS was

1 secretly adverse. (California *Constitution*, art. XVI, §17; *Gov't Code*, §§20170, 20178, 20225,  
2 20160, 20164; *Hittle, supra.*) CalPERS, its Board, and employees have mandatory fiduciary  
3 duties of good faith and fair dealing, to account, to not take advantage, and other duties. (*Cal.*  
4 *Const.*, art XVI, §17; *Gov't Code*, §20151.) CalPERS owes Plaintiffs a mandatory duty to inform  
5 and provide timely and *accurate* information to its Members (*Hittle, supra*, at 389-90; *In re*  
6 *Smith*, CalPERS' Preced. Dec. No. 99-01 (March 31, 1999) ["The duty to inform and deal fairly  
7 with members also requires that the information conveyed be complete and unambiguous"].)

8 CalPERS breached its fiduciary duties, including when it took advantage, acted adverse,  
9 took Plaintiffs money, used it to fund the IDR or offset the employer, failed to adequately  
10 inform, and omitted material terms in the contracts, publications and other written materials.  
11 (*Vasquez; Occidental Land; Massachusetts Mutual Life; Estate of Gump* (1991) 1 CA4th 582;  
12 *Mirkin v. Wasserman* (1993) 5 C4th 1082; *Caro v. Proctor & Gamble* (1993) 18 CA4th 644.)

13 Instead of informing Plaintiffs, CalPERS sought a waiver after the fact. CalPERS'  
14 breaches of duties are considered undue influence sufficient to allow rescission. (*Hittle; Vasquez;*  
15 *Marzec v. CalPERS*, at 914-916.) Breach of fiduciary duties based on the standardized forms and  
16 practices is a class-wide issue. CalPERS' neglect of its legal and fiduciary duty caused the  
17 plaintiffs lack of consent, mistake, and no consideration. These risks must be allocated to  
18 CalPERS. (*Civ. Code*, §1688.)

19 CalPERS is the sole party at fault. As a fiduciary, CalPERS took adverse positions, took  
20 advantage, failed to disclose, transferred funds, took the money, and benefitted itself without  
21 Plaintiffs' consent. CalPERS' averse position and advantage make the contract voidable. (*Hittle,*  
22 *supra.*) Plaintiffs did not bear the risk.

23 **Nondisclosure or misrepresentation by a fiduciary.** When a claim is based upon a  
24 misrepresentation or nondisclosure by a fiduciary, "the reliance element is relaxed ... to the  
25 extent we may presume reasonable reliance ... absent direct evidence of a lack of reliance."  
26 (*Estate of Gump, supra; Toadter v. Bradshaw* (1958) 164 CA 200.; *Edmunds v. Valley Circle*  
27 *Estates* (1993) 16 CA4th 1290, 1302.) CalPERS has not produced a single document that  
28 provides "specific notice" of the material terms before contracting or that shows a lack of

1 reliance. (*Jensen*, 55-61.)<sup>3</sup> No evidence shows that Plaintiffs were informed that CalPERS turned  
2 adverse against them before contracting.

3 **F. Reliance: Material Misrepresentations and Omission Communicated Across Class**

4 "[W]hen the same material misrepresentations have actually been communicated to each  
5 member of a class, an inference of reliance arises as to the entire class." (*Mirkin v. Wasserman* at  
6 1095, citing *Vasquez*.) "[A]ctual reliance can be proved on a class-wide basis when each class  
7 member has read or heard the same misrepresentations..." (*Ibid.*) Reliance is presumed when (a)  
8 the false representations were made to each putative class member (which by definition occurs  
9 when each receives essentially the same form documents), and (b) each putative member's acts  
10 were consistent with reliance upon the representations. (*Vasquez; Occidental Land;*  
11 *Massachusetts Mutual.*)

12 **Materiality.** The risk of loss, IDR offset, risk of no increases, and transfer to employers  
13 are objectively material. Materiality is an objective, not a subjective, element. (See, e.g.,  
14 *Vasquez*, cited in *Low v. Trump University, LLC* (S.D. Cal., Nov. 15, 2016, No.  
15 310CV00940GPCWVG) 2016 WL 6732110, at \*2; *Massachusetts Mutual, supra; In re Steroid*  
16 *Hormone Produce Cases* (2010) 181 CA4th 145, 157, as modified on denial of reh'g (2/8/10).)

17 **Uniform material misrepresentations were actually communicated to class**  
18 **members.** CalPERS advertises the investment through only one channel, its written publications.  
19 When Plaintiffs called or visited CalPERS' office, CalPERS employees regularly would not talk  
20 or advise them orally and instead told Plaintiffs to read and rely on CalPERS written materials.  
21 CalPERS' publications contained the same or similar material omissions and misrepresentations.

22 No other correct information was provided or disclosed by CalPERS before contracting.  
23 (*In re First American Home Buyers Protection Corporation Class Action Litigation* (S.D. Cal.  
24 2016) 313 F.R.D. 578, 604-605.) The representations and reliance are common. (*Vasquez*, at  
25 814-815; see also *Occidental Land*, at 362-363 [misrepresentations contained in public report  
26

27 <sup>3</sup> A fiduciary's failure to share material fact constitutes "constructive fraud," and eliminates the  
28 need to prove actual fraudulent intent. (*Michel v. Palos Verdes Network Group, Inc.* (2007) 156  
CA4th 756, 762.)

1 which each purchaser was obliged to read]; *Wilner v. Sunset Life Ins. Co.* (2000) 78 CA4th 952,  
2 962 [misrepresentations to life insurance purchasers always the same].)

3 **Plaintiffs' actions were reasonable.** All of Plaintiffs' acts were reasonable and consis-  
4 tent with reliance on CalPERS and the promise of increases. Some mortgaged their homes,  
5 others rolled over their 457 accounts, and others planned financially and relied on increases. In  
6 *Vasquez*, justifiable reliance may be established on a common basis. (*Occidental Land*, at 363.)<sup>4</sup>

7 **Reliance is presumed and burden shifts to CalPERS.** The presumption of reliance is  
8 more than the simple shifting of the burden of proof to facilitate the determination of a particular  
9 action. (*Evid. Code*, §605; *Edmunds v. Valley Circle*, at 1302; see also *In re Tobacco II Cases*  
10 (2009) 46 C4th 298, 327 [plaintiff need not demonstrate individualized reliance on specific  
11 misrepresentations to satisfy the reliance requirement]; *Williams v. Gerber Products*, 552 F.3d  
12 934, 938 (9<sup>th</sup> Cir. 2008); *Kumar v. Kumar v. Salov North America Corp* (N.D. Cal, July 15,  
13 2016, No. 14-CV-2411-YGR), 2016 WL 3844334, at \*4.) CalPERS must show that it provided  
14 some material information to all class members that advised them of the material terms.

15 **No information on "no refunds" provided before contracting.** Before contracting,  
16 none of the class had access to all the information Plaintiffs believe they needed before investing  
17 in the military/airtime. Indeed, CalPERS' own assessment of no refunds and other matters was  
18 withheld before contracting and only disclosed to a few after the harm was done when CalPERS  
19 sought an unlawful waiver. An inference of reliance that the adverse terms were material and not  
20 included as to the entire class would arise. (*Massachusetts Mutual*, at 1295.)

21 **Class claims are manageable, no inquiry needed into individual reliance.** In  
22 *Occidental Land*, the Supreme Court did not require each class member to separately prove  
23 justifiable reliance, especially about material facts (*Occidental Land, Inc. v. Sup. Ct., In and For*  
24

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25 <sup>4</sup> CalPERS has relied on dicta in *Sotelo v. MediaNews Group, Inc.*, a *de minimus* wage and  
26 hour case where no business records proved class membership. (See *Aguirre v. Amscan*  
27 *Holdings, Inc.* (2015) 234 CA4th 1290, 1304.) In dicta in *Sotelo*, the court conjectured that  
28 reliance could not be presumed on a class-wide basis absent a showing that class members  
actually read their contracts. *Sotelo's* dicta is inconsistent with *Mirkin, Vasquez, Occidental Title*  
and other law. Plaintiffs herein could not take the next steps without reading prior documents.

1 *County of Orange* (1975) 52 CA3d 373, vacated sub nom; *Occidental Land, supra.*)

2 This case involves a significant investment of *tens of thousands of dollars each* of  
3 Plaintiffs' retirement funds that was transacted by a series of misleading form contracts. Each  
4 member was required to sign the form Election contract. (*Occidental Land*, at 361.) Reliance is  
5 presumed. (*Mirkin v. Wasserman*, at 1095.)

6 **G. Legal and Factual Mistake**

7 Mistake may be either of fact or law. (*Civ. Code*, §1576.) Plaintiffs and class members  
8 satisfy all parts of the mistake of fact and mistake of law statute. At the time of "contracting,"  
9 safety members were *not* informed and did not consent to material terms about any risk, loss, no  
10 refunds, transfer, or offset of their money. Each class member made a legal and factual mistake  
11 regarding a basic assumption upon which they considered the investment. (*Ibid.*) The mistake  
12 has a material effect upon the agreed exchange of performances that is adverse to class members.  
13 (*Ibid.*) As CalPERS was the fiduciary hiding terms to its benefit, class members did not bear the  
14 risk of the mistake. (*Ibid.*) The effect of the mistake is such that enforcement of the contract  
15 would be unconscionable. (*Ibid.*) As evidenced by its later "waiver" and other conduct, CalPERS  
16 knew at the time of the original contracting that each class member made a mistake of law, but  
17 CalPERS failed to correct it. (*Jensen*, 81-87.)

18 Factually, CalPERS represented that it lawfully could provide increases without a risk of  
19 loss of their money. Class members were entitled to rely on CalPERS disclosing the material  
20 terms. Class members invested for "present value" or risk-free increases without a risk of loss of  
21 their money. Class members suffered a mistake of fact not caused by their neglect of a legal  
22 duty. Because of CalPERS' failure to disclose and it being the sole source of official information,  
23 each class member was unconscious, ignorant or forgetful of a fact past or present, material to  
24 the contract. Each class member relied or was presumed to rely on CalPERS' representations of  
25 the present existence of the increases and no risk of loss which are material to the contract, but  
26 the increases and no risk of loss do not exist, or did not exist. (*Civ. Code*, §1577.)

27 Since at the latest 1991, CalPERS knew or should have known that it would not provide  
28 increases if a safety officer retired with IDR. CalPERS knew or should have known that each

1 safety member under age 50 that invested was uninformed, factually and legally mistakenly  
2 about any risk, loss, transfer, or offset of their money. CalPERS failed to disclose before they  
3 contracted, and remained silent for those who invested lump sums, but forced waiver of refunds  
4 on others in the guise of suspending installment payments after injury.

5 Plaintiffs satisfy both prongs of the mistake of law statute. (1) CalPERS and Plaintiffs  
6 misapprehension of the law, all supposing that they knew and understood the investment would  
7 provide increases and refunds (or CalPERS' failure to disclose no increases and no refunds on  
8 IDR), and CalPERS and Plaintiffs making substantially the same mistake as to the law; or, (2) a  
9 misapprehension of the law by class members that there were refunds on IDR and increases, and  
10 that CalPERS was aware of the Plaintiffs misapprehension at the time of contracting, but which  
11 CalPERS did not rectify before contracting. (*Civ. Code*, §1578.)

## 12 **H. Class Members Are Entitled to Rescission**

13 **Lack of Consideration.** Plaintiffs were already entitled to a 50% IDR before contracting.  
14 They contracted for increases in their benefit, but received no increase and no benefit under the  
15 contracts. The contracts provide no good consideration (*Civ. Code*, §1605.) Plaintiffs can rescind  
16 as they receive no consideration, the consideration provided in exchange by CalPERS fails  
17 through no fault of Plaintiffs, or the consideration becomes entirely void. (*Civ. Code*, §1689.)

18 Since service credit is not counted in IDR, the service credit purchase becomes entirely  
19 void. CalPERS' consideration also fails as each class member fails to receive a commensurate  
20 increase for their investment. Some receive no increase at all. Instead, they receive only the 50%  
21 IDR that they were already entitled to before contracting. Others receive only partial increase  
22 and partial rescission is allowed. To say that they received "service credit" of no value to them  
23 also means that they received no value or consideration. (*Civ. Code*, §§1688-1689.)

24 **Unconscionability.** The loss and no refunds terms fall outside Plaintiffs' reasonable  
25 expectations, are unduly oppressive, and "unconscionable." (*Therma-Coustics Mfg., Inc. v.*  
26 *Borden, Inc.* (1985) 167 CA3d 282.) CalPERS is a fiduciary, sole information source, sole  
27 administrator, and there are no market substitutes. (*Harper v. Ultimo* (2003) 113 CA4th 1402.)

28 **Interest, costs, fees, and consequential damages.** Rescission restores the parties to their



1 former positions. (*Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 CA3d 169.) The Court  
2 may including interest and attorney fees, to afford Plaintiffs complete relief, as CalPERS is at  
3 fault. (*Civ. Code*, §1692; *Runyan v. Pacific Air Industries, Inc.* (1970) 2 C3d 304.)

4 **Defenses to rescission are limited.** CalPERS has limited defenses to rescission. The trial  
5 plan allows CalPERS to present its defenses. (See *Duran v. U.S. Bank Nat. Assn.* (2014) 59 C4th  
6 1.) Class wide, CalPERS could defend the adequacy of its disclosure, or argue that the PERL  
7 controls even without disclosure or consent. CalPERS may assert individual defenses. But the  
8 motive for rescission is irrelevant and cannot be a defense. Rescission is a legal right, not an  
9 equitable claim, and there is no equitable balancing. See accompanying trial management plan.

10 **I. Delayed Accrual: Mistake and Rescission In a Fiduciary Relationship**

11 Plaintiffs assert delayed accrual and discovery from reliance, failure to disclose, mistake,  
12 omission, misrepresentation, adversity, rescission, *et al* in a fiduciary context.<sup>5</sup> (See *United*  
13 *States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 C3d 586, 598; *Hobart v. Hobart*  
14 *Estate Co.* (1985) 26 C2d 412, 439-440; *April Enterprises, Inc. v. KTTV* (1983) 147 CA3d 805.)

15 **IV. ALL REQUIREMENTS FOR CLASS CERTIFICATION ARE MET**

16 Common legal and factual issues predominant over any individual issues. CalPERS'  
17 breaches, omissions, and acts involve the same or similar standardized contracts distributed  
18 across the class and common legal issues that affect numerous similarly situated parties who are  
19 impracticable to bring to court. (*Code Civ. Proc.*, §382; *Richmond v. Dart, supra*, at 470; see  
20 also *Daar v. Yellow Cab Co.* (1967) 67 C2d 695, 704. Common questions of law predominant  
21 and involve (1) the scope of CalPERS fiduciary duties, (2) the adequacy of the contract  
22 language, (3) whether CalPERS breached its fiduciary duties, (4) was there a legal mistake,  
23 including about "no refunds", (5) the purpose of the contract; (6), whether "no refunds" was a  
24 term in the original contract, (7) what is "present value", (8) whether Plaintiffs received  
25 consideration, (9) is CalPERS required to gain consent of material terms, (10) does the existence

26 <sup>5</sup> CalPERS is a fiduciary. It is unreasonable to expect Plaintiffs to continually monitor  
27 whether CalPERS is performing some act inconsistent with terms in a contract. ...the discovery  
28 rule applies to breaches which are committed in secret and, and where the harm will not be  
reasonably discoverable until a future time." (*April Enterprises, Inc. v. KTTV, supra*, at 832.)

1 of a waiver of no refunds after the fact indicate that CalPERS knew the original contract did not  
2 contain the term "no refunds" and (11) other legal questions. The common questions of fact  
3 predominate and include (1) did Plaintiffs sign the contract; (2) retire on IDR; (3) receive an  
4 increase; and (4) other facts, most of which are not in dispute or resolved by documents. Any  
5 individual issues are negligible or easily managed at trial. See concurrent trial management plan.

6 The proposed class representatives have claims typical of the class. CalPERS' defenses to  
7 the class representatives' rescission claims are typical of the class. The class representatives are  
8 sufficiently motivated and without conflicts that each can adequately represent the class.

9 (*Richmond v. Dart, supra*, at 470.) (See generally, *Declarations of Named Plaintiffs*.)

10 **The proposed class is ascertainable.** Class members can be ascertained readily from  
11 CalPERS' records using the class definition in the *Third Amended Complaint*. (*Miller v. Woods*  
12 (1983) 148 Cal.App.3d 862, 873.) In an initial search of safety officers who retired since 2003  
13 with IDR, CalPERS identified at least 177 with total losses and 70 with partial losses. The class  
14 includes safety members from 1991 to the present who invested in military, airtime, or other  
15 service credit on CalPERS' forms. (See *Trial Management Plan*, documents lodged under seal.)  
16 Class members are readily identified without unreasonable expense or time by reference to  
17 official records. (*Rose v. City of Hayward* (1981) 126 CA3d 926, 932.) The class is sufficiently  
18 numerous that it would be impracticable to join them all. (*Rose v. City of Hayward*, at 934.)

19 **Common issues of law and fact are central and predominate over individual issues.**  
20 "Common questions" around contract formation predominate. (*Collins v. Rocha* (1972) 7 C3d  
21 232, 238.) CalPERS expressly knew or should have known the specific significant risks for  
22 safety members *across the class*, but did not add a sufficient warning, and then took advantage.

23 **Few or no individual issues about liability.** The language of the standardized form  
24 contracts are the same or similar to all and the standardized contracts do not disclose the risk of  
25 loss, no refunds, the risk of no increases, the IDR offset, etc. No inquiry into motive or any act or  
26 non-act of Plaintiffs regarding rescission is relevant. There are few or no relevant factual issues  
27 that would be individualized regarding CalPERS' liability. (See trial plan and *Duran*.)

28 **Few or no individual issues re CalPERS' defenses.** Since the contract failed at the time

1 of contracting, each safety member is entitled to rescind, with restitution, and to be made whole  
2 without regard to what happened after the contract. After contracting, few or no issues or events  
3 are relevant. (See trial plan and *Duran.*) Motive is irrelevant. No equitable balancing is required.

4 **Named Plaintiffs' claims are typical of those of the putative class members.** Each  
5 named Plaintiff's interest and claim is similar to those of the other class members. (See *Daniels*  
6 *v. Centennial Group, Inc.* (1993) 16 CA4th 467, 473; *B.W.I. Custom Kitchen v. Owens-Illinois*  
7 (1987) 191 CA3d 1341, 1347; see also *Declarations*, trial management plan and *Duran.*)

8 Each proposed class representative (1) is a CalPERS member; (2) was a safety officer; (3)  
9 had money on deposit with CalPERS; (4) was entitled to IDR before contracting; (5) requested  
10 information from CalPERS; (6) received standardized form information from CalPERS; (7)  
11 signed the CalPERS material; (8) relied or was presumed to rely on CalPERS and the written  
12 CalPERS information; (9) invested money with CalPERS; (10) was injured on the job; (11)  
13 retired with IDR; (12) lost some or all of the value of the money invested; (13) receives no  
14 commensurate advantage; (14) receives a check with 50% IDR; (15) seeks rescission and  
15 restitution of their investment; and (16) seeks to be whole for their losses, interest from deposit,  
16 costs, fees, or other detriments. (See generally *Declarations of Named Plaintiffs.*)

17 **Plaintiffs will fairly and adequately represent the class.** Each named Plaintiff does  
18 "not have a conflict of interest antagonistic to the other class members. (*Ibid.*; *McGhee v. Bank of*  
19 *Am.* (1976) 60 CA3d 442, 450.) Plaintiff's attorney is experienced in pension related class action  
20 litigation, and qualified to prosecute this action. (*Jensen*, 88-92.)

21 **Trial management plan is filed concurrently.** Pursuant to *Duran v. U.S. Bank*, a trial  
22 management plan, including addressing CalPERS' defenses, is filed concurrently.

## 23 V. **CONCLUSION**

24 Plaintiffs meet all of the requirements for certification. Class treatment is substantially  
25 beneficial to the litigants and the Court. Plaintiffs respectfully request that the class be certified.

26 *Respectfully submitted,*

27  
28 Dated: October 2, 2017

By: \_\_\_\_\_  
John Michael Jensen, Counsel for Plaintiffs