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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10 ROBERT MARZEC, an individual; RACHEL) Case No.: BC 461887
11 HEALY, an individual; BENJAMIN) [Consolidated with BC 480695]
12 ESPARZA, an individual; JEFFREY E.)
13 ANDERT, an individual; NEIL MacLAREN,) **CLASS ACTION**
14 an individual; RANDY SLAUGHTER, an) (Assigned to the Hon. Maren E. Nelson,
15 individual; and HENRY BROWN, an) Department 17, for all purposes)
16 similarly situated,)

16 Plaintiffs,)

17 vs.)

18 CALIFORNIA PUBLIC EMPLOYEES')
19 RETIREMENT SYSTEM (CalPERS),)
20 BOARD OF ADMINISTRATION OF)
21 CALIFORNIA PUBLIC EMPLOYEES')
RETIREMENT SYSTEM,)

22 Defendants.)

Date: May 11, 2018
Time: 9:00 am
Department: 17

Trial Date: None
Complaint Filed: May 18, 2011

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1 **I. CalPERS' Defective Premise**

2 Legally, *Hittle v. Santa Barbara County Empl. Ret. Ass'n.* (1985) 39 C3d 374 holds that
3 CalPERS as a retirement system is a fiduciary that must fully and fairly disclose the actual terms
4 of pension benefits in a written booklet, publication, or other document that it makes available to
5 safety members before contracting. (*Hittle*, at 394.) *Hittle* directly and very clear holds that an
6 invitation to call the retirement system for oral communications is not sufficient to satisfy a
7 retirement system's fiduciary duties to fully and fairly inform. (*Ibid.* ["This omission [to
8 adequately and fully inform in the booklet and written materials] was not remedied by the form
9 letter's invitation to retiring employees to contact the Association if any additional information is
10 required".]) *Hittle* requires that disclosures must fully and fairly describe the terms, make the
11 booklet available to members, and explicitly reference the booklet. (*Ibid.*) *Hittle* clarifies that
12 CalPERS was required to provide full and fair disclosures in writing regardless of its specific
13 knowledge or interactions with a member. CalPERS "must meet its fiduciary obligation to fully
14 inform its members of their options in obtaining retirement benefits notwithstanding the extent of
15 [CalPERS'] knowledge of each member's particular situation or entitlement. ...[T]he failure to
16 satisfy this obligation is particularly egregious where [CalPERS] is on notice." (*Ibid.*)

17 The Supreme Court granted Mr. Hittle the right to rescind his election, and *Hittle* could
18 have been certified as a class action: "SBCERA's incomplete communications with Hittle are
19 apparently standard and used routinely to inform SBCERA members of their options for
20 disposing of their retirement contributions." (*Ibid.*) The *Marzec* opinion and remittitur relies on
21 *Hittle* and adopts this written standard, adopting the *Hittle* language.

22 CalPERS' *Opposition* relies on a defective legal premise: It implies that the *Marzec*
23 opinion revised *Hittle*, removed *Hittle's* requirement that a retirement system use written
24 documents to inform, and instead argues that *Marzec* newly allows a retirement system to use
25 oral disclosures, even third party oral disclosures, to meet its fiduciary duties to fully and fairly
26 inform. It seeks to undermine *Hittle* by taking a single sentence in *Marzec* out of context:
27 "Plaintiffs' cause of action for rescission [] does not depend on the language of the contracts, but
28 on the totality of CalPERS' disclosures to its members." (*Opp.*, 2:18-21.)

1 In the context of the *Marzec* opinion, however, this language clearly referred to Plaintiffs
2 not having attached copies of all of the CalPERS *documents* to the *Complaint* when it was under
3 review on appeal. For example, the appellate court referred to Plaintiffs' allegations based on "a
4 variety of member publications" and "CalPERS publications" (*Marzec*, at 913) and even quotes
5 CalPERS' own demurrer to the *First Amended Complaint* urging "that the [trial] court should
6 examine the language of CalPERS' disclosures 'alleged in or attached to the FAC'..." (*Ibid.*)

7 The appellate court then concludes that while "plaintiffs have attached to their complaint
8 some of the communications ...there is no suggestion in the complaint that these are *all* of the
9 relevant disclosures on which plaintiffs base their cause of action" (*Id.*, at 916), where "attached"
10 clearly refers to written materials. Contrary to CalPERS' suggestion, the *Marzec* opinion did not
11 articulate any limitation or criticism of *Hittle*.

12 Since *Hittle* allowed a retirement system to refer to its other publications to fully inform,
13 the *Marzec* court remitted the case to determine if there are other CalPERS publications that
14 fully and fairly disclosed the risk of loss, no refunds, etc. After remittitur, Plaintiffs attached the
15 additional CalPERS publications to the complaints like the state and local safety handbooks and
16 service credit purchase handbooks. (*Compendium*,, Exh. 22-30.) CalPERS, by contrast, has
17 attached nothing new—an apparent admission that CalPERS has *no* written materials that
18 contain the kind of complete and unambiguous disclosures required of CalPERS as a fiduciary.

19 CalPERS turns *Hittle* on its head. Under CalPERS' framework, there *are no* affirmative
20 duties to provide full and fair disclosure in writing. Instead, the duties shift to the individual to
21 seek information and question CalPERS' written documents to plumb whether the documents
22 mean something other than the plain meaning of the words. The beneficiary can never trust its
23 fiduciary because some employee somewhere may have said something different than required.
24 It also provides great incentive to fiduciaries to encourage their employees to say different things
25 to different individuals, and not follow the law, because their errors and breaches actually help
26 the fiduciary avoid responsibility for fulfilling its fiduciary duties across the class. CalPERS'
27 flawed proposal is quite extraordinary and extraordinarily dangerous to the rule of law.

28 CalPERS arguments twist the concept of fiduciary duties and the *Marzec* opinion beyond

1 any reasonable or acceptable meaning. The Court should reject such extraordinary departures
2 from settled law. The *Marzec* opinion is consistent with and respectful of *Hittle's* holding that a
3 retirement system has an affirmative obligation as a fiduciary to make the material points known
4 to its beneficiaries in writing, including to make clear the different options that are available.

5 **II. CalPERS' Duty to Fully and Unambiguously Disclose and Warn**

6 Plaintiffs' *Motion for Class Certification* proved that common law and facts predominate
7 across the class based on the *Marzec* remittitur and *Hittle*. In the *Motion of Class Certification*,
8 *Trial Management Plan*, and *Third Amended Complaint*, Plaintiffs proved that a class action for
9 rescission is appropriate and manageable, that CalPERS' class and individual affirmative
10 defenses can be effectively addressed to the extent that they are valid, that the Court and litigants
11 benefit with a class action, and that the requirements for rescission across the class and
12 certification are satisfied.

13 At the core of Plaintiffs' lawsuit is the simple, stark fact that CalPERS never informed
14 safety members of the latent risks veiled in the military/airtime investment, and specifically
15 *never adequately informed or made information available to safety members before investing*
16 *that there were significant material risks of loss of their private money, a policy of "no refunds,"*
17 *IDR offset, and other key terms.* CalPERS' failure as a fiduciary to fully and fairly inform safety
18 members of these risks means no military/airtime investment "contracts" ever formed, and
19 Plaintiffs are eligible for rescission, with restitution of their investment funds plus interest.

20 Instead of directly addressing the failings and consequences of its flawed disclosures,
21 CalPERS has come up with a new and novel claim: That even if the warnings in the contracts
22 and other official documents *were* defective, CalPERS' employees (and maybe others) *may* have
23 *orally* informed *some* Plaintiffs of at least *some elements* of the risks, so there is no commonality
24 and certification must fail. CalPERS then combines this with mere assertions (a) that there were
25 other reasons to invest (which are encompassed within the *increases*); (b) that Plaintiffs did
26 nothing and abandoned their claims because they did not sue earlier; (c) that CalPERS is entitled
27 to interpret the term "irrevocable" in its contract to mean "nonrefundable" even though CalPERS
28 explicitly defines it otherwise in the contract; and (d) that rescission claims beyond CalPERS'

1 jurisdiction and expertise should be individually heard in CalPERS' administrative process. All
2 of these are without merit, inadmissible, contradicted by facts, or simply wrong,

3 **A. No Full and Unambiguous Disclosures in CalPERS' Documents**

4 CalPERS admits that its written documents were standardized across the class. (*Opp.*,
5 2:17-18.) Based on those written documents, it then argues that four sentences either disclosed
6 the risk of loss or put Plaintiffs on inquiry notice: (1) "If you retire on disability retirement, this
7 service credit may not benefit you"; (2) "Some may never receive a service retirement benefit,
8 but instead become disabled" (but CalPERS ignores the immediately preceding paragraph, "[w]
9 look at the projected retirement benefit *increase* you may receive from this additional service
10 credit (at retirement, **disability**, death, or other termination from employment)" (e.g., *R. Healy*
11 *Decl.*, Exh. 14; *Brown Decl.*, Exh. 1; *Andert Decl.*, Exh. 5); (3) "I understand this election is
12 irrevocable" (but CalPERS omits the very next sentence, "Once elected, any future changes to
13 the actuarial assumptions or interest rate will not affect the cost of service credit already
14 purchased or an existing payment schedule" (e.g., *R. Healy Decl.*, Exh. 17; *Esparza Decl.*, Exh.
15 8; *MacLaren Decl.*, Exh. 8) and simply asserting that "irrevocable" does not refer to actuarial
16 pricing (as it says) but instead means "no refunds"; and then (4) inviting the member to contact
17 or telephone CalPERS if he/she has questions. (See *Opp.*, 5:10-6:13.)

18 CalPERS argued these very issues to the appellate court in its Respondents' Opposition
19 Brief at pgs. 32-34 and called on that court to "affirm the trial court's ruling that it adequately
20 disclosed the disability risk of purchasing service credit." (*Compendium*, Exh 1.) Instead, the
21 appellate court found those four phrases were insufficient as a matter of law to provide adequate
22 notice, and thus the remittitur. Indeed, CalPERS language does not fully and fairly disclose the
23 real material terms of risk of loss and no benefit on IDR. (1) The "may not benefit" language
24 does not disclose a risk of loss or no refunds; rather, it implies a refund if CalPERS does not
25 provide the agreed upon increases. It is not seizure or forfeiture language. (2) Consistent with
26 CalPERS' other documents, the contract materials recurrently promise "increases" on both
27 service retirement and disability, and do not disclose a risk of loss on disability; (3) the word
28 "irrevocable" is not a synonym for "nonrefundable". CalPERS consistently used the word

1 "irrevocable" in the context of actuarial pricing. It is not sufficient notice of a seizure or
2 forfeiture; and (4) *Hittle* is clear that an invitation to contact the retirement system for additional
3 information is not sufficient to satisfy its fiduciary duties.

4 No CalPERS document, form, publication, contract, phone script, PowerPoint or Webinar
5 presentation, or any other communication available to members fully and fairly disclosed a risk
6 of loss, "no refunds", IDR offset, or the other adverse terms before contracting. CalPERS
7 apparently agrees that it did not disclose this risk or obtain Plaintiffs' consent to "no refunds".
8 After the fact of disability, CalPERS felt it needed and then sought a waiver of refunds, buried in
9 a two-page form to suspend installment payments. (*Compendium*, Exh. 2.) CalPERS' *Opposition*
10 never mentions the suspension of installments form or the waiver of refunds at all.

11 The Court can simply compare the language of the suspension of installments form with
12 the language in any of CalPERS' documents to see that CalPERS fails to disclose the material
13 terms regarding "no refunds" or *Government Code* sections 21037/21039 before contracting.
14 CalPERS' first use of the waiver of refunds long after contracting is persuasive proof that even
15 CalPERS understood it failed to disclose the "no refunds" terms in the contract and needed a new
16 signed agreement after the fact to try to bootstrap in the consent it failed to get at contracting.

17 CalPERS mischaracterizes Plaintiffs' position as looking only to the four corners of
18 CalPERS' contract, but Plaintiffs have attached the safety handbooks, (*Compendium*, Exh. 22-
19 27), service credit purchase books (*Id.*, Exh. 28-29) annual member statements, suspension of
20 installment payments form, and other publications as discussed in *Hittle*. None disclose the risks.

21 CalPERS makes at least two damaging admission in its *Opposition*. First, it admits that it
22 used standardized publications across the class. Second, CalPERS admits that the standardized
23 documents that it used across the class did not adequately inform. It offers two declarations that
24 purport without foundation to perhaps, orally explain—only "if asked"—that the term
25 "irrevocable" means "nonrefundable." The two terms are not synonyms and they are not
26 ambiguous. They were never used as synonyms in any of CalPERS' writings.

27 But CalPERS does not then concede that next logical step of having made material
28 misrepresentations across the class: that class certification for rescission of the defective written

1 agreement across the class should be granted for all safety members because the documents fail
2 to fully and fairly disclose the real terms under *Hittle*.

3 **B. CalPERS' Mischaracterization of the Risk**

4 CalPERS mischaracterizes the risk with the invented phrase "disability risk." But the
5 risks and harm arise not from disability itself. Rather, they arise from a member's age at IDR and
6 amount of service credit at the time of retirement, and only impact those who retired with IDR
7 below age 50, or retired over age 50 but without sufficient service credit to benefit from their
8 military/airtime investment.

9 CalPERS knew that the hidden or latent risks were (1) that if a safety member retired
10 with IDR younger than 50 (no matter how much service credit), he or she would suffer a total
11 investment loss and only receive the 50% IDR that he/she was already entitled to before
12 contracting; or (2) that if a safety member retired with IDR at age 50 or older (but with less than
13 16.67 years of earned service credit in a "3% @ 50" formula), he or she would also suffer a total
14 loss and only receive the 50% IDR that he/she was already entitled to; or (3) that if a safety
15 member retired with IDR over age 50 and had earned between roughly 12 and 16.5 years of
16 service credit, he or she might get a partial benefit for his/her investment but would not receive
17 the full "present value" incremental increase from that investment. By contrast, safety members
18 over age 50 and with more than 16.67 years of earned service credit would suffer no loss at all.¹

19 CalPERS fully understood these risks. It knew or had reason to know since the failure of
20 legislation in 1991 that safety members, by contrast, did *not* know or did not understand these
21 significant but difficult to discern risks. (10/2/17 *Jensen Decl.*, ¶¶14-31; Exh. 2.) And CalPERS
22 knew since at least 2004 that *Government Code* sections 20137 and 20139 barred refunds and
23 thereby forced disabled safety members to lose their personal money. (*Ibid.*)

24 Yet at least between 2004 and late 2016 (when CalPERS finally began including an
25 arguably more complete warning in its official publications; see *Compendium*, Exh. 30, 26-27),
26 and likely before 2004 as well, CalPERS never clearly disclosed this in any of the safety member

27
28 ¹ The same formula holds true for safety members with 2%, 2.5% and 2.7% formulas, but the
number of years required to reach a given benefit increases as the formula decreases.

1 handbooks, service credit purchase pamphlets, standardized form contracts, or other official
2 communications addressed to safety members looking to invest in military/airtime. CalPERS
3 ignored that IDR is only available to safety members (not miscellaneous members) and failed to
4 address the unique risks faced by those in safety positions. When "airtime" became available in
5 2004 and 20% or more of the over 50,000 who invested in it were safety members, CalPERS
6 developed new materials to advise members about military/airtime investments but used the
7 same or similar standardized disclosures, forms, contracts, publications, and processes for safety
8 member as for miscellaneous members, again even though they faced very different risks.

9 Again, the real risk is not that safety members might suffer disability and retire with IDR.
10 The risk is that those retiring with IDR may not be old enough or have sufficient earned service
11 credit at IDR to get the benefits for which they invested. CalPERS never explained this. And
12 without the relevant information, Plaintiffs were denied the right to consider the real impact of
13 investment before signing, there was no "meeting of the minds" and no contract formed. Even
14 Plaintiffs' counsel did not discover the risks until right before this case was filed.

15 **C. CalPERS Misrepresents When Different Documents Were Used**

16 While none of CalPERS' disclosures were sufficient at least prior to 2016, Plaintiffs'
17 *Third Amended Complaint* separated out a subclass of members who invested in 1991 through
18 2003 from those who invested in 2004 and afterward. Plaintiffs' proposed two subclasses reflects
19 the fact that airtime became effective in January 2004 and CalPERS used different standardized
20 publications, forms, and contracts starting in 2004 than before that, as well as the fact that the
21 records produced by CalPERS prior to 2004 are more incomplete than those afterward.

22 This separation was patently clear in the *TAC, Motion for Class Certification, and Trial*
23 *Management Plan*. Yet CalPERS ignores the separation of the two periods and two subclasses,
24 and instead misleadingly points to text from a 2003 contract offer letter (and moreover, one sent
25 to a *miscellaneous* member who was not even eligible for IDR²) to imply the contents were

26 ² CalPERS claims that it "wrote prospective purchasers pointing out, '[f]or safety members...
27 [t]here are scenarios where some members may derive little or no increased benefit from
28 additional service credit,' and telling them to contact CalPERS to 'determine when or if the
additional service credit would be most beneficial' ", citing to Exh. 2 to Plaintiffs' original 2011

1 included in official text from 2004 forward. Even though the 2003 language is far from complete
2 and unambiguous, it at least hints at a risk of loss. CalPERS' standardized documents from 2004
3 through 2016, by contrast, entirely omit even these hints and make no clear disclosure of risk to
4 give Plaintiffs the right and opportunity to consider the real investment terms.

5 **D. Analysis of CalPERS' Misrepresentation of Increases**

6 **From 2004 to 2016, CalPERS' documents promise incremental increases.** The annual
7 member statements reads, "You may be eligible to increase your retirement allowance by ...
8 purchasing additional service sredit, military service credit.... " (See e.g., *Marzec Decl.*, Exh. 14;
9 *Esparza Decl.*, Exh. 2; *MacLaren Decl.*, Exh. 3.) The service credit calculator promised
10 incremental increases for incremental investment with no warning of risk of loss. (E.g., *Healy*
11 *Decl.*, Exh. 12; *Brown Decl.*, Exh. 3.) CalPERS' standardized offer letters contracts and
12 publications promised increases without disclosing the risk of losses. The contract itself wrote,
13 "We look at the projected retirement benefit increase you may receive from this additional
14 service credit (at retirement, disability, death, or other termination from employment. Then we
15 convert that to a lump sum in today's dollars." (E.g. *Esparza Decl.*, Exh. 6; *Andert Decl.*, Exh.
16 5.) CalPERS used the standardized form contract and documents throughout. Even the handout
17 for airtime on 1/2/04, the day CalPERS began offering it, discusses "present value" pricing and
18 states "This means that you are funding the cost of your future pension increase in full" with no
19 discussion of any risk. (*Compendium*, Exh. 7, p. 117.)

20 **IDR letter.** The IDR notices after injury did not disclose a risk of loss, a forfeiture,
21 anything about the money invested, anything about the service credit, about the balance, or how
22 the money that was on deposit was used. After IDR, CalPERS did not disclose that it transferred
23 the money to offset the IDR or transferred it to the employer. Simply indicating an amount did
24 not put Plaintiffs on notice that they were not going to get refunds or increases for their
25 investment. CalPERS argues that "Once Plaintiffs were on notice of their claims—when they

26 *Complaint.* (*Opp.*, 6:1-4) Exhibit 2, however, was sent to a *miscellaneous* member, someone not
27 even eligible for IDR. (*Compendium*, Exh. 3 and was attached to the *Complaint* as an exemplar
28 of other service credit investment contracts. There is nothing in evidence suggesting such letters
were sent to *safety* members. Judge Mohr's dismissal in 2012 was also mistakenly based in part
on that 2003 letter. (*CalPERS' Compendium of Evidence*, 11/5/2012 Marzec Order, at 14:17-19.)

1 took IDR, saw no benefit for their purchases, and were refused refunds—they were obliged to
2 investigate notwithstanding CalPERS' fiduciary status." (*Opp.*, 20:2-5.) But the language of the
3 IDR letter belies CalPERS' rhetoric. It indicates an initial payment after adjustments to be made.
4 (See, e.g., *Marzec Decl.*, Exh. 20; *Slaughter Decl.*, Exh. 21.) There was no disclosure. It does not
5 say that they will be refused refunds. Since CalPERS argues IDR is not calculated with respect to
6 service credit, how were individuals, especially under age 50, supposed to know their investment
7 benefit was somehow impacted? CalPERS implies the *omission* of information by a fiduciary put
8 people on inquiry notice, and eschews any affirmative duty to disclose material terms.

9 **Waiver.** Perhaps the clearest proof of the lack of transparent disclosures post-2003 is the
10 two-page suspension of installments form and waiver. (*Compendium*, Exh. 2) CalPERS admits it
11 created this waiver form sometime in 2003. (See Answers to Request for Admissions,
12 *Compendium*, Exh.4.) The language in the 2-page waiver shows how ambiguous, defective, and
13 misleading CalPERS' original contract language was. (Compare *Andert Decl.*, Exh. 21, 23, and
14 *Brown Decl.*, Exh. 14, 15, with contract disclosures for example in *Marzec Decl.*, Exh. 11;
15 *R.Healy Decl.*, Exh. 17; *Esparza Decl.*, Exh. 8.)

16 CalPERS' *first use of the waiver after injury* shows CalPERS realized that none of the
17 Plaintiffs consented to "no refunds" in the original contracts. CalPERS threatened that "failure to
18 sign ..." would cause CalPERS to deduct still more money out of the reduced IDR
19 (*Compendium*, Exh. 2.) The suspension of installment payments letter also purports to keep the
20 member's money on deposit for the member, "If you reinstate to active employment, your
21 payment, plus interest accrued during the period of time that the payments were suspended, will
22 resume from you active member payroll, as directed by GC20139(b) The interest rate on your
23 account is 8.25%" (*Ibid.*) There is no notice of forfeiture, seizure, or finality .However, CalPERS
24 kept the information secret until a Plaintiff had already suffered a catastrophic loss.

25 **CalPERS' argument about documents.** In its *Opposition* CalPERS argues that
26 Plaintiffs may not have reviewed other documents (including those that CalPERS did not send
27 them), but fails to even argue, much less prove, that CalPERS even had any written material or
28 oral communication that could inform a safety member of the risk of loss, no refunds, *Gov't*

1 Code §21037, IDR offset, or other detriments, (other than the post disability waiver of refunds).

2 **E. An Analysis of CalPERS' Disclosures, and Distortions**

3 First, the risks facing safety members considering investing in military/airtime were
4 hidden, including the undisclosed risk of "no refunds." CalPERS does not point to a single
5 document that discloses "no refunds" risk, available before contracting.

6 If CalPERS had such a document, then CalPERS would have provided it. There is none.

7 Second, from late 2004 forward, CalPERS wrote standardized scripts for their employees
8 to follow and use when interacting with members. The scripts were consistent with the written
9 documents. The scripts, webinars, and the flowcharts and decision trees CalPERS' employees
10 were required to use in phone calls from at least 2003 forward did not disclose the risk of loss or
11 no refunds. (*Compendium, Exh., 7, pp. 27-28; 69-158.*)

12 Third, CalPERS' argument that it disclosed "no refunds" when it used the word
13 "irrevocable" is a deceptive and perhaps desperate tactic that exacerbates the nondisclosure. As
14 described in detail in Plaintiffs' 4/20/18 *Motion to Strike, Motion for Discovery/Evidentiary*
15 *Sanctions and Request for Judicial Notice (Compendium, Exh. 5, 6 and 7)*, CalPERS' contract
16 documents and other official publications repeatedly use "irrevocable" to mean that if the
17 actuarial assumptions used to price military/airtime investments change, members cannot ask to
18 change the amount they paid. There is absolutely no mention of "no refunds." CalPERS does not
19 and cannot point to a single document that explains that "irrevocable" means "you can't later
20 change your mind and get a refund" as it claims.. (*Opp., 6:11-2.*)

21 Fourth, CalPERS grossly distorts its own writings. For example, CalPERS' insistence that
22 the offer letters revealed that "some may never receive a service retirement benefit, but instead
23 become disabled" actually says "Determining the *increase* [emphasis added] to your future
24 benefits involves a number of actuarial assumptions, including projected age at retirement, life
25 expectancy, and the probability that some may never receive a service retirement benefit but
26 instead become disabled, die, or terminate their CalPERS membership." (See, e.g., *R. Healy*
27 *Decl., Exh. 14; Brown Decl., Exh. 1; Andert Decl., Exh. 5*) Disability is simply mentioned as one
28 of the actuarial assumptions used to "determin[e] the *increase*."

1 Moreover, the paragraph immediately above says, "The cost to purchase this service
2 credit is calculated using a 'present value' method.... This provides us the best estimate of the
3 potential future Final Compensation figure that may be used at retirement for calculating your
4 retirement benefit. We look at the projected retirement benefit *increase* you may receive from
5 this additional service credit (at retirement, disability, death, or other termination from
6 employment). Then, we convert that to a lump sum cost in today's dollars." So in this paragraph,
7 "increase" *includes increase to retirement, disability, death,...* benefits. (*Ibid.*)

8 **F. CalPERS' Reliance on "Oral Representations" Does Not Cure the Problem**

9 The very fact that CalPERS wants to introduce oral evidence to explain the terms of the
10 standardized written contract is a judicial admission that CalPERS' written documents failed to
11 fully and fairly inform and that CalPERS breached its fiduciary duties under *Hittle* across all of
12 those who received the standardized writing, justifying certification.

13 To dodge this result, CalPERS distorts *Marzec* to argue that "the totality of disclosures"
14 do not all have to be in writing; *oral* disclosures are an acceptable *substitute* for written booklets
15 to fulfill fiduciary duties to inform. *Hittle* may support using additional oral communications as
16 long as a written document fully and fairly discloses the terms and CalPERS provides the
17 booklet, but CalPERS' oral disclosures must be *consistent* with and secondary to the written
18 booklets that fully disclose. However, CalPERS hopes to introduce oral representations that
19 *revise and alter* the written terms of the contract, including using the putative oral represent-
20 ations to cleanse and correct any omissions, misrepresentations or orally revise written terms that
21 CalPERS chooses to revise after the fact. This way, the oral representations take precedence over
22 written ones. As a result, CalPERS can misrepresent in writing as long as it purports to possibly
23 tell a few people of different facts, and always avoid a class action on commonality grounds.

24 Interpreting *Marzec* to allow CalPERS to primarily fulfill its fiduciary duties by using
25 oral communications in lieu of written disclosures, CalPERS asserts that even if all safety
26 members received the same defective standardized written materials, then because a few of them
27 *might* have been orally told *something else by someone* about the risks, there is no commonality
28 to support a class action. Based on the mistaken idea that *Marzec* revised *Hittle* to allow oral

1 representations in lieu of correct written material, CalPERS argues that the mere *possibility* or
2 *speculation* that some oral hints were given to a potential class member—without foundation and
3 without producing a single contemporaneous business record documenting such exchanges with
4 members—can defeat certification based on commonality. Encouraging mistakes and
5 speculation, CalPERS tries to free itself from the consequences of breaching its fiduciary duties
6 and defeat commonality without any proof. If it were not so cynical, it would be astonishing.

7 *Hittle* and *Marzec* are clear: oral representations are not adequate substitutes for the
8 *written* documents required by CalPERS' fiduciary responsibilities. Nevertheless, Plaintiffs' case
9 can proceed on whatever interpretation the Court makes of the *Marzec* opinion because (i) there
10 is no evidentiary support that CalPERS' employees even made the disclosures CalPERS claims
11 they made and thus the declarations should be excluded, or (ii) even if the declarations are not
12 excluded, the oral disclosures they recount are *still* not full and fair disclosures of the military/
13 airtime investment terms. In either case, CalPERS has breached its fiduciary duties to inform in
14 the same and similar ways based on the same or similar law and the class should be certified.

15 **Oral representations fail as a matter of law.** CalPERS' oral representations fail as: (1)
16 CalPERS treats them as independent contracts that provide for no refunds (which violates the
17 statute of frauds), or (2) CalPERS' oral communications changed or altered the written contract
18 (which violates the parol evidence rule), or (3) the "totality of CalPERS' disclosure" cannot
19 include communications by unions and employers not authorized to bind CalPERS and without
20 apparent or actual authority to do so, including even CalPERS employees who make
21 representations that are inconsistent with CalPERS' internal guidance. CalPERS cannot rely on
22 rogue employees or simply vague assertions that are likely not true to defeat commonality.

23 The appellate court in *Marzec* did not open a Pandora's Box and gut a retirement system's
24 fiduciary duties. That court did not empower CalPERS to violate the statute of frauds, violate the
25 parol evidence rule, defeat commonality by the mere assertion of oral communications, or
26 empower CalPERS to trick its members. Instead, it remitted a cause of action for rescission.

27 Across the class, CalPERS communicated *identical*, material misrepresentations of
28 increases, and omitted material terms regarding risk. An inference of reliance arises as to the

1 entire class so that actual reliance can be proved on a class-wide basis. (*Mirkin v. Wasserman*
2 (1993) 5 C4th 1082, 1095; *Vasquez v. Sup.Ct.* (1971) 4 C3d 800, 814-815; *Occidental Land, Inc.*
3 *v. Sup.Ct.* (1976) 18 C3d 355, 362-363; *Wilner v. Sunset Life Ins. Co.* (2000) 78 CA4th 952, 962)

4 **The CalPERS employee declarations fail on their face.** The unsupported assertion by
5 CalPERS' declarants Fox and Horton that they explained "irrevocable" meant "no refunds" tries
6 to introduce parol evidence to change the plain meaning. Neither Fox nor Horton actually say
7 that they told members about "no refunds." Horton says she "cautioned members that ... the
8 purchases were irrevocable. I would explain, *if* asked, that irrevocable meant 'no refunds.' "
9 (*Horton Decl.*, 2:2-4, emphasis added.) But she never explicitly says she ever told anyone this.
10 Fox's declaration is even more defective. "*I don't recall a single instance* of a member asking
11 me what irrevocable meant, but *if* they had, I *would* have explained it meant 'you can't later
12 change your mind and get a refund'." (*Fox Decl.*, 1:22-25, emphasis added.)

13 The Fox and Horton declarations are totally unsupported by any documents. This is not
14 surprising, since no CalPERS publications, booklets, website postings, Election contracts and
15 offer letters, PowerPoints and webinars, and scripts for employee interactions with members
16 mention "no refunds" before the time of contracting.

17 For decades, CalPERS has maintained information systems and computer databases and
18 required its employees to record and document interactions with members, including in-person
19 consultation, phone, or email contact. (See Compendium, Exh. 5, *Jensen Decl.*, ¶16.) The only
20 Workflow, TouchPoint or similar documents produced by CalPERS over the past seven years are
21 44 pages referencing interactions with the named Plaintiffs. Of those, *only two* document "no
22 refunds," a 4/24/07 entry for Andert and a 1/18/05 entry Slaughter, and both were *after* they had
23 been disabled and were retiring with IDR. (*Compendium*, Exh. 7, pp. 36, 61.) If
24 contemporaneous business records documenting these interactions do not exist, it means there is
25 no proof at all that the events described by Fox and Horton occurred. Plaintiffs have moved
26 strike and exclude. (*Compendium*, Exh.5, 6 and 7.)

27 **No authority for "no refunds."** CalPERS is a statutorily defined entity and only has
28 power in its statutory mandate. It has no statutory power to seek forfeiture or no refunds under an

1 irrevocable contract. The law traditionally disfavors forfeitures and statutes imposing them are to
2 be strictly construed. (*People v. Sup.Ct.* (2002) 103 CA4th 409.) If a provision for forfeiture or
3 penalty is couched in ambiguous terms, it will not be enforced by the courts. (*Argonaut Mining*
4 *Co. v. Kennedy Mining & Milling* (1900) 131 Cal. 15.) CalPERS has previously argued that "no
5 refunds" arises from *Gov't Code* sections 21037 and 20139. (*Compendium*, Exh. 1, p. 29.)
6 Neither Fox nor Horton mention sections 21037 or 20139.³

7 As indicated, Plaintiffs have moved to strike and exclude the declarations. (*Compendium*,
8 Exh. 5, 6 and 7.) Nevertheless, Plaintiffs' case can proceed even if the Court admits them
9 because the oral disclosures they recount are *still* not full and fair disclosures of the military/
10 airtime investment terms, breaching CalPERS' fiduciary duties and allowing rescission.

11 **III. CalPERS' Misstatement of Facts**

12 **A. Misquoting and Mischaracterization of Deposition Testimony**

13 Much of CalPERS' deposition examination involved asking Plaintiffs about what they
14 *might have* done or thought years ago *if* they had been presented with different facts. Plaintiffs
15 refused to speculate which CalPERS misconstrues as Plaintiffs "cannot be certain" whether they
16 would have invested or not if they knew the risks. See Evidentiary Objections concurrently filed.

17 Plaintiff has stated under oath what they did, why they did it, what they expected to get
18 from their investments, and what they did not think was part of the deal. See *Motion for Class*
19 *Certification*, 2:23-8:24 for a detailed description referencing each Plaintiff's *Declaration*.

20 Consistent with their *Declaration* statements, each Plaintiff also testified clearly and
21 passionately in deposition about how they saw no substantive warnings in CalPERS' contract or
22 other materials, trusted CalPERS to act in their interest, and were shocked by CalPERS' refusal
23 to provide them the expected increases or refund their money. Although *Hittle* does not look to
24

25 ³ CalPERS' argument about "irrevocability" is inherently defective even under its own "logic".
26 Sections 21037/21039 allow at least partial revocation of the contract for those paying
27 installment payments. If the word "irrevocable" was intended to generate no refunds, seizure, or
28 forfeiture, then full and fair disclosure of irrevocability would require CalPERS to inform safety
members that there is great incentive to pay by installment than by lump sum because if you are
injured, you will likely lose less money. Likely nothing was disclosed because CalPERS
intentionally or negligently did not disclose *anything* about seizure, no refunds, or loss of money.

1 each Plaintiff's subjective understanding, but requires *objective, written* evidence of full and fair
2 disclosures (*Hittle*, at 394), the Plaintiffs' stories are important. As a representative sample:

3 **Robert Marzec** says CalPERS "screwed us out of our money and didn't give us the
4 benefit they promised." Police officers "were bamboozled, we were lied to with the false promise
5 of increasing our retirement and it never happened." (*Compendium*, Exh.8, 47.) "Nowhere in
6 there does it state anything at all in any shape, form, degree, or capacity about any kind of risk or
7 liabilities involved in electing to purchase this service credit. (*Id.*, 82.) CalPERS' IDR letter did
8 not put him on notice of a problem. (*Id.*, 143-144.)

9 **Rachel Healy** says "CalPERS represented in legal documents to me a contract, and the
10 con- tract is what we based our decision on. Because my husband was an attorney at the time,
11 and he said, 'We have to read the contract.'" (*Compendium*, Exh 9, 53.) "We honestly trusted
12 CalPERS. I mean, we did. They do everything for us, home loans, everything else. They are our
13 fiduciary. There was—there was nothing on the contract that said 'loss' or that you would lose
14 your money, or that, 'We will steal your money.' There was nothing on the contract that said
15 that." (*Id.*, 71-2.)

16 **Tim Healy**, an attorney, reviewed the contract. "If I saw this paperwork today, I would
17 say, 'Buy it. Buy that five years because this is a no-brainer. There is nothing in here about losing
18 any money. ... Nobody else put any money in there. It wasn't Stockton's. It wasn't CalPERS'. It
19 was Tim and Rachel's money.... There's nothing in here that said you are going to lose your
20 principal, nothing. If I had know CalPERS was not going to give us the money, the principal... I
21 think anybody would be crazy to buy that." (*Compendium*, Exh. 15, 167-170.)

22 **Ben Esparza** says "If it had been laid out somewhat in this manner...[that] I would not
23 get refund on that purchase, that would have made a material difference in my decision to invest,
24 and nowhere in that paperwork was there any language stating that." (*Compendium*, Exh.10, 225)

25 **Jeffrey Andert** says "I went home and looked at the CalPERS website and read the
26 documents that I received already in a more -- I guess you would call it more thorough fashion to
27 ensure that I understood exactly what I was getting into. " "It doesn't specify... or talk directly
28 about any of those having an effect". (*Compendium*, Exh. 11, 43.) "Had I known there was a risk,

1 it would have been a big deal to me" (*Id.*, 172.)

2 **Neil MacLaren** says CalPERS never gave "clear indication to me that my money or
3 subsequent investment in these two years of airtime was at risk."(*Compendium*, Exh. 12, 31.)
4 CalPERS' language did not raise "a red flag for me that would put even calling CalPERS on—on
5 the radar for me. If—again, if it was a specific statement about the fact that, 'Thanks for your
6 investment, You may never see a dime of this if you don't—if you retire in IDR', then—then my
7 name wouldn't be on any of these documents." (*Id.*, 132.)

8 **Randy Slaughter** says "If that was truly a risk, then it should have been identified to
9 me...[that] if I get hurt, I don't get it back? I - I mean, to me, that's overwhelming because I don't
10 think anyone would have done it. I trusted CalPERS. I relied on them. They took moneys in
11 exchange, promised me they would prove me a benefit, but didn't tell me that that money that I
12 paid provide a risk, that there was a risk involve with it." (*Compendium*, Exh. 13, 101-102.)

13 **Henry Brown** said, "If I knew back then that ... this is what they [CalPERS] were
14 planning on doing, then I would never have purchased it at all, and I'm sure nobody else would
15 either." (*Compendium*, Exh. 15, 137.) When I learned that CalPERS "don't give no refunds
16 back?" I said, 'So you guys are ripping me off.' " (*Id.*, 149.)

17 **California Professional Firefighters (CPF) President Lou Paulson** said in deposition
18 that "we are not the conduit for CalPERS' information to our affiliates or our members. CalPERS
19 does all that." (*Compendium*, Exh. 16, 20.) CPF does not get involved in dealings between
20 members and CalPERS. "Those are individual decisions ..., and we don't advise our
21 membership about that [CalPERS benefits.] We don't communicate directly to the membership
22 on any issue..... That is with the individual and the system itself." (*Id.*, 28.)

23 **Jill Ortiz of the City of Newport Beach HR Department** clarified in her Second
24 Declaration that "neither the City nor I provide advice or interpretation of CalPERS right or
25 benefits to our employees. The City makes available information produced by CalPERS.... I do
26 not add or interpret the information produced by CalPERS and do not change or modify the
27 information provided by CalPERS. Instead, I direct the employees to contact CalPERS for
28 information or questions about CalPERS benefits." (*Compendium*, Exh. 17, *Ortiz Second Decl.*,

1 ¶¶4, 5, 7.) She clarified that neither she nor the City held themselves out as agent or advisor of
2 CalPERS benefits to the employees. She "explain[s] to City employees that they should contact
3 CalPERS because CalPERS, not the City or myself, is the official source of information about
4 CalPERS right and benefits that they have to rely on. (*Id.*, ¶¶8, 10.)

5 **Jennifer Williams of the City of Stockton HR Department** testified (in a deposition
6 that CalPERS initiated) that the City does not go over or present the information to employees.
7 (*Compendium*, Exh. 18, 30-31.) If someone asks, they direct them to CalPERS or CalPERS'
8 website. (*Id.*, 34-35.) If an employee had a question about CalPERS benefits, she would have
9 them talk directly to CalPERS. (*Id.*, 16.) The City has not created a PowerPoint or a summary of
10 CalPERS benefits. (*Id.*, 27, 37.) She confirmed that Sherry Denton worked in deferred
11 compensation as part of MassMutual and not involved with CalPERS benefits. (*Id.*, 32-33.)

12 **Lauren Vasquez of the City of Monrovia HR Department** testified (in a deposition
13 that CalPERS initiated) that neither she nor the City advised employees about CalPERS benefits
14 and do not create their own documents to inform or interpret CalPERS benefits. She confirmed
15 that the HR department did not advise or inform members about CalPERS benefit, but just makes
16 CalPERS publications available. (*Compendium*, Exh. 19, 36-37.) If an issue arose, she would
17 refer the employee to CalPERS publication and encourage them to work directly with CalPERS.
18 (*Id.*, 55-56, 62, 75.) The only City email produced simply forwarded a CalPERS list of
19 educational classes offered at CalPERS' Glendale office. (*Id.*, 22-25, 58-59, 83-84.)

20 **B. CalPERS' Blatant Misstatements About What CalPERS Did**

21 There is no factual support for CalPERS' assertions: (1) that CalPERS trained their
22 employees or others to disclose that investors "might lose their purchase money" (*Opp.*, 2:25);
23 (2) that CalPERS warned purchasers in election material that they could not change their minds
24 and get their money back (*Opp.*, 6:11-12); (3) that CalPERS specialists explained the "disability
25 risk" (*Opp.*, 6:16); or (4) that education class attendees were unambiguously told that service
26 credit purchase were irrevocable and may not provide an increased retirement benefit should the
27 member take DIR before service retirement age (*Opp.*, 7:7-9). These statements are false,
28 unsupported by any documents submitted by CalPERS, or contradicted by the evidence in the

1 record, including CalPERS' standardized written documents and scripts that CalPERS produced.

2 CalPERS' fiduciary duties "may be satisfied by *appropriate reference* to the booklet
3 itself, supplemented by a provision of forms pertaining to all available choices." (*Hittle*, at 394.)

4 LAW AND ARGUMENT

5 I. The Class Definition is Ascertainable, Specific and Clear

6 For those safety members who invested in airtime, military time or other present value
7 service credit, the class definition addresses financial results that can be precisely and
8 mathematically calculated from CalPERS' electronic records to determine with specificity who is
9 in the class if given a small number of parameters all of which are recorded in CalPERS
10 electronic database. (See description in *Third Amended Complaint*, ¶¶199-200.) Plaintiffs' class
11 is ascertainable under *Hicks* as it is defined in terms of objective characteristics and common
12 transactional facts that have enabled identification of the class members. (*Hicks v. Kaufman &*
13 *Broad Home Corp.* (2001) 89 CA4th 908, 915.) Class members may be readily identified
14 without unreasonable expense or time by reference to business or official records. (*Hale v. Sharp*
15 *Healthcare* (2014) 232 CA4th 50, 58; *Bridgeford v. Pacific Health Corp.* (2012) 202 CA4th
16 1034, 1041.) In the *Declaration of Marlene Cody* filed in a prior Motion to Compel (*Compen-*
17 *dium*, Exh. 20), Plaintiffs offered a way to identify class members in CalPERS' information
18 system and separate those in the class from those not in the class. (*Marler v. E.M. Johansing,*
19 *LLC* (2011) 199 CA4th 1450, 1461; *Sevidal v. Target Corp.* (2010) 189 CA4th 905, 921.)

20 CalPERS' arguments against the class definition fail to construe the words plainly.⁴ The
21 definition includes individuals who contracted on CalPERS standardized forms but does not
22 exclude those who got information from "other sources", because the written contract controls.
23 The definition does not divide the group based on intent, mental state or any realization. Its
24 objective financial results calculable from data in CalPERS database. It is possible that subparts
25 overlap, but the characteristics are clear and no class member would get double recovery.

26 ⁴ The class definition does not conflict with the Government Claims Act, which CalPERS
27 misconstrues. Plaintiffs timely served the class claims and satisfied the GCA. (*City of Los*
28 *Angeles v. Sup.Ct.* (2008) 168 CA4th 422, 430; *DiCampli-Mintz v. County of Santa Clara* (2012)
55 C4th 983.) Issues about accrual, tolling, and delayed discovery across the class under
rescission, mistake, fraud, breach of fiduciary duties etc. are described *infra* at 30-35.

1 **II. Commonality**

2 In the *Motion for Class Certification* and the *Trial Management Plan*, Plaintiffs showed
3 that common legal and factual issues predominant and can be proved up with evidence that is
4 common across the class or subclass. Plaintiffs offered ways to effectively manage proof and any
5 element or affirmative defense that may require individualized evidence. Plaintiffs showed that
6 "the issues which may be jointly tried, when compared with those requiring separate
7 adjudication, are sufficiently numerous and substantial to make the class action advantageous to
8 the judicial process and to the litigants." (*Washington Mut. Bank, FA v. Sup.Ct.* (2001) 24 C4th
9 906, 913-914; *Brinker Restaurant Corp. v. Sup.Ct.* (2012) 53 C4th 1004.)

10 Plaintiffs propose to introduce the standardized documents that CalPERS admits that it
11 used across the class in the period of 2004 to 2016. Plaintiffs proposed to separately introduce
12 the documents used in the period of 1991 to 2003, as one or more subclasses. (See *Trial*
13 *Management Plan.*) If CalPERS has any documents proving its affirmative defenses for any
14 individual Plaintiffs, the class is small enough and the member files available so any such
15 defenses can be asserted based on documents; no testimony is necessary. If the Court finds that
16 oral declarations or statements are allowed as evidence, Plaintiffs allow CalPERS to introduce
17 the admissible part of those putative statements, including because none of the documents,
18 declarations, or other CalPERS material discloses the real risk of loss, no refunds, and loss of
19 money for safety members. Plaintiffs do not believe that subjective interpretation of any contract,
20 disclosure or evidence is relevant, as the objective reasonable interpretation controls.

21 Plaintiffs' primary theories of recovery are, as an analytical matter, amenable to class
22 treatment as they rest with the objective review of CalPERS' documentation or disclosure.
23 (*Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 C4th 1, 28; *Brinker Restaurant Corp., supra*, at 1021.)
24 CalPERS has not produced any documents that disclose the risks. Instead, CalPERS attempts to
25 offer oral declarations, but even those declarations do not adequately or objectively disclose the
26 risk. As a general rule, since CalPERS' liability can be determined by facts common to all
27 members of the class, the class may be certified, even if the members must individually prove
28 their damages. (*Duran v. U.S. Bank, supra*, at 28; *Brinker Restaurant Corp., supra*, at 1022.)

1 CalPERS first focuses on rescission as consent given by mistake, et al. CalPERS then
2 wrongly says that Plaintiffs present no argument on duress, menace or undue influence but
3 ignores that requesting the waiver after the fact of disability when seeking a suspension of
4 installment payments is sufficiently coercive to cause a reasonably prudent person with no
5 reasonable alternative to succumb to CalPERS' pressure. (*Rich & Whillock, Inc. v. Ashton*
6 *Development, Inc.* (1984) 157 CA3d 1154.) It is also menace.

7 Regarding undue influence, Plaintiffs cited *Hittle*: "[T]he advantage to SBCERA
8 resulting from Hittle's choice to withdraw his retirement contributions, rather than seek a life-
9 time allowance, was gained without sufficient consideration and under undue influence." (*Hittle*
10 at 394.) CalPERS says we never argue undue influence. (*Opp.*, pg. 22.) But *Hittle* says that *Civil*
11 *Code* section 2235 provides that "all transactions between a trustee and his beneficiary during the
12 existence of the trust, or while the influence acquired by the trustee remains, by which he obtains
13 any advantage from his beneficiary, *are presumed to be entered into by the latter without*
14 *sufficient consideration, and under undue influence.*" (*Hittle* at 393, emphasis added.)

15 CalPERS insists that "[no] Probate Code dictum applies to public pension fiduciaries
16 unless consistent with common law trust principles and cites to the 3d Restatement of Trusts, §78
17 Duty of Loyalty, Comment c(2)) that impropriety is not presumed where trust terms authorize
18 fiduciary-beneficiary transactions because the PERL authorizes and requires CalPERS to sell its
19 members service credit. (*Opp.*, fn. 163.) This misses the point. Plaintiffs' complaint is not that
20 CalPERS offered military/airtime investments. It is that CalPERS *failed to warn Plaintiffs of the*
21 *risk of loss or offset, no refunds, and other potential negative consequences* if they invested.

22 Regarding *Hittle* as a class action, the Supreme Court granted Mr. Hittle the right to
23 rescind his election, and could have certified it as a class action: "SBCERA's incomplete
24 communications with Hittle are apparently standard and used routinely to inform SBCERA
25 members of their options for disposing of their retirement contributions." (*Hittle* at 394.)

26 CalPERS claims that *Hittle* does not apply because it deals with a waiver of statutory
27 right. All public retirement systems are statutory and the rights are statutory, so that objection
28 fails. Plaintiffs had various statutory rights, including a statutory right to a fully funded 50% IDR

1 without paying more than a percentage of their paychecks.

2 CalPERS' argument that *Hittle* only applies to a writ of mandate also fails. The *Marzec*
3 appellate court extensively cited *Hittle* in its opinion, clearly applying it to this case.⁵ A writ is a
4 procedural posture, but the same substantive law applies in writ, complaint, and class actions.
5 Pointing out *Hittle's* procedural status as a writ gets CalPERS nowhere because the substantive
6 holdings in *Hittle* about fiduciary duties apply to this case, including via the *Marzec* remittitur.⁶

7 **Mistake in Fact.** CalPERS misconstrues the "mistake of fact" law, by assuming that
8 Plaintiffs were adequately informed before contracting. CalPERS principally cites to *Paramount*
9 *Petroleum Corp. v. Sup.Ct.* (2014) 227 CA4th 226 where both parties expressly recognized the
10 existence of a risk, allocated that risk in the contract to one party, and one party knowingly
11 assumed the risk (of a price change in oil). The court found that both parties were informed so
12 there was no mistake *in consent* even though the change in price was greater than anticipated.
13 (*Paramount Petroleum*, at 245.) *Paramount* does not apply here. Although CalPERS knew the
14 risks, it did not disclose the risks to Plaintiffs. CalPERS knew that Plaintiffs did not know or
15 accept the risks in the contract (i.e. waiver). Since CalPERS did not inform them about the loss
16 of money on IDR and the information was not available to Plaintiffs, Plaintiffs were not
17 informed. Plaintiffs did not assume hidden unanticipated risk. They did not make a mistake in
18 judgment. They were not gambling. (*Mosher v. Mayacamas Corp.* (1989) 215 CA3d 1, 5.)

19 **Legal Mistake.** CalPERS omits that there are two independent parts to legal mistake:

20 A mistake of law as defined by Civil Code section 1578 exists only when 1) all
21 parties think they know and understand the law but all are mistaken in the same
22 way, or 2) when one side misunderstands the law at the time of contract and the
23 other side knows it, but does not rectify that misunderstanding.

24 (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th
25 1410, 1421 as modified on denial of reh'g (Feb. 22, 1996).)

25 ⁵ While the appellate court cited *Hittle* in the section remitting the breach of fiduciary duties
26 cause of action and those claims have since been dismissed by this Court on government
27 immunity grounds, the existence and import of CalPERS' fiduciary and trust duties remains. The
28 *Hittle* quotes address these duties and are still directly on point re the rescission cause of action.

⁶ Further, CalPERS' precedential decision *In re Smith* quotes *Hittle* and says it applies to
CalPERS, including that "[t]he duty to inform and deal fairly with members also requires that the
information it conveyed be complete and unambiguous." (*Compendium*, Exh. 21.)

1 CalPERS focuses only "prong" #1 where all parties must be mistaken in the same way.
2 "Plaintiffs do not suggest CalPERS shared their alleged misunderstanding they would benefit no
3 matter what -- even if disabled before serviced retirement age. That subjective misunderstanding
4 of their purchase contract is no mistake of fact; it is 'at most a mistake of law.'" (*Opp.*, 23:8-11.)

5 CalPERS totally ignores the second independent prong #2 of legal mistake that Plaintiffs
6 rely on: when one side misunderstands the law at the time of contract and the other side knows it,
7 but does not rectify that misunderstanding. Factually, CalPERS knew that there would be no
8 increases and no refunds on IDR under the age and service credit terms, knew that Plaintiffs did
9 not know or agree to "no refunds," but CalPERS did not rectify the Plaintiffs' misunderstanding.
10 (*Civ. Code*, §1578; *Harris v. Rudin, Richman & Appel* (2002) 95 CA4th 1332, 1339.) CalPERS'
11 standardized waiver after the fact is strong evidence that CalPERS knew that class members
12 misunderstood the deal since at least 2004 and it failed to rectify that misunderstanding. Instead,
13 CalPERS waited until after disability to get consent to "no refunds" that CalPERS knew was
14 missing from the original contract. (*Donovan v. RRL Corp.* (2001) 26 C4th 261, 279.) CalPERS
15 needed a waiver of refunds after the fact only if CalPERS believed that it did not get consent to
16 no refunds in the contract, and yet failed to rectify that misunderstanding at least since 2004.

17 Mixing up the code section and mixing up mistake of law and mistake of fact, CalPERS
18 cites *Bunnett v. Regents of Univ. of Cal.* (1995) 35 CA4th 843, even though that case is about a
19 "rescission cause [based on] unilateral mistake of fact. (§ 1689, subd. (b)(1).)" (*Bunnett*, at 854.)
20 Under *Civil Code* section 1689, rescission is available for unilateral mistake "when that mistake
21 is known to the other contracting party and is encouraged or fostered by that party." (*Id.*, at 854-
22 855. But that is a different statute and a different test. It is not the test for legal mistake or *Civil*
23 *Code* section 1578 that Plaintiffs cite. CalPERS' failure to address Plaintiffs' cause of action and
24 Section 1578 shows CalPERS has no defenses to legal mistake.

25 In addition, rescission is appropriate where material "mistake of fact" arises about present
26 value increases in future benefits without risk of no refunds. (*Civ. Code*, §1576; *Donovan v. RLL*
27 *Corp.*, *supra*, at 278; *Grenall v. United of Omaha Life Ins. Co.* (2008) 165 CA4th 188, 193.) The
28 mistake was about the latent hidden adverse risk terms not about the future possible injury.

1 (*Assilzadeh v. California Fed'l Bank* (2000) 82 CA4th 399, 409.)

2 Rescission is also appropriate for failure of consideration. Named Plaintiffs only receive
3 the 50% IDR that they were already entitled to before contracting. Class members receive
4 nothing or no commensurate advantage for their investment of tens of thousands of dollars each
5 to get increased retirement benefits. The contract for increases may be rescinded because the
6 consideration fails, in whole or in part, due to the fault of CalPERS (*Civ. Code*, §1689(b)(2)),
7 becomes void from any cause (*Civ. Code*, §1689(b)(3)), and because the consideration fails in a
8 material respect from any cause before it is rendered (*Civ. Code*, §1689(b)(4)). Receiving no
9 value and no increase, the failure of consideration is material, going to the essence of the
10 contract. It justifies rescission. (*Wylar v. Feuer* (1978) 85 CA3d 392.) In addition, a presumption
11 of constructive fraud arises because there is inadequate consideration for the class members'
12 performance and especially where the parties are in a confidential relationship. (*Civ. Code*,
13 §§1572-1573; *Kloehn v. Prendiville* (1957) 154 CA2d 156; *Younis v. Hart* (1943) 59 CA2d 99.⁷)

14 Both substantive and procedural unconscionability are shown here "because the
15 oppression and surprise ordinarily results from the mistake—and inequality in bargaining
16 power." (*Donovan v. RRL Corp.*, *supra*, at 292.) Enforcing the contract would yield overly harsh
17 and one-sided results thereby entitling class members to rescission. (*Id.*, at 282.) Plaintiffs did
18 not bear the risk of loss, including because they were already fully vested in IDR and the transfer
19 of risk and funding of their IDR was not disclosed.

20 Partial rescission is also available. CalPERS apportioned the "net present," "cost neutral"
21 investment by specific yearly increments of time, so the contract is severable or divisible. (*IMO*
22 *Development Corp. v. Dow Corning Corp.* (1982) 135 CA3d 451; *Howell v. Courtesy Chevrolet,*
23 *Inc.* (1971) 16 CA3d 391.) CalPERS offers "if you pay us \$X per yearly increment, then we
24 promise you \$Y in increased monthly benefits; if you pay us \$2X for a two year increment, then

25
26 ⁷ Rescission is also appropriate because Plaintiffs' objective was frustrated. Plaintiffs'
27 performance is excused as it is objectively impracticable due to excessive and unreasonable
28 difficulty and expense. (*City of Vernon v. City of Los Angeles* (1955) 45 C2d 710; *Habitat Trust*
for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 CA4th 1306, 1337.)

1 we promise to pay you \$2Y,"⁸ In our words, the incremental or "proportionate" nature of each
2 year of increasing investments shows that they are divisible without problem. (*Simmons v. Cali*
3 *Institute of Tech* (1949) 34 C2d 264.) Partial rescission satisfies the legislative intent that the
4 member fund only the "present value", "cost neutral" increase, without secret forfeiture.

5 **More on commonality.** CalPERS focuses on the oral communications and the "totality"
6 of communications to assert that there are no evidence of class-wide nondisclosures. It argues
7 Plaintiffs cannot prove that CalPERS did not disclose disability risk class-wide.

8 Plaintiffs can and did prove that. Focused on the *Marzec* remittitur and *Hittle*, Plaintiffs
9 proved that CalPERS is a fiduciary and the only source of official information for the investment,
10 military/airtime, IDR, and service retirement. (*Compendium*, Exh.1, 35.) CalPERS remains the
11 only responsible party and the only official source of information. CalPERS has a fiduciary duty
12 to fully and fairly disclose. (See *Marzec*, *Hittle* and *In re Smith*.) All Plaintiffs similarly contact-
13 ed CalPERS, received written communications from CalPERS, and relied directly and actually
14 on CalPERS, including when investing directly with CalPERS. The two questions are: What is
15 CalPERS required to disclose to fully inform? What manner may CalPERS use to fully inform?

16 *Hittle* directly finds that oral representations are not sufficient. (*Hittle* at 394.) Indeed,
17 *Hittle* holds that CalPERS was required to provide full and fair disclosures in writing regardless
18 of CalPERS' specific knowledge or interaction with a member. CalPERS "must meet its
19 fiduciary obligation to fully inform its members of their options in obtaining retirement benefits
20 notwithstanding the extent of [CalPERS'] knowledge of each member's particular situation or
21 entitlement. ... [T]he failure to satisfy this obligation is particularly egregious where the
22 Association is on notice." (*Hittle* at 394.)

23 Jumping quickly to the first question, what had to be disclosed? The military/airtime

24 ⁸ For illustrative purposes, assume a Plaintiff in a 3% @ 50 plan bought five years of ARSC for
25 \$75,000 but only got a pension increase attributable to two of those years (40% of what they
26 thought they were getting, i.e. \$30,000 of the investment). If "partial loss" Plaintiffs remained in
27 the contract, it means the contract terms would have been changed contrary to Plaintiffs'
28 expectation and intent, making them pay a full \$75,000 for only two years, i.e. 250% of what
they thought they were contracting to pay. This would not be what they bargained for. (At
minimum, this undermines CalPERS' claims that "partial loss" Plaintiffs got what they bargained
for, i.e. that the additional service credit.)

1 investment put firefighters, police officers and other safety members under age 50 or without
2 enough service credit at risk of losing all of part of their investment monies if they suffered an
3 injury on the job and were industrially retired before age 50 or without enough service credit to
4 fully benefit. The consequence of an IDR was that they would be injured, lose their job, be
5 disabled, be retired at half their salary, not get a refund, get no increases, and lose their principal
6 private money right when they needed extra money the most. That is a counter-intuitive,
7 unexpected material risk. No one expects the government to seize tens of thousands of dollars of
8 their private money when they are injured on the job. CalPERS has no written and no oral
9 disclosures anywhere it plainly, objectively or adequately discloses these risks.

10 **III. CalPERS' Disclosures Are Not Adequate**

11 CalPERS admits that the investment documents were standard across the class. (*Opp.*,
12 2:17-18.) It partially argues that Plaintiffs invested for service credit, not increases, but the after-
13 the-fact waiver shows that the essence of the contract was for increases. CalPERS'
14 misrepresentations of increases, omission of "no refunds" or material risk of loss of money, and
15 placement of vague disclaimers buried in a sea of boilerplate contract language that contained
16 latent or hidden seizure or forfeiture provisions that must be narrowly construed, as they are
17 disfavored. The law abhors a forfeiture, especially an implied hidden forfeiture.

18 **Full and Fair Disclosure Required.** To get a waiver or consent, CalPERS must fully
19 and fairly disclose the risk in writing.⁹ "The burden ... is on [CalPERS as] the party claiming a
20 waiver of a right to prove it by clear and convincing evidence that does not leave the matter to
21 speculation, and 'doubtful cases will be decided against a waiver.' This is particularly apropos in
22 cases in which the right in question is one that is 'favored' in the law...." (*City of Ukiah v.*
23 *Fones* (1966) 64 C2d 104.)

24 **Plaintiffs Duty To Inquire Relaxed in Fiduciary Relationship.** There is no duty for
25 class members to inquire until the *relationship is repudiated* or Plaintiff becomes aware of facts

26 ⁹ CalPERS clearly knows how to write a waiver. When Healy left employment with Tuolumne
27 County and wanted to cash out her contributions, CalPERS required her to sign a Refund
28 Election Form that was vastly more detailed and informative. (Healy Declaration, Exhibit 3.) It
would have been a small matter for CalPERS to do that for military/airtime; if nothing else, it
could have simply cut and paste from the after-the-fact suspension of installments waiver.

1 that would make a reasonably prudent person suspicious of the fiduciary. (*Stella v. Asset Mgmt.*
2 *Consultants, Inc.* (2017) 8 CA5th 181, 197, fn. 13; *Lee v. Escrow Consultants, Inc.* (1989) 210
3 CA3d 915, 921.) CalPERS did not give Plaintiffs reason to suspect it of wrongdoing, even when
4 it requested the "no refunds" waiver. CalPERS made the waiver demand under its legal opinion
5 citing *Gov't Code §21037* and asserted legal reasons to induce Plaintiffs to sign. CalPERS
6 remained the sole and official source of information on CalPERS benefits, and a reasonable
7 person would not suspect CalPERS, a nonprofit government agency, of covering up its bad acts.

8 **Materiality.** Plaintiffs prove materiality across the class. Materiality is objective, based
9 on the reasonable person. A fact is material if " 'a reasonable man would attach importance to its
10 existence or nonexistence in determining his choice of action in the transaction in question'..."
11 (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 CA4th 951, 977, quoting Rest.2d Torts,
12 §538, subd. (2)(a).) An undisclosed fact is material if it has a significant and measurable affect
13 on market value. (*Shapiro v. Sutherland* (1998) 64 CA4th 1534, 1545; *Karoutas v. HomeFed*
14 *Bank* (1991) 232 CA3d 767.) Clearly, the suppressed risk of total loss of tens of thousands of
15 dollars on injury is material to a reasonable person. (*Sanfran Co. v. Rees Blow Pipe Mfg. Co.*
16 (1959) 168 CA2d 191, 205.)

17 CalPERS argues that materiality is only established if class members say that they would
18 have not have invested if they knew of the risk. One obvious problem is that the investment
19 occurred many years ago. In deposition, CalPERS only asked incomplete hypotheticals without
20 any disclosure language, asking Plaintiffs to speculate about an unknown convoluted conjecture.
21 Then CalPERS argues that four of the named Plaintiffs could not say definitely what they would
22 have done in the past based on that unknown improper hypothetical. Plaintiffs asserted
23 objections and chose not to speculate, including about hypothetical investments with unknown
24 disclosures many years ago. Plaintiffs preserved speculation and improper hypotheticals
25 objections to all of CalPERS' questions. Now CalPERS tries to use the Plaintiffs' "non-answers"
26 as positive proof that Plaintiffs cannot say that they would not have invested, to defeat
27 materiality. (See Evidentiary Objections.) It is simply improper gamesmanship.

28 **Plaintiffs are entitled to a presumption of reliance across the class.** CalPERS

1 communicated *identical*, material misrepresentations of increases in writing to each member of
2 the class, and sent identical material omission of the risk of loss and no refunds in writing to each
3 member. As a result, the inference of reliance arises as to the entire class so that actual reliance
4 can be proved on a class wide basis. (*Mirkin v. Wasserman* (1993) 5 C4th 1082, 1095.) If oral
5 communications are relevant, CalPERS produced scripts, webinars, and other oral communica-
6 tions that omitted the risk of loss, misrepresented increases, and omitted other materials terms.
7 Under these facts, reliance was a common issue. (*Vasquez v. Sup.Ct.* (1971) 4 C3d 800, 814-815;
8 see also *Occidental Land, Inc. v. Sup.Ct.* (1976) 18 C3d 355, 362-363 [misrepresentations
9 contained in public report which each purchaser was obliged to read]; *Wilner v. Sunset Life Ins.*
10 *Co.* (2000) 78 CA4th 952, 962 [misrepresentations are the same].)

11 CalPERS argues there is no commonality because two of its representatives *perhaps*
12 orally recited some different information (*perhaps* equated "irrevocable" with "no refunds",
13 maybe, "if asked"). However CalPERS required that Plaintiffs before contracting review a series
14 of written statements, agree to the written statements in sequence, and then sign a written
15 standardized contract, all of which misrepresented increases and failed to disclose the material
16 terms. As is clear, CalPERS required that Plaintiffs rely on CalPERS' standardized written
17 documents and agree to the terms in the written documents. There is no evidence that CalPERS
18 transacted the investments orally, or would agree to an oral revision if made by one of its
19 representative if they "went off script" or changed the terms "if asked." Instead, CalPERS has an
20 affirmative duty to fully and fairly disclose the real terms, *always*.

21 An inference of reliance arises here because the evidence shows and CalPERS admits
22 that the allegedly false written representations were uniformly made to all members of the
23 putative class. CalPERS required all of the class members to sign the standardized contract that
24 contained one of more of the misrepresentations and omission, which went to the central
25 consideration that each Plaintiff paid tens of thousands of dollars of their private or retirement
26 money to get. Materiality regarding the importance of the risks described above would not vary
27 across the class of safety members investing in airtime/military time because all reasonable
28 safety members (or reasonable people in general) would find the misrepresented increases and

1 undisclosed risk to be material. (See *Reed v. King* (1983) 145 CA3d 261, 265.) Although
2 CalPERS newly states that there were three additional reasons to invest (high returns, early
3 retirement, and cheap price), all of those occur only if the increases are received. All of those are
4 part of the increases, and destroyed by the hidden risk. The situation is vastly different from the
5 *de minimus* consumer contract situations that CalPERS relies on outside the fiduciary context in
6 *Knapp v. AT&T Wireless Services, Inc.* (2011) 195 CA4th 932 and *Tucker v. Pacific Bell Mobile*
7 *Services* (2012) 208 CA4th 201, 227-228; see *infra*.)

8 CalPERS implies wrongly that Plaintiffs did not think that the risk of loss was material.
9 But each Plaintiff said repeatedly that the risk of loss was material. Plaintiffs have proven
10 causality, materiality, and reliance, including supporting the presumption of reliance.

11 **CalPERS' attack on certifying a fraud-based class action.** Ignoring that Plaintiffs also
12 seek to certify a class based on legal mistake, breach of fiduciary duty, and failure of
13 consideration outside of the fraud or constructive fraud, CalPERS focuses its *Opposition* on
14 saying that the Court may certify a fraud-based class only where the evidence shows that all
15 members of the class received uniform material misrepresentations citing *Kaldenbach v. Mutual*
16 *of Omaha Life Ins. Co.* (2009) 178 CA4th 830. The largest difference between this case and
17 *Kaldenbach* is there were no writings in *Kaldenbach*. All of the presentations were oral.
18 "Kaldenbach ... relied completely on what Meyerson told him about the policy." (*Kaldenbach*,
19 *supra*, at 841.) Although *Kaldenbach* relied upon uniformity in Mutual's sales materials, training,
20 and illustrations, the court found that there was no evidence linking the common tools to what
21 was actually said or demonstrated in any individual sales transaction. (*Id.*, at 841-842.)
22 Regarding military/airtime, CalPERS relies on its standardized writings, and any purported oral
23 discussions were used to "explain" the writing. However the parol evidence rule would prohibit
24 the introduction of oral communications to change the terms of the writing, therefore the written
25 contracts remain unchangeable by oral communication and so have no effect.

26 CalPERS then cites to a number of consumer cases that did not involve fiduciaries with
27 duties to fully and fairly disclose. CalPERS cites to *Tucker*, a materiality case about disclosure of
28 whether extra cellphone minutes would "roll over" if not used. CalPERS cites *Tucker* to argue

1 that CalPERS communicated in a variety of ways to the general public and individual members
2 of this broad group may, or may not, have seen or relied upon any of them. (*Tucker v. Pacific*
3 *Bell Mobile Services, supra*, at 221.) As a preexisting fiduciary to class members, CalPERS
4 knew that safety members under age 50 or with insufficient service credit faced significant risks,
5 and CalPERS knew that they were interested in investing for increases. CalPERS was not blindly
6 advertising to the general public about a commodity available from different providers. CalPERS
7 was the sole provider of military/airtime, IDR and service retirement. Members were required to
8 use CalPERS. But CalPERS did not offer information that allowed a safety member to prevent
9 being "deceived." (*Tucker* at 221.)

10 *Tucker* asserted common law fraud and CLRA claims where actual reliance must be
11 established for an award of damages. In a CLRA action, plaintiffs must show a defendant's
12 conduct was deceptive and that the deception caused them harm. *Tucker* also holds that "[i]t is
13 true that causation, on a class wide basis, may be established by materiality. (*Massachusetts*
14 *Mutual, supra*, 97 Cal.App.4th at p. 1292, 119 Cal.Rptr.2d 190 ['plaintiffs [may] satisfy their
15 burden of showing causation as to each by showing materiality as to all'].) 'If the trial court finds
16 that material misrepresentations have been made to the entire class, an inference of reliance
17 arises as to the class. [Citation.]" (*Tucker* at 357.)

18 In *Massachusetts Mutual Life Ins. Co. v. Sup.Ct.* (2002) 97 CA4th 1282, the trial court
19 certified a class of life insurance policy purchasers who alleged that, when they bought their
20 policies, the insurer had no intention of maintaining the discretionary dividend rate which it had
21 been paying, and failed to disclose information about its plans to lower the rate of dividends.
22 (*Massachusetts Mutual, supra*, at 1286.) The trial court found the misrepresentations to be
23 material, and the appellate court affirmed the class certification order, holding a plaintiff in these
24 circumstances did not need to present individual proof that each class member relied on
25 particular representations made by the insurer or its agents in order to establish liability for a
26 nondisclosure under either the UCL or the CLRA. (*Id.* at 1292-1293.)

27 With the waiver as compelling evidence, Plaintiffs prove that CalPERS had no intention
28 before contracting to pay the increase or refund the money if Plaintiffs were retired with IDR

1 before age 50 or with insufficient service credit. (See *Massachusetts Mutual, supra.*)

2 This case is not like like the *Vioxx, Knapp, Kaldenbach, or Tucker* cases. No others
3 offered military/airtime. There are no different or subjective reasons for investing in
4 military/airtime except to receive the increases. There are no relevant individualized inquiries.
5 (*Knapp, supra*, at 944-945.) CalPERS' "three reasons" are only after-the-fact excuses or mirages.
6 None is different from increases. This case is not like the Direct TV case because all of the class
7 members necessarily read the publications in the series of documents that CalPERS required, and
8 they signed them. This case is not like *Knapp* because CalPERS represented that there would be
9 increases in retirement benefits. (*Knapp, supra*, at 944-945; *Kaldenbach, supra*, at 850; see also
10 *Pfizer Inc. v. Sup.Ct.* (2010) 182 CA4th 622, 632; *Fairbanks v. Farmers New World Life Ins. Co.*
11 (2011) 197 CA4th 544, as modified (Aug 1, 2011).

12 **IV. Delayed Discovery and Delayed Accrual**

13 CalPERS ignores that the accrual date of the claims across the class is a common issue,
14 occurs on discovery, and is delayed or estopped by CalPERS' acts. CalPERS hid that its
15 disclosures were inadequate, hid its standardized waiver, hid the IDR offset, failed to provide
16 appeal rights, gave no notice of forfeiture or seizure, failed to provide an accounting, concealed
17 the problems, and cited law to induce class members' reliance on CalPERS' legal expertise when
18 CalPERS acted. Only when CalPERS materially changed the disclosures in September 2016
19 could reasonable people begin to suspect that CalPERS recognized that its prior disclosures were
20 inadequate. The claims had been long filed before then, so all claims are timely.

21 Plaintiffs have been diligent throughout, but since at least 1991, CalPERS has defiantly
22 concealed the problems, hid the risk, induced reliance, denied discovery, taken unsupported legal
23 positions, abused its fiduciary positon, said it acted under the color of law, even when seeking
24 the after the fact waiver of refunds to cover up that it failed to disclose and get consent for the
25 "no refunds" in the original contract. Inducing the class members to rely on its fiduciary status
26 and legal expertise, CalPERS has been "successfully" concealing the harm in a way that would
27 not make a reasonable person suspicious that CalPERS was acting wrongfully.

28 **V. CalPERS' Misstatements About Accrual of Claims**

1 Plaintiffs pled facts of delayed discovery and delayed accrual across the class. Since the
2 substantive accrual date for rescission is based in the underlying mistake, breach of fiduciary
3 duty and other claims, the cause of action has not yet accrued, discovery and accrual are delayed,
4 the statute of limitations has not yet run, and CalPERS is equitably tolled, including as described
5 *infra*. The Government Claims Act looks at the accrual of the last element of the cause of action,
6 including that mistake and fraud do not accrue until a person has knowledge. Especially in a
7 fiduciary context, the GCA cannot set an earlier accrual date for those claims.

8 Marzec and Healy timely presented GCA claims and timely sued for class relief asserting
9 rescission claims based on mistake, fraud, breach of fiduciary duty and other claims. Before that
10 time, no safety member could discover CalPERS' breaches of fiduciary duty, including the
11 transfer of monies to the employer to offset the IDR, the forfeiture, the seizure, and other facts
12 underlying the claims, until Plaintiffs' counsel learned of them and filed the GCA claims. So,
13 under rescission and the claims, all of the claims of everyone in the class are timely. Plaintiffs
14 have limited the class to those who invested after 1991 because that was the time that CalPERS
15 was explicitly put on notice that class members did not know of the latent "no refunds" term.

16 CalPERS argues that Marzec's GCA claim in March 2011 only reaches back one year.
17 (*Opp.*, 19:10-16.) But CalPERS misconstrues claim accrual and what the GCA filing deadline is.
18 GCA accrual refers to the substantive law. Marzec's GCA filing is not a bar to others who claims
19 had not yet accrued. The GCA accrual date can be tolled and equitably estopped. Once Marzec
20 filed his GCA claim and lawsuit, all those similarly situated were included in the putative class.

21 CalPERS is also estopped to assert a GCA bar and the claims have not yet accrued.
22 CalPERS never provided any member (including Andert, MacLaren, Slaughter and Esparza)
23 with any seizure notice, due process, appeal rights, notice of transfer of funds to the employer, or
24 disclosure that CalPERS was adverse to them, or suspicion of fiduciary breach. (*Esparza Decl.*,
25 ¶¶180-195; *MacLaren Decl.*, ¶¶165-183; *Slaughter Decl.*, ¶¶163, 191; *Andert Decl.*, ¶¶220-255.)

26 Plaintiffs have asserted rescission on a number of different grounds. CalPERS confounds
27 the accrual date, delayed accrual, the statute of limitations and GCA deadlines. It argues that the
28 claim accrues on receipt of the IDR letter regardless of the content of the IDR letter and

1 regardless of Plaintiff's ignorance of facts constituting the mistake. CalPERS ignores that
2 rescission is delayed until discovery by a class member of the facts constituting the fraud or
3 mistake. (*Code Civ. Proc.*, §338(d); *Broberg v. Guardian Life Ins. Co. of America* (2009) 171
4 CA4th 912, 920.) The rescission claim accrues at last element of the notice or damages from the
5 underlying fraud, mistake, fiduciary breach, or legal mistake. (*Code Civ. Proc.*, §312.)

6 **Accrual of the rescission claim based on breach of fiduciary duty.** CalPERS' fiduciary
7 *relationship* and duties to class members delays accrual. (*Parsons v. Tickner* (1995) 31 CA4th
8 1513, 1526; *Moreno v. Sanchez* (2003) 106 CA4th 1415, 1424.) The plaintiff's "burden of
9 discovery is reduced and he [or she] is entitled to rely on the statements and advice provided by
10 the fiduciary." (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 CA4th 148,
11 156-157.) Plaintiffs are entitled to rely and to continue to rely until they are given sufficient
12 notice of wrongdoing, or adversity or untoward conduct. None of that occurred here.

13 Once CalPERS accepted Plaintiffs' money on deposit as money in an account as shown in
14 the annual member statements, CalPERS as a fiduciary simply holds Plaintiffs' money in trust for
15 Plaintiffs. CalPERS has not given notice of its adversity, has not disclaimed the relationship, has
16 not initiated a forfeiture or seizure process, and has not given appeal rights. CalPERS has still not
17 disclosed that it transfers the money to benefit employers, so this claim has not yet accrued.
18 CalPERS has failed to provide an accounting that would start accrual.

19 **Accrual of the rescission claim based on mistake.** By statute, rescission based on fraud
20 or mistake accrues only "upon discovery, by the aggrieved party of the facts constituting the
21 fraud or mistake." (*Code Civ. Proc.*, §338(d).) Although it appears individualized, it does not
22 effect the certification of a class because there was no possibility that an individual could
23 discover the IDR offset, seizure, forfeiture, breach of fiduciary prior to the filing of the *Marzec*
24 case. Indeed, the individualized discovery only delays the accrual, it cannot advance the accrual
25 date. Because the statute expressly requires discovery by the aggrieved party, plaintiff *cannot* be
26 charged with knowledge of information in public records or other publicly available sources.
27 (*FDIC v. Dintino* (2008) 167 CA4th 333, 349.)

28 **Accrual of the rescission based on legal mistake.** Accrual of rescission under legal

1 mistake occurred after this lawsuit was filed, when in discovery CalPERS disclosed that it had a
2 standard form waiver of refunds to send after the fact of disability to try to get consent for "no
3 refunds." The discovery of CalPERS' standardized forms showed that CalPERS did not think that
4 it originally got consent for "no refunds" across the class in the original contract. One of the
5 elements of the second "prong" of legal mistake is CalPERS' knowledge of its failure to disclose
6 at contracting. Counsel's discovery of CalPERS' standardized form gave notice of the essential
7 fact that CalPERS thought it withheld information at the time of contracting across all the
8 contracts so a new waiver was required. Without the discovery of the standardized forms, an
9 individual person who received the installment payment form would not be on notice that
10 CalPERS thought it did not previously disclose the "no refunds" terms in the contract. The
11 existence of a standardized form first put counsel on notice of claim of legal mistake.

12 **Accrual of the rescission claim based on failure of consideration.** The contract
13 purports to provide increases at age 50. For example, accrual of rescission under failure of
14 consideration occurs at the earliest when increases are not paid at age 50. Although age is
15 individualized, it is also easily to prove from data already in CalPERS' possession because the
16 birthdate is a required record in the data that CalPERS keeps. No personal testimony is required
17 to prove it. The notice and accrual did not occur on the receipt of IDR if it was before age 50.

18 **No accounting or notice.** CalPERS has not given Plaintiffs "an interim or final account
19 in writing, or other written report" that adequately discloses the basis of a claim. (*Prob. Code*,
20 §16460(a)(1); *Prakashpalan v. Engstrom, Lipscomb, Lack* (2014) 233 CA4th 1105, 1122-1127.)

21 **Delayed accrual.** Delayed accrual protects Plaintiffs who were ignorant of their right to
22 sue because it was difficult to immediately detect or comprehend the breach or the resulting
23 injuries or where the cause or injuries are hidden. (*Seelenfreund v. Terminix of Northern Calif.,*
24 *Inc.* (1978) 84 CA3d 133, 138; *April Enterprises, Inc. v. KTTV* (1983) 147 CA3d 805, 832.)

25 CalPERS argues that Plaintiffs should have been suspicious that CalPERS was acting
26 legally wrongly. But there was no notice, nothing suspicious, and a plaintiff is not charged with
27 constructive notice or even public data in fraud and mistake claims. (*Norgart v. Upjohn Co.*
28 (1999) 21 C4th 383, 397; *FDIC v. Dintino, supra*, at 349-350.) Even Plaintiff's knowledge that

1 he or she has been injured, by itself, may not trigger accrual. (*Rosas v. BASF Corp.* (2015) 236
2 CA4th 1378, 1394-1399; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 C4th 797, 808, fn. 2.)

3 Asserting its unique expertise, CalPERS argued that it was following the law throughout.
4 Notice is not implied where defendant's misrepresentation or concealment of the harm is also
5 widespread: "A defendant's fraud in concealing a cause of action against him will toll the statute
6 of limitations, and that tolling will last as long as plaintiff's reliance on the misrepresentation is
7 reasonable." (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 C4th 623, 637.)

8 **IDR letter did not provide notice, no damage, no accrual.** While it is the discovery of
9 facts, not their legal significance, that starts the statute, the facts contained in the IDR letter or
10 check did not give rise to the discovery of the facts underlying mistake, breach of fiduciary
11 duties etc. (See, e.g., *Gutierrez v. Mofid* (1985) 39 C3d 892, 898.)¹⁰ CalPERS' IDR letter did not
12 contain information to put a class member on notice of the harms or claims related to rescission.
13 The investment monies or component of an IDR payment were not mentioned or referred to.
14 CalPERS gave no notice of seizure of the money or other adverse consequences.

15 The contracts provide increases at age 50. Many Plaintiffs expected to receive an increase
16 at age 50, but were not yet 50. CalPERS never gave notice that Plaintiffs had suffered any actual
17 damages, which starts accrual. Mere threat, or even probability, of future harm does not trigger
18 accrual. (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 CA4th 882, 886-887.)

19 **No notice from suspension of installment payment, estoppel.** CalPERS told those
20 seeking a suspension of installment payments that *Gov't Code* §21037 required no refunds.
21 CalPERS induced beneficiaries to rely on CalPERS' rarified legal expertise which reasonably led
22 them to believe that law required no refunds. Thus class members did not have notice of
23 wrongdoing and no reason to inquire. CalPERS is equitably estopped to assert the claim filing or
24 statute of limitation. Plaintiffs relied on CalPERS and continued to rely on CalPERS until they
25 became Plaintiffs in this case. (See Plaintiffs' *Declarations*.) The suspension of installment

26 _____
27 ¹⁰ The facts relevant to rescission based on breach of fiduciary for IDR offset and transfer to
28 employer instead of remaining in their account, mistake including legal mistake, were not even
available much less discoverable until after the filing of the case. (*Jolly v. Eli Lilly & Co.* (1988)
44 C3d 1103, 1113.)

1 payments indicates that the money remains still on deposit for the individual at CalPERS. It is
2 not a final decision, no appeal rights were given, and no administrative process was offered.

3 **Continuing wrong.** Since CalPERS' payment of a pension arises on a recurring basis, a
4 cause of action accrues again each time a wrongful offset or underpayment of the IDR occurs,
5 triggering a new limitations period each month. (*Hogar Dulce Hogar v. Community Dev. Com'n*
6 *of City of Escondido* (2003) 110 CA4th 1288.) Class members can recover for misconduct that
7 occurred outside the period provided it is "sufficiently linked" to the conduct within the
8 limitations period. (*Richards v. CH@M Hill, Inc.* (2001) 26 C4th 798, 812.)

9 **Offer of an administrative action extends the limitation period.** CalPERS' offer of an
10 administrative venue extends the benefits of *Gov't Code* §20164 to this case and equitably estops
11 CalPERS from asserting a statute of limitations contrary to Section 20164 as a substantive matter.
12 (See *City of Oakland v. PERS* (2002) 95 CA4th 29.) Even though Plaintiffs reject the
13 administrative jurisdiction and CalPERS' administrative process, the offer expressly negates any
14 GCA requirements or statute of limitations. The administrative appeal process is procedurally,
15 jurisdictionally, and substantively defective and will not offer full relief and is inadequate. The
16 claims are not statutory under the Public Employees' Retirement Law, and worthless there.

17 **Earliest accrual date.** Plaintiffs' counsel discovered the facts underlying rescission,
18 breach of fiduciary duty, legal mistake et al claims at the earliest in the demurrer in the *Yost* case.

19 **Government claims filing.** "Accrual" under *Gov't Code*, §901 for class rescission claims
20 is based on mistake, etc as describe above. There are no individualized issues as no class member
21 could possibly get notice of CalPERS' internal processes, its legal mistake, as described above.

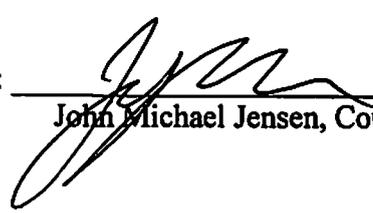
22 **VI. Conclusion**

23 CalPERS' *Opposition* fails. Plaintiffs meet all of the requirements for certification.

24 *Respectfully submitted,*

25 Dated: April 27, 2018

26 By: _____

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28 John Michael Jensen, Counsel for Plaintiffs