

Case No.: _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAVID YOST,
Plaintiff and Appellant,

vs.

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

Defendants and Respondents.

PETITION FOR REVIEW

Pursuant to *California Rules of Court*, Rule 8.500

After a Decision by the
Court of Appeal, Second Appellate District, Division Five
[incorrectly identified as Division One in the Court's *Opinion*]
Case No. B232920

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

JOHN MICHAEL JENSEN (SBN 176813)
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Ste. 550
Los Angeles, CA 90064

Attorneys for Plaintiff and Appellant
David Yost

Plaintiff and Appellant David Yost's Petition for Review

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

This Petition addresses the California Public Employees' Retirement System's ("CalPERS") attempt to bar or severely limit class action lawsuits by pension system members against CalPERS.

The Court of Appeal, Second Appellate District ("Second District"), failed to issue a definitive ruling on the presented issue. The Second District affirmed the trial court's Order sustaining CalPERS' *Demurrer to First Amended Complaint*. A copy of the unpublished Second District *Opinion* is attached as Exhibit 1.

I. ISSUES PRESENTED FOR REVIEW

This Petition addresses three questions of first impression:

(1) CalPERS bears constitutional and statutory fiduciary duties to members and their beneficiaries to correct the errors and omissions of the pension system over their lifetimes. (Cal. Const., art. XVI, §17; *Government Code*, §§20160, 20164.) CalPERS' mandatory lifetime duty to correct applies, without a statute of limitations, to litigation of "actions" filed in Superior Court. (*Government Code*, §20164(b)(2).)

Should CalPERS *escape* those lifetime duties, and punish putative class members, by insisting that class action claims be filed with the Victim

Compensation and Government Claims Board ("VCGCB") within one year of accrual of the cause of action? Must all class claims accrue within a year prior to the VCGCB filing?

(2) Does CalPERS have a functionally equivalent claims process, such that class action claims do not have to be filed with the VCGCB before filing suit? (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1153.)

(3) *Rose v. City of Hayward* holds that a representative plaintiff in a proposed class action is *excused* from exhausting CalPERS' administrative remedies because those remedies are inadequate. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926 ("*Rose*").) Can CalPERS instead substitute the VCGCB process for its excused administrative process? Does a person have to satisfy the VCGCB if the functionally equivalent process is excused?

II. **INTRODUCTION AND BACKGROUND**

CalPERS bears constitutional fiduciary duties to put the interests of its members above all else. (Cal. Const., art. XVI, §17.) Statutorily, CalPERS is required to correct errors and omissions of the pension system throughout the lifetime of a member or beneficiary. (*Government Code*, §20164(a).) In cases where CalPERS owes money to a member or beneficiary, no statute or period of limitations applies. (*Government Code*,

§20164(b)(2).) CalPERS' duty to correct errors and pay members applies without a statute of limitations to litigation of "actions" filed in Superior Court, as well as administrative claims. (*Ibid.*)

Yost alleges that CalPERS has illegally mis-accounted for or seized large sums of money from him and all putative class members (police officers, firefighters and other "safety" employees). On CalPERS' promise to increase their retirement benefits, Yost and others invested in the purchase of optional service credit such as prior military service or air time. After the purchase but before fully vesting in a service retirement, Yost and the others were injured on the job and forced to retire on Industrial Disability Retirement ("IDR"). (Yost's *Opening Brief*, p. 10.)

As a result of their disability, CalPERS transferred Plaintiffs' "service credit" investment to the employer to offset the cost of Plaintiffs' existing disability coverage. CalPERS had not previously disclosed this offset or consequence. Receiving only their disability benefit (which is not based on service credit whatsoever), Plaintiffs received no benefit from their additional investments. Yost further alleges that CalPERS' illegal policy and practice dates back decades and likely affects hundreds or even thousands of CalPERS members. (Yost's *Opening Brief*, p. 6.)

Before ruling on the substantive merits of Yost's claims, the trial court granted CalPERS' *Demurrer* on Government Claims Act ("GCA")

grounds. The substantive issues are being litigated in related but separate cases brought by members who satisfied alleged VCGCB filing requirements.

At stake in this *Petition for Review* is foundational law about (i) whether or how members can bring class actions against CalPERS and benefit from CalPERS' lifetime duties to correct errors that are brought in "actions"; or (ii) whether CalPERS has authority to sharply limit or even bar class actions.¹

CalPERS' efforts to thwart Yost's class action represents a frontal assault on CalPERS' constitutional and statutory fiduciary duties to the membership. Moreover, CalPERS' assault contradicts long-standing case law, such as *Rose v. City of Hayward*.

CalPERS and its defective administrative process put Yost in an impossible Catch-22² where each option would force him to give up rights:

¹ The heart of CalPERS' argument is that Yost could *either* (i) file an individual administrative claim (in which case CalPERS concedes he could avail himself of CalPERS' lifetime duties) *or* (ii) he could file a class action lawsuit but only if he first filed and obtained rejection of a VCGCB claim—something CalPERS insists must be done within one year of accrual of his cause of action.

² "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

(1) Yost could elect to initiate an *individual* administrative proceeding against CalPERS for his claims. The administrative process has no statute of limitations, but it requires that each person be a named and represented party. No class or unrepresented parties are allowed. (See *Rose, supra*, at 935-937, for a detailed discussion of the constitutional inadequacies of CalPERS' administrative remedies for class-wide claims.) An individual administrative claim would mean an expensive, time consuming effort seeking a relatively small recovery.³ Further, once Yost initiated an administrative claim, he would be compelled to fully exhaust his administrative remedies. If he did not receive the recovery sought, he could challenge the final administrative decision by filing a petition for writ of administrative mandamus based solely on the record of facts and law about his *individual* claim.⁴

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.

³ Yost spent nearly \$90,000 of his personal retirement funds to buy optional service credit before his injury and eventual IDR retirement, and will not even break even unless he lives to collect a pension until he is over 140 years old. The loss to Yost is substantial, but nowhere near the kind of money that could compensate him for what would likely be a very lengthy process costing many tens of thousands of dollars in legal fees, fees that cannot be recovered in CalPERS' Administrative Practices Act process.

⁴ While CalPERS suggested that Yost could file an *individual claim* and later, if dissatisfied with the outcome, could somehow "convert" that

(2) Or Yost could file a GCA claim with the VCGCB and then file a class action in Superior Court—the course of action authorized by the Second District's decision. To satisfy the GCA, Yost would be required to file a VCGCB claim within a year of accrual of his cause of action. (*Government Code*, §905.2.) He would not be entitled to benefit from CalPERS' mandatory lifetime duties to correct. (*Government Code*, §§20160 and 20164.) Although it is not yet fully decided, it appears that the proposed class itself would be restricted to those who themselves could have filed timely VCGCB claims within a year prior. In short, compliance with VCGCB filing deadlines would potentially exclude the vast majority of similarly situated CalPERS members from benefiting from the class action, in spite of CalPERS' mandatory *lifetime duties* to such members to not apply a period of limitations to "actions". (*Government Code*, §20164(b)(2).)

As Yost pointed out to the appellate court, he chose to take the only course of action available to him that would not prejudice his rights or

into a *class-wide* claim via a Petition for Writ of Administrative Mandamus ("PWAM"), this course of action is illusory. A PWAM can at only seek court review of the administrative record produced below. Yost would have no authority to assert the claims of unrepresented individuals at the administrative level (and CalPERS would undoubtedly object if he tried) limiting his PWAM to the facts and legal arguments raised in his *individual* capacity. (See Yost's *Reply Brief* to the Second District, Law and Argument sections VII and VIII, pages 33-42, for a more thorough discussion of the futility of CalPERS' suggestion.)

those of the class. He could not consent to an inadequate, limited, and prejudicial administrative process that was incapable of adjudicating class-wide claims. He could not consent to an inadequate, limited, and prejudicial filing with the VCGCB which could potentially limit the number of class members to those whose claims accrued within the last year before filing.

So Yost (a) sought to maintain the benefit of CalPERS mandatory lifetime duties to correct without a period of limitations that would otherwise apply to an "action" and (b) simultaneously sought to comply with the spirit of the GCA:

- (i) He filed suit in Superior Court (thereby precluding consent to CalPERS' administrative jurisdiction);
- (ii) He immediately served a copy of the suit upon CalPERS; and
- (iii) He provided CalPERS with a stay on any prosecution of the suit for 30 days to entertain settlement discussions so as to give CalPERS time to evaluate the claims and potentially avoid costly litigation by settling those claims, the precise purpose of the GCA.

CalPERS argues that this course of action did not comply with GCA requirements and did not submit to the administrative process.

But should CalPERS be allowed to take advantage of its own failure

to establish a viable system to adjudicate class-wide claims while maintaining its mandatory lifetime obligations to individual members? Should CalPERS be able to assert its own failure to provide an effective process for a class of people to benefit from CalPERS mandatory lifetime fiduciary duties to properly pay its members as a defense to effectively immunize itself against any class-wide liability?

III. WHY REVIEW SHOULD BE GRANTED

Yost submits that review and decision by this Court is necessary pursuant to *California Rules of Court*, Rule 8.500(b)(1) both "to secure uniformity of decision" (specifically, whether the holdings in *Rose, supra*, on the inability of CalPERS' administrative process to adjudicate class-wide claims is still good law) and "to settle an important question of law": (i) Is CalPERS' administrative claim process is functionally equivalent to satisfy the GCA and (ii) do CalPERS' lifetime obligations to correctly pay its members apply to "actions" such that it cannot interpose VCGCB filing against class actions?

A. Yost's Decision to Forego Filing a Petition for Rehearing

Yost did not file a petition for rehearing in the Court of Appeal because he concluded it would be futile. The unpublished *Opinion* did not rule on the matters emphasized in both parties' briefs and in oral arguments. CalPERS and Yost extensively briefed the conflicts with *Rose* and *excuse*

from CalPERS' administrative process. (See Yost's *Reply Brief*, Law and Argument section VI, pp. 29-33.) The matter was extensively discussed during oral argument. (Audio recording of the Second District oral argument, at 26:38-27:48). Yet *Rose* is never mentioned in the *Opinion*.

The issue of functional equivalence and GCA satisfaction was also extensively addressed by both parties in oral argument and briefing. (See, e.g., Yost's *Opening Brief*, Law and Argument sections F and G, pp. 38-52; and *Reply Brief*, Law and Argument sections IX and X, pp. 42-51.) The Second District chose not to address it "because Yost did not file an administrative claim to initiate CalPERS' administrative process." (*Opinion*, p. 12.) If Yost filed an administrative claim, then the GCA would not be an issue, but Yost could also not file a class action.

Yost argued that CalPERS' lifetime duties to correct its errors and omissions applied to court actions. He requested that the Second District issue a ruling upholding this, but the *Opinion* never addresses this issue.

Based on the foregoing, Yost felt it would be ineffectual to request rehearing.

B. CalPERS' Lifetime Duties to Members and Beneficiaries Must Either Be Upheld and Reinforced, or This Court Should Subject It to Restriction

Yost contends that the clear and unambiguous language of

Government Code section 20164 mandates that CalPERS bears *lifetime* duties when it owes money to a member or beneficiary:

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. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting agencies to this system in respect to retired members formerly employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged. The obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

(*Government Code*, §20164(a).)

Moreover, this lifetime obligation applies not only to claims brought or resolved through CalPERS' administrative process but also to those filed in Superior Court:

(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:

...

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

(*Government Code*, §20164(b)(2), emphasis added.)

The reference to a "period of limitation of actions" clearly references litigation in court. (See, for example, the opinion of the Third District in *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29 which repeatedly discusses CalPERS' lifetime duties to its members in the context of court litigation, not administrative proceedings.)

The Second District failed to address the issue of whether CalPERS' lifetime duties to correct errors and omissions of the pension system apply in the context of class action lawsuits against CalPERS. Indeed, it does not even include this as one of the issues upon which it ruled. (*Opinion*, p. 2.)

This issue is a matter of first impression involving the rights of all participants in class actions filed against CalPERS in the future. If CalPERS members wish to file *individual* administrative claims to recover money they claim the pension system owes them, they can do so at any point during their lives, and their beneficiaries may be able to pursue those claims even after the member has passed away. Under CalPERS' construct, however, *class actions* would either be severely limited or potentially barred altogether by the assertion that such lawsuits must be preceded by VCGCB claims presentment within a year after class-action lawsuit participants knew or should have known about their cause of action against CalPERS.

CalPERS argued that the one-year VCGCB presentment deadline is

not a statute of limitations and that "claims against government entities must be presented within the VCGCB deadline regardless of whether another statute extends, relieves or revives the limitations period for filing the underlying civil claims." (CalPERS' *Opposition Brief*, p 10.) In effect, CalPERS argued that the lifetime duties issue does not even come into play because of the VCGCB presentment deadline, and the Second District signaled its agreement (or at least did not state any disagreement) by its silence on the issue. There are two legal errors in this reasoning that Petitioner respectfully asks this Court to correct:

First, the one-year presentment deadline would only apply if CalPERS' administrative claims process is *not* functionally equivalent to that of the VCGCB. If CalPERS' process *is* functionally equivalent, the VCGCB's one-year presentment deadline has no applicability. Instead, claims would need to be brought within the lifetime of the member or his/her beneficiary.

Second, this is not a situation where a claimant is presumed to have an adversarial relationship to the governmental agency he or she is lodging a claim against. Instead, CalPERS is presumed to be *on the side of its members*, and is constitutionally mandated to put the interests of the membership above all else. (Cal. Const., art. XVI, §17.) This constitutional mandate will lose all meaning if CalPERS is allowed to disavow its lifetime

duties and strike an adversarial stance against the very membership it was set up to protect and represent.

C. **This Court Should Either Affirm or Overturn the Findings In**
Rose v. City of Hayward

The *Rose* case has been established law for over 40 years. CalPERS itself acknowledged in oral argument that *Rose* found that CalPERS' administrative process is incapable of adjudicating class-wide claims and that class actions are therefore excused from the administrative process. (Audio recording of Second District oral argument, at 13:48-14:00.)

However, the Second District failed to make a definitive ruling on this, and instead confounded the issue with discussion on what might occur if Yost filed an individual administrative claim.⁵ Although the *Opinion* is unpublished, the failure to make a definitive ruling on the precedential nature and applicability of the *Rose* case creates an ambiguity in the law which this Court should clear up.

⁵ The *Opinion* references the fact that Yost never filed an administrative claim with CalPERS (*Opinion*, p. 12), but fails to note that Yost could only have done so by abandoning his class-wide claims and acting solely in his individual capacity. Similarly, one of the Second District justices asked why Yost could not file an individual claim with the assumption that if successful, CalPERS would automatically settle the claims of all other similarly situated CalPERS members. (Audio recording of Second District oral argument, at 5:15-5:32 and 6:58-7:06.) Again, this assumes Yost would forsake his class-wide claims and thus fails to address the holding in *Rose* that class-wide claims are *excused* from CalPERS' administrative process.

D. The Question of the "Functional Equivalence" of CalPERS' Administrative Claims Process is a Matter of First Impression Deserving of Resolution

The Second District did not rule on the question of whether CalPERS' administrative claims process is functionally equivalent to that of the VCGCB, opining that the issue was not before it.

Ironically, the Catch-22 nature of Yost's dilemma described above is captured by the Second District's own argument that "[w]e do not need to determine whether CalPERS' administrative process is functionally equivalent, however, because Yost did not file an administrative claim to initiate CalPERS' administrative process. Whether CalPERS' administrative process would have been functionally equivalent is irrelevant." (*Opinion*, p. 12.)

In so ruling, the Second District either failed to appreciate or chose to side-step the core issue: Yost *could not* "file an administrative claim to initiate CalPERS' administrative process" unless he chose to do so as an individual; no class-wide claim could be heard administratively pursuant to *Rose, supra*. And once Yost initiated the administrative process, he would be trapped within that process with no ability to bring a class-wide action.⁶

⁶ Rather than rule on the core questions, the Second District essentially "punted" by raising the possibility that Yost may be eligible for

The *Opinion* also found that "Yost has never presented a claim to the VCGCB. Moreover, it is clear that service of Yost's complaint on CalPERS' general counsel did not satisfy the requirement to present the claim prior to initiating litigation."

This, too, begs the question of whether CalPERS' administrative claim process is functionally equivalent to that of the VCGCB. If it is, then no claim need be filed with the VCGCB. (See, e.g., *Snipes v. City of Bakersfield, supra* [FEHA process is a functionally equivalent claims process; no GCA claim need have been also presented to the City of Bakersfield].)

The "functional equivalence" of the CalPERS system has never come before the appellate courts to Yost's knowledge and is a matter of first impression. The question of whether class action plaintiffs must first file GCA claims with the VCGCB or can satisfy the GCA requirements by presenting their claim to CalPERS (albeit, by simultaneously filing in Superior Court to avoid submitting to CalPERS' administrative claim process *as individuals* and thus abandoning their class-wide claims) will remain unsettled unless this Court resolves the issue.

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recovery through a related class action advancing similar claims. (*Opinion*, p. 6, fn 3.)

IV.
CONCLUSION

This case has never been simply about what Mr. Yost lost. He chose from the outset to act as representative of thousands of CalPERS members and beneficiaries who have suffered the same harm.

Moreover, the Second District's *Opinion*—both what it decides and what it avoids—will likely have serious repercussions affecting the rights of many, many thousands of CalPERS members and their beneficiaries to seek justice by way of the class action mechanism, regardless of the nature of the injuries they have incurred.

Those members and beneficiaries deserve to have definitive rulings on the three core issues addressed in this Petition: (1) the functional equivalence of CalPERS' administrative claim process; (2) the attempt by CalPERS to use its own failure to establish an administrative process capable of adjudicating class-wide claims to instead demand that claimants comply with *some other* claims process; and (3) whether CalPERS can disavow its lifetime duties if members wish to pursue class action claims against the pension system.

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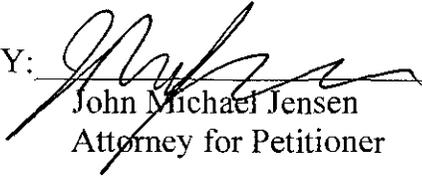
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Yost therefore respectfully requests that this Court grant his Petition for Review and decide the issues raised herein.

DATED: November 29, 2012

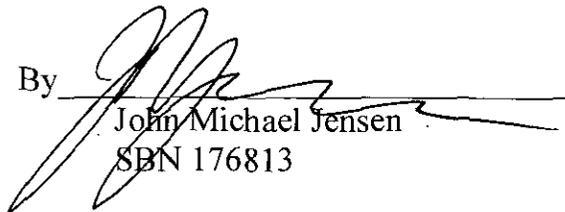
BY:


John Michael Jensen
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief, double spaced in Times New Roman 13-point font, contains 3,739 words, including footnotes, as counted by the Microsoft Word 2010 program used to generate the brief.

By



John Michael Jensen
SBN 176813

EXHIBIT 1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID YOST,

Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Defendant and Respondent.

B232920

(Los Angeles County Super. Ct.
No. BC444842)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anthony
Mohr, Judge. Affirmed.

Law Offices of John Michael Jensen and John Michael Jensen for Plaintiff and
Appellant.

Steptoe & Johnson, Edward Gregory, Jason Levin, Jennifer Morrow and Sheri T.
Cheung for Defendant and Respondent.

Plaintiff and appellant David Yost appeals from a judgment of dismissal following an order sustaining a demurrer in favor of defendant and respondent California Public Employees' Retirement System (CalPERS) in this class action lawsuit concerning the calculation of retirement benefits. Yost contends: 1) he substantially complied with the claim presentation requirements of California's Government Claims Act (GCA) (Gov. Code, §§ 900 et seq.);¹ 2) the claim presentation requirements do not apply, because he was seeking the return of property that CalPERS held as a bailee; (3) the claim presentation requirements do not apply, because settlement has been provided for by statute and constitutional provision; 4) CalPERS has a functionally equivalent claims process; and 5) the trial court abused its discretion by denying pre-class certification discovery and leave to amend to substitute a new representative plaintiff. We conclude that Yost was required to comply with the requirements of the GCA and was not excused from compliance. The trial court did not abuse its discretion by denying pre-class certification discovery and leave to amend to substitute a new class representative. Therefore, we affirm.

BACKGROUND

CalPERS

CalPERS administers the retirement system for many public employees in California in accordance with the Public Employees' Retirement Law (§ 20000 et seq.) (PERL). Vested members of CalPERS are covered by a defined benefit retirement plan which provides retirement allowances using a formula based on factors such as final compensation, service credit for years of employment, and an age-based multiplier. (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121.) The member's retirement allowance

¹ All further statutory references are to the Government Code, unless otherwise stated.

is paid from two components: an annuity and a pension. (§ 21350.) A member makes contributions during employment through paycheck deductions, which are converted into an annuity upon retirement. (*In re Marriage of Sonne, supra*, 48 Cal.4th at p. 121.) The member's employer makes contributions to a pension fund. (*Ibid.*) The employer's contributions must be sufficient, in combination with the annuity, to provide the specified benefit under the formula. (*Ibid.*)

CalPERS members can purchase service credit under certain circumstances. (§ 21020 et seq.; e.g., §§ 21022 [service credit for time while the member was laid off], 21023.5 [service credit for time in the Peace Corps or AmeriCorps], 21024 [service credit for time in the United States armed forces], 21029.5 [service credit for time in California National Guard].) Section 20910, enacted in 2003, allows CalPERS members with at least five years of credited state service to elect to make contributions to receive additional retirement service credit of one to five years. (§ 20910, subd. (a).) In order to receive the additional retirement service credit, the member makes contributions as specified in sections 21050 and 21052. (§ 20910, subd. (b).)

Sections 21050 through 21054 standardize the procedure for purchasing service credit. (Stats. 2000, ch. 489, § 18.) The member must contribute "an amount equal to the increase in employer liability, using the pay rate and other factors affecting liability on the date of the request for costing of the service credit." (§ 21052.) *The member can make a lump sum payment or installments.* (§ 21050.)²

However, when a local safety member retires as a result of an industrial disability, the member is entitled to receive "a disability retirement allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, he or she shall receive his or

² Section 21050 was amended in 2010 with additional provisions governing installment payments. (Stats. 2010, ch. 197, § 1.) Current section 21050, subdivision (d), expressly states that CalPERS members may cancel installment payments at any time prior to retirement. (§ 21050, subd. (d).)

her service retirement allowance if the allowance, after deducting the annuity, is greater.” (§ 21413.)

The disability retirement allowance for a local safety member retired because of industrial disability “shall be derived from his or her accumulated normal contributions and the contributions of his or her employer.” (§ 21418.) “‘Accumulated normal contributions’ means the sum of all normal contributions standing to the credit of a member's individual account, and interest thereon.” (§ 20012.) Instead of receiving disability retirement, a disabled CalPERS member may elect to withdraw his or her contributions or permit the “contributions to remain in the fund with rights to service retirement.” (§ 21153.)

Alleged Facts

Yost worked as a vocational instructor for the California Youth Authority (CYA). A calculator on the CalPERS web site showed that if he purchased five years of service credit, then his estimated monthly retirement allowance, based on his monthly salary of \$5,631, “may increase” by \$703.88. Yost concluded that this was an increase of 12.5 percent.

In December 2004, CalPERS informed Yost of his right to purchase additional retirement service credit. CalPERS stated that the estimated monthly pension increase as a result of purchasing five years of service credit was \$703.88 if he retired at age 57. The paperwork contained the following statement: “If you RETIRE ON DISABILITY, this additional service credit may not benefit you and cannot be used to qualify for, or change the method of calculating benefits.” It also stated that “[a]n Election to Purchase Service Credit is irrevocable. Once elected, any future changes to the actuarial assumptions or interest rate will not apply to service credit already purchased or an existing payment schedule.”

In February 2005, Yost purchased five years of additional service credit for \$83,171.88. He made a lump-sum payment of \$21,438.25 with funds from his 401(k)

account and elected to pay the balance in 31 monthly installments of \$2,209.79, which would be deducted from his paychecks.

In 2007, Yost was exposed to chemicals in the CYA print shop and could no longer work in that environment. He filed an application for industrial disability retirement and began receiving his industrial disability retirement allowance in February 2008. He had 15 years of service and 5 years of additional retirement service credit. Yost's service retirement allowance based on 20 years of service credit was 51.425 percent of his final salary. However, Yost believed he was entitled to 50 percent of his final compensation as his disability retirement allowance, plus an additional 12.5 percent of his final compensation based on his purchase of five years of additional retirement service credit, for a total of 62.5 percent of his final compensation. CalPERS continued to deduct installment payments of \$154.66 from Yost's retirement checks.

Procedural History

Yost filed a class action lawsuit against CalPERS on September 2, 2010. He sent a letter that day to the general counsel for CalPERS with a copy of the lawsuit, offering to dismiss the complaint if CalPERS provided the benefits requested. CalPERS filed a demurrer. Yost filed an amended complaint on December 10, 2010, alleging a class action for breach of statutory duties, breach of contract, rescission, restitution, breach of fiduciary duties, due process and equal protection violations, equitable and declaratory relief, accounting, and other relief. Yost brought the action on behalf of a class consisting of "[a]ll persons who have purchased, or in the future will purchase, 'Additional Retirement Service Credit' or other 'present value service credit' options from the California Public Employees' Retirement System; who thereafter suffered, or in the future will suffer, an industrial disability; and whose retirement allowances are or will be such that Plaintiffs will not receive all of the benefits that they are entitled to." Yost alleged that class members are entitled to a supplemental benefit based on contributions for additional retirement service credit in addition to the disability benefit. In the

alternative, he claimed restitution of the payments made to purchase additional retirement service credit. Yost alleged that he had demanded CalPERS pay him a larger pension or return his payment for additional retirement service credit, but CalPERS refused. Yost claimed that filing and serving his complaint on CalPERS complied with any government claim presentation requirements. He noted that he was seeking to conduct discovery in a separate motion and requested leave to amend to add additional class representatives.

CalPERS filed a demurrer to the amended complaint on the ground that Yost had failed to comply with the claim presentation requirements of the GCA. Yost opposed the demurrer. A hearing was held on March 16, 2011. The trial court sustained the demurrer without leave to amend. The court found that it would be inappropriate to allow Yost to conduct discovery and amend the complaint. The claim presentation requirement is a precondition to filing a lawsuit. The court found that permitting discovery and amendment would undermine the purpose behind the strict presentment requirements. To allow discovery would permit Yost to conduct "a fishing expedition" that would burden CalPERS, which was the result that was to be avoided by presentment of the claim in the first place.

Yost filed a notice of appeal on May 10, 2011, from the order sustaining the demurrer. The court entered a judgment of dismissal on June 17, 2011. In the interests of justice, we deem the premature appeal to be taken from the judgment.³

³ After appellant's opening brief and respondent's brief had been filed in the instant appeal, the trial court found Yost's case to be related to three other cases against CalPERS: *Robert Marzec et al. v. CalPERS*, Los Angeles Superior Court Case No. BC461887 (*Marzec*); *Jeffrey E. Andert et al. v. CalPERS*, Los Angeles Superior Court Case No. BC480695; and *Randy Slaughter v. CalPERS*, Los Angeles Superior Court Case No. BS136503. Yost has represented to this appellate court that the claims in *Marzec* and *Yost* are similar in nature, but that the named plaintiffs in *Marzec* filed claims with the Victim Compensation and Government Claims Board, which were deemed denied, prior to filing their action in superior court.

DISCUSSION

Standard of Review

“A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]’ [Citation.] Thus, the standard of review on appeal is de novo. [Citation.] ‘In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]’ [Citations.]” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.)

Claim Presentation Requirements

The GCA “establishes certain conditions precedent to the filing of a lawsuit against a public entity.” (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1237.) The parties agree that CalPERS is a state agency. (§ 20002 [CalPERS is a unit of the State and Consumer Services Agency].) “[A]ll claims for money or damages against the state” which meet the following criteria must be presented to the Victim Compensation and Government Claims Board (VCGCB): “(1) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision. [¶] (2) For which the appropriation made or fund designated is exhausted. [¶] (3) For money or damages on express contract, or for an injury for which the state is liable. [¶] (4) For which

settlement is not otherwise provided for by statute or constitutional provision.” (§ 905.2, subd. (b).)

“Claims for personal injury must be presented not later than six months after the accrual of the cause of action, and claims relating to any other cause of action must be filed within one year of the accrual of the cause of action. (§ 911.2, subd. (a).) Timely claim presentation is not merely a procedural requirement, but is a condition precedent to the claimant’s ability to maintain an action against the public entity. [Citation.] ‘Only after the public entity’s board has acted upon or is deemed to have rejected the claim may the injured person bring a lawsuit alleging a cause of action . . . against the public entity.’ [Citation.]” (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591.) A claimant cannot institute civil litigation before the public entity has denied or rejected the claim. (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 832.)

“The purpose of the claims statutes is not to prevent surprise, but ‘to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity’s actual knowledge of the circumstances surrounding the claim.’ (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.) The claims statutes also ‘enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future.’ (*Baines Pickwick Ltd. v. City of Los Angeles* (1999) 72 Cal.App.4th 298, 303[;] see *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123 [(*Minsky*)].)” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 (*Stockton*).)

“[T]o satisfy the governmental claim requirements as a prerequisite to filing a putative class action lawsuit, a claim by the class representative for himself and others similarly situated can be found sufficient to support an action on behalf of the others in the class without the necessity for each individual to file a claim, provided the filed claim is sufficient to satisfy the statutory purposes.” (*California Restaurant Management Systems v. City of San Diego, supra*, 195 Cal.App.4th at p. 1592.)

It is undisputed that Yost has never presented a claim to the VCGCB. Moreover, it is clear that service of Yost's complaint on CalPERS' general counsel did not satisfy the requirement to present the claim prior to initiating litigation. To consider service of the complaint to be "substantial compliance" with the claims presentation statute would render the statute meaningless.

Specific Property

Yost contends the claim requirements of the GCA do not apply in this case, because he is seeking the return of personal property held by CalPERS as a bailee. We disagree.

Section 905.2, subdivision (b)(3) provides that the claim presentation requirements apply to "all claims for money or damages against the state". . . "[f]or money or damages on express contract, or for an injury for which the state is liable." The plain meaning of the requirement to present "all claims for money or damages" includes contract claims. (*Ibid.*; *Stockton, supra*, 42 Cal.4th at p. 738.) All claims against the state "[f]or money or damages on express contract" must be presented to the VCGCB. (§ 905.2, subs. (a), (b)(3).) "Section 910, governing the contents of claims against both the state and local entities, requires specification of the 'date, place and other circumstances of the occurrence *or transaction* which gave rise to the claim asserted' (§ 910, subd. (c), italics added), and a 'general description of the *indebtedness, obligation, injury, damage or loss incurred . . .*' (§ 910, subd. (d), italics added.)" (*Stockton, supra*, 42 Cal.4th at p. 738.)

"The California Supreme Court in *Minsky, supra*, 11 Cal.3d 113, held that an action for specific recovery of money taken from an arrestee and held by the city as a bailee was not a 'claim[] for money or damages' within the meaning of the statute. (*Id.* at p. 117.) The plaintiff in *Minsky* alleged that the police had taken \$7,720 from his possession upon his arrest, held the money as evidence, and later converted the money by transferring it to a public pension fund. (*Id.* at pp. 117-118.) He alleged counts against

the city for conversion and money had and received. (*Id.* at p. 119, fn. 6.)” (*City of Los Angeles v. Superior Court* (2008) 168 Cal.App.4th 422, 427-428.)

“*Minsky, supra*, 11 Cal.3d 113, concluded that the [GCA] was not intended to apply to actions for specific recovery of property. ([*Id.*] at p. 121.) *Minsky* stated: ‘[W]e find that the government in effect occupies the position of a bailee when it seizes from an arrestee property that is not shown to be contraband. [Citation.] The arrestee retains his right to eventual specific recovery, whether he seeks to regain tangible property like an automobile, ring, wallet or camera, or whether he seeks to recover a specific sum of money which, under general constructive trust principles, is traceable to property within the possession of the defendant. [Citations.] Although the instant complaint does not expressly seek specific recovery of the money in question, it does contain a general prayer for any such relief as the court may deem just and proper, and under established California authority, the facts alleged by the complaint are sufficient to support a claim for specific recovery of the sums seized and allegedly wrongfully withheld from plaintiff. [Citation.] As such, we hold that noncompliance with the claims statutes erects no bar to the instant action.’ (*Id.* at pp. 121–122.)

“*Minsky, supra*, 11 Cal.3d 113, stated that the [GCA] was inapplicable even if the money was no longer traceable to property still in the city's possession and therefore was ‘not strictly available for specific recovery’ ([*Id.*] at p. 121, fn. 14[.]) *Minsky* stated that the ‘initial exemption of the action from the claims statute is not lost simply because the city takes the further wrongful step of disposing of the bailed property. The city cannot be permitted to invoke the claims statute, originally not available to it, by virtue of a later wrongful dissipation of the property. To so hold would be in effect to allow the local entity to profit by its own wrong, penalizing a plaintiff who, in light of the specific recovery remedy apparently available to him, justifiably did not file a claim.’ (*Id.* at p. 122, fn. 14; accord, [*Stockton, supra*,] 42 Cal.4th [at p.] 742.)” (*City of Los Angeles v. Superior Court, supra*, 168 Cal.App.4th at p. 428.)

“*Minsky, supra*, 11 Cal.3d 113, stated further: ‘[T]he purposes of the claims statutes indicate that they do not apply to cases in which an owner seeks the return of

private property held as bailee by the government and wrongfully retained. So long as the policies of the claims statutes are effectuated, they should be given a liberal construction to permit full adjudication on the merits. [Citation.] The policy underlying the claims statutes is to afford prompt notice of claims to governmental entities. [Citations.] The courts and commentators have considered prompt notice important for several reasons: to allow (1) early investigation of the facts, (2) informed fiscal planning in light of prospective liabilities, (3) settlement of claims before the initiation of costly civil litigation, and (4) avoidance of similarly caused future injuries or liabilities. [Citations.] None of these reasons apply to the governmental entity owing an affirmative statutory duty to hold private property for eventual return to the lawful owner.’ (*Minsky, supra*, 11 Cal.3d at pp. 123–124.)” (*City of Los Angeles v. Superior Court, supra*, 168 Cal.App.4th at pp. 428-429, fn. omitted.)

“The California Supreme Court in *Stockton, supra*, 42 Cal.4th 730, rejected the argument that *Minsky, supra*, 11 Cal.3d 113, stood for the proposition that all restitution claims are exempted from the [GCA] requirements. (*Stockton, supra*, 42 Cal.4th at pp. 742–743.) *Stockton* stated: ‘The *Minsky* rationale is that a claim for specific property effectively held by the government as a “bailee” for the claimant is not one for “money or damages” under the [GCA]. (*Minsky, supra*, 11 Cal.3d at p. 121.) The *Minsky* court’s reference to “general constructive trust principles” must be understood in that context. (*Ibid.*) Subsequent cases have limited the *Minsky* exception to situations in which the defendant had a duty to return seized property, enforceable by way of mandamus. [Citations.] When a claim for “money or damages” is not based on a governmental obligation to return specific property, it is subject to the claim requirements.’ (*Stockton, supra*, 42 Cal.4th at p. 743, fn. omitted; see also *TrafficSchoolOnline, Inc. v. Clarke* (2003) 112 Cal.App.4th 736, 742 [‘*Minsky* and the cases relying upon it have not been applied outside the bailee context’].)” (*City of Los Angeles v. Superior Court, supra*, 168 Cal.App.4th at p. 429, fn. omitted.)

In this case, Yost’s class action seeks an additional retirement allowance for class members, or alternatively, restitution of contributions paid to CalPERS for the additional

service credit. The gravamen of the complaint is money or damages on an express contract. Unlike in *Minsky, supra*, 11 Cal.3d 113, CalPERS did not seize money from the class members and hold it for them as a bailee, and CalPERS was not under any obligation to return the specific property. Because Yost's claim for monetary relief is not based on an obligation to return specific property held by CalPERS as a bailee, we conclude the claim is a claim for "money or damages" within the meaning of section 905.2 and is subject to the requirements of the GCA.

Settlement Provided for by Statute

Yost also contends that the claim presentation requirements do not apply in this case, because settlement of his claim has been provided for by statutory and constitutional provisions. Specifically, Yost contends section 21420 provides for settlement of his claim. This is simply incorrect. Section 21420 provides for CalPERS members who retire for industrial disability to receive an annuity for certain types of contributions. It does not provide for settlement of claims against CalPERS. The fact that statutory and constitutional provisions may provide a basis for recovery does not transform them into provisions for the settlement of claims. Under Yost's interpretation, the GCA would not apply to any claims.

Functionally Equivalent Claim Process

Yost contends that he was excused from compliance with the GCA, because CalPERS has a comprehensive claim administration process that is functionally equivalent to the claim presentation requirements of the GCA. We do not need to determine whether CalPERS' administrative process is functionally equivalent, however, because Yost did not file an administrative claim to initiate CalPERS' administrative process. Whether CalPERS' administrative process would have been functionally equivalent is irrelevant.

Denial of Discovery and Leave to Amend

Yost contends that the trial court abused its discretion by denying pre-class certification discovery in order to identify a new class representative and leave to amend to substitute the new named plaintiff. We find no abuse of discretion.

Under Code of Civil Procedure section 473, subdivision (a)(1), “The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party” In general, courts liberally allow amendments to a complaint to allow a plaintiff who lacks standing to substitute another plaintiff as the real parties in interest. (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273.) “Leave to amend a complaint is thus entrusted to the sound discretion of the trial court. ‘ . . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court’s order will yet not be reversed unless, as a matter of law, it is not supported by the record.’ [Citation.]” (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 506.) Review of discovery rulings is also governed on appeal by the abuse of discretion standard. (*First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1573.)

In this case, the trial court correctly noted that the claimant was required to present a claim against the state prior to filing a lawsuit, which would have allowed the state entity to evaluate the dispute and possibly settle without costly litigation. To allow Yost to conduct discovery into potential plaintiffs would directly contravene the purposes of the GCA, because the state entity would be forced to engage in further litigation and lose the option to evaluate and settle the case prior to litigation. This reasoned determination is not an abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondent California Public Employees' Retirement System is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.

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 - (b) Person served:
 - (i) Name: Hon. Anthony Mohr
 - (ii) Address:
Los Angeles Superior Court, Central Civil West
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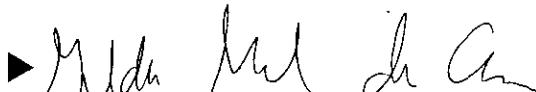
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