2ND Civil No. B232920

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FIVE

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DAVID YOST,

Appellant,

vs.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, BOARD OF ADMINISTRATION OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL.

Respondents.

APPELLANT DAVID YOST'S REPLY BRIEF

Appeal from Judgment of the
Superior Court of the County of Los Angeles
Case No. BC 444842
The Honorable Anthony Mohr, Judge

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INTRODUCTION

CalPERS' *Opposition* begins: "It has long been settled that a plaintiff must satisfy the Government Claims Act (GCA) and present a [Victim Compensation and Government Claims Board ("VCGCB")] claim" before filing suit (CalPERS' *Opposition Brief* ("OB"), p. 1). However, as the VCGCB does not have exclusive original jurisdiction, the GCA (*Government Code* §§900, *et seq.*)[1] is satisfied by *either*:

(i) presentation of a claim for money or damages to the VCGCB,[2] *or*

(ii) presentation of the claim to a "functionally equivalent" claims process of an agency. (See *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139.)

Despite CalPERS' claim that this is nothing but a typical "GCA compliance" case, the truth is CalPERS is attempting to (i) significantly revise what it means to "comply" with the GCA, and (ii) drastically limit CalPERS' lifetime obligations and duties to its Members. (§§20160,

[1] Unless otherwise indicated, all statutory references are to the *Government Code*.

[2] Although claims against local government entities must be presented to their governing boards or similar bodies, all claims against the state must be presented to the VCGCB. Since the claims of Appellant are against CalPERS, a state agency, we speak only of state claims herein unless specifically stated otherwise.

20164.)

Several conflicts clash:

1. Statutes and case law establish the VCGCB's original jurisdiction to accept all "claims for money or damages" against the state and state agencies. (§§900, *et seq.*)

2. Alternatively, an individual may satisfy the GCA without VCGCB filing if he or she presents a claim to an agency (like CalPERS) that has administrative procedures that are "functionally equivalent" to the VCGCB. (*Lozada, supra.*)

However, if the agency does not have a "functionally equivalent" administrative claims process, the current law indicates that the VCGCB is the original and exclusive jurisdiction for all "claims for money or damages" against the state. (§§905.2(a) and (b).)

3. In practice, CalPERS typically adjudicates individual pension claims for money or damages in its own independent administrative process. Not only are these money claims for increased CalPERS pension benefits not presented to the VCGCB, CalPERS has historically insisted on *CalPERS'* exclusive jurisdiction.[3] Moreover, the Public Employees'

[3] CalPERS has historically argued that it alone has the experience and expertise to decide claims for pension rights and benefits brought by Members against the pension system. It has insisted that Members file claims with *CalPERS'* claims process and exhaust *CalPERS'* administrative remedies, rather than filing with the VCGCB, and has demurred to claims

Retirement Law ("PERL", §§20000, *et seq.*), including CalPERS' detailed hearing process, indicates legislative endorsement that CalPERS' administrative hearing procedures are "functionally equivalent" for GCA purposes. No statute of limitations applies if CalPERS owes a Member money. (§20164(b)(2).)

4. In this case, CalPERS newly (and strategically) argues that its own administrative process is *not* functionally equivalent to the VCGCB. CalPERS does not cite independent statutory authority for excluding its administrative procedures from the GCA. So based on the novel arguments that CalPERS has tactically alleged in this case, CalPERS' simply *asserts* that its existing administrative procedures do not satisfy the GCA.

5. A four-part "original" jurisdiction question arises: (1) CalPERS is adamant that Yost was required to present his *class action* claims to the VCGCB before filing a class action in Superior Court. (2) At the same time, CalPERS concurrently seeks to retain the right to adjudicate *individual* money claims for increased pension benefits in its own independent, allegedly non-equivalent administrative procedures in order to retain the power and advantages it wields in the administrative procedures. (3) Simultaneously, CalPERS is barred from adjudicating class claims

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filed directly with the VCGCB on grounds of failure to exhaust CalPERS' administrative processes. (*See*, e.g., discussion in Yost's *Opening Brief*, pp. 45-46.)

(*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926). Yet (4) CalPERS is obligated and required to correct its errors and omissions over the lifetime of its Members and beneficiaries without respect to where the claim is processed, and without applying a statute of limitations or other deadline (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29).

6. Intensifying these conflicts is the fact that CalPERS' mandatory, enduring statutory and constitutional obligations require that it "shall" correct its errors and omissions throughout the *lifetime* of its Members and their beneficiaries. (§§20160, 20164.) The mandatory long-term obligations and duties exist independently of any filing, presentation, legal process, jurisdiction, or venue.

Managing those enduring compulsory obligations, CalPERS historically has adjudicated individual pension claims for money in its independent administrative procedures, outside and irrespective of the GCA, without asserting any "presentation" or other deadline or statute of limitations on claims.

7. As mentioned, CalPERS' is barred from adjudicating or processing *class action* claims administratively. (See *Rose v. City of Hayward*, *supra*, and generally *Civil Code* §382, *et. seq* establishing or governing class actions.) Rather than establish an administrative process

that *can* adjudicate, process, or intake class claims without a statute of limitations or presentation deadline (and thereby honor or attempt to fulfill its enduring compulsory lifetime obligations to Members), in this case CalPERS has (like *Catch-22*[4]) seized on the perceived inadequacy of its self-established administrative process to instead (i) assert the need for VCGCB presentation for class-wide claims and (ii) as a result assert a one-year "presentation deadline" for class actions that negates CalPERS' mandatory lifetime duties to Member/beneficiaries as members of a proposed class.

Intentionally and in practical effect, CalPERS' GCA strategy against class actions[5] seeks to **limit the number and dollar value of claims of**

[4] "There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle." *Catch-22*, by Joseph Heller, Chapter 5, pg. 55.

[5] The likely motive or impetus for CalPERS' strategy against class actions is to force individual Member claims into CalPERS' administrative process where CalPERS exerts enormous power and control, and where the Member individually has to pay attorney fees that are not recoverable under the Administrative Procedures Act governing CalPERS' hearing process. CalPERS' strategy makes all but the most valuable claims untenable to enforce, and effectively denies recovery for the vast majority of claims.

CalPERS Members who file class actions against CalPERS, either (i) by limiting the time period of CalPERS' duty to correct its errors and limiting the "reach" of the class action or (ii) by extinguishing the class claims altogether, based on assertion of the one-year VCGCB presentment deadline.[6]

Notably, the statutory and constitutional provisions setting forth CalPERS' required lifetime duties repeatedly use plurality language (referring to the membership as a whole) such as "members", "participants" and "beneficiaries". This language indicates that CalPERS' mandatory duties advantage all Members, whether in a class, individually, or otherwise. Nothing in Section 20164 or Article XVI, §17, of the *Constitution* limits CalPERS' obligations to *individual* Members. Nothing excludes *class-wide* relief. There is no statutory support for CalPERS' attempts to confine its open-ended fiduciary duties solely to Members who seek corrections as individuals while captive in CalPERS' non-equivalent administrative process.

[6] The date and accrual of the cause of action for the thousands of injured firefighters and police officers included in this proposed class action is in dispute. Yost has alleged the delayed accrual of the claims, permitting him to represent all such injured class members under any GCA scenario or presentation deadlines. Further, Yost's counsel is also seeking to litigate the date and accrual issues in two other similar class actions in Superior Court styled as *Marzec, et al. v. CalPERS*, Los Angeles Superior Court Case No. BC461887, and *Andert, et al. v. CalPERS*, Los Angeles Superior Court Case No. BC480695.

8. Yost and the class he represents satisfy the GCA because (i) CalPERS' administrative procedures are "functionally equivalent" to the VCGCB[7] so no VCGCB presentment is necessary, (ii) Yost presented the claim to CalPERS administratively while also reserving the class rights by filing a class action but allowing time for investigation and possible settlement, and/or (iii) Yost is *excused or not required* to present the class claims to CalPERS (and/or not to the VCGCB) because CalPERS has established a process (including one that safeguards the lifetime duties) which is incapable of adjudicating class-wide claims. (See *Rose v. City of Hayward*, *supra*.) "The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts 'has no application in a situation where an administrative remedy is unavailable or inadequate.' " (*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691, quoting *Martino v. Concord Community Hospital Dist.* (1965) 233 Cal.App.2d 51, 56.). This

[7] CalPERS and the VCGCB both accept claims for money damages. In the case of class actions, CalPERS' processes are excused (*Rose, supra*), while the VCGCB notifies class claimants that such detailed cases are too "complex" for resolution and must be decided by the Superior Court, and provides a form rejection letter without adjudicating or considering the substance of the matter. While the formal difference is that the VCGCB sends a "rejection" letter, in substance this is no different than the inability of CalPERS' administrative process to adjudicate class actions, excusing them from administrative exhaustion. CalPERS' and the VCGCB's presentation and function are equivalent. Jurisdictional authority of the Superior Court to accept and rule on the claims is also equivalent. CalPERS' lifetime duties and obligations to its Members, however, continue. See more on this, *infra*.

rule remains precedential. There is no reason to substitute the VCGCB procedures for CalPERS' administrative procedures because of the fact CalPERS' process is inadequate for class claims.

If/Since Appellant has satisfied or been excused from CalPERS' administrative presentation procedures (including because he is excused or not required to submit to that process), then Yost and the class would properly be venued in Superior Court concomitantly without the application of any statute of limitations or presentation deadline to his claim and the claims of the putative class.

9. A pivot point of disputed GCA law is whether individual "claims for money or damages" can be heard in CalPERS' independent hearing procedures if those hearing procedures are not "functionally equivalent" for GCA purposes. Effectively, CalPERS is arguing that individual claims for money in the form of increased pension benefits made against CalPERS as a state agency do not have to comply with the GCA.

Generally, satisfaction of the GCA is first required at the time of initial presentation for "all claims for money or damages" against the state or agencies, whether or not they are later filed in Superior Court. (§§900, *et seq.*) GCA satisfaction at the time of initial presentation is independent and primary, without regard to later filing in court as a complaint for damages or as a petition for writ. The fact that GCA compliance can be pled as a

demurrer defense to a complaint does not therefore mean that the GCA exists solely as a demurrer defense to suits for money filed in Superior Court. The statutes and case law describe GCA compliance as a threshold substantive matter that is independent of and separate from any subsequent court filing. (§§900, *et seq.*) Generally, a claimant obtains the right to file suit in Superior Court *after* GCA compliance, presentation and rejection (i.e., typically the VCGCB is unable or unwilling to settle the claim because it is too complex). (§945.4). In GCA terms, a claim of money must be timely presented in a manner to satisfy the GCA or the claimant loses the right to pursue that claim in court *or* administratively.[8]

In its *Opposition*, CalPERS assumes that CalPERS as an agency can choose and determine whether the GCA applies on a case-by-case basis.[9] But outside of establishing a "functionally equivalent" claims process, the GCA does not allow agencies to assert or to retain independent jurisdiction for money claims in independent non-equivalent processes. That discretion or power was subsumed into the GCA, as was the legislative purpose of the GCA.

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[8] CalPERS itself asserts herein that the failure to simply *present* an otherwise valid "claim for money or damages" to the VCGCB within one year of accrual cut off and doomed Appellant's right to pursue such a claim.

[9] In exercising it power, CalPERS believes that it can insist on its own jurisdiction of individual claims (including demurring to individual claims filed in Superior Court for failure to exhaust administrative remedies), while demanding VCGCB presentment for class claims.

Substantively, the individual and class claims are identical. Procedurally, class actions aggregate individual claims, but the class vehicle does not change the underlying claims. CalPERS argues that individual members with a claim for money against CalPERS do not have to satisfy the GCA or present a VCGCB claim because CalPERS can adjudicate the money claim in its non-equivalent process. However, CalPERS argues that class representatives with similar money claims against CalPERS are required to satisfy the GCA or to present the claim to the VCGCB before starting a class action in court (which is the only available initial venue for class claims against CalPERS).

As a threshold matter, CalPERS cannot *sua sponte* establish a loophole to authorize itself (an agency) to adjudicate a claim for money outside the confines of "rigidly delineated circumstances" of the GCA or functionally equivalent processes. Keeping the process it terms non-equivalent (as a matter of strategy in this case), CalPERS cannot simultaneously insist on GCA compliance or VCGCB presentment for identical claims that are aggregated into class actions simply because adjudicating class claims are clearly outside its agency jurisdiction on procedural law unrelated to the GCA. (See *Williams v. Horvath* (1976) 16 Cal.3d 834, 838, as quoted in *State v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1243.)

In its *Opposition*, CalPERS narrowly frames the purpose and function of the GCA as a procedural presentation threshold before filing suit in court. (See CalPERS' citations to *Bodde, supra*, and other cases in its Opposition, p. 14.) The rulings in those demurrer cases are fact-sensitive and taken out of context as applied to the change in the threshold GCA compliance law that CalPERS seeks in this case. CalPERS glosses over the larger authority that would deny CalPERS the right to hear administrative claims for money in a non-equivalent process.

Instead CalPERS focuses on the subsequent procedural distinction where the "final administrative decision" could later be appealed only as a *Petition for Writ of Administrative Mandamus* ("PWAM") and not heard in court as a claim for money. As legal legerdemain, CalPERS' entire basis for excluding its administrative process from GCA compliance is that the appeal by the individual of CalPERS' final agency determinations will be made by PWAM instead of by a suit for damages.

CalPERS assumes that the appeal posture authorizes CalPERS to initially accept claims for money in a manner that does not satisfy the GCA. But the title of the pleadings of the appeal process does not negate the initial GCA filing requirements and purposes. The appeal process does not authorize CalPERS to avoid the GCA initially.

CalPERS does not situate Yost's claim for increased pension benefits

and CalPERS' inability to administratively hear class claims in the larger context of GCA compliance (or in the large substantive context of CalPERS' lifetime obligations, including the duties to correct). If CalPERS had, it would be forced to admit that all claims for increased pension benefits would have to be initially presented to the VCGCB or to an equivalent claims process. At that point, CalPERS would have to recognize that its own administrative claims process is functionally equivalent to the VCGCB. If CalPERS admitted the obvious equivalence, then CalPERS' entire challenge to Yost would vanish as CalPERS' functionally equivalent administrative process is unable to adjudicate class claims. Whether termed satisfied, excused, presented or otherwise, Yost's only option is to proceed in Superior Court as he did.

The factual reality is that CalPERS' claims process is functionally equivalent to the GCA and satisfies the GCA. CalPERS treats it as equivalent. CalPERS proffered "non-equivalence" is hollow lawyer-driven litigation strategy, not fact or substance. The only potential resolution to this dispute is to ignore CalPERS' proffered litigation strategy to call its administrative process non-equivalent (in this case) and find that CalPERS' process is equivalent, that Yost satisfied or was excused from CalPERS' equivalent processes, or find otherwise such that Yost is properly with jurisdiction in Superior Court with the life time duties (and no statute of

limitations) intact.

10. Lastly, CalPERS is in a unique position as the only state agency where adversarial claims for money or damages are regularly made against it *in the agency's capacity as a fiduciary*, i.e. CalPERS is obliged to hold the claimant's money under statutory and constitutional duties and obligations.

As discussed in greater depth below, CalPERS' mandatory obligations to correct its errors and omissions endure and continue throughout the lifetime of its Members and their beneficiaries. CalPERS' duties to correct are substantive rights vested in the Member[10], not procedural suggestions for CalPERS to ignore cleverly or "spin" at its whim. Even though CalPERS is barred from adjudicating class action claims in its administrative procedures per *Rose*, *supra*, the substantive lifelong duties still vest to help unnamed class members in every process or claim (or otherwise the obligations are not lifetime ones).

If it were more forthcoming, CalPERS' *Opposition Brief* should have instead begun:

"Although the authority is unsettled or nonexistent,

[10] The statutory duties to correct unilaterally benefit and vest in the Members, not CalPERS. CalPERS is not the beneficiary of the right to correct. For example, CalPERS is generally limited in its ability to seek repayments or and other causes of action against Members to three years, while Members' claims are unlimited.

CalPERS has long adjudicated individual pension claims against CalPERS in an administrative process that it controls. To avoid responsibility to class members in the Yost class action, CalPERS has decided strategically that it had better argue that CalPERS' administrative claims process is not equivalent to the GCA in this case. While CalPERS does not apply a presentation deadline or statute of limitations in its hearings, however we want to start to apply a presentation deadline against class actions or large group of unrepresented CalPERS members, if we so choose, in order to limit our liability in a case-by-case basis.

"We cannot adjudicate class actions in our administrative process anyway, so we better try to impede them at the first chance so they do not develop in Superior Court. CalPERS now wishes to significantly limit its 'lifetime' duties (i.e., cap them at one year) to Members who do not proceed individually in our costly administrative process, and newly assert the GCA presentation deadlines against class actions, and thereby bar their class actions claims after one year.

"Please immunize us from the cost of our errors,

> regardless of our lifetime duties, and force the Member (especially disabled police officers and firefighters that purchased their prior military service and were disabled while performing their dangerous jobs) to pay for CalPERS staff's errors. Please do not consider whether it is fair or wise, or whether it is good policy or law, CalPERS simply wants the Court to allow CalPERS to do it.
>
> "Please don't publish the opinion as it may then bind us, because we may want handle things in a different way in another case in the future. By the way, the State of California may be in precarious financial position, so that is sufficient reason to justify what we want to do."

There is a simple and correct solution to this complex "dilemma". CalPERS should retain its affirmative duties to correct its errors for the benefit of its membership and allow the class action to be decided in Superior Court by a judge. CalPERS should recognize the PERL's mandate that CalPERS' obligations and duties exist throughout the lifetimes of all Members and their beneficiaries. CalPERS should encourage the Superior Court judge to independently decide the underlying substantive issues of the class action correctly. If shown to be wrong by the court's ruling, CalPERS should willingly correct its policy and practice to provide relief to

all of the members of the class, without limitation.

What should not happen is what CalPERS is seeking here: To kill the class lawsuit, cut off the mandatory duties, negate CalPERS' responsibility to its Members, and make the Members bear the costs of CalPERS' errors.

LAW AND ARGUMENT

I. Background On CalPERS' Obligations

At the core of this appeal is the basic conflict between (i) CalPERS' lifetime duties to its Members to correct errors and omission independent of any legal or administrative process and (ii) CalPERS' assertion of VCGCB presentment and a one-year deadline barring class claims for pension relief arising from CalPERS' errors after one year.

Obligations. CalPERS owes lifetime obligations to its Members:

> The *obligations* of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged.
>
> (§20164(a), emphasis added.)
>
> A retirement board's duty to its participants and their beneficiaries *shall take precedence over any other duty*.
>
> (Cal Const., art. XVI, §17, emphasis added.)[11]

[11] "[T]he policy immanent in the California Constitution [is] to ensure the rights of members and retirees to their full, earned, benefits."

Lifetime. In enacting lifelong obligations, the Legislature intended to help potential pension plaintiffs, whether in class actions or individually, whenever and however they brought their claims. (§§20160, 20164.)

Independent of Process or Venue. The obligations and duties exist independently of any legal process, jurisdiction, or venue. Nothing in Section 20164 or Article XVI, §17, of the *Constitution* limits the obligations to the administrative process, venue, or procedure.

> [Historically] CalPERS also notes that section 20164 is a substantive statute creating an *ongoing* duty to properly discharge its obligations. The procedural statute of limitations [or analogously in this case, the VCGCB presentation] does not appear to override this duty.
>
> (*City of Oakland, supra*, at 45, fn. omitted.)

Owed to All Members. The Legislature enacted the law using plurality language such as "members", "participants" and "beneficiaries". Nothing in Section 20164 or Article XVI, §17, of the *Constitution* limits CalPERS' obligations only to individual Members.

Obligations Include Fiduciary Duties and Mandatory Corrections. The obligations owed include fiduciary obligations and the mandatory duty to correct errors or omissions of the retirement system. (§§20151, 20160, 20164.)

City of Oakland v. Public Employees' Retirement System (2002) 95 Cal.App.4th 29, 46.)

Benefit of Obligations and Duties Not Waived by Filing Class Action. The lifelong duties of CalPERS cannot be destroyed by something that a Member or a representative plaintiff does, such as filing a class action suit. What is foundational to this appeal—and is never addressed by CalPERS—is the fact that CalPERS has no ability to handle class action claims in its independent administrative process.

CalPERS' position. CalPERS asserts that there are only two ways to handle this claim: Either (1) Yost could file an *individual* administrative claim and later allegedly "convert" this to a class-wide claim in the course of petitioning for a writ of administrative mandamus (see discussion of CalPERS' skewed interpretation of *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494 in section VIII, below), or (2) if Yost wanted to pursue a *class* claim, he was required to first file with the VCGCB and consent to the one-year limitation imposed on such claims by the GCA (and thereby implicitly waive CalPERS' lifetime duties to him and the class, which a class representative cannot do on behalf of a class as it violates his duty to advance the class interests).

In reality, CalPERS is asserting the one-year VCGCB presentation deadline because there is no way to "convert" an administrative appeal via a writ petition into an acceptable "class action".

CalPERS' two "choices" (i.e., one year VCGCB presentation or

solely filing an individual claim) distort the applicable law, *dis*-harmonize the PERL and the GCA, and do great violence to CalPERS' mandatory duties to its Member/beneficiaries.

Logical Result. If CalPERS' assertion that its administrative process is *not* "functionally equivalent" is correct, then it seems logical that *all* pension claims must be presented to the VCGCB under the one-year presentation deadline, including both individual and class-wide claims. CalPERS cannot make an exception to the GCA to use its "non-equivalent" process for individual claims.

But CalPERS cannot insist on VCGCB presentment without also breaching its lifetime duties to its Member/beneficiaries and negating the specific statutory obligations in Sections 20160 and 20164, unless it explicitly asserts that no statute of limitations will apply once the claim is in Superior Court. It has done precisely the opposite.[12] CalPERS has no statutory or constitutional authority to require VCGCB one-year presentation as it causes a breach of CalPERS' statutory duties and obligations to its Members. An agency cannot negate its own mandatory

[12] Yost's counsel has filed a second class action making similar allegations to those raised in Yost's *First Amended Complaint* (*Marzec, et. al. v. CalPERS*, Los Angeles Superior Court Case No. BC461887). In that case two representative plaintiffs *did* first file VCGCB claims, albeit under protest. CalPERS has argued that the one-year VCGCB presentment deadline limits the class to Members who could have filed timely VCGCB claims no more than a year before the first representative plaintiff did. (See concurrently filed *Request for Judicial Notice* ("RJN"), Exh. 1, p. 9:1-7.)

duties. An agency is bound by the power and duties set in statute by the Legislature.

On the other hand, if CalPERS' process *is* functionally equivalent but CalPERS cannot adjudicate class claims, Appellant's compliance with that process is excused, futile, or satisfied. Yost and the class he represents are entitled to be venued and litigate in Superior Court pursuant to *Rose, supra, without time or presentation limitation*. Specifically, Yost and the class are entitled to fully benefit from CalPERS' lifetime duties, without a statute of limitations or presentation deadline to limit or bar such suit.

Either way, CalPERS must lose.

II. Legislative History of CalPERS' Obligations and Lifetime Duties to Member/Beneficiaries

Nearly six decades ago the Legislature enacted the foundations of CalPERS' "correction statutes" which mandate that CalPERS' duties to correct its errors and omissions last throughout the lifetimes of Members and their beneficiaries. (§§20160, 20164 [formerly §§20180 and 20181].) (RJN, Exh.2, for legislative history.)

In 1987, the Legislature amended Section 20181 (now §20164) to clarify the applicable periods of limitations on such corrections. The new language—which has remained in Section 20164 ever since—mandates that while there is a three-year statute of limitations on actions when CalPERS

seeks to recover monies wrongly paid to a Member or beneficiary, "in cases where the system *owes money to a member or beneficiary*, the period of limitations shall not apply." (§20164(b)(2), emphasis added; see also *City of Oakland, supra*; *RJN*, Exh. 3.)

A year later the Legislature repealed Section 20180 (now §20160) and replaced it with a new statute bearing the same number to more precisely spell out the terms governing correction of errors and omissions. As the legislative history describes, the new statute was sponsored by CalPERS to make clear that Member/beneficiary errors and omissions were *permissibly* correctable but CalPERS' errors and omissions were *mandatorily* correctible. (*RJN*, Exh. 4; compare §§20160(a) and (b).)

III. CalPERS Never Addresses Lifetime Duties

Yost devoted extensive space to a discussion of CalPERS' lifetime constitutional and statutory responsibilities to its Member/beneficiaries in his *Opening Brief*. CalPERS dismisses these responsibilities as mere procedural and administrative matters.

CalPERS' *Opposition* addresses Section 20164 only once (and then only parenthetically in a footnote) and never addresses the constitutional duties at all.

Moreover, CalPERS describes these obligations as "*administrative* duties" (OB, p. 26, fn. 9), implying that the lifetime obligations are solely

relevant within the parameters of CalPERS' administrative process.[13] Section 20164 is not so limited.

In fact, CalPERS' constitutional and Sections 20160 and 20164 obligations and duties exist whether the Member seeks to enforce them administratively *or* through judicial action. After defining the lifetime nature of CalPERS' obligations to its Member/beneficiaries, Section 20164 goes on to discuss the fact that the lifetime duties extend to "actions" (i.e., legal action in court) as well:

> (b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of *limitation of* ***actions*** shall be three years, and shall be applied as follows:
> (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.
> (2) In cases *where this system owes money to a member or beneficiary, the period of limitations shall not apply*.

(§20164(b), emphasis added.)

The appellate court has found that these are substantive duties. (*City*

[13] Lest one think "administrative duties" is just a semantically poor way of describing more far-reaching obligations, CalPERS' OB says: "[Yost argues] CalPERS has a duty to correct administrative errors and omissions throughout a member's lifetime. The problem with all this is that Yost *never made an administrative claim* or sought *administrative relief*.… Had Yost truly been interested in obtaining a neutral interpretation of the PERL, he could have had a *hearing before an administrative law judge* and, if the administrative determination went against him, petitioned the superior court for a writ of mandate." (OB, pp. 2-3, emphasis added.) It is clear that CalPERS believes its lifetime duty to correct errors and omissions is applicable only if one files an *administrative* claim.

of Oakland, supra, at 45.)

The Legislature intended the plain, unambiguous language it used and knew exactly what it meant when it enacted the explicit language of Section 20164. The statute has been amended five times since it was first enacted in 1953. Lifetime obligations have been explicit in the plain language from the start. (*RJN*, Exh. 2; see also current version of §20164.)

IV. CalPERS' Selective Reading of the GCA

CalPERS has historically argued—both in pleadings and in practice—that CalPERS alone has the experience and expertise to adjudicate claims for pension rights and benefits brought by Members against CalPERS. It has insisted that Members file claims with *CalPERS'* claims process and exhaust *CalPERS'* administrative remedies, rather than file with the VCGCB. (*See*, e.g., discussion in Yost's *Opening Brief*, pp. 45-46.)

Now, CalPERS suddenly turns 180 degrees and argues that aggregated pension claims of unrepresented Members are "claims for money or damages" and therefore must be presented *to the VCGCB* pursuant to Section 905.2. Since class actions do not transform the nature of the claim, CalPERS' position logically leads to divesting itself of the authority to consider *any* claim, including claims of individuals. Perhaps inadvertently (or in way that it hopes the Court will overlook), CalPERS'

logic strips it of authority to calculate contested pension allowances, determine "final compensation", determine beneficiaries of deceased Members, and a host of similar claims.

CalPERS argues that GCA compliance only applies (i) to class claims and (ii) to the actual filing (or pre-filing requirements) of a lawsuit in Superior Court. It argues that someone wishing to represent a class of similarly situated individuals against CalPERS must present their claim to the VCGCB "before *filing a class action* seeking money or damages" from CalPERS (OB, p. 1, emphasis added), and thereby waive the advantage of the lifelong duties that CalPERS owes to all Members in the putative class. But CalPERS' narrowing arguments are unavailing and unsupported.

First, Section 905.2 explicitly states that it "shall apply to claims against the state" and state agencies (including as filed with the VCGCB) (§905.2(a)) and mandates presentation of "*all* claims for money or damages against the state" (§905.2(b), emphasis added). Nothing in Sections 905.2, *et seq.*, limits the process to class claims (which are simply the aggregation of individual claims). If class claims for pension benefits are "claims for money or damages", then the same must apply to *individual* pension claims that are also "claims for money or damages".

Second, CalPERS' attempt to limit the applicability of Section 905.2 to situations where a claimant goes on to file a Superior Court action is

without foundation. Section 905.2 says nothing about filing suit in court—it simply specifies that initially "all *claims* for money or damages against the state" must be presented to the VCGCB unless some exception provides otherwise.[14]

At this time, CalPERS continues to provide an administrative process for individual claims. By insisting that pension claims are "claims for money or damages"[15] subject to the GCA, CalPERS has created a conundrum—either (i) *all* pension claims should be presented to the VCGCB within one year of accrual (and thus severely limit CalPERS' lifetime duties, especially to class Member/beneficiaries); or (ii) CalPERS' administrative processes are functionally equivalent (and excused for class actions); or (iii) we must acknowledge that CalPERS' lifetime duties require some procedural avenue that preserves those rights for class members.

[14] The fact that if the VCGCB is unable or unwilling to settle the claim, it *then* gives the claimant the right to file suit in Superior Court pursuant to Section 945.4, is irrelevant. CalPERS asserts herein that the failure to simply *present* an otherwise valid "claim for money or damages" to the VCGCB within one year of accrual ends the claimant's right to pursue such a claim.

[15] CalPERS' assertion that pension claims are "for money or damages" requiring VCGCB presentment opens the door to a future situation where CalPERS could seek to deny even an *individual* claim by terming it a "claim for money or damages" and invoking the GCA presentment deadline to foreclose the claimant's right to proceed.

V. CalPERS' Efforts to Escape Its Lifetime Duties

CalPERS is trying to *escape or limit* its lifetime obligations and duties by interposing other statutory law, i.e. the alleged duty to present pension claims for money or damages to the VCGCB with its attendant one-year limitation[16]. But "[t]o the extent that the two statutes conflict [speaking of Section 21064(b) mandate of lifetime duties and a more general statute of limitations in that case governing misclassification mistakes], the more specific language in the retirement statute should govern." (*City of Oakland, supra*, at 45.)

CalPERS argues that the VCGCB filing deadline is a presentment limit or deadline, not a statute of limitations.

The practical and inevitable result is the same: Unless the more specific language in the retirement statute governs, CalPERS' assertion of the VCGCB presentment deadline negates the legislative mandate of lifetime obligations and guts CalPERS' constitutional duties. In other words, CalPERS cannot assert a presentment deadline as a way of limiting its lifelong duties any more than CalPERS can assert a statute of limitations to limit its lifetime duties.

[16] CalPERS' assertion of the need for VCGCB presentation is itself a breach of CalPERS' lifetime duties to correct.

On its own *Demurrer* motion[17], CalPERS argues that pension claims must be presented to the VCGCB pursuant to Section 905.2.[18] CalPERS is trying to avoid living by the same logic that it asserts.

CalPERS fudges when it seeks to define "claims" as (i) only class-wide claims (insisting it can still adjudicate individual claims) and (ii) only those claims that will be later filed in Superior Court. But "claims" are neither limited to class-wide claims nor just those that lead to suit; "claims" also include individual pension claims that CalPERS hears administratively. —"claims" are not just those that lead to suit, but also include individual pension claims that CalPERS hears administratively. The term "claims" is the exact term that CalPERS uses to require Yost to present to the VCGCB.

Why does CalPERS demand VCGCB filing in this case when it has never done so previously—and in fact has *opposed* VCGCB jurisdiction in the past?

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[17] CalPERS filed the *Demurrer* leading to this appeal based on utilizing VCGCB presentment as a way to assert a "presentation" deadline of one year, and thus bar all claims brought more than one year after accrual. Under its logic, the fact that CalPERS has failed to establish an adequate hearing process that can hear class claims administratively *ipso facto* entitles it to require VCGCB presentment and thus break its lifetime duties.

[18] While the GCA has an exception excluding pension claims at the local level, CalPERS takes the position that since the local employer contracts with CalPERS, the claims are claims against the state and not excluded.

Background of Underlying Class Action. CalPERS finds itself the defendant in a potentially very large (and very expensive) class action. The lawsuit seeks justice for thousands of disabled police, firefighters and other safety officers—CalPERS Members who invested tens of thousands of dollars of their own retirement funds to purchase optional service credit, only to have CalPERS seize those funds because Plaintiffs suffered industrial injuries and took industrial disability retirement.[19]

The class action lawsuit has spotlighted CalPERS' longstanding and illegal policy and practice of (i) mischaracterizing Members' optional service credit investments contrary to law and (ii) on that basis justifying seizure of the funds and their transfer to the Members' *employers* when the Members take industrial disability retirement. And it may take significant retirement system funds to correct the errors, not easy in today's changing economic and political environment.

For the Members who have lost money, correction of errors is all the more important if CalPERS errors are "costly", because the Members are

[19]While CalPERS acknowledges that the trial court dismissed the case long before the merits of Yost's claims could be addressed and that those issues have little place in this appeal, it has nonetheless spent several pages dismissively describing what it terms Plaintiffs' attempt to obtain "preferential treatment" compared to other CalPERS Members. (OB, p. 8, fn. 2.) The claims are far more serious and troubling than that. If the Court wishes to look further into the matter, Appellant urges review of the first few pages of his *Opposition to CalPERS' Demurrer to First Amended Complaint* (6CT1257-7CT1261) for a more balanced understanding of the issues in the case.

the ones who benefit commensurately from those costly mistakes.

VI. *Rose v. City of Hayward*: CalPERS' Inability to Handle Class Claims

In its *Opposition*, CalPERS never addresses that it has no ability to handle class action claims. *Rose v. City of Hayward*, *supra*, ruled more than 30 years ago:

> [P]laintiffs in a class action need not exhaust their administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief. (*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 690-91, 94 Cal.Rptr 421, 484 P.2d 93.) Here, as in *Ramos*, the statutory provision for an administrative appeal is premised upon an individual claim and makes no mention of class relief.… Hence, the administrative hearing procedure established by the Legislature for claims of rights arising from the Public Employees' Retirement Law is constitutionally inadequate for class action hearings.…
>
> (*Rose, supra*, at 935-936.)

CalPERS insists that Appellant should have simply filed an administrative claim. (OB, p. 19, fn. 6.) But this would amount to a Faustian bargain where Yost could only avail himself of the administrative process by turning his back on and abandoning the rest of the class he seeks to represent. CalPERS forgets that class actions are judicially preferred litigation strategies as they lower costs, reduce the expense of adjudication, and ensure that losses that would not otherwise be recovered are secured.

Pursuant to legislative directive, CalPERS has adopted the

Administrative Procedures Act ("APA", §§11500, *et seq.*) for the conduct of its administrative process, where an individual claimant litigates solely on his or her own behalf. (§20134.) Under the APA, unnamed parties, representative actions, or class actions cannot proceed in CalPERS' administrative processes. (7CT1262:18-7CT1265:1; 7CT1281:10-20.) Only named individuals appear in CalPERS' APA hearings.

The appellate court in *Rose, supra*, extensively examined CalPERS' administrative procedures and concluded that the process is incapable of handling class claims. First, it found that

> Section 20133 [since renumbered as §20134], which codifies the retirement system's administrative remedy, states 'The board (of administration of the Public Employees' Retirement System) may, in its discretion, hold a hearing for the purpose of determining any question presented to it involving any right, benefit, or obligation of a person under this part…' (Gov. Code, s 20133). The reference to 'a person' clearly contemplates individualized treatment of claims for retirement benefits rather than class actions.
>
> (*Rose, supra*, at 935.)

Further, the *Rose* court provided specific reasons, including mandatory constitutional protections, why CalPERS' administrative process cannot handle class actions:

> The absence of an adequate administrative remedy becomes even clearer when we consider that the Administrative Procedure Act (Gov. Code, §11500, et seq.) has no provisions for pretrial proceedings in which prompt and early determination of class membership may be made. Nor are there any provisions for notice to the absent class members

informing them that they are required to decide whether to remain members of the class represented by counsel for the named plaintiffs, whether to intervene through counsel of their own choosing, or whether to pursue independent remedies. Such pretrial proceedings are constitutionally required as a matter of due process when an adjudication is to be made which will be binding upon the entire class. (*Home Sav. & Loan Assn. V. Superior Court* (1976) 54 Cal.App.3d 208, 126 Cal.Rptr. 511.) Hence, the administrative hearing procedure established by the Legislature for claims of rights arising from the Public Employees' Retirement Law is constitutionally inadequate for class action hearings, thus defeating respondent's contention that appellants must seek administrative relief as a class.

Respondent contends that as an administrative agency empowered by the Administrative Procedure Act, its board has the power to consolidate several actions into a "test case/class action involving many persons similarly situated." As authority for this proposition, respondents cite Government Code section 11512, which states, in pertinent part, as follows: "(b) … When the hearing officer alone hears a case he shall exercise all powers relating to the conduct of the hearing." …

Although section 11512 may on its surface read as a plenary grant of authority to hearing officers, the section must nonetheless be read conjunctively with all other pertinent statutes relating to administrative hearings. As we have seen, Government Code section 20133 grants a right only to individuals to present claims to PERS. A hearing officer's discretionary authority may be broad, but it is not so broad that all other statutes relating to the conduct of administrative hearings will be denied effect in deference to the hearing officer's discretion. A hearing officer would clearly exceed his authority under Government Code section 11512 in entertaining a class action. Moreover, even were the statute the absolute grant of authority respondents interpret it to be, constitutional questions would again lurk in the shadows. The due process requirement of notice to absent class members must not be left to the hearing officer's discretion. A hearing officer would violate both statutory and constitutional

authority in opening his hearing room to a class action.

(*Rose*, *supra*, at 935-937.)

CalPERS explicitly and implicitly argues that the inability of its administrative process to adjudicate class claims is irrelevant. Glossing over its deficiencies, CalPERS argues that the exhaustion of administrative remedies and GCA compliance are fundamentally different processes. (OB, pp. 21-22, fn. 8; 8CT1522:17-8CT1524:5.) CalPERS defends itself based on an assertion that Appellant is trying to conflate the two.

Appellant has never argued that the CalPERS administrative process and the VCGCB's processes are the same. They are different, but the processes are also equivalent under the GCA. Although CalPERS has itself confounded the record, Yost argues that CalPERS' administrative procedures satisfy the GCA as the functional equivalent of VCGCB filing pursuant to *Lozada, supra*.

CalPERS never addresses an important element of Yost's argument: that CalPERS administrative inability to resolve class claims **does not *therefore* give CalPERS authority to repudiate its lifetime duties to unrepresented CalPERS Members by substituting the VCGCB's administrative process and limitations for CalPERS' own inadequate (for class actions) administrative process.** The court simply excuses the administrative process under *Rose, supra,* and entitles Yost to file a class

action claim in Superior Court and still benefit from CalPERS' lifetime duties.

Stripped of pretense, CalPERS' claim to be upholding the GCA is nothing more than an attempt to use the inability of its administrative process to administer class claims as justification to retaliate against class plaintiffs *because* they seek class-wide relief.

VII. CalPERS' Suggestion to Pursue an Individual Claim and Later "Convert" It to a Class Action Is Illusory

CalPERS argues that Yost should have (i) filed an individual administrative claim, (ii) exhausted the administrative remedies by pursuing the process to decision, and then (iii) if still dissatisfied, filed a *Petition for Writ of Administrative Mandamus* ("PWAM") asserting class-wide claims. (OB, p. 19, fn. 6.)

Assuming for argument's sake that CalPERS retains *selective* jurisdiction to hear some claims for pension money (a questionable assumption if CalPERS sticks with its insistence that "*all* claims for money or damages" against the state must be presented to the VCGCB), it would be impossible to pursue a *non*-class administrative claim and later convert it to a *class-wide* claim via a PWAM.

First, if Yost initiated an administrative claim with CalPERS, he would thereby personally consent to CalPERS' adjudication through

CalPERS' limited jurisdiction. (*Stuck v. Board of Medical Examiners of State* (1949)94 Cal.App.2d 751; 2 Cal.Jur.3d, *Administrative Law* §445.) CalPERS has not established a "right to sue" process for class actions.[20] Therefore, Yost's submittal and consent to CalPERS' administrative adjudication of his claim would void or extinguish his *class* allegations precisely because he selected and consented to an administrative forum that cannot adjudicate class claims. (7CT1262:18-7CT1263:25.)

Second, once an individual Member initiates an administrative process, he or she is required to *exhaust* the administrative process, unless futile or excused. Otherwise he or she must complete the administrative process. If dissatisfied with CalPERS' final decision, the claimant is only entitled to file a PWAM regarding the legal and factual conclusions in the adopted Proposed Decision, as formulated by the agency board in its sole discretion. (*Code of Civil Procedure*, §1094.5.)

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[20] CalPERS asserts that the fact its administrative process does not result in a "right to sue" letter is proof that its process is not "functionally equivalent" to the VCGCB. (OB, pp. 26-27.) This misses the point.

The concept of "functional equivalence" was explored in *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861 where the appellate court determined the Fair Employment and Housing Act ("FEHA") claims process was "functionally equivalent" to that of the VCGCB, excusing VCGCB presentment. There is nothing in the GCA that requires issuance of a "right to sue" letter for a claims process to be "functionally equivalent". Both FEHA and the VCGCB process contemplate situations where the agency will reach a settlement of the claim. Further, if the Department of Fair Employment and Housing ("DFEH") prosecutes a FEHA claim on its own, it has authority to take the case to decision. No "right to sue" ever issues. At most, the claimant can appeal the decision by way of PWAM.

A PWAM only reviews the agency's final legal and factual findings, based on the limited evidence presented in the administrative hearing. The record, pleadings, parties, causes of action, and ultimate proposed decision, however, are largely if not wholly controlled by the agency. CalPERS, for example, typically argues in administrative hearings that a respondent has no right to file a *Notice of Defense* pursuant to §11506 because the process is initiated by a *Statement of Issues* (§11504), not an *Accusation* (§11503). CalPERS then insists that the administrative hearing will be confined to presentation of evidence relevant to the issues that *CalPERS itself* has identified in its *Statement of Issues*, without permitting the respondent to raise any new issues he or she would be entitled to raise in a *Notice of Defense*. Other plaintiffs not explicitly named as parties are excluded as they are not named as respondents in the *Statement of Issues*. This precludes bringing *class* claims because (i) CalPERS can only adjudicate the claims of *identified* individuals, and (ii) it will therefore exclude the evidence and claims regarding any unrepresented (and unidentified) Member from adjudication.

Third, since CalPERS' administrative process only permits claims on behalf of individuals or aggregations of identified individuals, no opportunity exists to discover, identify, or plead on behalf of other similarly situated members or otherwise develop an administrative record for

unrepresented parties.[21] Discovery is limited. The administrative record would only reflect the facts associated with the individual, while the facts necessary to develop class claims would be excluded.

In other words, there is no practical ability to develop the facts or law to support a class in the APA or CalPERS' process. Once at the Superior Court on writ, *Code of Civil Procedure* section 1094.5 denies supplementing the agency record in most cases, so that avenue it also closed.

VIII. CalPERS' Distortion of the Findings in *Tarkington v. California Unemployment Ins. Appeals Bd.*

CalPERS has suggested that Yost could file an individual administrative claim, then if unsuccessful he could later "convert" this into a class action on a PWAM, citing the case of *Tarkington, supra*, as authority for this approach. (OB, p. 19, fn. 6.) CalPERS' suggestion that *Tarkington* stands for this "conversion of a writ to a class action" proposition, however, is without merit and less than candid.

[21] CalPERS claimed below that it can adjudicate claims on behalf of more than individuals, citing to *In the Matter of Abbond, et al., and City of Huntington Beach*, CalPERS Precedential Decision 99-02. (8CT1524:24-28.) Appellant, however, pointed out that *Abbond* was not a representative or class action, but a claim on behalf of a group of fully identified individuals, and therefore that every single claimant was presumably able to put on evidence and make argument regarding his or her individual claim. In any event, CalPERS does not mention *Abbond* in its OB and appears to have abandoned its reference to the faulty premise it claims *Abbond* proves.

First, Tarkington does not stand for the proposition that CalPERS asserts.

CalPERS represented to the trial court that *Tarkington* concerned two PWAM petitioners who challenged their individual denials by the California Unemployment Insurance Appeals Board ("CUIAB") in Superior Court on behalf of a similarly situated class. (5CT0932:6-14.) In truth, petitioners Gayle Tarkington and Joel Straub were denied their individual requests for unemployment insurance by the Economic Development Department ("EDD"), **but more importantly pursued *class-wide* claims throughout the administrative process before the CUIAB**.

> Petitioners Gayle Tarkington and Joel Straub, two Albertson's employees whose claims had been denied by the EDD, appealed the decision to the California Unemployment Insurance Appeals Board (CUIAB). CUIAB set the hearings on the appeals in March, May, and July of 2004. It sent notice of the hearings to thousands of claimants, and hundreds attended the hearings. At the hearings, Tarkington and Straub **asserted that they were seeking unemployment benefits on a "class- or group-wide" basis** [emphasis added]. Hundreds of claimants who attended the hearings chose not to present their own statements on the record in reliance on the assertions that the Tarkington and Straub case would yield class-wide relief.
>
> In November 2004, the CUIAB issued a written decision (authored by Administrative Law Judge (ALJ) F.G. Knipe) concluding that UFCW had "instituted the 'first blow' " by initiating a strike against Vons and thus its members, including the employees locked out by Albertson's, were ineligible for unemployment benefits because they fell within the ambit of section 1262. In December 2004, ALJ Knipe issued a nearly identical decision denying benefits for

> employees locked out by Ralphs.
>
> Tarkington and Straub appealed ALJ Knipe's decision to the Board Panel Members of the CUIAB (Board), **on behalf of themselves and all persons similarly situated** [emphasis added]. On June 13, 2005, the Board issued a written decision affirming ALJ Knipe's ruling that the employees locked out by Albertson's had voluntarily stopped working over a trade dispute. On June 22, 2005, the Board issued a virtually identical decision regarding Ralphs employees.…
>
> On December 12, 2005, Tarkington and Straub, along with two Ralphs employees (John Duran and Deborah Brown) who had also sought review by the Board and were denied relief, filed a petition for writ of administrative mandate in Los Angeles Superior Court, styled as a class action, against the CUIAB and named as real parties Albertson's and Ralphs.
>
> (*Tarkington, supra*, at 1498-1500.)

In other words, Tarkington was **always stylized a class action in an administrative forum that could adjudicate class claims**. There was no "conversion" of individual claims into class-wide claims once petitioners sought review from the Superior Court. Rather, the claims were pursued on a class-wide basis throughout the administrative process *as well* as in Superior Court.

Second, CalPERS neglects to inform this Court that the reason Tarkington and Straub were able to make class-wide claims at the administrative level (and then "carry" those class claims into Superior Court) is because the provisions of the *Unemployment Insurance Code* governing the hearing process before the CUIAB explicitly authorize

entertaining class-wide claims at the administrative level:

> **§1951. Disputed claims, appeals and petitions; presentation; conduct of hearings and appeals; consolidation for hearing; participation by telephone**
>
> The manner in which disputed claims, appeals and petitions shall be presented, the reports required thereon from the claimant and from any employing unit and the conduct of hearings and appeals shall be *in accordance with rules prescribed by the appeals board*. The appeals board *shall require administrative law judges to consolidate for hearing cases with respect to which the alleged facts and the points of law are the same*. The appeals board shall permit a party or representative to participate in a hearing by telephone upon the party's or representative's request and showing a good cause, in accordance with regulations adopted by the board.
>
> (*Unemployment Insurance Code*, §1951, emphasis added.)

Compare this to CalPERS' administrative proceedings which do not authorize class-wide actions as discussed in *Rose*, *supra*.

The *Unemployment Insurance Code* also provides the CUIAB with authority to consider evidence that would otherwise be inadmissible in CalPERS administrative proceedings:

> **§1952. Rules of evidence or procedure; recording proceedings**
>
> *The appeals board and its representatives and administrative law judges are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties*. A full and complete record shall be kept of all proceedings in connection with disputed claims. All testimony at any hearing held in this state upon a disputed claim arising under this division shall be recorded and, when feasible, by a reporter in shorthand or by

> machine writing. The testimony need not be transcribed unless the disputed claim is further appealed.
>
> (*Unemployment Insurance Code*, §1952, emphasis added.)

In other words, the CUIAB has statutory authority to set its own evidentiary rules unbound by common law or statutory rules of evidence and unrestricted by technical or formal rules of procedure that permit it, for example, to take testimony and receive evidence from unnamed class members. That, in turn, ensures that those class members as well as the evidence relating to the class-wide claims are part of the administrative record subject to Superior Court review on a PWAM.

No individual could do this through CalPERS' administrative process. Yost noted:

> [T]here would be no way to discover the names of the other class members because discovery in a PWAM is limited to information that was not available at hearing. The administrative record would be limited to Yost's individual fact pattern, and any PWAM he filed would be limited to challenging CalPERS' particular decision in his case. *Code of Civil Procedure* section 1094.5 limits the introduction of evidence beyond that in the administrative record, so the only evidence that would be admissible in PWAM proceedings would be that available to Yost at the time of the administrative hearing. The futility of CalPERS' suggested approach was described by Yost. (7CT1263:26-12:7CT1265:1; 7CT1287:24-7CT1288:8 and fn. 7).
>
> To illustrate the absurdity of CalPERS' suggested approach, assume that Yost had filed an administrative claim with CalPERS, individually and in his representative capacity. *Rose, supra*, prohibits CalPERS from adjudicating or hearing class-wide claims. Therefore, Yost would be restricted to arguing a claim for himself. In the hearing, the OAH or ALJ

> would necessarily exclude all evidence of other individuals not before the court as irrelevant or extrinsic to the determination of the individual's rights.
>
> If Yost filed a PWAM after a final administrative decision, he could not expand his individual PWAM to assert rights to represent unnamed or class members. He could not get discovery to identify them, as the information was technically "available" at the time of hearing (but not relevant, not admissible, and not subject to discovery).
>
> Although Yost could argue that the evidence was wrongfully excluded or denied, CalPERS would assert that Yost consented to the limited jurisdiction and no discovery was wrongfully denied because he never had a right to additional discovery of identities in that venue (as a matter of law). Yost's request to admit additional evidence of the class members' existence would be denied or excluded under *Code of Civil Procedure* section 1094.5(e). The record could not be augmented. Defensively, CalPERS would undoubtedly insist that each member could first be named and comply with the *entire administrative process* and *exhaust all administrative remedies* before each could proceed by way of a PWAM.
>
> (Yost's *Opening Brief*, pp. 49-51.)

In short, CalPERS' red-herring suggestion that Appellant should have filed an administrative claim and later pursued his dispute on a class-wide basis via a PWAM is illusory at best, as well as a trap setting his Petition up for demurrer at the PWAM hearing. CalPERS' suggested course of action is neither authorized by the PERL nor the APA. It does <u>not</u> accurately reflect what *Tarkington* stands for.

IX. CalPERS Only Has Authority to Hear Pension Claims in a "Functionally Equivalent" Administrative Process

Section 905.2 says that "all claims for money or damages against the state" shall be filed with the VCGCB. Case law holds that GCA requirements may alternatively be met by complying with a "functionally equivalent" claims process:

> "Exceptions to the filing requirement not specifically enumerated in the Government Claims Act have occasionally been allowed … where the claim is based on a statute or statutory scheme that includes a functionally equivalent claim process," such as the FEHA or … claims under 42 United States Code section 1983.
>
> (*Lozada, supra.*, quoting *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 764.)

Burdened with lifelong duties and obligations to correct, CalPERS' administrative process is also an exceptional circumstance where a "functionally equivalent" claims process applies.

CalPERS has no statutory authority to exempt itself from GCA requirements. It also regularly hears and adjudicates pension claims on the CalPERS administrative level. CalPERS apparently has never (until this case, at least) insisted Members must file pension claims with the VCGCB.

There are only two logical explanations: Either (i) CalPERS is knowingly and deliberately flaunting GCA law, or (ii) CalPERS has authority to hear pension "claims for money or damages" *because* its

administrative process is "functionally equivalent" to that of the VCGCB.[22]

If CalPERS' process or procedures were not "functionally equivalent", then *all* Members would be required to present their pension claims for money directly to the VCGCB, rather than file a claim in the CalPERS administrative process. Members would be required to do so within one year of accrual of their claim, stripping CalPERS' lifetime duties of any meaning or consequence. And CalPERS could not insist on exhaustion of CalPERS' administrative remedies since claimants would be submitting to a *different* administrative process (the VCGCB's) that cover the same initial jurisdiction for the right. CalPERS would thereby lose any jurisdiction to hear the claim.

X. "Functional Equivalence" and the Purpose of the GCA

The concept of a "functionally equivalent" claims process relates to the purposes of the GCA. An agency's claims process is equivalent to VCGCB presentment if it can satisfy the purposes behind the GCA.

[22] The only other logical interpretation is that CalPERS' administrative process is merely voluntary on the Member's part, without any binding legal authority. CalPERS cannot create additional fiscal liability for the state outside the VCGCB. If voluntary, Members who bring pension claims and are dissatisfied with the outcome of the administrative process would not be limited to filing a PWAM to review the agency's decision, but would be entitled to present a claim to the VCGCB and then bring suit in Superior Court against CalPERS, and the administrative decision would have no *collateral estoppel* impact on the Superior Court action.

A. Purpose of GCA

The California Law Revision Commission said GCA claims presentation requirements serve two basic purposes.

> First, they give the governmental entity an opportunity to settle just claims before suit is brought. Second, they permit the entity to make an early investigation of the facts on which a claim is based, thus enabling it to defend itself against unjust claims and to correct the conditions or practices which gave rise to the claim.
>
> *4 Cal. L Rev'n Comm'n Reports 1008* (1963), cited in *Cal. Gov't Tort Liab. Prac.*, 4th Ed., §5.6.

In *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, the appellate court applied the "functionally equivalent" criteria and determined that FEHA's administrative process is functionally equivalent to the VCGCB's.

In other case, courts have also determined that federal civil rights cases brought under 42 *U.S.C.* §1983 have complied with a "functionally equivalent" claims process.

The *Snipes* court carefully examined FEHA's provisions, including (i) the filing of a claim for employment discrimination, (ii) how FEHA was to investigate and resolve the dispute, and (iii) the time frame for action:

> The above provisions demonstrate a legislative intention to exempt actions under the FEHA from the general Tort Claims Act requirements. The procedural guidelines and the time framework provided in the FEHA are special rules for this particular *type* of claim which control over the general rules governing claims against governmental entities. The FEHA

> not only creates a statutory cause of action, but sets out a comprehensive scheme for administrative enforcement, emphasizing conciliation, persuasion, and voluntary compliance, and containing specific limitations periods. [Citation omitted.]
>
> (*Snipes, supra*, at 868, emphasis in original.)

As evidence that CalPERS' claims process is functionally equivalent, CalPERS (i) encourages Members to file claims for pension determinations within CalPERS' administrative system; (ii) CalPERS investigates and issues a *Statement of Issues* pursuant to its regulations such as *C.C.R.* Sections 555-555.4; and (iii) most importantly, there is no time frame for action because there is no statute of limitations in the PERL. The open-ended lifetime obligations are consistent with a trust fund that holds and invests money for another in a fiduciary capacity.

Second, the *Snipes* court scrutinized the purpose of the GCA notice provisions:

> The purposes of the general claims presentation requirement are to give the governmental entity an opportunity to settle claims before suit is brought, to permit early investigation of the facts, to facilitate fiscal planning for potential liabilities, and to avoid similar liabilities in the future. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123, 113 Cal.Rptr. 102, 520 P.2d 726.) The provisions of the FEHA for filing of a complaint with the department, administrative investigation, and service of the complaint on the employer serve a similar function.
>
> (*Snipes, supra*, at 869; italics emphasis on "*type*" in original.)

In this case, Yost presented the claims of himself and the class to

CalPERS (2CT0249:20-2CT0251:8, 2CT0323); provided CalPERS with an extended opportunity to settle (1CT0082-1CT0085); and thus permitted early investigation of the facts (even though CalPERS has lifelong duties to correct), facilitated CalPERS' planning for financial liabilities and allowed CalPERS to avoid similar liabilities in the future.

B. "Particular *Type* of Claim"

A foundational element in *Snipes* is the finding that the FEHA constitutes a functionally equivalent claims process "for this particular *type* of claim…." (emphasis in original). For example, the FEHA enforcement scheme "emphasiz[es] conciliation, persuasion, and voluntary compliance" because it is seeking to remedy discriminatory actions in the employment setting and aims to bring the parties to an amicable resolution. By comparison, a VCGCB claim might involve a claim for wrongful death at the hands of a state employee where "conciliation, persuasion, and voluntary compliance" would not apply.

Pension claims to CalPERS also represent a "particular *type* of claim" unlike either FEHA employment discrimination claims or the type of claim typically presented to the VCGCB. In line with this, the Legislature has established with CalPERS a comprehensive statutory scheme to receive, investigate and adjudicate pension claims against the system that also meets the requirements of the GCA:

(1) CalPERS has plenary authority and exclusive control over pension system administration (*Constitution*, Art. XVI, §17);

(2) CalPERS has established fiduciary duties to the membership (§20151);

(3) CalPERS exclusively determines membership and benefits (§§20120, 20123, 20125);

(4) the CalPERS Board must determine all issues of membership, contributions, service credit, benefits, and death benefits (§§20280-21635.5);

(5) no statute of limitations applies when CalPERS owes a Member money (§20164(b)(2));

(6) CalPERS must correct the system's errors and omissions throughout the lifetime of Members-beneficiaries (§§20160, 20164);

(7) CalPERS conducts hearings to determine any right, benefit or obligation (§20134, *CCR* §555.1);

(8) CalPERS hearings are subject to the APA (§§11500, *et seq*.);

(9) CalPERS has adopted specific additional detailed *Regulations* for hearings on all claims for pension rights and benefits (2 *CCR*, §§555-555.4); and

(10) CalPERS' final decisions are subject to Superior Court writ review within 30 days of becoming final (§11523).

(Yost's *Opening Brief*, pp. 42-43.)

C. Timing Requirements

CalPERS makes much of the fact that the FEHA contains specific timing requirements for the filing of an administrative claim, issuance of a "right to sue" letter, and a waiting period before a claimant has permission to sue in Superior Court. (OB, p. 23.) Like the discussion above regarding particular *types* of claims, the point is not to look at the purpose each provision has in resolving the type of claim presented.

For example, CalPERS argues that its administrative claims process

is dissimilar to FEHA's because it has no "GCA-like 1-year deadline for bringing administrative claims." (OB, pp. 25-26.)[23] Limitation requirements under FEHA or the VCGCB reflect legislative efforts to limit how long a government agency may be liable for a specific claim. In CalPERS' case, however, the Legislature has explicitly mandated that it is liable for correction of its errors (and for payment of claims arising from those errors) for the *lifetime* of the Member/beneficiaries. There is no applicability of a "file by such-and-such date or you are precluded from doing so" rule precisely because CalPERS owes trust duties to Member/beneficiaries for as long as they live.

Similarly, CalPERS argues that its administrative procedures are dissimilar to the FEHA or VCGCB claims procedures because unlike those agencies, CalPERS does not issue "right to sue" letters. Again, this stems from the "particular *type* of claim" involved. Both DFEH and the VCGCB are tasked with trying to resolve claims without the necessity of litigation. If they cannot, the agencies can do nothing further and the claimant is given

[23] Actually there is no "GCA-like 1-year deadline". VCGCB claims must be filed within a year of accrual, but FEHA allows claims to be filed up to 15 months after accrual (§12960) and claims under 42 *U.S.C.* §1983 (another "functionally equivalent" claims process repeatedly mentioned in case law) may be filed up to two years after accrual (*Wallace v. Kato* (2007) 127 S.Ct. 1091; *Code of Civil Procedure*, §335.1).

the right to seek justice in the courts. [24]

CalPERS' administrative procedures, on the other hand, are likely designed to resolve pension claims and require different (but still GCA compliant) procedures. Individual Member claimants file their pension claims that *are against CalPERS for adjudication with CalPERS in CalPERS' administrative hearing*, the very entity they are making a claim against. FEHA, by comparison, acts as prosecutor *against* the outside separate (usually private) entity charged with employment discrimination.

CalPERS also has both plenary authority over the management of the pension system (Cal. Const., art. XVI, §17) and generally has "primary jurisdiction" over pension claims based on its special expertise. Taking that whole picture into account, the Legislature has vested CalPERS with authority not only to receive and investigate pension claims, but to adjudicate those claims to final administrative decision in a process that is equivalent for GCA purposes.

The fact that the Legislature did not extend this authority to the adjudication of class-wide claims does not thereby give CalPERS authority to insist on claims presentment to the VCGCB, since the Legislature also explicitly insisted on lifetime duties to correct errors and pay claims.

[24] Not all FEHA claims result in "right to sue" letters. The statutes permit the DFEH to instead take a claim all the way to judgment, leaving the claimant no recourse if dissatisfied other than filing a PWAM. In this case, the FEHA procedure parallels CalPERS' procedures.

In sum, CalPERS is attempting to morph "functional equivalence" into a requirement that an alternative process be a "mirror double" of another claims process to comply with the GCA. The whole point of the concept of "functional equivalence" is that the Legislature has established different procedures for bringing different types of claims. If CalPERS were correct and "functional equivalence" required procedures to be identical to those of the VCGCB, FEHA itself would not qualify as a "functionally equivalent" process.

D. Exhaustion of Administrative Procedures

Finally, CalPERS' *Opposition* argues that its process *is* functionally equivalent, Yost cannot benefit from it because parallel processes like FEHA require claimants to exhaustion the agency's administrative procedures and "Yost, on the other hand, did not initiate much less exhaust his administrative remedies." (OB, p. 20.)

Once again, CalPERS argues against a different point than what Yost argued. It is undisputed that CalPERS' administrative process is incapable of adjudicating class-wide claims. (*Rose, supra*.) "The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts 'has no application in a situation where an administrative remedy is unavailable or inadequate.' " (*Ramos, supra*, at 691.)

If Yost were to accept CalPERS' "invitation" to file an

administrative claim—something he could only do as an individual, not the representative of a putative class—he would be "locked in" to CalPERS' administrative process and extinguish his right to represent the class. CalPERS seeks to punish Yost and the class because of *its own* inadequate administrative process.

XI. Appellant's Statutory Construction Harmonizes the PERL and GCA, Demonstrates His GCA Compliance

CalPERS' insistence that the only way Yost could comply with GCA requirements was by filing his class action claims with the VCGCB has created a contradictory mess. If carried to its logical conclusion, CalPERS' statutory construction threatens to undo fundamental guarantees of the state pension system: Either pension claims must be presented to the VCGCB within one year of accrual, thereby robbing CalPERS' lifetime duties to its Member/beneficiaries of any meaning or consequence, or we must acknowledge that CalPERS' lifetime duties require some other procedural avenue that preserves those rights for class members.

Yost offers an approach that (i) honors the legislative mandate of lifetime duties, (ii) acknowledges the fact that CalPERS has no authority or ability to handle class-wide claims, and (iii) still provides CalPERS with timely notice of class claims in compliance with the GCA.

First, the Court should uphold the statutory insistence on CalPERS'

lifetime duties to correct its errors and pay the consequent pension claims pursuant to §§20160 and 20164, independent of any particular form of filing, presentation, legal process, jurisdiction, or venue.

Second, the Court should reaffirm the holding in *Rose v. City of Hayward*, *supra*, that CalPERS' administrative process is incapable of adjudicating class-wide claims, and that those claims are therefore excused from having to submit to and exhaust CalPERS' administrative remedies.

Third, the Court should find that CalPERS provides a "functionally equivalent" claims process to that of the VCGCB pursuant to *Lozada*, *supra*.

Based on those three findings, Yost contends that he has fully complied with the core elements of the GCA while holding CalPERS to its constitutional, statutory and fiduciary obligations:

- Yost had no opportunity to file an individual administrative claim with CalPERS without thereby sacrificing the interests of the putative class he seeks to represent.
- Yost could not file a VCGCB claim without simultaneously acquiescing to a one-year limitation on claims, and Yost did not *need* to file with the VCGCB because CalPERS has a "functionally equivalent" claims process, albeit one he was excused from.

- Yost filed suit directly in Superior Court to preserve his rights and avoid consenting to CalPERS' individual administrative process provisions by simultaneously serving CalPERS and presenting its General Counsel with copies of the Summons and Complaint, together with a settlement letter providing CalPERS a 30-day stay on any litigation. (2CT0249:20-2CT0251:8, 2CT0323.) This gave CalPERS the opportunity to investigate, evaluate and possibly settle the claims without the necessity of litigation—exactly what GCA notice is designed to do.
- Yost subsequently granted CalPERS a further 15-day extension at CalPERS' request. (1CT0082-1CT0085.)
- If CalPERS believes it has the necessary expertise to evaluate and resolve the underlying pension issues in Yost's claims, it can assert it in Superior Court.

Finally, if CalPERS is dissatisfied with the fact that Yost had to file suit concurrent with serving notice of his claims on CalPERS, this is a problem of CalPERS' own making. The inability of CalPERS to adjudicate class-wide claims while honoring its lifetime obligations to the putative class left Yost no other choice but to file in Superior Court in order to clarify that he was not consenting to the administrative process.

If CalPERS wishes to establish an alternative claims process for

class actions, it should go to the Legislature or enact appropriate regulatory authority. But if it fails to do so, it has only itself to blame. It would be completely inequitable to punish class plaintiffs for *CalPERS'* inadequacies. Right now, Yost and the class suffer a loss because of CalPERS' initial errors and subsequent VCGCB assertions denying him due process.

XII. Bailee Exception to the GCA: *Minsky v. City of Los Angeles*

Appellant asserts he is excused from GCA presentment (and dismissal was reversible error) because he seeks return of specific property held by CalPERS as bailee. (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113.)

CalPERS argues that *Minsky* only applies when the claim is for the return of specific property, but "Yost's purchase of service credit was an investment ..." (OB, p. 28.)

CalPERS distorts Appellant's claim. Yost's *First Amended Complaint* explicitly alleges that when Yost and the other class members took industrial disability retirement ("IDR"), CalPERS failed to pay them an additional annuity funded with the contributions each made for the purchase of optional additional service credit as required by Section 21420. (See, e.g., 2CT0259-2CT0261.) The funds used to make those service credit purchases were specific monies provided to CalPERS as a trust which CalPERS was required to separately account for on each Member's

behalf. (§20225.)

Once Yost and the others retired on IDR, Section 21420 mandates that those monies (plus any accrued interest) became each Member's *personal property*, to be returned to the Member in the form of an annuity but based specifically on the investment funds. CalPERS never discusses Section 21420 or its implications when discussing the *Minsky* bailee exception.

In any event, the trial court never considered or ruled on the factual or legal issues surrounding the optional service credit purchases nor the legal interpretations of Section 21420 and related statutes underlying much of Appellant's bailee exception argument. Rather than rule on this issue, the Court should remand the matter back to the trial court for discovery, pleading and a full hearing on the issue.

XIII. Government Code Section 905.2 Exceptions to GCA Filing Requirements

Appellant has also asserted he is excused from GCA presentment under Section 905.2(b)(1) and (b)(4), relieving a claimant from presenting a GCA claim when that claim seeks funds provided by statute or constitutional provision.

He explained in his *Opening Brief* (citing to *Tirapelli v. Davis* (1993) 20 Cal.App.4th 1317) that persons making claims against the state

authorized by statute or constitutional provision where an appropriation has been made or funds are available for settlement shall make those claims directly to the state Controller. He also explained that the CalPERS Board has exclusive control of the administration and investment of the retirement fund (§20171)' The state Controller has no authority to disburse funds from the pension system, only CalPERS can. (California *Constitution*, Art. XVI, §17.)

CalPERS never addresses this argument in its *Opposition* nor the related argument that Section 21420 provides for settlement of claims in the form of annuities owed to Yost and the class, based on the specific funds they entrusted to CalPERS. Instead, it essentially recycles the same assertions that "claims for money or damages" require GCA compliance discussed above.

XIV. Delayed Accrual of Yost's Claims, and Right to Amend

Even if the Court were to find (i) that Yost and the proposed class should *not* benefit from CalPERS' lifetime duties, (ii) that CalPERS has no "functionally equivalent" claims process and therefore no authority to hear pension claims, and (iii) that Yost therefore had no choice but to file a claim with the VCGCB, he can satisfy the timing requirements based on the delayed accrual of his cause of action.

Appellant explains in his *Opening Brief* that he did not know that the

losses he and the rest of the class suffered likely originated from CalPERS' wrongful accounting until CalPERS filed its initial *Demurrer* in the case on October 15, 2010.

> As a fiduciary and otherwise, … CalPERS' has "a fiduciary duty to provide timely and *accurate* information to its members". (*City of Oakland, supra,* at 40; emphasis in original.) CalPERS knew or should have known that Yost and others would believe that CalPERS acted within statutory authority, including when refusing to increase benefits based on their optional service credit investments.
>
> Because CalPERS misapplied the relevant statutes, while representing its accounting as accurate and lawful, it was impossible for Yost or anyone else to discover the cause, reasons, facts, and mechanisms behind CalPERS' failure to provide the correct benefits, the resulting loss or seizure of the optional service credit investments, and CalPERS' refusal to refund the investment funds. CalPERS' illegal acts and undisclosed practices delayed the discovery of Plaintiffs' causes of until revealed in CalPERS' first *Demurrer*.
>
> (Yost's *Opening Brief*, pp. 56-57.)

CalPERS does not even address, much less discredit, Appellant's legal argument that the discovery rule indefinitely delays accrual of a cause of action until the plaintiff discovers or reasonably has cause to discover the facts constituting it (*Samuels v. Mix* (1999) 22 Cal.4th 1) and that delayed discovery means delayed accrual of the causes of action (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797). It never confronts the fact that "[d]elayed accrual of a cause of action is viewed as particularly appropriate where the relationship between the parties is one of special trust such as

that involving a fiduciary relationship." (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1424.) Instead, it simply argues that "Yost suspected CalPERS had done something wrong to him no later than April 2008 [when he received his first IDR check]." (OB, p. 33.)

In any case, the trial court never sought the detailed briefing nor conducted the evidentiary hearings Yost thought necessary to evaluate the delayed accrual of the claims. (7CT1266:10-7CT1267:1; 8CT1600:2-6; 8CT1621-8CT1622.) This Court should remand the matter back to the trial court for further litigation on this issue, including whether delayed accrual would grant Yost time to submit a VCGCB claim if necessary and/or substitute a new representative plaintiff, eliminating the foundation of the trial court's *Order Sustaining Demurrer*.

XV. Leave to Amend and Substitute New Representative Plaintiff

CalPERS raises three objections to Appellant's argument that he should have been granted the opportunity to amend his *First Amended Complaint* and if necessary, substitute a new representative plaintiff:

1. That Yost's claims had accrued more than a year earlier (OB, p. 35)—but see arguments above about "delayed accrual";

2. That this would sanction the fact that Yost filed suit prior to either filing a class-wide claim with the VCGCB or an *individual* claim with CalPERS (*Ibid*)—but see extensive argument above about why

CalPERS' inadequate administrative process and lifetime duties left Yost no choice but to take the path he did; and

3. That in any case the claims of Yost and the class could still be vindicated via CalPERS' individualized administrative claims process (OB, p. 39, and trial court's *Order Sustaining Demurrer* at 8CT1656)—but see discussion above about the complete inapplicability of CalPERS' administrative process to class-wide claims and the illusory nature of CalPERS' contention that Yost could file an individual claim and "later" allegedly "convert" this into a class-wide claim on a writ.

None of these arguments confront the serious issues in this appeal. None even raise, much less confront, the consequences of CalPERS' attempt to shirk off its lifetime duties to Member/beneficiaries by asserting the necessity of VCGCB presentment for class actions.

CONCLUSION

The issues to be resolved in this appeal have far-reaching, serious consequences for the more than 1.5 million CalPERS Members. Appellant respectfully asks this Court to consider:

1) Should CalPERS be allowed to escape its obligations to unrepresented class Plaintiffs, including based on a misreading of the purpose of the GCA?

2) Should CalPERS be permitted to selectively (and self-

servingly) focus on isolated language in specific sections of the PERL, "hopscotching" over sections it dislikes in order to avoid the *totality* of the PERL's intent?

3) Should CalPERS be given authority to insist that Members come to CalPERS *as individuals* while denying the right of financially-disadvantaged Plaintiffs to seek *class* relief for CalPERS' misdeeds?

4) Finally, should this misreading of the GCA be allowed to trump CalPERS' constitutional duties to its Members above all? (Cal. Const., art XVI, §17(b).)

* * * *

How difficult or impossible is it for individuals to hold an erroneous government agency accountable, especially when the words in statute say that CalPERS owes *lifetime* duties?

If CalPERS *is* breaking the law and making a fundamental error that it is required to correct, how do the Members get relief and force CalPERS to make good on its mistakes?

For the hundreds, possibly thousands, of injured and disabled police officers, firefighters and other government workers who also invested tens of thousands of dollars with CalPERS, is there a process that provides them as a class with a hearing?

A ruling unfavorable to Yost will allow CalPERS, after recognizing

that it has been making a costly error for a long time, to kill the class action suit and repudiate its constitutional duties and lifetime obligations. Thousands of financially harmed safety Members will simply be without a forum to hear their case.

In other words, does the law simply let CalPERS get away with it, now and in the future?

Dated: May 25, 2012

LAW OFFICES OF JOHN MICHAEL JENSEN

By: _____
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,979 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By_____
John Michael Jensen
SBN 176813