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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) **PLAINTIFFS' PROPOSED TRIAL**
21) **METHODOLOGY PLAN**
22) **(Proposed Jury Instructions and Forms**
23) **Attached)**
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Plaintiffs present this proposed Trial Methodology Plan and proposed order of proof for the Court's consideration with Plaintiffs' *Motion for Class Certification*. (See *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1.)

The "threshold" task for the trial court is to determine whether the substantive law is amenable to class treatment. (*Duran* at 29.) Secondly, the trial court must also find that the

1 individual issues, including the defendant's affirmative defenses, "can be managed fairly and
2 efficiently." (*Id.*, at *12, 33.)

3 **Pursuant to *Duran*, Plaintiffs Show Substantive Law is Amenable To Class**

4 **Treatment. Manageably Efficient Trial on the Sufficiency of Disclosure in Original Material,**
5 **Including as Compared to 2-Page Disclosure in CalPERS' "No Refunds" Waiver After the Fact.**

6 The sufficiency of CalPERS' disclosure in the original contract is a common question across the
7 class.

8 Plaintiffs will provide evidence that CalPERS was a fiduciary that knew or should have
9 known (i) that CalPERS' written representations in the original standardized forms (including of
10 "increases") were misleading and false as to safety members, (ii) CalPERS' promises of "present
11 value" or risk-free "increases" and its disclosure that "if you are considering disability, this
12 service credit may not benefit you" are ambiguous and misleading including because they do not
13 disclose the "no refunds" or the risk of loss provisions, (iii) the lack of disclosure of no refunds
14 and loss were material omissions that CalPERS communicated across the class in writings that
15 were the primary or sole means of communication, (iv) the language in CalPERS' subsequent
16 waiver about "no refunds" was not included or available to any class member before contracting,
17 but only used in suspending the installments *after* injury to some plaintiffs, (v) CalPERS' waiver
18 seeking "no refunds" was an inappropriate and unlawful addition of new terms after the fact of
19 injury and disability, unconscionable, and rescindable, (vi) by its waiver CalPERS admits that
20 these terms are the required subject of consent and contract and (vii) that CalPERS did not get
21 consent for "no refunds " in the original contract and did not include the 2 page form waiver in
22 material before contracting.

23 A trial regarding the content, adequacy, and propriety of CalPERS' disclosure in the
24 standardized forms, the original contract, and the waiver is readily manageable. Common legal
25 questions include whether the no refunds term breached CalPERS' fiduciary duty to disclose
26 these risks before contracting, and allow rescission. *Hittle v. Santa Barbara County Employees*
27 *Retirement Assn.* (1985) 39 Cal.3d 374, *Marzec, et al. v. CalPERS* (2015) 236 Cal.App.4th 889,
28 *Vasquez v. Superior Court* (1971) 484 P.2d 964, 973; *Massachusetts Mutual Life Ins. Co. v. Sup.*

1 *Ct.* (2002) 97 CA4th 1282, *Occidental Land, Inc. v. Sup. Ct.* (1976) 18 C3d 355. In addition,
2 common legal questions include whether CalPERS failed to disclose CalPERS' adversity,
3 breached CalPERS' fiduciary duty of loyalty in transferring some of the funds to itself or the
4 employer, failed to get consent to these terms, legal mistake is present, consideration failed, and
5 the original contracts and waivers are rescindable as described below. (*Ibid*)

6 **Forms Distributed Across Class.** The trial plan shows that there are few or no legal or
7 factual variations between class members claims regarding CalPERS' distribution of the forms
8 across the class. Plaintiffs prove that CalPERS distributed standardized adherence contracts across
9 the class in a serial set process where each class member had to read one set before proceeding to
10 the next set. CalPERS required each class member to sign the standardized nonnegotiable form
11 contracts. Plaintiffs will also prove that CalPERS communicated predominantly or only through
12 its written materials, and that CalPERS staff as a policy and practice directed the Plaintiffs and
13 class members to gain information, and to contract only through the use of CalPERS'
14 standardized form and adherence contracts. The overriding similarity of the contracting forms and
15 materials that CalPERS distributed is a common issue. CalPERS has admitted that Plaintiffs have
16 all of the CalPERS materials.

17 Reliance is presumed across the class when material misrepresentations have been
18 communicated uniformly across a class, especially in a fiduciary context. (*Ibid.*)

19 Liability regarding rescission of standardized form contracts that were the sole means to
20 contract and which contained material omissions or misrepresentations about risk-free or
21 "present value" increases and which were actually distributed across the class in serial process
22 and required signature at the time of investing tens of thousands of dollars of private money, has
23 few or no individualized facts.

24 **Liability.** CalPERS' liability is a legal question common to the class. The trial plan
25 allows CalPERS to present all of its relevant and legitimate defenses individually and class-wide,
26 including CalPERS' class-wide defenses on the sufficiency of the disclosure.

27 **Rescission is Available As a Remedy Across Class.** Rescission is a legal remedy and
28 appropriate across the class, including because class members receive nothing from the contracts.

1 Rescission does not require equitable balancing or separate mini trials. Partial rescission is
2 available to allow those who receive partial increases to rescind the part of the contract for those
3 separate increments of investment that do not provide increases.

4 **Amount of Restitution, Interest, and Numbers in Class Readily Ascertained.** The
5 amount of restitution and interest is readily determinable from CalPERS' records. The class is
6 ascertainable and largely ascertained already. The partial discovery of members since 2003 has
7 disclosed that at least 177 police officers, fire fighters, correctional officers sand other safety
8 members lost all their investment of over \$11,000,000. In addition, about 70 or more safety
9 officer lost partial investment of about \$7,000,000. (See documents concurrently filed under
10 seal.) In addition, the class extends to include to all safety members who invested since 1991 and
11 includes other present value and service investments on CalPERS' forms. They are also entitled
12 to interest, attorney fees, costs, and otherwise to be made whole.

13 **Managing the Few or No Individualized Issues and CalPERS' Defenses.** This trial
14 plan also recognizes that the manageability of legitimate relevant individual issues is just as
15 important as the existence of common questions uniting the proposed class. This trial plan allows
16 CalPERS the right and opportunity to assert *legitimate relevant* defenses individually and on a
17 group basis to liability or damages, as long as those issues legitimately touch upon relevant
18 aspects of the case being litigated. (*Duran* at 931.)

19 But CalPERS' defenses and any asserted individual issues have to *legitimately* touch
20 upon *relevant* aspects of the case being litigated. CalPERS does not have an unfettered right to
21 present individualized evidence in support of a defense. (*Duran* at 935.) "No case . . . holds that a
22 defendant has a due process right to litigate an affirmative defense as to each individual class
23 member." (*Duran* at 937.)

24 Most or all of CalPERS' defenses will be resolved by the legal issues. (*Hittle, Marzec,*
25 *Vasquez, Mass. Mutual, Occidental.*) Many or all of CalPERS' asserted defenses and assertions
26 of individualized matter are without legal or factual merit, and should be closely scrutinized and
27 briefed. CalPERS' potential claims of individualized issues such as differences in each Plaintiff's
28 subjective intent, subjective understanding, prior injuries, or work situation are irrelevant under

1 law as described below.

2 However, for those small number of potential individualized issues and defenses that are
3 potentially not resolved by the legal issues, for example if a class member did not sign
4 standardized forms, the Court can manage and review factual or legal variations among class
5 members' claims as described below.

6 **Common Proof, Trial is Manageable.** Plaintiffs show the case can be manageably tried
7 through common proof, based on largely undisputed CalPERS standardized documentation.
8 (*Declaration of John Jensen.*) In general, CalPERS' records contain sufficient information on the
9 standardized contracts, the amount and date of the investments, and other facts to determine the
10 liability and amount of rescission, interest, and other factual evidence accurately. Plaintiffs focus
11 the proposed Trial Methodology Plan on efficient trial management, the applicability of
12 statistical analysis if needed, treatment of individualized issues and CalPERS defenses, and the
13 number of witnesses.

14 **Methodology.** This trial plan and statistical methodology has been developed with expert
15 input and affords CalPERS an opportunity to impeach the trial plan, the statistical methodology,
16 and otherwise show its liability is reduced. (*Duran at 2; Declaration of John Jensen.*) Plaintiffs
17 propose (i) a trial methodology applicable to all class claims; (ii) that trial be bifurcated into
18 phases: (a) liability and (b) amount of restitution, interest, fees, and other damages or relief; (iii)
19 establishing CalPERS' liability and the existence of damages and right to rescission (with
20 restitution and interest owed) across the class including utilizing CalPERS' records; (iv)
21 presenting documentation, declarations, prior testimony, and a limited and manageable numbers
22 of witnesses live at trial; (v) presenting a common method for confirming the amount of
23 restitution with interest and/or calculating damages across the class utilizing data from CalPERS'
24 records; (vi) allowing CalPERS to present any legitimate relevant individual or class-wide
25 defenses, and (vii) presenting expert statistical analysis as needed, including about the existence
26 (or non-existence) of relevant variability in the liability issues, in the class, in the amount of
27 damages, in the defenses, and other matters. (See *Duran.*)

28 **Class Action Elements.** Plaintiffs will prove that (1) CalPERS has applied uniform

1 customs, policies, or practices to communicate and transact with safety employees that invest in
2 military/airtime and other optional "present value" or no risk service credit (*Sav-on Drug Stores,*
3 *Inc. v. Superior Court* (2004) 34 Cal.4th 319, 330.); (2) CalPERS' standardize policy and
4 practices used form contracts and publications across that class that contained material
5 misrepresentations and omissions; (3) CalPERS knowingly or negligently withheld material
6 information at the time of contracting, including about "no refunds"; (4) safety members were
7 similarly situated at the time of CalPERS communication and contracting; (5) Plaintiffs are
8 presumed to rely on the representations of CalPERS, including as a fiduciary to them; (6)
9 Plaintiffs suffered from CalPERS breach of fiduciary duties; (7) Plaintiffs were factually and
10 legally mistake; (8) Plaintiffs did not consent; (9) the consideration failed or there was no
11 consideration; (10) Plaintiffs suffered harm, restitution, loss of interest, fees, costs, loss of
12 investment, damages and diminution in value arising from CalPERS' practices; (11) Plaintiffs are
13 entitled to rescission; (12) CalPERS' waiver shows that CalPERS knew but did not disclose the
14 "no refunds" term prior to contracting and therefore sought a waiver of "refunds" selectively
15 *after-the-fact* at the time that CalPERS sought to suspend the future installments; (13) the
16 existence and amount of Plaintiffs' restitution, recovery, interest, and fees can be proven and
17 calculated across the class with certainty from known or ascertainable data from CalPERS'
18 records; (14) CalPERS' defenses to rescission can be managed individually and on a class-wide
19 basis; (15) CalPERS defenses class wide at contracting, such as that the disclosure was adequate,
20 can be manageably tried; (16) CalPERS' individual defense at contracting can be managed; (17)
21 CalPERS' class-wide defenses after contracting can be managed; (18) CalPERS' individual
22 defenses after contracting can be managed; (19), to the extent that factual question are in dispute,
23 they can be managed at trial by statistics, sampling, surveys, or otherwise; (20) class action is the
24 most efficient means of resolving class members' claims; (21) the trial is manageable; and (22)
25 the trial management plan is adequate under *Duran*. (*Sav-On, supra*.)

26 **Duran, Statistical Plan and Method If Necessary.** If needed, there is fairly large
27 population of safety members entitled to IDR before contracting that investigated military or
28 airtime time by requesting an estimate. (*Declaration of John Jensen*.) This population that can be

1 ascertained from CalPERS' records of those who requested information, and then sampled such
2 that sufficient sample size available. It is believed that at least 10,000 safety employees invested
3 in airtime alone from 2003 to 2011. (*Declaration of John Jensen.*)

4 The uniformity of the population is high, the uniformity of the information provided is
5 high, and the relevant variances in the population are very low. (*Declaration of John Jensen.*)

6 The relevant variability in the form contract is small, because while there were some changes in
7 CalPERS' standardized publications and forms from 1991 to the present, and some differences
8 between military and airtime, the relevant inquiry includes whether the "increase" terms, the
9 "present value" , "no refunds" and other misrepresentations or omission are present, etc..

10 (*Declaration of John Jensen.*) Indeed, CalPERS used the same standardized form for both safety
11 officers and non-safety members, for those who are entitled to IDR and those who are not
12 entitled to IDR, and the forms do not mention IDR at all. The population to be sampled and the
13 forms are also without significant relevant variance or variability within. (*Declaration of John*
14 *Jensen.*) The population is sufficiently large to provide a uniform pool, and random sampling is
15 sufficiently without bias as to provide accurate samples and results that can be meaningfully
16 extrapolated to the class, if needed. (*Declaration of John Jensen.*)

17 *Respectfully submitted*

18
19 Dated: October 2, 2017

By: _____
John Michael Jensen, Attorney for Plaintiffs

TABLE OF CONTENTS

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I. Substantive Law is Amendable To Class Treatment 1

II. Documents 1

III. Legislative History 4

IV. Duran Substantive Legal Issues To be Resolved First To See If Amenable to
Class Treatment 5

V. Fiduciary Duties Legal Issues 5

VI. Contract Legal Issues 7

VII. Class Action Legal Issues 9

VIII. Rescission Legal Issues 11

IX. Delayed Discovery and Delayed Accrual Legal Issues 13

X. Common Facts 14

XI. Common Facts of CalPERS' Standard Practice and Forms 14

XII. Common Facts of CalPERS' Misrepresentations and Omission Communicated
Across the Class 15

XIII. Common Proof of Lack of Consent to Loss, Risk, No Refunds, Transfer to
Employer, Adverse Terms 17

XIV. Common Facts of Lack of Disclosure 18

XV. Common Facts Entitling Class to Rescission 20

XVI. Plaintiffs Will Prove That Rescission Across the Class is Appropriate 22

XVII. Common Facts About Delayed Discovery And Delayed Accrual, Mistake,
Misrepresentations, Nondisclosure in Fiduciary Context 24

XVIII. Common Facts in Class Action: Plaintiffs Will Prove Class is Ascertainable 25

XIX. Alternative Methods of Proof 26

XX. Alternatives to Establish Liability If Reliance is Not Presumed Across the Class 28

XXI. Statistical and Sampling Issues 28

CALPERS DEFENSES 29

I. Managing CalPERS' Defenses 30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. First, Substantive Issue of Whether CalPERS' Defenses Are Legitimate and 30

III. Some of CalPERS' Expected Class-Wide Defenses At Contracting 30

IV. Some of CalPERS' Expected Individualized Defense At Contracting 31

V. Some of CalPERS' Expected Defenses After Contracting 32

VI. Many or All of CalPERS Defenses Are Not Relevant and Not Legitimate 33

VII. Plaintiffs Will Prove Defect in CalPERS' Defenses 33

VIII. Duran: How CalPERS' Defenses and Individual Issue Can Be Managed 37

USE OF STATISTICS, *DURAN*, MANAGEABILITY 39

I. *Duran* Background..... 40

II. Methodology 42

III. Preliminary Assessment of Variability of the Class Shows That It is Manageable..... 42

IV. Little or No Variability 43

CONCLUSION..... 49

Proposed Jury Instructions and Forms (attached)

[Declaration of John Jensen, Memorandum of Points and Authorities in Support of Motion for Class Certification, and Declarations of Representative Plaintiffs concurrently filed]

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Cases

American Employers Group, Inc. v. Employment Development Dept., 154 Cal. App. 4th 836 7, 7, 17

April Enterprises, Inc. v. KTTV (1983) 147 CA3d 805 13

B.W.I. Custom Kitchen v. Owens-Illinois (1987) 191 CA3d 1341 27

Badie v. Bank of America, 67 Cal. App. 4th 779, 79 (1st Dist. 1998)..... 8, 18

Caro v. Proctor & Gamble Co. (1993) 18 Cal.App.4th 644 19

Chalmak v. H.J. Lucas Masonry, Inc. (1976) 55 CA3d 124..... 7

City of Oakland v. PERS (2002) 95 Cal.App.4th 29..... 14

City of Oakland v. Pub. Employees' Ret. Sys., (2002) 95 Cal.App.4th 29..... 35

Conlin v. Osborn (1911) 161 C 659..... 12

Daniels v. Centennial Group, Inc. (1993) 16 CA4th 467 27

Diem v. C.I.R., T.C. Summ.Op. 2006-121 (2006), July 31, 2006..... 5

Duran v. U.S. Bank National Association, 325 P.3d 916 (Cal. 2014 passim

Edmunds v. Valley Circle Estates (1993) 16 CA4th 1290..... 6, 10

Elyaoudayan v. Hoffman, 104 Cal. App. 4th 1421, 129 Cal. Rptr. 2d 41 (2d Dist. 2003) 7, 17

Estate of Gelonese (1974) 36 Cal.App.3d 854 27

Hittle v. Santa Barbara Cnty. Empl. Retire. Assn. (1985) 39 C3d 374 passim

Hobart v. Hobart Estate Co. (1985) 26 C2d 412..... 13, 25

Howell v. Courtesy Chevrolet, Inc. (1971) 16 CA3d 391..... 11

IMO Development Corp. v. Dow Corning Corp. (1982) 135 CA3d 451..... 11

In re Marriage of Green (2013) 56 Cal.4th 1130 37

In re Steroid Hormone Produce Cases (2010) 181 CA4th 145..... 7

In re Tobacco II Cases (2009) 46 C4th 298, 327 10

Kumar v. Kumar v. Salov North America Corp (N.D. Cal, July 15, 2016, No. 14-CV-2411-YGR), 2016 WL 3844334, at *4.) 10

1 *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915..... 36

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3 WL 6732110, at *2 7

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5 *Marzec, et al. v. CalPERS* (2015) 236 Cal.App.4th 889 6, 10, 18

6 *Massachusetts Mutual Life Ins. Co. v. Sup. Ct.* (2002) 97 CA4th 1282..... passim

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8 *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082..... 19

9 *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621..... 6

10 *Occidental Land, Inc. v. Sup. Ct.* (1976) 18 C3d 355..... passim

11 *Occidental Land, Inc. v. Sup. Ct., In and For County of Orange* (1975) 52 CA3d 373, *vacated*

12 *sub nom* 10

13 *Occidental Land, Inc. v. Superior Court, In and For County of Orange* (1975) 52 Cal.App.3d . 28

14 *People v. Dubon* (2001) 90 Cal.App.4th 944..... 27

15 *Perdue v. Crocker National Bank*, 38 Cal. 3d 913..... 9, 16

16 *Poublon v. C.H. Robinson Company*, 846 F.3d 1251 (9th Cir. 2017) 9, 16

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19 *Siegel v. Lewis* (1946) 74 CA2d 86 12

20 *Simmons v. Cali Institute of Tech* (1949) 34 C2d 264 11

21 *Therma-Coustics Manufacturing, Inc. v. Borden, Inc.*, 167 Cal. App. 3d 282..... 13

22 *Toadter v. Bradshaw* (1958) 164 CA 200..... 6

23 *United Multiple Listing Service, Inc. v. Bernstein*, 134 Cal. App. 3d 486, 184 Cal. Rptr. 465 (2d

24 Dist. 1982)..... 16

25 *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1070) 1 C3d 586..... 13, 25

26 *Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1691,..... 36

27 *Vasquez v. Superior Court*, 484 P.2d 964, 973 (Cal. 1971)..... passim

28 *White Mountains Reins. Co. of America v. Borton Petrini, LLP* (2013) 221 Cal.App.4th 890..... 6

1	<i>Williams v. Gerber Products</i> , 552 F.3d 934, 938 (9 th Cir. 2008).....	10
2	<i>Winograd v. American Broadcasting Co.</i> , 68 Cal. App. 4th 624, 80 Cal. Rptr. 2d 378 (2d Dist.	
3	1998),.....	8, 17
4		
5	Statutes	
6	26 U.S.C.A. § 415(n)(3)	4
7	<i>Civ. Code</i> , § 1566.....	8, 18
8	<i>Civil Code</i> , §1567	9, 18
9	<i>Civ. Code</i> , § 1577.....	21
10	<i>Civ. Code</i> , §1578.....	12, 21
11	<i>Civ. Code</i> , § 1580	7, 17
12	<i>Civ. Code</i> , § 1595	8, 18
13	<i>Civ. Code</i> , § 1598	8, 18
14	<i>Civil Code</i> 1605	22
15	<i>Civ. Code</i> , § 1649	8, 18
16	<i>Civ. Code</i> , §§ 1644	7, 18
17	<i>Civ. Code</i> , §§ 1645	7
18	<i>Civil Code</i> § 1688	20, 23
19	<i>Civil Code</i> § 1689	20, 22
20	<i>Civil Code</i> section 2228.....	5
21	<i>Code Civ. Proc.</i> , §2025.620.....	14
22	<i>Evid. Code</i> , §606.....	27, 28
23	<i>Evid.Code</i> , §605.....	10
24	<i>Evidence Code</i> Section 776	14
25	<i>Government Code</i> 21039	11
26	<i>Government Code</i> , §§20160	13
27	<i>Government Code</i> , §20164.....	13
28	<i>Gov't Code</i> , §§20160	6

1	<i>Gov't Code</i> , §20164	5, 6
2	<i>Gov't Code</i> , §§20178	6
3	<i>Gov't Code</i> , §20225	6
4	<i>Gov't Code</i> , §§21006	4
5	<i>Gov't Code</i> , §§21008	4
6	<i>Gov't Code</i> , §§21024	4
7	<i>Gov't Code</i> , §§21406	5
8	<i>Gov't Code</i> , §21013	4
9	<i>Gov't Code</i> , §21020.5	4
10	<i>Gov't Code</i> , §21023.5	4
11	<i>Gov't Code</i> , §21025.5	4
12	<i>Gov't Code</i> 21027	4
13	<i>Gov't Code</i> 21029	4
14	<i>Gov't Code</i> , §21030	4
15	<i>Gov't Code</i> , §21031	4
16	<i>Gov't Code</i> , §21409	5
17	<i>Gov't Code</i> , §21418	5
18	<i>Gov't Code</i> . §§21411, <i>et seq</i>	5
19	<i>Gov't Code</i> , §21154	36
20	<i>Gov't Code</i> , §21156	36
21	<i>Gov't Code</i> , §21192	36
22	<i>Gov't Code</i> , §21193	36
23	<i>Internal Revenue Code</i> Section 104(a) (1).....	5
24		
25	Other Authorities	
26	4 <i>Witkin, Cal. Proc. 5th</i> (2008) Pleading § 541, p. 668.....	35
27	4 <i>Witkin, Cal.Proc. 5th</i> (2008), <i>Pleading</i> , 541, p. 668	12
28		

1	AB 1146 (1991)	4
2	AB 719, <i>Enrolled Bill Report of AB 719, State and Consumer Services Agency (i.e. CalPERS),</i>	
3	9/25/03	4
4	<i>Enrolled Bill Report of AB 719, State and Consumer Services Agency (i.e. CalPERS), 9/25/03,</i>	
5	page 4.),.....	4
6	<i>Governor's Office of Planning and Research, Enrolled Bill Report for AB 719, pages 1-2</i>	4
7	<i>In re Application of Smith, CalPERS' Precedential Decision No. 99-01 (March 31, 1999</i>	5
8	Policy Committee: Pub. Emp. Ret. & Soc. Sec. (1984).....	4
9	Rest.3d, <i>Agency</i> , §§8.01-8.06	6
10	Section 1.104-1(b), <i>Income Tax Regs</i>	5

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12
13
14
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16
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Constitutional Provisions

California <i>Constitution</i> , art. XVI, §17	5
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1 **PROPOSED TRIAL MANAGEMENT PLAN**

2 **I. Substantive Law is Amendable To Class Treatment**

3 Pursuant to *Duran v. U.S. Bank Nat. Assn.* (2014) 59 C4th 1, Plaintiffs must show at the
4 "threshold" that the substantive law is amenable to class treatment. (*Duran*, at 29.) To meet this
5 threshold, Plaintiffs show that the substantive law is amenable to class treatment.

6 **Documentary Evidence to be Offered.** The main documentary evidence will include
7 CalPERS' form contracts, standardized documents, related CalPERS documents, legislative
8 history, statistical or other analyses as appropriate, and a manageable number of other
9 documents.

10 **II. Documents**

11 **CalPERS' General Publications**

12 Plaintiffs will introduce copies of CalPERS' publications that are distributed generally,
13 including the following CalPERS documents and variations of those documents over time:

- 14 1. *What You Need to Know About Your Local Safety Benefits*, Pub 9.
- 15 2. *What You Need to Know About Your State Safety Benefits*, Pub 7,
- 16 3. *A Guide to Your CalPERS Service Credit Purchase Options*, Pub 12
- 17 4. *Annual Member Statements*
- 18 5. Other CalPERS standardized forms, publications and documents from 1991 to the
19 present.

20 **CalPERS' Standardized Forms and Publications in Contracting Process for Each of**
21 **the Seven Class Representatives.** Regarding the standardized forms, publications, and

22 documents that CalPERS sent to each individual class representative, and each class member,
23 Plaintiffs will introduce the following CalPERS' documents and their minor variations over the
24 class period from 1991 to the present:

- 25 1. CalPERS' Standardized Form: Annual Member Statements: CalPERS' Annual
26 Member Statements are the same or similar for Plaintiffs Marzec, Healy, Esparza,
27 Andert, MacLaren, Slaughter and Brown.
- 28 2. CalPERS' Standardized Form: Publications: CalPERS' Service Credit Purchase

1 booklets were the same or similar, including variations of *A Guide to Your*
2 *CalPERS Service Credit Purchase Options*, CalPERS publication PUB 12.

- 3 3. CalPERS' Standardized Form: Request for Information on Investments From
4 1991 to 2002: CalPERS' Request for Service Credit Cost Information-Military
5 *Service* are the same or similar for Marzec and Slaughter.
- 6 4. CalPERS' Standardized Form: Election Contracts to Invest from 1991 to 2002:
7 *CalPERS' Election to Purchase Service Credit* are the same or similar for Marzec
8 and Slaughter.
- 9 5. CalPERS' Standardized Form: Request for Information on Military after 2002:
10 *CalPERS' Request for Service Credit Cost Information-Military Service* are the
11 same or similar for Marzec, Andert and Brown.
- 12 6. CalPERS' Standardized Form: Military Contracts After 2003: CalPERS' Election
13 to Purchase Service Credit, Military Service are the same or similar for Marzec,
14 Andert, and Brown. The Military Forms were the same or similar as the airtime
15 forms.
- 16 7. CalPERS' Standardized Form: Web Calculator: CalPERS' Service Credit Cost
17 Estimator are the same or similar for Marzec, Healy, Esparza, Andert, MacLaren,
18 Slaughter, and Brown.
- 19 8. CalPERS' Standardized Form: Request for Information About ARSC: Airtime
20 started in 2003 and continued until 2014. CalPERS' Request for Service Credit
21 Cost Information-Additional Retirement Service Credit (ARSC) are the same or
22 similar for Healy, Esparza, MacLaren, and Brown.
- 23 9. CalPERS' Standardized Form: Airtime Contracts: After 2003, CalPERS sent out
24 the same or similar standardized forms for investing in airtime to Healy, Esparza,
25 MacLaren, and Brown.
- 26 10. CalPERS' Standardized Form: Other Net Present Value Service Credit Contracts:
27 *CalPERS' other net present value service contracts and materials* were the similar
28 or same.

- 1 11. CalPERS' Standardized Form: Roll-over After 2003: CalPERS' rollover
2 *Certification* form contracts were the same or similar for Marzec, Healy, Esparza,
3 MacLaren and Slaughter. CalPERS' *Certification* forms required Plaintiffs to
4 complete and sign for "plan to plan transfers" and "direct rollovers."
- 5 12. CalPERS' Standardized Form: Installment Payment contracts were the same or
6 similar: CalPERS sent the same or similar installment payment forms to Andert,
7 Slaughter, and Brown.
- 8 13. CalPERS' Standardized Form: Payoff of Installments. CalPERS sent the same or
9 similar installment "pay off" forms to Slaughter.
- 10 14. CalPERS' Standardized Form: Suspension of Installment Payments: CalPERS
11 sent the same or similar 2-page suspension of installment payment forms to
12 Andert and Brown. Each signed suspension of installment payments that newly
13 included the "no refunds" language.
- 14 15. CalPERS' Standardized Form: The IDR determination: CalPERS' documents
15 showing the IDR determination forms for Marzec, Healy, Esparza, Andert,
16 MacLaren, Slaughter, and Brown are the same or similar.
- 17 16. CalPERS' Standardized Form: The current amount of their allowance: CalPERS'
18 document that shows the amount of the current allowance from Marzec, Healy,
19 Esparza, Andert, MacLaren, Slaughter and Brown are the same or similar.
- 20 17. CalPERS' Standardized Form: The amount of their investment: CalPERS'
21 documents showing the amount of the investment from Marzec, Healy, Esparza,
22 Andert, MacLaren, Slaughter and Brown are the same or similar.
- 23 18. Their salary: The amount of the last salary from Marzec, Healy, Esparza, Andert,
24 MacLaren, Slaughter and Brown.
- 25 19. The calculation of the amount of the benefit that they receive: The calculation of
26 that no increase is provided to Marzec, Healy, Esparza, Andert, MacLaren,
27 Slaughter and Brown.
- 28 20. Any communication in writing with CalPERS: Any other relevant communication

1 from CalPERS to Marzec, Healy, Esparza, Andert, MacLaren, Slaughter and
2 Brown.

3 21. Any other relevant document, if necessary.

4 **III. Legislative History**

5 Plaintiffs will offer the legislative history that includes:

6 1. Permissive service credit. (26 U.S.C.A. § 415(n)(3).

7 2. 1979 refund statute.

8 3. 1984 refund statute. Policy Committee: Pub. Emp. Ret. & Soc. Sec. (1984).

9 4. Refunds in 1991. unenacted and enacted legislation AB 1146 (1991). 1991.: AB
10 1146.

11 5. "Present Value" Increases, "Cost Neutral", Fund Increases, No Risk of Loss, No
12 transfer to Employer. Bill Analyses of "Airtime", AB 719, *Enrolled Bill Report of AB 719, State*
13 *and Consumer Services Agency (i.e. CalPERS), 9/25/03, page 4, Enrolled Bill Report of AB 719,*
14 *State and Consumer Services Agency (i.e. CalPERS), 9/25/03, page 4.), Governor's Office of*
15 *Planning and Research, Enrolled Bill Report for AB 719, pages 1-2.*

16 6. "Present Value" Methodology. "Present value methodology" 2001 to the present,
17 (*Gov't Code*, §§21024, 21027 and 21029).

18 7. "Present Value" Investment, After 1991, *Government Code* sections 21024, 20127
19 and 21029 (statutes governing military time), section 20909 (statute governing ARSC), or
20 sections 21006-21008, 21013, 21020.5, 21023.5 and 21030-21031 (statutes governing other
21 types of PVC).

22 8. Other Present Value Investments. Peace Corps service, (ii) uncompensated leaves
23 of absence, and (iii) maternity/paternity leave. (*Gov't Code*, §§21006-21008, 21013, 21020.5,
24 21023.5, 21025.5 and 21030-21031.)

25 9. Duty to Correct. CalPERS' correction statute, *Gov't Code*, §20164(b)(2).

26 10. Fiduciary Duty to Inform. CalPERS' duty to Inform adopting Hittle, *In re*
27 *Application of Smith*, CalPERS' Precedential Decision No. 99-01 (March 31, 1999).

28 11. Tax Law that IDR Cannot Include Contributions. *Internal Revenue Code* Section

1 104(a) (1) and Section 1.104-1(b), *Income Tax Regs.*; *Diem v. C.I.R.*, T.C. Summ.Op. 2006-121
2 (2006), July 31, 2006.)

3 12. IDR rights. *Gov't Code*, §§21406-21409 and 21411- 21414, *Gov't Code*, §§21151.
4 50% of last salary, as a tax-free tort recovery for the physical injury. (*Gov't Code*. §§21411, *et*
5 *seq*). IDR is funded by the employer and from contributions made in that safety job. (*Gov't Code*,
6 §21418).

7 13. Other Legislation

8 **IV. Duran Substantive Legal Issues To be Resolved First To See If Amenable to Class**
9 **Treatment**

10 **Substantive Law is Amendable To Class Treatment.** In *Duran*, Plaintiffs must show at
11 the "threshold" that the substantive law is amenable to class treatment. (*Duran* at 29.) To meet
12 this threshold, Plaintiffs show that the substantive law is amenable to class treatment below.

13 **V. Fiduciary Duties Legal Issues**

14 **Plaintiffs Will Prove that CalPERS is A Fiduciary.** Plaintiffs will prove that CalPERS
15 owed fiduciary duties to each class member. (*California Constitution*, art. XVI, §17; *Hittle v.*
16 *Santa Barbara Cnty. Empl. Retire. Assn.* (1985) 39 C3d 374.)

17 **Plaintiffs Will Prove that CalPERS Has a Fiduciary Duty to Disclose Before**
18 **Contracting.** Plaintiffs will prove that CalPERS owes Plaintiffs a mandatory duty to inform and
19 provide timely and *accurate* information to its Members ((*Hittle, supra*, at 389-90; *In re*
20 *Application of Smith*, CalPERS' Precedential Decision No. 99-01 (March 31, 1999).

21 **Marzec on Remittitur: Plaintiffs Will Prove that CalPERS Has a Fiduciary Duty of**
22 **Good Faith: Duty to Deal Fairly and Act in Utmost Good Faith.** Plaintiffs will prove that
23 CalPERS is "charged with the fiduciary relationship described in Civil Code section 2228: 'In all
24 matters connected with his trust, a trustee is bound to act in the highest good faith toward his
25 beneficiary, and may not obtain any advantage therein over the latter by the slightest
26 misrepresentation, concealment, threat, or adverse pressure of any kind.'" (*Hittle v. Santa*
27 *Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 392–393, 216 Cal.Rptr. 733,
28 703 P.2d 73.) "This fiduciary relationship is judicially guarded by the application of Civil Code

1 section 2235, which provides that "[a]ll transactions between a trustee and his beneficiary during
2 the existence of the trust, or while the influence acquired by the trustee remains, by which he
3 obtains any advantage from his beneficiary, are presumed to be entered into by the latter without
4 sufficient consideration, and under undue influence." (*Id.* at p. 393, 216 Cal.Rptr. 733, 703 P.2d
5 73.) (*Marzec, et al. v. CalPERS* (2015) 236 Cal.App.4th 889, 915-16.)

6 **Plaintiffs Will Prove that CalPERS Has a Fiduciary Duty of Loyalty.** Plaintiffs will
7 prove that CalPERS owes a duty of "undivided loyalty." (*White Mountains Reins. Co. of*
8 *America v. Borton Petrini, LLP* (2013) 221 Cal.App.4th 890, 902; see also Rest.3d, Agency,
9 §§8.01-8.06.)

10 **Plaintiffs Will Prove that CalPERS Has a Fiduciary Duty to Account and Correct.**
11 Plaintiffs will prove that CalPERS is required to account and correct. (*Oakland Raiders v.*
12 *National Football League* (2005) 131 Cal.App.4th 621, 631.) (*Gov't Code*, §§20178, 20225);
13 (*Gov't Code*, §§20160, 20164).

14 **Marzec Citing Hittle: Plaintiffs Will Prove that CalPERS' Breaches of Fiduciary**
15 **Duty Are Undue Influence that Allow Rescission.** CalPERS' breaches of duties are considered
16 undue influence sufficient to allow rescission. (*Hittle, supra; Vasquez, supra. Marzec v.*
17 *CalPERS*, (2015) 236 CA4th 889, 914-916.)

18 **Plaintiffs Will Prove CalPERS' Nondisclosure by a Fiduciary.** Plaintiffs will prove
19 that CalPERS' misrepresentation or nondisclosure means, "the reliance element is relaxed ... to
20 the extent we may presume reasonable reliance ... absent direct evidence of a lack of reliance."
21 (*Estate of Gump, supra; Toadter v. Bradshaw* (1958) 164 CA 200.; *Edmunds v. Valley Circle*
22 *Estates* (1993) 16 CA4th 1290, 1302.)¹

23 **Plaintiffs Will Prove CalPERS Offered No Notice of Adversity or Warning.**
24 CalPERS has not produced a single document that provides "specific notice" of the risks or
25 notice of CalPERS' adversity.

26
27 ¹ 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 **Plaintiffs Will Prove CalPERS Did Not Disclose Open Adversity.** *Miller* did
2 not involve an "omission."

3 **Plaintiffs Will Prove that CalPERS Did Not Exercise Reasonable Diligence.**
4 Plaintiffs will prove that CalPERS did not exercise reasonable diligence to correct these
5 problems which were known to CalPERS since at least 1991.

6 **Plaintiffs Will Prove Materiality.** Plaintiffs will prove that the risk of loss, IDR offset,
7 risk of no increases, and transfer to employers are objectively material. Materiality is an
8 objective, not a subjective, element. (See, e.g., *Vasquez*, cited in *Low v. Trump University, LLC*
9 (S.D. Cal., Nov. 15, 2016, No. 310CV00940GPCWVG) 2016 WL 6732110, at *2;
10 *Massachusetts Mutual, supra; In re Steroid Hormone Produce Cases* (2010) 181 CA4th 145,
11 157.)

12 **VI. Contract Legal Issues**

13 **No Formation. Plaintiffs Will Prove that A Contract and Consent Was Required.**
14 Plaintiffs will prove that CalPERS needed to gain Plaintiffs' consent to all of the material terms
15 of the contract. (*American Employers Group, Inc.* (2007) 154 CA4th 836; *Elyaoudayan v.*
16 *Hoffman* (2003) 104 CA4th 1421.) In later seeking a "no refunds" waiver after the fact, CalPERS
17 acknowledged needing Plaintiffs' consent. The PERL applies only by contract even to
18 contracting agencies.

19 **Plaintiffs Will Prove that No Contract Formed.** Plaintiffs will prove that no contract
20 formed because there never was a meeting of the minds on all material points. (*American*
21 *Employers Group, Inc. v. Employment Development Dept.* (2007) 154 CA4th 836; *Elyoudayan v.*
22 *Hoffman* (2003) 104 CA4th 1421; *Civ. Code*, §1580.)

23 **Plaintiffs Will Prove That the Parties Did Not Agree on the Same Object.** Plaintiffs
24 did not consent to material terms, including as Plaintiffs and CalPERS did not agree to the same
25 thing in the same sense. (*Chalmak v. H.J. Lucas Masonry, Inc.* (1976) 55 CA3d 124, 127.)

26 **Plaintiffs Will Prove No Consent and No Formation.** Plaintiffs will prove that in the
27 terms' ordinary and popular sense, there was no disclosure of loss, no refunds, IDR offset etc.
28 (Civ. Code, §§ 1644, 1645). Plaintiffs will prove that CalPERS' ambiguous language like

1 "present value" must be interpreted to mean increases as the promisee understood it (Civ. Code,
2 § 1649). *Badie v. Bank of America*, 67 Cal. App. 4th 779, 79 (1st Dist. 1998).

3 **Plaintiffs Will Prove that Plaintiffs Did Not and Could Not Consent to Material**
4 **Adverse Terms That Were Undisclosed.** Plaintiffs will prove that before contracting, CalPERS
5 did not inform Plaintiffs so Plaintiffs did not agree, and did not consent to the material terms of
6 risk, loss, risk of no increases, no refund, IDR offset, transfer to CalPERS or the employer, and
7 other material terms, that are expressly contrary to "increases" and "present value."

8 **Plaintiffs Will Prove No Objective Agreement on No Refunds.** Plaintiffs will prove
9 that objective terms of agreement or objective expressions of intent did not include a risk of loss
10 or "no refunds." (*Winograd v. American Broadcasting Co.* (1998) 68 CA4th 624, as modified,
11 (Jan. 7, 1999).

12 **Plaintiffs Will Prove That There Was No Agreement and No Consent on the Object**
13 **of the Investment Contract.** Plaintiffs will prove that the objective language of the contract
14 indicated that the investment provided increases. (*Civ. Code*, §1595.) Now CalPERS says that
15 they bought "service credit" that CalPERS changed into normal contributions that were lost on
16 IDR and did not necessarily provide increases, and that there are no refunds after IDR. CalPERS
17 did not disclose those terms. But if increases or refunds are impossible as CalPERS argues, or so
18 vaguely expressed, the entire contract is void and restitution should be provided, with interest.
19 (*Civ. Code*, §1598.)

20 **Plaintiffs Will Prove That Because There is No Mutual Consent, Rescission is**
21 **Appropriate.** If there is no consent, rescission is appropriate. (*Civ. Code*, §1566.)

22 **Plaintiffs Will Prove That If Increases Were Not Allowed on IDR, Contract is**
23 **Void.** Plaintiffs will prove that consent has but a single object of providing "present value"
24 increases, but increases were not possible on IDR, and were vaguely expressed as to be wholly
25 unascertainable, such that the entire contract is void. (*Civ. Code*, §1598.)

26 **Plaintiffs Will Prove Rescission Based on Duress, Menace, And Undue Influence.**
27 Plaintiffs will prove that Plaintiffs' apparent consent was not real as it was obtained through
28 duress, menace, fraud, undue influence, or mistake (*Civil Code*, §1567)

1 **Plaintiffs Will Prove it An Adhesion Contract.** Plaintiffs will prove that CalPERS'
2 standardized forms were adhesion contract that CalPERS, as the party of superior bargaining
3 strength, imposed and drafted. (*Perdue v. Crocker National Bank* (1985) 38 C3d 913; *Poublon v.*
4 *C.H. Robinson Company* (9th Cir. 2017) 846 F.3d. 1251.)

5 **Plaintiffs Will Prove that CalPERS Used Ambiguous or Nonstandard Terms.**
6 Plaintiffs will prove that CalPERS used terms "present value", "increases", "service credit",
7 "contributions", "considering" and other terms in an ambiguous or nonstandard way across the
8 class.

9 **Plaintiffs Will Prove CalPERS Communicated the Same or Similar Material**
10 **Misrepresentations Actually Across the Class.** Plaintiffs will prove that CalPERS distributed
11 *the same material misrepresentations to each member of a class*, and therefore an inference of
12 reliance arises as to the entire class." (*Mirkin v. Wasserman* (1993) 5 C4th 1082, 1095, citing
13 *Vasquez.*) "

14 VII. **Class Action Legal Issues**

15 **Plaintiffs Will Prove It Is Appropriate to Have Class Action.** Plaintiffs will prove
16 that the undisclosed information was material. (*Massachusetts Mutual Life Ins. Co. v. Superior*
17 *Court* (2002) 97 CA4th 1282.)

18 **Plaintiffs Will Prove That Plaintiffs Are Entitled to a Presumption of Reliance.**
19 Plaintiffs will prove that "[a]ctual reliance can be proved on a class-wide basis because each
20 class member has read or heard the same misrepresentations...." (*Ibid.*) Plaintiffs will prove that
21 reliance is *presumed* because (a) the false representations were made to each putative class
22 member (which by definition occurs when each receives essentially the same form documents),
23 and (b) each putative member's acts were consistent with reliance upon the representations.
24 (*Vasquez, supra; Occidental Land, supra; Massachusetts Mutual, supra.*)

25 **Plaintiffs Will Prove Their Acts Were Consistent.** Plaintiffs will prove that their acts
26 of taking out instalment payments, investing large sums of money, rolling over their 457
27 retirement funds, and mortgaging their homes was consistent with a belief in increases and no
28 risk of loss.

1 **Plaintiffs Will Prove That CalPERS Cannot Inquire Into Individual Reliance and**
2 **That Individual Reliance is Irrelevant.** Plaintiffs will prove that consent that each class
3 member is not required to separately prove justifiable reliance, especially about material facts, so
4 that Is not an individual issue and cannot defeat certification (*Occidental Land, Inc. v. Sup. Ct.,*
5 *In and For County of Orange* (1975) 52 CA3d 373, *vacated sub nom; Occidental Land, supra.*)

6 **Plaintiffs Will Prove Plaintiffs' Subjective Understanding is Not Relevant.** Plaintiffs
7 will prove that Plaintiffs' subjective understanding of the standardized form contracts and other
8 related documents is irrelevant, including as the objective language controls. (*Marzec, et al. v.*
9 *CalPERS* (2015) 236 Cal.App.4th 889, 914-916).

10 **Plaintiffs Will Prove That Reliance is Presumed and the Burden Shifts to CalPERS**
11 **to Provide Information that Communicated Correct Terms Before Contracting.** Plaintiffs
12 will prove that the presumption of reliance is more than the simple shifting of the burden of
13 proof to facilitate the determination of a particular action.

14 **Plaintiffs Will Prove That CalPERS Did Not Provide Notice And Cannot Defeat**
15 **Presumption of Reliance.** Plaintiff prove that to defeat the presumption of reliance, CalPERS
16 must prove that CalPERS provided some material information to all class members before
17 contracting that advised them of the material terms. (*Evid.Code*, §605; *Edmunds v. Valley Circle,*
18 *supra*, at 1302; see also *In re Tobacco II Cases* (2009) 46 C4th 298, 327 [plaintiff need not
19 demonstrate individualized reliance on specific misrepresentations to satisfy the reliance
20 requirement]; *Williams v. Gerber Products*, 552 F.3d 934, 938 (9th Cir. 2008) *Kumar v. Kumar v.*
21 *Salov North America Corp* (N.D. Cal, July 15, 2016, No. 14-CV-2411-YGR), 2016 WL
22 3844334, at *4.)

23 Plaintiffs will prove that CalPERS did not distribute information about the risk of loss,
24 IDR transfer, no refunds, or other terms prior to contracting.

25 **Plaintiffs Will Prove That Rescission is a Remedy Available on Class Action,**
26 **Especially in a Fiduciary Context.** Plaintiffs will prove that class actions for rescission of
27 standardized adherence contracts that omit or misrepresent material terms are authorized.
28 (*Vasquez v. Superior Court* (1971) 4 C3d 800; accord, *Richmond v. Dart Industries, Inc.* (1981)

1 29 C3d 462.), *Occidental Land, Inc. v. Sup. Ct.* (1976) 18 C3d 355, and *Massachusetts Mutual*
2 *Life Ins. Co. v. Sup. Ct.* (2002) 97 CA4th 1282.)

3 **Plaintiffs Will Prove That the Amount of Restitution, Interest, and Damages on**
4 **Rescission is Readily Established From CalPERS' Records On a Class-Wide Basis with**
5 **Individual Determinations Needed.** Plaintiffs will prove that the amount of restitution after
6 rescission with interest is readily available from CalPERS' records. Through partial discovery,
7 Plaintiffs ascertained the identity of at least 177 safety officers who similarly suffered total losses
8 of approximately \$11,250,000 from 2003 to 2014, without including interest. CalPERS provided
9 them no advantage, no increase, and no benefit from the optional investment. CalPERS also used
10 the same practice and policy to cause at least another 70 officers to suffer partial losses of
11 \$6,900,000 from 2003 to 2014, without including interest. Partial rescission is available for these
12 incremental contracts. See *infra*. Plaintiffs seek interest too.

13 **VIII. Rescission Legal Issues**

14 **Plaintiffs Will Prove that Partial Rescission is Available.** Plaintiffs will prove that
15 since the contract is apportioned by increases or time, partial rescission is available as this is a
16 severable or divisible contract. (*IMO Development Corp. v. Dow Corning Corp.* (1982) 135
17 CA3d 451; *Howell v. Courtesy Chevrolet, Inc.* (1971) 16 CA3d 391.) Plaintiffs will prove that
18 Plaintiffs who suffered partial losses can rescind the contracts for that part of the investment that
19 they receive no increase for. (*Simmons v. Cali Institute of Tech* (1949) 34 C2d 264.)

20 **Plaintiffs Will Prove that There was a Mistake of Law.** Plaintiffs will prove that
21 CalPERS represented that it lawfully could provide increases without a risk of loss but withheld
22 that it knew before contracting that the law may not provide for increases on IDR. CalPERS
23 wrote a waiver *for the first time* to those who still had unpaid installments, adding new terms in
24 a 2-page waiver *after the fact*:... "Government Code 21039 is clear in stating that the payments
25 are suspended on a prospective basis meaning there will be no refund of payments that were
26 made prior to this election. I understand there will be no refund of payments already made..."
27 and then request that Andert and Brown sign away their rights to refund. *The existence of the*
28 *waiver used only after the fact shows the legal mistake.* The existence of a form waiver that

1 CalPERS first used after the injured Plaintiffs retired with IDR shows that CalPERS knew that
2 the original contract did not include all material terms and was defective. The existence of the
3 waiver shows that CalPERS was aware of Plaintiffs' legal and factual mistake and lack of
4 consent at the time of the original contract, and tried to fix it piecemeal after the fact *in*
5 *CalPERS' favor*. The waiver establishes the grounds for legal mistake and rescission across the
6 class. A misapprehension of the law by class members that there were refunds on IDR and
7 increases, and that CalPERS was aware of the Plaintiffs misapprehension at the time of
8 contracting, but which CalPERS did not rectify before contracting." (*Civ. Code*, §1578.)

9 **Plaintiffs Will Prove That Rescission of Waiver for Suspending Installment is**
10 **Appropriate.** Plaintiffs will prove that the "no refunds" term in the waiver cannot be inserted
11 after the fact. Lacking consideration and consent, the waiver cannot retroactively impose contract
12 terms. Especially as CalPERS is a fiduciary and sole provider of the IDR, an after the fact waiver
13 is unconscionable, without consent,² and rescindable.

14 **Plaintiffs Will Prove That CalPERS Cannot Inquire Into Motive, and Motive for**
15 **Choosing Rescission is Irrelevant.** Plaintiffs will prove that class members' motive in choosing
16 rescission is irrelevant (*Conlin v. Osborn* (1911) 161 C 659; *Siegel v. Lewis* (1946) 74 CA2d 86.)

17 **Plaintiffs Will Prove That Individual Inquiries are Not Relevant and Rescission is a**
18 **Legal Claim, with No Balancing of Equities.** Rescission is a statutory and legal remedy. It is
19 not personal and not an equitable action. No balancing is required. (4 Witkin, *Cal.Proc.* 5th
20 (2008), *Pleading*, 541, p. 668.)

21 **Plaintiffs Will Prove There Was No Waiver of a Right to Rescind.** Plaintiffs will
22 prove that there was no waiver of a right to rescind. Each rescinded promptly after knowledge of
23 the right to rescind. Any delay was caused or generated by CalPERS' acts or omission.

24 **Plaintiffs Will Prove the Contract is Unconscionable.** Plaintiffs will prove that the loss
25 provision does not fall within the reasonable expectations of a contract with a fiduciary to
26

27 ² The waiver itself is misleading as it was supposedly a request to suspend future installments,
28 but the language of CalPERS' waiver also sought something very different, an agreement to deny
"refunds" of prior paid money.

1 provide "present value" increases." Plaintiffs are unduly oppressed and the contracts are
2 "unconscionable." Both the terms of the contract and the situation of the subscribing party are
3 relevant to a determination of enforceability. (*Therma-Coustics Manufacturing, Inc. v. Borden,*
4 *Inc.* (1985) 167 CA3d 282.)

5 **IX. Delayed Discovery and Delayed Accrual Legal Issues**

6 **Plaintiffs Will Prove Delayed Accrual: Mistake and Rescission In a Fiduciary**

7 **Relationship.** Plaintiffs will prove delayed accrual and discovery across the class from reliance,
8 failure to disclose, mistake, omission, misrepresentation, adversity, rescission, *et al* in a fiduciary
9 context.³ (See *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1070) 1 C3d 586, 598;
10 *Hobart v. Hobart Estate Co.* (1985) 26 C2d 412, 439-440; *April Enterprises, Inc. v. KTTV*
11 (1983) 147 CA3d 805.)

12 **Plaintiffs Will Prove Delayed Accrual For the Claims Arising out of Mistake,**

13 **Breach of Fiduciary Duty, Fraud.** Plaintiffs will prove delayed accrual regarding or arising
14 from mistake, fiduciary duties, and other grounds, such that they are entitled to delay the
15 discovery and accrual of the claims.

16 **Plaintiffs Will Prove Delayed Accrual and No Statute of Limitations.** Although
17 Plaintiffs filed a government claims form prior to instituting action, Plaintiffs are not limited in
18 the scope of the class to those time periods. There is no relevant statute of limitations when
19 CalPERS owes money to a member. (*Government Code*, §§20160, 20164.) No statute of
20 limitations applies to fiduciaries' errors, especially undisclosed errors. Plaintiffs were not put on
21 notice and did not know that CalPERS failed to inform. Plaintiffs are entitled to rely on CalPERS
22 and the presumption of reliance benefits all of the class unless CalPERS can prove that it
23 informed Plaintiffs that it was adverse or the contracts were rescindable. There is no evidence
24 that CalPERS ever informed anyone about the loss or no refunds until after already injured.

25 The failure to inform is an error or omission by a fiduciary that was not disclosed.

26 ³ CalPERS is a fiduciary. It is unreasonable to expect Plaintiffs to continually monitor whether
27 CalPERS is performing some act inconsistent with terms in a contract. ...the discovery rule
28 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 CalPERS owes lifetime substantive duties to inform and correctly pay the benefits, which are
2 substantive duties. (*City of Oakland v. PERS* (2002) 95 Cal.App.4th 29.)

3 **X. Common Facts**

4 Plaintiffs will prove that common facts predominate and that any individualized issues
5 and CalPERS' defenses are manageable as described below.

6 **Trial Evidence – Documentation, Spreadsheets, Limited Number of Witnesses,**
7 **Evidence Code Section 776 Examination.** Plaintiffs propose to introduce documents, and the
8 testimony of less than fifteen (15) witnesses including at most five (5) CalPERS' current and
9 former employees and representatives, including PMK (persons most knowledgeable) deponents,
10 the 7 class representatives and Tim Healy, expert witnesses, and a small number of other
11 witnesses in live testimony and including pursuant to *Evidence Code* section 776 and/or prior
12 deposition testimony. (*Code Civ. Proc.*, §2025.620)

13 However, the testimony is not extensive and not time consuming, and will focus on
14 authenticating the documents, CalPERS' standardized policy, practice or custom of informing
15 individuals by written materials, CalPERS' standardized policy, practice or custom of contracting
16 on standardized forms, CalPERS' policy, practice or custom to pay no refunds and pay no
17 increases when an individual retired with IDR.

18 **Testimony of Class Representatives and Class Members.** Named Plaintiffs will testify
19 as described in the concurrently filed Declarations. As the events are largely undisputed and
20 backed up by CalPERS' records, the testimony will be efficient.

21 Plaintiffs will offer the testimony of the class representatives live to the extent in dispute
22 including by offering testimony of Plaintiffs Robert Marzec, Rachel Healy, Benjamin Esparza,
23 Jeffrey Andert, Neil MacLaren, Randy Slaughter, Henry Brown, Timonthy Healy (husband of
24 Plaintiff Rachel Healy), and other percipient and expert witnesses, proof through CalPERS'
25 records, the testimony of CalPER' employees.

26 **XI. Common Facts of CalPERS' Standard Practice and Forms**

27 **Plaintiffs Will Prove that CalPERS Was the Sole Source of Official Information.**

28 Plaintiffs will prove the CalPERS was the sole source of official information on CalPERS'

1 issues.

2 **Plaintiffs Will Prove CalPERS' Standardized Policy, Practice, and Use of**
3 **Standardized Forms.** CalPERS exclusively used standardized forms contracts. No substantive
4 oral communications were used. CalPERS' employees told class members to use and sign the
5 forms contracts.

6 **Plaintiffs Will Prove That CalPERS Used the Written Contract as the Means of**
7 **Communication.** CalPERS advertises through only one channel, its written publications. No
8 other correct information was provided or disclosed by CalPERS before contracting.

9 **Plaintiffs Will Prove That CalPERS Did Not Offer In-Person Communication.**
10 Plaintiffs will prove that CalPERS had a policy or practice of referring inquiries to the official
11 booklet and did not provide advice to individual before contracting for airtime military or other
12 present value investments. Plaintiffs will also prove that CalPERS did not refer inquiries to any
13 other agency other than CalPERS.

14 **Plaintiff Will Prove that CalPERS Made No Other Substantive Communications**
15 Plaintiffs will prove that CalPERS made no other substantive communications about these risks
16 across the class, other than the standardized form communications.

17 **Plaintiff Will Prove That There Was No Alternative Way that CalPERS Disclosed**
18 **the Issues.** Plaintiffs will prove that CalPERS made no alternative communications about these
19 risks across the class, other than the standardized publications. The Declarations say that
20 CalPERS required the use of the forms.

21 **Plaintiffs Will Prove Plaintiffs Did Not Have Access to All the information**
22 **Necessary Before Contracting.** Before contracting, none of the Plaintiffs or class members had
23 CalPERS' assessment of no refunds available. CalPERS only disclosed the no refunds policy
24 after the fact in its attempt to get a waiver of refunds form Plaintiffs.

25 **XII. Common Facts of CalPERS' Misrepresentations and Omission Communicated**
26 **Across the Class**

27 **Plaintiffs Will Prove That CalPERS Used Standard Practice and Policy Forms**
28 **Across the Class.** Plaintiffs will prove that *CalPERS followed the same policies, procedures,*

1 *and processes for investing* in military/airtime. As a policy, custom, and practice, CalPERS used
2 standardized communications publications, and nonnegotiable forms to inform class member
3 their rights and obligations, including regarding contributions to service and industrial disability
4 retirement (IDR).

5 **Plaintiffs Will Prove That CalPERS' Standardized Representations and**
6 **Standardized Documents Contained the Same or Similar or Identical Material**
7 **Misrepresentation and Omissions and Were Communicated Across the Class.** Plaintiffs will
8 show that the same or similar material omission, misrepresentations have actually been
9 communicated to each member of a class.

10 **Plaintiffs Will Prove it An Adhesion Contract.** Plaintiffs will prove that CalPERS'
11 standardized forms were adhesion contractd that CalPERS, as the party of superior bargaining
12 strength imposed and drafted. (*Perdue v. Crocker National Bank* (1985) 38 C3d 913; *Poublon v.*
13 *C.H. Robinson Company* (9th Cir. 2017) 846 F.3d. 1251.)

14 **Plaintiffs Will Prove That the Language in the Contract Was Ambiguous.** Plaintiffs
15 will show that CalPERS used ambiguous terms or terms that were used contrary to common
16 understanding such as "present value," "service credit," "increases," "may not benefit,"
17 "considering" and other terms. (*United Multiple Listing Sesrvice, Inc. v. Bernstein* (1982) 134
18 CA3d 486.)

19 **Plaintiffs Will Prove the Misrepresented or Omitted Terms were Material.** The
20 contracts and publications attached to the declaration show that material false representations
21 were made to all members of the putative class.

22 **Plaintiffs Will Prove There Was No Objective Agreement on No Refunds.** Plaintiffs
23 will prove that the objective manifestations of agreement or objective expressions of intent
24 would lead a reasonable person to believe increase without risks of loss, and that it did not
25 disclose a risk of no refunds, or any IDR offset. (*Winograd v. American Broadcasting Co.* (1998)
26 68 CA4th 624, as modified, (Jan. 7, 1999).

27 **Plaintiffs Will Prove the Signature and the Steps Indicate Plaintiffs Read the**
28 **Contracts.** Plaintiffs will prove that CalPERS required each investor to read material before

1 requesting additional material in sequential steps and then required each investor to sign a
2 standardized form before completing the sales transaction and the contract contain the omissions
3 misrepresentations and inadequate disclosures. (*Occidental Land, Inc. v. Superior Court* (1976)
4 18 Cal.3d 355, 361.)

5 **Plaintiffs Will Prove Risk of Loss and No Refunds was Material.** Plaintiffs will prove
6 that materiality is an objective, not a subjective, element. (*See, e.g., Vasquez v. Superior Court*
7 (1971) 484 P.2d 964.)

8 **XIII. Common Proof of Lack of Consent to Loss, Risk, No Refunds, Transfer to**
9 **Employer, Adverse Terms**

10 **Plaintiffs Will Prove that Consent is Required.** Since this was an optional investment
11 of Plaintiffs' private outside monies, Plaintiffs will prove that consent was required to the
12 material terms of the deal.

13 **Plaintiffs Will Prove That No Contract Formed.** Plaintiffs will prove that no contract
14 formed because there never was a meeting of the minds on all material points. (*American*
15 *Employers Group, Inc. v. Employment Development Dept.* (2007) 154 CA4th 836; *Elyoudayan v.*
16 *Hoffman* (2003) 104 CA4th 1421; *Civ. Code*, §1580.)

17 **Plaintiffs Will Prove Rescission Based on No Consent.** Plaintiffs assert that no
18 agreement on the material and essential terms was ever reached, the parties lacked contractual
19 intent, and thus no contract formed between Plaintiffs and CalPERS. If no consent, rescission is
20 appropriate. (*Civil Code*, §1566.) Plaintiffs' apparent consent was not real as it was obtained
21 through duress, menace, fraud, undue influence, or mistake (*Civil Code*, §1567)

22 **Plaintiffs Will Prove That There Was No Agreement and No Consent on the Object**
23 **of the Investment Contract.** Plaintiffs will prove that the objective language of the contract
24 indicated that the investment provided increases and that they were not informed of and did not
25 consent to a risk or loss or no refunds. (*Civ. Code*, §1595.) Now CalPERS says that they bought
26 "service credit" that it changed into normal contributions that were lost on IDR and did not
27 necessarily provide increases and that there are no refunds after IDR. CalPERS did not disclose
28 those terms. But if increases or refunds are impossible as CalPERS argues, or so vaguely

1 expressed, the entire contract is void and restitution should be provided, with interest. (*Civ.*
2 *Code*, §1598.) If no consent, rescission is appropriate. (*Civ. Code*, §1566.)

3 **Plaintiffs Will Prove No Consent and No Formation.** Plaintiffs will prove that in the
4 terms' ordinary and popular sense, there was no disclosure or loss, no refunds, IDR offset etc.
5 (*Civ. Code*, §§1644, 1645). Plaintiffs will prove that CalPERS' ambiguous language like "present
6 value" must be interpreted to mean increases as the promisee understood it (*Civ. Code*, § 1649).
7 (*Badie v. Bank of America* (1998) 67 CA4th 779.)

8 **Plaintiffs Will Prove that Plaintiffs Did Not and Could No Consent to Material**
9 **Adverse Terms That Were Undisclosed.** Plaintiffs will testify the contracts did not disclose so
10 they were not informed of, did not agree, and did not consent to the undisclosed material terms
11 of risk, loss, risk of no increases, no refund, IDR offset, transfer to CalPERS or the employer,
12 and other material terms, that are expressly contrary to "increases" and "present value."

13 **Plaintiffs Will Prove Plaintiffs' Subjective Understanding is Not Relevant.** Plaintiffs'
14 subjective understanding of the standardized form contracts and other related documents is
15 irrelevant, including as the objective language controls. (*Marzec, et al. v. CalPERS* (2015) 236
16 Cal.App.4th 889, 914-916).

17 **XIV. Common Facts of Lack of Disclosure**

18 **Plaintiffs Will Prove that CalPERS' Breaches of Fiduciary Duty of Loyalty and**
19 **Good Faith Proximately Caused Damages to Plaintiffs, Allows Rescission.** Plaintiffs will
20 prove that CalPERS' breach of the duty to act fairly and in good faith caused Plaintiffs' damages,
21 Plaintiffs will prove that CalPERS took adverse positions, took advantage, failed to disclose,
22 transferred funds, took the money, and benefitted itself without Plaintiffs' consent. CalPERS'
23 adverse position and advantage make the contract voidable. (*Hittle, supra.*) Plaintiffs did not bear
24 the risk.

25 **Plaintiffs Will Prove that CalPERS Breached its Fiduciary Duties to Disclose.**
26 Plaintiffs will prove that CalPERS breached its fiduciary duties including when it took
27 advantage, acted adverse, took Plaintiffs money, used it to fund the IDR or offset the employer,
28 failed to adequately inform, and omitted material terms in the contracts, publications and other

1 written materials. (*Vasquez, supra; Occidental Land, Inc., supra; Massachusetts Mutual Life,*
2 *supra; Estate of Gump* (1991) 1 CA4th 582; *Mirkin v. Wasserman* (1993) 5 C4th 1082; *Caro v.*
3 *Proctor & Gamble Co.* (1993) 18 CA4th 644.)

4 Instead of informing Plaintiffs, it sought a waiver after the fact. CalPERS' breaches of
5 duties are considered undue influence sufficient to allow rescission. (*Hittle, supra; Vasquez,*
6 *supra. Marzec v. CalPERS,* (2015) 236 CA4th 889, 914-916.)

7 **Plaintiffs Will Prove that CalPERS Breached its Duty to Disclose, Caused Damages**

8 Plaintiffs will prove that CalPERS breached this duty by failing to disclose material facts,
9 including that Plaintiffs could (i) lose all or part of their investment; (ii) contribute more to their
10 IDR or other retirement benefits than the 5% to 9% of his or her *earnings from salary*; (iii) be
11 forced to contribute their private funds to offset their employers' existing IDR or other account or
12 liability; (iv) the change in the source and percentage of funding of their defined benefit; (v) that
13 the Military/ARSC/PVC was not "present value" and "cost neutral"; (vi) that losses were risked;
14 (vii) that more funds were provided; and (vi) related unknown effects.

15 Plaintiffs will prove that CalPERS has not produced a document class wide before
16 contracting that provides "specific notice" of the material terms before contracting or that shows
17 a lack of reliance. No evidence shows that Plaintiffs were informed that CalPERS turned adverse
18 against them before contracting.

19 **Breaches of Fiduciary Duty to Account, Proximately Causing Damages to Plaintiffs.**

20 Plaintiffs will prove that CalPERS breached its duty to account when some of the money was
21 transferred or accounted for to benefit anyone other than solely Plaintiffs, failed to price the
22 Military/ARSC/PVC investment as based on "present value" increases and failed to pay the
23 increases, or the refund and failed to inform or otherwise correct that error

24 **CalPERS Breached Harmed Plaintiffs.** Plaintiffs will prove that CalPERS' breach of its
25 fiduciary and other duties proximately and directly caused Plaintiffs damages and detriment, the
26 loss of their investments, an IDR or other offset, attorney fees, costs, and other losses or
27 detriments, including as reliance is presumed

28 **Rescission Arising From Breach of Fiduciary Duties.** Plaintiffs across the class are

1 entitled to rescission based on CalPERS' breach of fiduciary duties. See Hittle supra.

2 **XV. Common Facts Entitling Class to Rescission**

3 **Rescission.** Plaintiffs will prove that material misrepresentations were made across the
4 class and all class members are entitled to a presumption of reliance. Plaintiffs invested to get
5 "increases" in their future defined benefits, but Plaintiffs obtained something substantially
6 different from that which each Plaintiff was led to expect. (*Civil Code*, §§1688, *et seq.*, including
7 §1689(b)(7).)

8 **Plaintiffs Will Prove Mistake.** Plaintiffs will prove that Plaintiffs were uninformed and
9 mistaken about (1) the risk of loss of the investment; (2) the IDR offset; (3) an undisclosed
10 change in the source of funding of their defined benefits; (4) increase in their IDR contributions
11 in amount and in source; (5) loss of funds or other reduction if they suffered an IDR; and (6)
12 related other mistakes identified in the Complaint, and points and authorities and declarations.

13 **Plaintiffs Will Prove Their Mistake Was Not Caused by the Neglect of a Legal Duty**
14 on the part of the Plaintiffs, but due to CalPERS' acts or omissions.

15 **Plaintiffs Will Prove that Plaintiffs Were Misinformed and Had An Unconscious**
16 **Ignorance or Forgetfulness** of a fact past or present, material to the contract.

17 **Plaintiffs Will Prove They Were Misinformed and Had Belief in the Present**
18 **Existence of a Thing Material** to the contract, which does not exist, or in the past existence of
19 such a thing, which has not existed. (*Civ. Code*, §1577.) Plaintiffs invested based on CalPERS'
20 representations that lawfully could provide "present value" increases, even on disability or IDR.

21 **Plaintiffs Offer Proof of CalPERS' Duress Menace, Fraud, Undue Influence.**
22 Plaintiffs will prove Plaintiffs' mistake across the class arising from for duress, menace, fraud,
23 undue influence, caused by CalPERS.

24 **Plaintiffs Will Prove Mistake of Law.** Plaintiffs will prove that Plaintiffs were entitled
25 to a presumption of reliance on CalPERS and that CalPERS would provide for "present value"
26 increases for their investment.

27 Since CalPERS stopped providing refunds on IDR in 1984, CalPERS knew or should
28 have known that refunds were not provided and then specifically inform the investor of that

1 material term. Since at the latest 1991, CalPERS knew or should have known that it needed to
2 adequately inform safety officers about the risk or loss and risk of no refund if the safety officer
3 retired with IDR, especially as CalPERS was promoting the investments as "present value"
4 increases in future monies. Therefore either both parties had a mutual mistake of law, or
5 Plaintiffs made a mistake of law that CalPERS was aware of and should have rectified,
6 especially by informing Plaintiffs *before contracting*.

7 Based on CalPERS' omission and misrepresentations, Plaintiffs are presumed to have
8 relied and have misunderstood or misunderstood the law at the time of contracting for
9 military/airtime regarding no refunds, no increase, IDR offset, transfer to employer, and other
10 omission, misrepresentations, or mistakes of law identified in the Third Amended Complaint,
11 and points and authorities and declarations, but CalPERS knew the "correct" law but did not
12 rectify the other party's misunderstanding before contracting (*Civil Code*, §1578.) and instead in
13 an unconscionable, after-the-fact, waiver first disclosed the "no refunds" and risk of loss, et al.

14 In addition, Plaintiffs offer proof that Plaintiffs were not informed and were misinformed
15 by CalPERS and therefore mistaken (through no fault of their own) regarding other material
16 terms including that (i) the investments in service credit were treated as "normal contributions"
17 in the job at the time of purchase; (ii) that CalPERS assumes the monetary value can be lost on
18 IDR when the "service credit" is not counted without informing the class member before; (iii)
19 that the investment funds would be available to fund the IDR or to offset the employer's IDR
20 costs; (iv) that the investment could be lost; (v) that the IDR funding could be changed; (vi) that
21 the defined IDR benefit would be funded from sources other than their earnings; and (vii) other
22 mistakes,

23 Plaintiffs satisfy both "prongs" of the mistake of law statute.

24 Either both parties had a mutual mistake of law, or Plaintiffs made a mistake of law that
25 CalPERS was aware of and should have rectified, especially by informing Plaintiffs *before*
26 *contracting*. Plaintiffs satisfy both "prong" of the mistake of law statute.

27 **Proof of the Element of Causation or Presumption of Reliance.** To the extent
28 causation or presumption of reliance is involved, reliance can be presumed under Vasquez et al,

1 and if not presumed, Plaintiffs will prove that reliance can be inferred from the records, from
2 statistical analysis (*infra*), or otherwise testimony can be elicited.

3 **Plaintiffs Will Prove That They Are Entitled to Rescission Based on Failure of**
4 **Consideration.** Plaintiffs will prove that Plaintiffs have received no value from their investment.
5 The consideration for the Plaintiffs' obligation fails, in whole or in part, through the fault of
6 CalPERS, the other party to the contract. (*Civil Code*, §1689(b)(2).) The consideration for the
7 Plaintiffs' obligation became entirely void from any cause. (*Civil Code*, §1689(b)(3).) The
8 consideration for the Plaintiffs' obligation fails in a material respect from any cause before it is
9 rendered. (*Civil Code*, §1689(b)(4).)

10 **Plaintiffs Will Prove No Consideration and Consideration Failed.** Plaintiffs will
11 prove that Plaintiffs were already entitled to the 50% IDR before contracting. They did not
12 receive any increase. The contracts provide them no good consideration. (*Civ. Code*, §1605.)

13 **Plaintiffs Will Prove They Are Entitled to Rescission For Lack of Consideration.**
14 Plaintiffs will prove that *Civil Code* §1689 allows rescission. Since service credit is not counted
15 in IDR, the service credit purchase becomes entirely void. CalPERS' consideration also fails as
16 each class member fails to receive a commensurate benefit for their investment. Some receive no
17 benefit at all. Plaintiffs receive no consideration or nothing new from the contract. They receive
18 only the 50% IDR that they were already entitled to before contracting. They contracted for
19 increases, without any known risk of loss. To say that they received "service credit" of no value
20 to them also means that they received no value or consideration. § 1688-1689 of the *Civil Code*.

21 **XVI. Plaintiffs Will Prove That Rescission Across the Class is Appropriate**

22 **Plaintiffs Will Prove that Plaintiffs are Allowed to Rescind Across the Class.**
23 Plaintiffs will prove up that the class is entitled to rescission of standardized adherence contracts
24 that omit or misrepresent material terms.

25 CalPERS' representation that the investment were priced at present value and would
26 provide increases was false, the "no refunds" and loss terms were omitted, and CalPERS
27 concealed the fact that it knew that it would not give refunds before contracting in part to induce
28 plaintiffs to purchase their investment, while waiting with a waiver of refunds after the fact in

1 order to suspend the future installments. Although the amount of the increase was estimated,
2 CalPERS' "present value" or no-risk contract must be construed to mean that CalPERS' "present
3 value" or no-risk estimated increase reflected an honest estimate of the actual increase that safety
4 members would receive instead, as alleged, that CalPERS' higher estimated increase were
5 calculated to deceive or deceived potential investors while withholding the information that the
6 increases were not guaranteed, that the money could be lost and that there were "no refunds".
7 Indeed, the plaintiffs invested for "present value" or no-risk increases and paid the full principal
8 of the investment, but CalPERS apparently tried to sell them "service credit" that it *at some point*
9 turned into normal contributions without notice, which it would use fund and offset something
10 different, the existing IDR allowance, and then transfer the money to itself or to the employers
11 benefit without providing an increase to Plaintiff. Thus, the standardized forms contract used
12 across the class supports the allegation that CalPERS failed to disclose material terms, offered
13 false "present value" or no-risk estimated increases and did not disclose the risk of loss or "no
14 refunds". Especially as CalPERS knew of this inadequate disclosure and created a much longer,
15 much more detailed waiver of "refunds" as part of a deceptive suspension of future installment
16 for those already on IDR. A question whether CalPERS fraudulently represented,
17 misrepresented, the estimated increases and omitted terms of loss and no refunds in the contract
18 at the time plaintiffs invested remains an issue common to the class. (*Occidental Land, Inc. v.*
19 *Superior Court* (1976) 18 Cal.3d 355, 361–62.)

20 CalPERS' arguments that even if the alleged written misrepresentations were made to
21 each investor, a class suit is not appropriate because at trial each plaintiff will be required to
22 separately prove justifiable reliance is without merit. The "present value" or no-risk increase in
23 pension, risk of loss, and no refunds are manifestly material factors in the investment. An
24 inference of reliance arises across the class if material false representations were made to persons
25 whose acts thereafter were consistent with reliance upon the representation. That principle
26 controls the present case. Because the investments made by plaintiffs were acts consistent with
27 their reliance on "increases", justifiable reliance may be established on a common basis.
28 (*Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363.)

1 **Plaintiffs Will Prove the Elements of Rescission and That They are Entitled to**

2 **Rescind.** Plaintiffs across the class establish the following facts to obtain rescission of a contract

3 • (1) each safety officer was entitled to full information about the risks from
4 CalPERS before contracting and could not take into account the risk of loss that was not
5 disclosed so necessarily made a mistake regarding a basic assumption of receiving "present
6 value" increases upon the class member made the contract;

7 • (2) the mistake about the not knowing and not being able to take into
8 consideration the risk of loss on IDR and "no refunds" has a material effect upon the agreed
9 exchange of performances that is adverse to the class member;

10 • (3) the safety member investing in "present value" or no-risk increases is a
11 mistaken party does not bear the risk of loss on IDR or "no refunds" because the class member is
12 already entitled to fiduciary duties of full information and already fully entitled to the 50% IDR
13 before investing the mistake; and

14 • (4) the effect of the mistake is to make the class member lose his investment, pay
15 for a share of IDR that he or she would not otherwise have to pay and loss the increase and value
16 of their money, such that enforcement of the contract would be unconscionable.

17 **XVII. Common Facts About Delayed Discovery And Delayed Accrual, Mistake,**

18 **Misrepresentations, Nondisclosure in Fiduciary Context**

19 **Plaintiffs Will Prove Delayed Accrual: Mistake and Rescission In a Fiduciary**

20 **Relationship.** Plaintiffs will prove that Plaintiffs assert mistake and rescission in a fiduciary
21 context, and discovery and accrual rules may be governed by the delayed discovery and delayed
22 accrual rule when the defendant owed fiduciary duties to the plaintiff.⁴ (See *United States*
23 *Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 598; *Hobart v. Hobart Estate*

24
25 _____
26 ⁴ When the defendant is a fiduciary, courts have found it was unreasonable to expect "that a
27 contracting party in such situations has a duty to continually monitor whether the other party is
28 performing some act inconsistent with one of many possible terms in a contract. ... Specifically,
we hold the discovery rule may be applied to breaches which can be, and are, committed in
secret and, moreover, where the harm flowing from those breaches will not be reasonably
discoverable by plaintiffs until a future time." (*April Enterprises, Inc. v. KTTV, supra*, at 832.)

1 Co. (1985) 26 Cal.2d 412, 439-40; *April Enterprises, Inc. v. KTTV, supra.*)

2 **XVIII. Common Facts in Class Action: Plaintiffs Will Prove Class is Ascertainable:**

3 **Class definition is Clear.** The class which Plaintiffs seek to represent is compose of and
4 defined as follows: All persons (and their beneficiaries or successors in interest) who are or once
5 were employed as a state safety Member, local safety Member, or in a job covered for the
6 potentiality of industrial disability retirement ("IDR") under a system, plan, or fund administered
7 by the California Public Employees' Retirement System ("CalPERS"), who deposited or will
8 deposit funds (or had or will have their employer or others deposit funds on their behalf)
9 associated with (i) "Military Service Credit", including pursuant to *Government Code*, §§21024,
10 20127 and 21029 and equivalent, predecessor, or successor statutes, (ii) "Additional Retirement
11 Service Credit" ("ARSC"), including pursuant to *Government Code*, §20909, or (iii) or other
12 Present Value Service Credit ("PVC"), including pursuant to *Government Code*, §§21006-21008,
13 21013, 21020.5, 21023.5, 21025.5 and 21030-21031 and equivalent, predecessor or successor
14 statutes, (collectively referred to as "Military/ARSC/PVC") with CalPERS pursuant to CalPERS'
15 standardized forms or publications, and who later were retired with IDR (including "service
16 retirement payable" IDR), whether before, at or after age 50, and who (1) receive or will receive
17 no benefit associated with funds deposited for Military/ARSC/PVC, or (2) receive or will receive
18 no increased allowance associated with funds deposited for Military/ARSC/PVC, or (3) do not
19 receive or will not receive full value for funds deposited for Military/ARSC/PVC, or (4) do not
20 receive a proportionate increase in their retirement allowance commensurate with the estimated
21 increases represented by CalPERS at the time of "contracting" for incremental amounts of
22 Military/ARSC/PVC; or (5) had or will have their Military/ARSC/PVC funds transferred to
23 benefit their employer, CalPERS, or others, or (6) had or will have their Military/ARSC/PVC
24 funds transferred to offset the cost of IDR and/or other defined benefits or accounts, or (7) had or
25 will have their Military/ARSC/PVC funds transferred to reduce CalPERS' or the employers' cost
26 associated with IDR and/or other defined benefits.

27 **Plaintiffs Will Prove CalPERS Already Responded with Information on Class**

28 **Members.** Through partial discovery, Plaintiffs ascertained the identity of at least 137 safety

1 officers who similarly suffered total losses of approximately \$11,250,000 from 2003 to 2014,
2 without including interest. CalPERS provided them no advantage, no increase, and no benefit
3 from the optional investment. CalPERS also used the same practice and policy to cause at least
4 another 70 officers to suffer partial losses of \$6,900,000 from 2003 to 2014, without including
5 interest *See concurrently filed information under a protective order*

6 **Plaintiffs Will Prove that Common Legal and Factual Issues Predominate Over Any**
7 **Individual Issues.** Plaintiffs will prove that common questions of law predominant and involve
8 (1) the scope of CalPERS' fiduciary duties, (2) the adequacy of the contract language (3) whether
9 CalPERS breached its fiduciary duties, (4) was there a legal mistake, including about "no
10 refunds", (5) the purpose of the contract; (6), whether "no refunds" was a term in the original
11 contract, (7) what is "present value", (8) whether Plaintiffs received consideration, (9) is
12 CalPERS required to gain consent of material terms, (10) does the existence of a waiver of "no
13 refunds" after the fact indicate that CalPERS knew the original contract did not contain the term
14 "no refunds" and (11) other legal question. The common question of fact predominate and
15 include (1) did Plaintiffs sign the contract; (2) retire on IDR; (3) receive an increase; (4) and
16 other facts most of which are not in issue, or resolved by documents.

17 **Plaintiffs Will Prove that Named Plaintiffs' Claims Are Typical of Those of the**
18 **Putative Class Members.** Plaintiffs will prove that each named Plaintiff's interest and claim is
19 similar to those of the other class members. (See *Daniels v. Centennial Group, Inc.* (1993) 16
20 CA4th 467, 473; *B.W.I. Custom Kitchen v. Owens-Illinois* (1987) 191 CA3d 1341, 1347.) *See*
21 *Duran.*)

22 **Plaintiffs Will Prove That Named Plaintiffs Will Fairly and Adequately Represent**
23 **the Class.** Plaintiffs will prove that each named Plaintiff does "not have a conflict of interest
24 antagonistic to the other class members. (*McGhee v. Bank of Am.* (1976) 60 CA3d 442, 450;.)
25 Plaintiff's attorney is experienced in pension related class action litigation, and qualified to
26 prosecute this action.

27 **XIX. Alternative Methods of Proof**

28 **Alternatively, Plaintiffs Will Prove Plaintiffs and Therefore the Class Actually**

1 **Relied on CalPERS, Including When Signing The Contracts, Transferring Their**

2 **Retirement Funds.** See Declarations, see presumption of reliance below. Plaintiffs relied on
3 CalPERS.

4 **Alternatively, Plaintiffs Will Prove The Class is entitled to Rescission Based on**
5 **Constructive Fraud. Alternatively, Plaintiffs Will Prove Reliance issue in Nondisclosure**
6 **and Misrepresentation by a Fiduciary**

7 **Alternatively, Plaintiffs Will Prove Reliance Even Outside the Fiduciary Context,**
8 *(Occidental.)*

9 **Plaintiffs Will Prove Presumption of Reliance Shifts Burden Onto CalPERS to**
10 **Prove Nonexistence of Presumed Fact of Reliance.** The effect of the presumption of reliance
11 shifts the burden of proof and imposes upon CalPERS the burden of proof as to the nonexistence
12 of the presumed fact across the class. (*Evid. Code*, §606; see *People v. Dubon* (2001) 90
13 Cal.App.4th 944; *Estate of Gelonese* (1974) 36 Cal.App.3d 854, 862-863.) CalPERS will be
14 required to persuade the trier of fact of the nonexistence of the presumed fact by proof
15 "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Sheehan v.*
16 *Sullivan* (1899) 126 Cal. 189, 193; *Evid. Code*, §606.)

17 **Plaintiffs Will Show that CalPERS Cannot Rebut the Presumption.** CalPERS has to
18 produce some substantive evidence, such as a document or communication that it distributed
19 "class wide," CalPERS cannot rebut the presumption of class reliance by hoping to find some
20 insubstantial evidence or by seeking to depose each individual class representative (or class
21 member).

22 **Plaintiffs Will Prove Plaintiffs Acted Consistent with Reliance on CalPERS.** All of
23 Plaintiffs' acts were consistent with reliance on CalPERS, including depositing their retirement
24 funds with CalPERS, mortgaging their homes, and other acts.

25 **Plaintiff Will Rebut CalPERS' Defense and Prove CalPERS Cannot Inquire Into**
26 **Individual Reliance.** In *Occidental Land*, each member of the class would not be required to
27 offer proof of his individual reliance, and thus, the common issues could predominate.
28 (*Occidental Land, Inc. v. Superior Court, In and For County of Orange* (1975) 52 Cal.App.3d

1 Plaintiffs *invested tens of thousands of dollars each* in multipage contracts that CalPERS
2 required each to read and sign

3 **XX. Alternatives to Establish Liability If Reliance is Not Presumed Across the Class**

4 **Objective Standard.** Objectively what do the terms in the all of the CalPERS
5 standardized communications including the safety handbook, the contracts, the publications, the
6 promises of "cost neutrality." The promises of increases, promises of "present value." etc.

7 **Reasonable Safety Person Standard.** What would a reasonable safety officer
8 understand form all of CalPERS' standardized communications including the safety handbook,
9 the contracts, the publications, the promises of "cost neutrality"? The promises of increases, etc.

10 **If Not Reasonable Person Standard, Then Survey Across All of the Class of Those**
11 **Who Bought Military/Airtime and Went Out on IDR.** See Statistical Analyses *infra*.

12 **Statistical Sampling.** Since CalPERS violated its duties, it is appropriate to fill in this
13 evidentiary gap by statistical sampling. The evidentiary gap could address different factual
14 questions, including for example, would safety members have done if CalPERS had provided
15 additional reliable and full information in the past (which they did not have) before the Plaintiffs
16 contracted. (It is similar to a materiality question).

17 **Representative Plaintiffs' Testimony About Reliance.** Apply the Statistical Analysis
18 across the class.

19 **Alternative Ways to Prove Undue Influence, Duress, Legal or Factual Mistake.**
20 Sampling Statistical analysis.

21 **Alternative Ways to Prove No Consent.** Sampling Statistical analysis.

22 **XXI. Statistical and Sampling Issues**

23 **Statistical Issues in Surveying the Pool of Safety Members Who Considered or**
24 **Invested in Airtime or Military Time.** If necessary or appropriate, Plaintiffs offer a random
25 sample of population regarding the disclosures or about reliance, if a presumption is not
26 presumed or rebutted. *See infra*.

27 **Little or No Variability in the Population of Safety Members Entitled to IDR Before**
28 **Contracting Relevant to the Factors of Those Offered a CalPERS Form Contract.** Since the

1 variability in safety member entitled to IDR who sought more information from CalPERS about
2 investing is small with respect to the relevant factors about investing in form contract and
3 waiver, the Duran requirements are satisfied. The variability in the population is small as all
4 safety members are entitled to IDR before investing, and all safety members are similarly
5 situated as far as each would be provided the same or similar form publications, standardized
6 forms, or contract by CalPERS. The overall population is fairly uniform and standardized
7 regarding the characteristics that are relevant for purposes of determining any factual issues in
8 this case. *See infra*.

9 **Population is Large, Random Sample, Little Bias.** If there is no presumption of
10 reliance or it is rebutted, then there is also fairly large and sufficient sample size available, if
11 necessary. The population size is sufficiently large to be accurate, the use of random sample will
12 reduce bias, and the reliability of sampling is high. *See infra*.

13 **Survey Across All Class of Those Who Bought Military/Airtime and Went Out on**
14 **IDR.** The population size could be reduced and still be reliable, including a population that
15 consists of safety members who invested in airtime, military time or other present value
16 investment, and later retired with IDR, and still apply the statistical analysis randomly with little
17 bias and high reliability. *See infra*.

18 **CALPERS' DEFENSES**

19 **Efficient Trial Plan, Including for CalPERS' Defenses.** This trial plan recognizes that
20 the manageability of CalPERS' defenses and legitimate relevant individual issues is just as
21 important as the existence of common questions uniting the proposed class. (*Duran.*)

22 **Trial Plan Takes Into Consideration CalPERS' Expected Defenses to Liability.** This
23 trial plan allots time and procedure for CalPERS to assert its defenses, generally and
24 individually. (See *Duran, supra.*) Plaintiffs' trial plan also provides CalPERS the due process
25 opportunity to challenge or litigate defenses on an individualized basis re (*Duran.*)

26 **Plaintiffs Will Allow for an Appropriate Evidentiary Trial on CalPERS' Affirmative**
27 **Defenses.** Although CalPERS does not have an unfettered right to present individualized
28 evidence in support of a defense, this class action trial management plan does not foreclose the

1 litigation of relevant affirmative defenses, even when these defenses turn on individual
2 questions. (*Duran* [class action procedure cannot be used to abridge party's substantive rights].)
3 For example, this trial management plan does not abridge CalPERS' presentation of a particular
4 defense *if it is relevant and legitimate* merely because that defense will be cumbersome to
5 litigate in a class action. (*Duran* at 35.) A class action defendant has a right to litigate all of its
6 *relevant and legitimate* defenses both under the class action rules and principles of due process.
7 (*Ibid.*)

8 **I. Managing CalPERS' Defenses**

9 This trial plan takes into account individual issues: (1) when designing the sampling plan
10 and (2) recognizes that after a sampling plan has been settled on, "the defendant is entitled to
11 raise individual issues that challenge the result of the plan as implemented." *Duran* at *34

12 **II. First, Substantive Issue of Whether CalPERS' Defenses Are Legitimate and**
13 **Relevant**

14 **CalPERS' Defenses to the Class.** Plaintiffs plan to allow CalPERS to assert all of its
15 various defenses, on an individual and class wide basis, as long as the defenses are relevant and
16 legitimate.

17 This Trial Plan gives CalPERS the right or present legitimate relevant defenses to
18 rescission. If the presumption of reliance or other law does not foreclose them, any of CalPERS'
19 class-wide defenses can informed by, managed and presented to the court, including through the
20 use of reliable statistical methods described below.

21 **III. Some of CalPERS' Expected Class-Wide Defenses At Contracting**

- 22 1. Law Provides for No Refunds. The money is subject to the PERL even if the
23 material terms are not mentioned
- 24 2. All of the PERL is incorporated, even without Plaintiffs' consent.
- 25 3. Disclosure was adequate.
- 26 4. Plaintiffs subjectively agreed to the terms.
- 27 5. No fiduciary duties to disclose.
- 28 6. No Disclosure of Material Terms Required. CalPERS does not have fiduciary

1 duties to plaintiffs to advise them about the effects of the PERL

2 7. Terms not ambiguous.

3 8. Intent to invest in service credit, not increases.

4 9. Signing contract indicates agreement to no refunds in original contract.

5 10. Plaintiffs with IDR were similarly situated as those without IDR.

6 11. CalPERS did nothing wrong, equitable claim.

7 12. Court must balance equities, and therefore each require mini-trial.

8 13. Statute of limitations bars some or all claims.

9 14. Plaintiffs who suspended installments agreed to a waiver of refunds, and waiver is
10 adequate and legal, not unconscionable.

11 15. Other defenses

12 **IV. Some of CalPERS' Expected Individualized Defense At Contracting**

13 1. CalPERS' right to prove "individualized" defenses about the individualized
14 characteristics of each class member prior to contracting, such as whether they
15 have been injured before.

16 2. Subjective understanding. CalPERS may defend that the subjective
17 understandings of each Plaintiff is relevant to learn how that they understood the
18 terms to mean that they assumed a risk of loss.

19 3. Different investment amounts or goals. CalPERS' defense that there is no
20 commonality because each was investing a different amount money or for a
21 different thing

22 4. Full knowledge of risks. CalPERS argues that the individual invested with full
23 knowledge of risk for service credit with full knowledge of the loss or no refunds,

24 5. Individual Intent. CalPERS may argue that each individual intent is different.

25 6. May have been considering disability before contracting.

26 7. May have been injured before contracting. CalPERS may argue that the individual
27 intent is different because perhaps an individual was injured before contracting.

28 8. Other defenses

1 **V. Some of CalPERS' Expected Defenses After Contracting**

- 2 1. They suffered no loss, got what they contracted for. They got IDR, all that they
3 are entitled to.
- 4 2. They get a better benefit because the 50% IDR is tax-free, and it is tax-free
5 because it is a tort recovery compensating for their injury, not their investment or
6 service credit.
- 7 3. All they are entitled to is service credit. They contracted for service credit, not
8 increases, and even though they did not receive a benefit based on service credit,
9 they receive a benefit based on normal contributions. Plaintiffs should have
10 known that the "present value" investment would be transformed into normal
11 contributions that offset the employers cost of providing IDR.
- 12 4. There was no transfer to offset employer liability, even though each employer is
13 otherwise responsible to pay the IDR that was reduced by the Plaintiffs
14 investment.
- 15 5. Granted waiver of refunds. CalPERS may argue each person who signed the
16 suspension of acknowledgement that after the fact agreed to a binding a waiver of
17 refunds on suspension of installments. Although CalPERS did not seek a waiver
18 from those who lost lump sums, the same contracts were used for both.
- 19 6. Different injuries. CalPERS may argue that each is different because different
20 injuries.
- 21 7. Can go back to work. CalPERS may argue that each is different because they may
22 go back to work and gain the full benefit of the service credit.
- 23 8. By accepting a dangerous job, they assumed the risk of their injury and therefore
24 they were the cause of disability and they breached the contract to retire on
25 service credit.
- 26 9. That they are not injured, even though they have been already determined to be on
27 IDR.
- 28 10. That they are not disabled. CalPERS may make argument that Plaintiffs that retire

1 with IDR must make themselves available for retesting to see if they are healthy
2 gain and then go back to work.

3 11. CalPERS may argue that Plaintiffs can get better and return to work and therefore
4 then desire not to rescind and instead to keep working.

5 12. Other defenses.

6 **VI. Many or All of CalPERS' Defenses Are Not Relevant and Not Legitimate**

7 **Plaintiffs Will Prove CalPERS' Defenses to Rescission are Limited.** In general, other
8 than defending on the adequacy of their disclosure⁵, CalPERS has limited defenses to rescission
9 that are *relevant and legitimate*.

10 For example, the contracts provided for monthly increases for life and are not yet fully
11 executed, plaintiffs are not in default, there had been no delay in notice, and none of the plaintiffs
12 have knowingly or intentionally consented to any waiver of the right to rescind or "no refunds"
13 that is legitimate.

14 Since Rescission is a legal right, not an equitable claim, there is no need for equitable
15 balancing of each claims and class members' right to rescission is satisfied by the law described
16 above.

17 **VII. Plaintiffs Will Prove Defect in CalPERS' Defenses**

18 **No Notice Before Contracting.** Plaintiffs offer proof that CalPERS has not produced a
19 single document that provides "specific notice" of the material harms and risks to safety officers
20 that are hidden in military/airtime, nor any document that could be reasonably interpreted to
21 provide adequate notice.

22 **No Notice of CalPERS' Adversity.** Plaintiffs offers of proof that there was no notice
23 that CalPERS had turned averse or reneged on its fiduciary duties to all safety officers simply
24 because Plaintiffs optionally invested in military/airtime. Plaintiff will offer proof that it would
25 be unreasonable to think that CalPERS' omissions (which cannot impute notice *because* they
26

27 ⁵ The adequacy of the disclosure would inform the defense of full disclosure, no breach of
28 fiduciary duty, lack of mistake, and the legal argument that the PERL controls even without
disclosure, etc.

1 were omissions) would make Plaintiffs suspicious of CalPERS' adversity or hidden material
2 risks.

3 **CalPERS Admits Contract Language is Poor.** Plaintiffs offers of proof that CalPERS
4 argues that its own standardized contract language is so poor that it should have made Plaintiffs
5 suspicious that *CalPERS turned adverse against all safety officers who invested in*
6 *military/airtime*, but no clear language of CalPERS' adversity was ever provided.

7 **Plaintiffs Will Prove That No Statute of Limitation Applies.** Plaintiffs offers proof
8 that there are no relevant or binding statute of limitations or the discovery and accrual of the
9 cause of action is delayed including because CalPERS' duties to inform and duties to correct
10 error (and to do so in this case, outside the administrative process) are substantive duties that are
11 not limited by any procedural statute of limitations or filing requirement. For example, CalPERS
12 represents that Section 20164 is "a substantive statute creating an ongoing duty to properly
13 discharge its obligations. The procedural statute of limitations does not appear to override this
14 duty." (*City of Oakland v. Pub. Employees' Ret. Sys.*, (2002) 95 Cal.App.4th 29, 45.)

15 **Plaintiffs Will Prove That Individual Issues At the Time of Contracting Do Not Exist**
16 **or Are Manageable.** Plaintiffs will prove that no inquiry into motive or any act or non-act of
17 Plaintiffs regarding rescission is relevant.

18 Plaintiffs expect that CalPERS will argue that each choice to invest is individualized such
19 that no common practice is involved. CalPERS will be afforded the opportunity to argue these
20 and other defenses, including on an individualized basis as appropriate, especially if the Court
21 determines that there is no presumption of reliance or acts consistent with.

22 Other than if a class member did not sign the standardized forms, which would be
23 CalPERS' defense to prove from its own records as an exception to its standard practice, there
24 are few or no relevant factual issues related to liability or CalPERS' defenses that would be
25 individualized prior to or at the time of contracting. *See Duran*. If CalPERS can prove that
26 CalPERS allowed an individual to invest in the investment without signing a standardized form
27 contract, then those defenses and individuals can be dealt with separately. If CalPERS comes
28 forward with a list of individuals that did not sign the contracts, then these issues can be heard

1 separately, on an individual or subclass basis after trial on the common issues.

2 **Plaintiffs Will Prove that Rescission Does Not Require Balancing.** The burden was on
3 CalPERS to fully disclose before contracting. CalPERS' neglect of its legal duty caused the lack
4 of consent, breach of fiduciary duties, legal mistake, and other wrongs so that those risk must be
5 allocated to CalPERS. (*Civ. Code*, §1688.) Rescission is a statutory remedy. Rescission is not a
6 personal remedy. Motive for rescinding is irrelevant. There is no balancing of the equities or
7 inquiry into Plaintiffs actions (4 *Witkin, Cal. Proc. 5th* (2008) Pleading § 541, p. 668)

8 **Plaintiffs Will Prove CalPERS Suffers No Harm By Restitution with Interest.**
9 Plaintiffs will offer proof those Plaintiffs fully funded the military/airtime investment with their
10 private funds, and that CalPERS had use of Plaintiffs money since the investment, so that
11 CalPERS could not be harmed by restitution with interest.

12 **Plaintiffs Will Prove CalPERS Has No Equities; It Is All Plaintiffs' Money.** Plaintiffs
13 offer of proof that any "balance" of equities inquiry involves only the parties' actions in the same
14 "military/airtime" transaction and those strongly favor Plaintiffs, as Plaintiffs fully funded the
15 investments. (*Mahoney v. Bostwick* (1892) 96 Cal. 53, 61.)

16 **Plaintiffs Will Prove No Duty to Inquire By Beneficiary.** Plaintiffs offers proof that
17 Plaintiffs did not have a duty to inquire further of CalPERS and that CalPERS' "omission was
18 not remedied by the form letter's invitation to retiring employees to contact the Association if
19 any additional information is required" (*Hittle* at 394.).

20 Plaintiffs offer proof that Plaintiffs were entitled to rely on CalPERS as a fiduciary who
21 is the sole mandatory provider of both IDR and service retirement that had an affirmative duty to
22 adequately inform, and that Plaintiffs would not have a duty to inquire until CalPERS repudiates
23 the fiduciary relationship. (*Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921.

24 **Plaintiffs Will Prove No Duty to Forego Valuable IDR Rights.** Plaintiffs proof that
25 Plaintiffs are not required to forego valuable IDR rights and seek "service" employment,
26 including that class members are an innocent party who is not required to sacrifice and
27 surrender important and valuable rights, (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th
28 1691, internal citations omitted.)

1 **Plaintiffs Will Prove No Duty to Seek Employment in the CalPERS System After**

2 **IDR Determination.** Plaintiffs will prove that Plaintiffs are not required to seek or work in a
3 CalPERS job after disability and they may freely work in any private sector position. Plaintiffs
4 will prove that after IDR determination, Plaintiffs are entitled to remain on IDR and to work in
5 any non-safety job. Plaintiffs proof that only if the Plaintiff is under service retirement age,
6 regains health, and *their former employer* offers to rehire him or her into the same or similar
7 safety job, can the employer (*not* CalPERS) reinstate the Plaintiff back to work. (*Gov't Code*,
8 §§21154, 21156, 21192, 21193.) Plaintiffs proof that all of the Plaintiffs are currently receiving
9 IDR, and that none was offered a job by their former employer that they refused.

10 **Plaintiffs Will Prove No Duty to Mitigate By Working to Service Retirement Age.**

11 Plaintiffs will offer proof that CalPERS ignores that the "value of [...] years of credit far exceeds
12 the cost of obtaining it..." (*In re Marriage of Green* (2013) 56 Cal.4th 1130, 1139.) If it
13 suggests that Plaintiffs must mitigate the harm by working to service retirement. Plaintiffs proof
14 that ironically, giving effect to the terms of the military/airtime contracts would cost CalPERS
15 *more* than rescinding the contracts and restituting the investments with interest.

16 **Plaintiffs Will Prove CalPERS Cannot Make Further Undisclosed Restrictions**

17 **Arising From Contract Subject to Rescission.** Plaintiffs will offer prove that CalPERS'
18 arguments about working to service retirement age unlawfully attempt to *further* restrict
19 Plaintiffs' IDR rights, *ironically because* they "contracted" for military/airtime in a defective
20 contract that was all CalPERS' fault are without merit,

21 **Plaintiffs Will Disprove CalPERS' Other Incorrect Assumptions.** Plaintiffs will prove

22 that CalPERS incorrectly assumes either (i) the contract continues (i.e. is not rescinded) and/or
23 (ii) that CalPERS can force the members to take further actions now based on the purported
24 existence of the military/airtime "contract".

25 **Plaintiffs Will Prove that CalPERS' Class-Wide Defenses Are Without Merit.**

26 Plaintiffs will show that CalPERS' defense of lack of mistake, the adequacy of their disclosure,
27 and the PERL controls are without merits. Plaintiffs will prove that the objective terms of those
28 forms is what matters, not a subjective understanding. Plaintiffs will show that CalPERS agreed

1 to this in briefing before the Appellate Court. Plaintiffs will show that no inquiries into
2 subjective understanding is appropriate.

3 **VIII. Duran: How CalPERS' Defenses and Individual Issue Can Be Managed**

4 **CalPERS Can Raise Defense On An Individual Basis.** The trial plan recognizes that
5 under *Duran*, even if a statistical model or plan is in place, CalPERS must be able to raise
6 individual issues outside of the statistical model. Specifically, CalPERS' due process rights
7 include the right to present relevant affirmative defenses, even when those defenses turn on
8 individual questions.

9 If CalPERS has a legitimate relevant affirmative defenses regarding an individual
10 (including that they did not sign the form contract, invested in some other manner, etc.), then
11 those issues can be identified and raised individually. See *Duran v. U.S. Bank*.

12 **How Individualized Issues Can Be Managed.** Using the example of CalPERS' defense
13 that an individual did not sign the form contract, those defenses and individualized defense or
14 issues can be litigated, once the common issues have been tried. Assuming some of CalPERS'
15 defenses or individual issues remain, the trial can allow CalPERS to present it defenses and
16 allow those plaintiff still prove its claim, including through CalPERS' records, and also allow
17 CalPERS the opportunity to contest each individual claim on any ground that was not resolved in
18 the trial of the common issues. (*Duran*, at 29.) Pursuant to *Duran*, this trial management plan
19 allows CalPERS, once common issues have been tried, the "opportunity to contest each
20 individual claim on any ground not resolved in the trial of common issues." (*Id.*, *13.)

21 **Survey and Use of Statistics if the Legal Issues Do Not Control and the Factual**
22 **Testimony of Class Representatives is Not Sufficient.** Although numerous, there are likely to
23 be less than 600 class members. For the period of 2003 to about 2014, CalPERS has ascertained
24 and identified about 177 individuals who suffered total losses since 2002 and another 70
25 individual who suffered partial losses.

26 For example, a survey could be used to address all of CalPERS' defenses, if necessary

27 **Sample Survey Questions to Address Some of CalPERS' Expected Class-Wide**
28 **Defense At Contracting**

1. Did the disclosure "If you are considering a disability retirement, then this service credit may not benefit you," inform you that there was a risk of loss, an IDR offset, a transfer to employer, no refunds, no increases or other material risk?
2. Did you agree to take risk of loss, an IDR offset, no refunds, no increases or other material risk if you retired on IDR?
3. Did you agree to transfer your retiremetn monies to your employer if you were so injured on the job that you could not work?
4. Does "present value" mean that you will get nothing?
5. What does "service credit" mean to you?
6. Does "may not benefit" mean that it is not an increase but that you will remain even and not suffer a loss?
7. Do the terms "present value", "service credit" "increases," "may not benefit" have more than one meaning for you?
8. Did you intend to Invest in Service Credit or for increases in Your retirement allowance?
9. Other questions about other factual issues, or defenses

Some of CalPERS' Expected individualized Defense At contracting

1. Were you injured before contracting?
2. Did you agree to the loss or no refunds?
3. Were you considering Disability Before contracting?
4. Other questions about other factual issues, or defenses

Some of CalPERS' Expected Defenses After Contracting

1. Are you planning to go back to work at your prior employer?
2. Are you planning to go back to work at another CalPERS safety job?
3. By accepting a dangerous job, did you assumed the risk of their injury?
4. Are you currently injured, and on IDR.
5. Will you make yourself available for retesting to see if they are healthy gain and then go back to work?

1 identities of the population to be sampled are ascertainable or identifiable, and population of
2 safety members entitled to IDR are uniform with little or no relevant variability especially with
3 respect to the forms contracts that CalPERS offered and the other factual issues that could be
4 disputed in this case. The statistical analysis would proceed along the lines described below that
5 are consistent with *Duran*.

6 **I. Duran Background**

7 To show that the problems in *Duran* do not exist here, it is important to remember that
8 *Duran* involved factual uncertainties that could have great variability about an issue central to
9 liability. Those factual issues and variabilities do not exist in this case as all of the individual
10 were required to sign CalPERS' form contracts. If there was an individual who invested in
11 airtime military time or other present value investment outside of the form contract then those
12 individual could be dealt with separately, and CalPERS could assert its various defense to them.

13 But in *Duran*, to adjudicate the claims of 260 bank employees who alleged they had been
14 misclassified as exempt from California's overtime laws, the trial court devised a plan to
15 determine the extent of the defendant's liability to all class members by extrapolating from a
16 small nonrandom sample. *Id.* at 920. The court heard testimony on the work habits of 21
17 plaintiffs, and, "based on testimony from the small sample group, the trial court found that the
18 entire class had been misclassified." *Id.* at 920. The trial court "extrapolated the average amount
19 of overtime reported by the sample group to the class as a whole." *Id.* at 920.

20 More specifically, the issue in *Duran* was *where* the individuals performed their work
21 each day. Those uncertain facts as to liability do not exist in this case. Each class member signed
22 and returned the form contract that is alleged to contain misrepresentations and omissions.

23 In *Duran*, the plaintiffs proposed the use of surveys and sampling in which "the parties
24 would identify all tasks performed" and "classify which were sales-related." *Id.* at *2. The
25 amount of time class members "typically spent" on activities outside of the office would be
26 assessed through a survey.

27 Again, those type of factual issues regarding liability do not exist in this case.

28 In *Duran*, USB opposed plaintiffs' plan on the basis that the survey would not yield a

1 truly representative sample due to selection bias, i.e., those who were properly classified as
2 exempt would have no interest in participating in the trial or the survey. *Duran* at **2-3. USB
3 proposed to divide the class into 20 or 30 groups and have special masters conduct individual
4 evidentiary hearings on liability and damages. Plaintiffs opposed USB's plan on the basis that
5 USB did not have a due process right to assert its affirmative defenses against each individual
6 class member. *Duran* at *2. The trial court rejected both plans and devised its own plan, under
7 which twenty class member names would be drawn out of "the proverbial hat" by the court clerk,
8 in addition to the two named plaintiffs, to form a "representative witness group." *Duran* at
9 *3. The court then conducted a two-phase trial. In phase one, only those from the representative
10 witness group would testify. In phase two, the parties would present statistical evidence to
11 extrapolate the phase one evidence to the entire class. *Id.* After the group was selected, the trial
12 court allowed certain representative witnesses to opt out.

13 None of these issues and none of these disputed facts going to liability are present in this
14 case.

15 In *Duran*, the Supreme Court criticized the trial court for ignoring the individual issues
16 instead of managing them. *Id.* at *16. In doing so, the trial court sacrificed substantive law for
17 procedure and deprived the defense its due process right to litigate relevant defenses.

18 There is no risk of depriving CalPERS of due process or its legitimate relevant defenses
19 in this case.

20 In *Duran*, the court's plan failed to properly follow basic statistics concepts such as using
21 a sufficient sample size to account for variability and avoiding selection bias in the sample
22 selection process.

23 In the method herein, a sufficient sample size is available and selection bias is eliminated
24 by using random sampling to avoid these statistical problems.

25 In *Duran*, the 43.3% margin of error on the findings was intolerably high. *Id.* at **22-26.
26 Moreover, the trial court's bifurcation of the trial improperly reframed the individual questions
27 going to the "fact of liability" as questions about the "extent of liability," which avoided allowing
28 USB to present the individual issues during the liability trial. *Id.* at **19, 21.

1 In this case, CalPERS' form disclosure is either adequate or it is not adequate on several
2 different grounds including whether it was adequate to disclose the risk or loss, the "no refunds",
3 the IDR offset, the transfer to employer, the shift to "normal contributions", the advantage to the
4 employer, etc.

5 Each of these representations was a material term that was not adequately disclosed.
6 Although if there is no presumption of reliance, it could be that, some think that one or more of
7 those terms was implied or disclosed. However, CalPERS' failure to disclose any one of those
8 material terms is sufficient to breach its fiduciary duty, cause legal mistake, no consent, and be
9 sufficient grounds for rescission, So there is no concern over the gradations of liability.

10 **II. Methodology**

11 Complying with *Duran*, Plaintiffs offer a methodology for allowing CalPERS to present
12 any relevant legitimate defense, evidence of their defenses individually or class wide, presenting
13 statistical evidence if necessary, including analysis and opinion about the correct sample size and
14 determination of the number of witnesses, in order to show on class certification under *Duran*
15 that Plaintiffs' proof and CalPERS' due process rights will be managed with an efficient
16 manageable trial. *Duran v. U.S. Bank National Association*, 325 P.3d 916 (Cal. 2014) The
17 statistics part of this case has been developed with statistical expertise in class actions and allows
18 CalPERS as a defendant to assert its defense and impeach the statistical model if necessary.
19 (*Declaration of Jensen 1-20*)

20 **III. Preliminary Assessment of Variability of the Class Shows That It is Manageable**

21 The initial population to be sampled is safety members entitled to IDR before contracting
22 that investigated military or airtime time by requesting an estimate from CalPERS. This would
23 be the group that received at least some standardized from about the investment from CalPERS
24 and could have some relevant information if there is no presumption of reliance, etc..

25 The initial assessment of variability is that all of the safety members in the population
26 had low variability with respect to the issues involved in contracting for the investment on
27 CalPERS' forms, all of the forms had low or no meaningful variance between each, all of the
28 information given out by CalPERS was the same or similar with little variability between it, that

1 all of the Elections were the same or similar on the material terms with little or no variability
2 between them, that all of the information requests were processed in the same or similar manner
3 with little variability between them, and that CalPERS' practices with regard to the information
4 about the investments were standardized such that there was little or no variability between
5 transactions, and that CalPERS informed and transacted the investment on CalPERS'
6 standardized forms that were the same or similar across the class for that period of time.

7 Regarding other issues of potential variability, Plaintiffs recognize that there could be
8 some variability in population of safety members entitled to IDR before contracting that
9 investigated military or airtime time by requesting a service credit estimate, but most or all of the
10 variability in the population is not relevant. For example, there could be variability in the
11 population in the way that Plaintiffs subjectively understood the terms of the investment, there
12 could be some variability in whether or how badly each class member was injured prior to
13 contracting, there could be variation in their jobs, there could be some variability in how much
14 money they invested, there could be some variability in other aspects, however if so, that
15 variability is irrelevant and not legitimate for purposes of inquiring into rescission.

16 If the Court finds that any of those issues are relevant for purposes of rescission, then
17 there is sufficient uniformity in the population to survey the population for those aspects so as to
18 allow CalPERS to make its defense, or allow CalPERS to assert those defenses on an
19 individualized or class wide basis.

20 **IV. Little or No Variability**

21 **Little or No Variability in the Population of Safety Members Entitled to IDR Before**
22 **Contracting Relevant to the Factors of Those Offered a CalPERS Form Contract.** Since the
23 variability in the population of safety members entitled to IDR before contracting that
24 investigated military or airtime time by requesting a service credit estimate is small with respect
25 to the relevant legal factors involved in a claim of rescission especially related to or about
26 investing via CalPERS' form contract and waiver, the initial Duran requirements are satisfied.

27 The overall population of safety members entitled to IDR before contracting that
28 investigated military or airtime time by requesting a service credit estimate is fairly uniform and

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

8 **Population is Large, Random Sample, Little Bias.** There is fairly large population of
9 safety members entitled to IDR before contracting that investigated military or airtime time by
10 requesting an estimate and this population that can be ascertained from CalPERS' records of who
11 requested information, and then sampled such that sufficient sample size available. It is believed
12 that at least 10,000 safety employees invested in airtime alone from 2003 to 2011. Declaration of
13 John Jensen. Since the population of those who requested information on either investment
14 whether military or airtime are very similar with little variability, the population is the same for
15 both investments, even though those who sought information on military service likely served in
16 the military while those who sought information in airtime may not have. However, the
17 populations' characteristics at the time of investigating are likely nearly identical as are the
18 military and airtime time forms after 2003. Declaration of John Jensen.

19 The uniformity of the population is high, the uniformity of the information provided is
20 high, and the relevant differences or variances in the population are low. The relevant variability
21 in the form contract is small, because while there were some changes in the form from 1991 to
22 the present, and some differences between military and airtime, the relevant inquiry includes
23 issues such as whether the "increase "terms", the "present value" , "no refunds" and other
24 misrepresentations or omission are present in each.

25 Indeed, CalPERS used the same standardized form for both safety and non-safety officer,
26 for those who are entitled to IDR and those who are not entitled to IDR, and the forms do not
27 mention IDR at all. Therefore, both the population and the form have a low level of relevant
28 variance or variability.

1 The population size is sufficiently large to provide a large uniform pool, and random
2 sampling is sufficiently without bias as to provide accurate samples. The use of random sample
3 will reduce bias, and the reliability of random sampling of the population of safety member
4 entitled to IDR with respect to the CalPERS' forms is high.

5 **Stratified Survey Across All Class of Those Who Bought Military/Airtime and Went**
6 **Out on IDR.** The population size could be reduced and still be reliable, including a population
7 that consists of safety members who invested in airtime, military time or other present value
8 investment, and then retired with IDR, and apply the statistical analysis randomly with little bias
9 and high reliability. See above and infra Declaration of John Jensen.

10 **Preliminary Assessment of Variability of the Class Shows That It is Manageable.**
11 The initial assessment of variability takes into account the relevant factors of safety members,
12 with IDR, the form contracts, and standardized information when determining an appropriate
13 sample size. Since the variability is small, individual issues are not likely to swamp common
14 ones and render the class action unmanageable. The other potential issues where there may be
15 variability are addressed herein.

16 **Survey Questions and Terms.** Plaintiffs assert that the parties can agree to reasonable
17 survey terms and questions or with the court's assistance that will present any survey to the group
18 in a non-biased neutral manner so that the results will be accurate across the class. With respect
19 to a statistical analysis of this group, if necessary, then a survey could be written that would be
20 able to gain sufficient factual insights into the common view and traits of any group of safety
21 members with respect to their intent in the investment, the ambiguity of the terms in the
22 contracts, and related issues.

23 **Large Sample Size.** First, the sample is sufficiently large to provide reliable information
24 about the population, sampled group, stratified group, and class. Although the *Duran* court did
25 not establish a rule for an appropriate sample size, *Duran* advised that the parties' statistical
26 experts should be involved in determining an appropriate sample size, the sample size must be
27 "statistically appropriate," and the sample size must be "capable of producing valid results within
28 a reasonable margin of error." At this time, it is too early to offer a specific sample size, and

1 CalPERS has not challenged the methodology, and for other reasons, but the sample size will be
2 appropriate. However, the statistical methodology to be used is described below. (See
3 *Declaration of John Jensen.*)

4 For purposes of statistics, the first issue is what is the population or group of people who
5 would be involved in this sample or survey. Plaintiffs have proposed safety members entitled to
6 IDR before contracting that investigated military or airtime time by requesting a service credit
7 estimate from CalPERS.

8 The first question is whether there is a great deal of variability either in the form contracts
9 or in the group of safety members in general, relevant to the issue in this case. The relevant
10 difference involve only narrow set of issue that show that the overall pool of safety members are
11 essentially uniform with respect to the issues involving in contracting to invest additional monies
12 in this investment.

13 On the broadest level, the group involves all safety members who considered invested in
14 airtime, military time, or other present value investment with CalPERS and received forms from
15 CalPERS.

16 Secondly, there is a subset group of all safety members who requested a Service Credit
17 investment from CalPERS and later invested. This subset is known to CalPERS but not known to
18 Plaintiffs. CalPERS can acquire this information. This group is known to be larger than 10,000
19 people.

20 Thirdly, there is a smaller subset of safety member that invested in military or airtime and
21 then later retired with IDR. Based on partial discovery of those retiring between 2003 and 2014,
22 his group is not known exactly, but is believed to be about 2,000. See Documents filed under
23 seal.

24 However, in legislative history in 2003, CalPERS disclosed that there are about 1,250
25 individual at that time who are retired on either disability or IDR who are still paying installment
26 and do not receive any value for their money. See RJN, **Exh. 3**; *Declaration of John Jensen.*

27 Although there are likely a substantial number of people that retired on regular disability
28 rather than IDR, it appears that some of the information that CalPERS has provided may be

1 inconsistent.

2 Fourthly, there is the subset of the class members that invested in military or airtime and
3 then retired with IDR, where they lost all or part of their investment. Based on partial discovery
4 of those retiring between 2003 and 2014, this group is thought to number about 250 people.

5 Fifthly, there is the subset of the class members that invested in military or airtime and
6 then retired with IDR and lost all of their investment. Based on partial discovery of those retiring
7 between 2003 and 2014, this group is thought to be about 177 people

8 Lastly, there is the population of those who signed waivers to suspend CalPERS'
9 installments payments.

10 As evidenced in the Declarations of the representative Plaintiffs, many safety members
11 who requested information on the investment did no later invest for a variety of reasons
12 irrelevant to rescission. It would be incorrect and contrary to fact to assume that all of those who
13 requested information but did not invest made a decision not to invest because they detected
14 some element of risk of loss or no refunds from the form contracts or other standardized
15 material, especially as CalPERS omitted those terms before contracting.

16 Instead, it is far more likely that they did not invest because the investments were very
17 expensive. See Declaration of Marzec, regarding his original decision not to invest and then his
18 later decision to request more information.

19 **Randomly Selected.** It is fairly easy to make simple random sample of a member in the
20 selected population which means that each has an equal chance of being selected. A stratified
21 random sample would be more appropriate using one of the group numbered four or five above
22 could be sampled or surveyed. This would avoid the problems of the sample not being truly
23 random or biased. Declaration of John Jensen.

24 **Indicia of Reliability.** This method and technique will produce an acceptable margin of
25 error. Although the Duran court did not provide any bright-line guidance as to how high, the
26 margin of error could be and still be acceptable. A sampling method pursuant to this method will
27 produce low margins of error and a high indicia of reliability. Declaration of John Jensen.

28 **Statistical Issues in Surveying.** If statistical evidence is appropriate or necessary,

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

9 **Fairly Extrapolated.** The survey, sample, statistical evidence, and resulting information
10 from this method can be fairly extrapolated to the entire class. (*Declaration of John Jensen.*)

11 **High Indicia of Reliability.** The survey, sample, statistical evidence, and resulting
12 information from this method will contain sufficient indicia of reliability for the evidence to be
13 useful across the larger class. (*Declaration of John Jensen.*)

14 **Assumption Under Survey.** Plaintiffs assert that there certain assumptions can be safely
15 made. For example, it is safe to assume no person in the greater population wished to make a gift
16 of large amounts of their retirement monies to the state or their employer.

17 **CONCLUSION**

18 The trial is manageable allowing CalPERS all its rights under *Duran*.

19 *Respectfully submitted,*

20 Dated: October 2, 2017

21 _____
22 John Michael Jensen, Counsel for Plaintiffs
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