

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

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**VIA OVERNIGHT MAIL**

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**Re: Respondent's Argument - *Marc Hershman v. CalPERS*; OAH No.: 2022060511**

Respondent Marc Hershman submits the following written argument regarding the Proposed Decision issued in this appeal on March 22, 2023. Mr. Hershman respectfully requests that the CalPERS Board **reject** the Proposed Decision, and instead order that CalPERS compensate him in an amount consistent with his reasonable expectations, or otherwise compensate him for the harm CalPERS's misrepresentations have caused. Mr. Hershman sought information about his expected retirement benefits from every available CalPERS source, and CalPERS consistently represented that, for purposes of calculating his retirement benefits, Mr. Hershman's highest salary would be applied to his years of service on the Millbrae City Council. It was only after Mr. Hershman's retirement that CalPERS first indicated his final compensation would be calculated by applying Government Code section 20039, bifurcating the calculation of his final compensation and resulting in a retirement benefit roughly half of what he expected. The record shows that CalPERS's communications with Mr. Hershman were not only marked by unvarying misrepresentations, but also that for years the Agency *knew* that it had made misrepresentations and failed to inform Mr. Hershman. The egregious circumstances of this appeal warrant the relief requested.

**A. The Factual Record**

As reflected in the record, Mr. Hershman was elected to the Millbrae City Council in 1997, serving until 2007 while concurrently working as an associate attorney in a successful private law practice in San Mateo. Council members were considered full-time employees of the City but were paid only approximately \$300 per month. Mr. Hershman was enrolled in CalPERS in 1997. In October 2007, Mr. Hershman was offered a position as Chief Legislative Aide with the County of San Mateo.<sup>1</sup> In November 2008, he left the County to work in the State legislature, and from 2008 through 2020, Mr. Hershman worked as District Director for Jerry Hill in the California Assembly (2008-2012) and Senate (2012-2020).

For the duration of Mr. Hershman's CalPERS employment, CalPERS consistently represented to Mr. Hershman, through a variety of communications, that for purposes of calculating his retirement benefits his "final compensation" would be determined by the highest salary earned in CalPERS membership employment. This was critical for Mr. Hershman, as he was earning around \$300 per month

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<sup>1</sup> Mr. Hershman completed all necessary paperwork to establish reciprocity between San Mateo County Employees' Retirement Association ("SamCERA") and CalPERS.

for his nearly ten years of service on the City Council. Based on CalPERS's representations, Mr. Hershman expected a retirement benefit of approximately \$7,000 assuming a retirement date around 2020. CalPERS' representations, summarized in part below, directly informed Mr. Hershman's employment, financial, family, and life choices.

Beginning in 1998, CalPERS sent annual statements to Mr. Hershman indicating that his "final compensation" would be based on his highest salary.<sup>2</sup> Each year thereafter, CalPERS made identical or substantially similar representations to Mr. Hershman in its annual statements. These statements expressly encouraged Mr. Hershman to rely on them: "***With an increased awareness of your benefits, you will be in a better position to make decisions concerning your personal financial planning.*** We suggest that you review this statement carefully, discuss it with your family, and retain it for future reference."

CalPERS relayed the same information to Mr. Hershman through his employer. In September 2007, Mr. Hershman met with Millbrae's Assistant City Manager Jeff Killian, who was knowledgeable about CalPERS rules and responsible for advising members about them. Mr. Killian informed Mr. Hershman via email that he reached out to CalPERS on Mr. Hershman's behalf regarding his expected retirement benefits. A CalPERS representative told Mr. Killian that after Mr. Hershman left the City Council and started employment with the County of San Mateo, his pension "would be based upon the highest salary provided, regardless of whether the higher salary was received in the City or the County." That is, "[Cal]PERS would use the highest salary paid during a consecutive 12 month period even if the highest salary was obtained in the County."

Mr. Hershman also attended seminars hosted by CalPERS at which CalPERS encouraged him to seek an official retirement estimate from the Agency. Taking CalPERS's recommendation, Mr. Hershman sought an official estimate for the express purpose of making financial decisions for his family. On September 10, 2015, Mr. Hershman received a detailed statement setting forth his "retirement options" and expected retirement income. The statement specifies that CalPERS calculates "final compensation" by taking Mr. Hershman's "highest average monthly pay rate for 12 or 36 months of consecutive employment." Assuming a retirement date of approximately 2020, the estimate indicated Mr. Hershman could expect a monthly allowance of approximately \$7,000 upon retirement. On July 13, 2016, Mr. Hershman received another written calculation of his expected pension benefits generally corroborating the 2015 calculation. Both the 2015 and 2016 official CalPERS estimates used Mr. Hershman's highest CalPERS salary (with the State), consistent with all earlier representations about how retirement benefits were calculated. The estimates made no mention at all of Mr. Hershman's City wages, or Government Code section 20039 and did not contain disclaimers of any kind.

Unbeknownst to Mr. Hershman at the time, in 2011 CalPERS experienced an issue that prevented the transfer of certain information for optional members (like Mr. Hershman) to a new software system. Although this issue arose *four years* before Mr. Hershman ever sought an official estimate in 2015, CalPERS failed to correct it before it communicated the erroneous estimates. Even after uncovering the problem in (at the latest) 2018, ***CalPERS made no effort to notify Mr. Hershman*** that his official estimates

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<sup>2</sup> The 1998 annual statement states, for example, that "if you have service with more than one CalPERS employer," then your "final compensation" will be "based on the last or highest 12 consecutive months" of monthly pay for any State service, or 36 or 12 months for public agency service.

would have been erroneous. Instead, CalPERS allowed Mr. Hershman to continue making financial decisions for his family based on the faulty estimates.<sup>3</sup>

On May 21, 2020, as Mr. Hershman began the process of filing for retirement, he consulted with Kiran Natha, a CalPERS Governmental Program Analyst, who guided Mr. Hershman through his retirement options. Despite having Mr. Hershman's file in front of him, Mr. Natha never mentioned Government Code section 20039. In fact, Mr. Natha explicitly told Mr. Hershman—consistent with all representations Mr. Hershman had received to that point—that his highest public sector salary would be applied across all his years of CalPERS employment. Mr. Natha further advised Mr. Hershman to use CalPERS's "Retirement Estimate Calculator," a feature available on its website, to gain further insight into his expected pension. Mr. Natha then walked Mr. Hershman through the process of obtaining an online estimate. The estimate used a "final compensation" figure of \$12,090 which stated it was "calculated by us," apparently indicating that the CalPERS online calculator supplied that figure. The calculator produced estimated retirement benefits of between \$6,200 and \$6,600—generally consistent with all of the prior representations Mr. Hershman had received over the preceding 22 years.

In January 2021, Mr. Hershman filed retirement paperwork with CalPERS, setting a retirement date of February 28, 2021 and making beneficiary elections based on all the various representations he had received to that point. On March 8, 2021, three months after making his retirement election, Mr. Hershman received a letter from CalPERS via mail dated March 4, 2021. This letter informed Mr. Hershman, for the very first time, that he would receive only **\$3,393.29** as a monthly retirement benefit—about half what he was repeatedly told to expect. Assuming there had simply been an error, Mr. Hershman emailed CalPERS, and was eventually put in contact with Retirement Administration and Support Manager, Greta Moritz. Ms. Moritz wrote:

Per our recent conversation, please accept our apology for the *incorrect official retirement estimates* you received in 2015 and 2016. *I understand you relied upon these estimates to make decisions for you and your family* and learning your retirement allowance is lower than expected has caused you concern and frustration.

In explaining CalPERS' errors, Ms. Moritz admitted that "[w]hen we calculated your retirement estimates, we incorrectly applied your State of California compensation for all your service." Mr. Moritz stated that Mr. Hershman's service with the City of Millbrae is "subject to Government Code section 20039," a law most recently amended in 1996, which pertains to members appointed to an elected position on or after July 30, 1994.<sup>4</sup> In their call, Ms. Moritz offered apologies but no remedy, stating that they "need to train their people better." The discrepancy in retirement benefits will cost Mr. Hershman an estimated \$684,000 over the course of his expected life.

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<sup>3</sup> Furthermore, in 2020, before Mr. Hershman had made his final retirement elections, CalPERS records explicitly show it had identified "errors on [Mr. Hershman's] calculation," and CalPERS personnel internally communicated about these errors. But these records show, during this same time period, even as CalPERS agents corresponded with Mr. Hershman about his pending retirement, they made no mention of any "error" to him.

<sup>4</sup> Section 20039 provides that "final compensation" of a CalPERS member who served as "an elective or appointed officer on a city council or a county board of supervisors" is calculated using the member's "highest average annual compensation" during his period of elected service, rather than highest annual compensation across all CalPERS employment. Cal. Gov. Code § 20039.

**B. The Board Should Not Adopt the Proposed Decision**

On March 22, 2023, the ALJ issued a Proposed Decision concluding that Respondent “may only receive the retirement benefit allowance he is legally entitled to under the PERL.” (Proposed Decision at 29.) The Proposed Decision should be rejected on several grounds. First, the evidence does not support the Proposed Decision’s conclusion that CalPERS did not “intend [its] conduct to be acted upon.” Second, the Proposed Decision relies on the incorrect premise that CalPERS has no option but to apply Section 20039. Third, the Proposed Decision fails to address Respondent’s arguments that he is entitled to relief based upon CalPERS’s breach of fiduciary duty and based upon promissory estoppel.

The Proposed Decision’s discussion focuses on equitable estoppel, finding that Respondent is not entitled to relief on that theory. “The doctrine of equitable estoppel is founded on notions of equity and fair dealing and provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment.” *City of Oakland v. Oakland Police and Fire Retirement System*, 224 Cal. App. 4th 210, 239 (2014). The elements of equitable estoppel are: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended; (3) the party asserting estoppel is ignorant of the facts; and (4) the party asserting estoppel suffered injury in reliance on the conduct.

The Proposed Decision concludes that Respondent has not shown the second element of equitable estoppel—*i.e.*, that CalPERS intended Respondent to act upon its representations to him about his expected retirement benefits. In this regard, the Proposed Decision notes that the annual statements contained “disclaimers” and the official estimates, while erroneous, were simply estimates, “which by their very nature are approximations.” (Proposed Decision at 27.) However, the Proposed Decision fails to explain why CalPERS would not intend for an “official” “approximation” of retirement benefits to be relied upon by its members. Indeed, it defies logic that CalPERS would offer official estimates, let alone encourage members to request them, if they were not to be relied upon.

Furthermore, the Proposed Decision ignores numerous undisputed misrepresentations the Agency made to Mr. Hershman, as well as the Agency’s express invitations for Mr. Hershman to rely on them. As set forth above, CalPERS’s communications to Mr. Hershman seeking his reliance through, among other things, annual statements, advising sessions with a CalPERS Governmental Program Analyst, and use of the CalPERS online retirement calculator—all of which provided false or misleading information.<sup>5</sup> Additionally, as noted, CalPERS itself has acknowledged Mr. Hershman relied on its misrepresentations, writing to Mr. Hershman that the Agency “understand[s] you relied upon these [incorrect] estimates to make decisions for you and your family.” In short, the notion that CalPERS did not intend Mr. Hershman to rely on its representations is not supported by the record.

The Proposed Decision further found that even if CalPERS had intended that its representations be acted upon, “applying the doctrine of equitable estoppel would be contrary to strong public policy.” (Proposed Order at 28.) It is true that under California law, “the government may not be bound by an equitable estoppel in the same manner as a private party unless . . . the injustice which would result from

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<sup>5</sup> The Proposed Decision points out that annual statements contained language indicating that the “law will take precedence” over the annual statements. However, this “disclaimer” should be regarded as ineffective given that CalPERS’s misinformation remained the same in these statements year after year, and as long as Mr. Hershman received them.

a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest[.]” *City of Oakland*, 224 Cal. App. 4th at 240. However, in concluding that holding CalPERS accountable for its misrepresentations would be contrary to public policy, the Proposed Decision does not engage in the necessary balancing of interests, and instead cites the decision in *Chaidez v. Bd. of Admin.*, which is not applicable on the facts of this appeal. 223 Cal. App. 4th 1425 (2014).

In *Chaidez*, the court determined that a CalPERS member could not avoid application of Section 20039 where the member received information from CalPERS about his expected retirement benefit that was not always consistent. The court in *Chaidez* made clear that the outcome was based “on [the] record” in that appeal, and made no categorical ruling regarding the availability of relief for a CalPERS member where the Agency provides misinformation. *See id.* at 1428. Aside from the involvement of Section 20039, the facts in *Chaidez* bear little resemblance to the facts here. In *Chaidez*, for example, there was evidence that: “[Cal]PERS provided timely information about section 20039 to Chaidez” (*id.* at 1430); that CalPERS provided guidance that was “not always consistent” (*id.* at 1429); and “Chaidez had been communicating with PERS for years regarding the calculation of his retirement benefits, and Chaidez was “not satisfied with the answers he was receiving from PERS” (*id.* at 1430 n.5) (emphases added).

Here, by contrast, there is **no evidence CalPERS ever informed Mr. Hershman about Section 20039**, or even attempted to inform him. Moreover, contrary to the record in *Chaidez*, each communication Mr. Hershman received from CalPERS over the course of more than 20 years corroborated and reinforced the notion that his highest salary would be used as his “final compensation” to calculate his retirement benefits. Mr. Hershman was at all times satisfied with this erroneous information. Given the divergence on such key facts, *Chaidez* has no here. Indeed, *Chaidez* specifically states that “widespread, long-continuing” misrepresentations may support application of equitable estoppel “in the public pension context” where the outcome results in a narrow precedent. *Id.* at 1432 (citations omitted). This appeal presents the type of egregious circumstances *Chaidez* suggested may warrant relief.

The law is clear that equitable estoppel can be invoked despite statutory provisions “where justice and right require it.” *Driscoll v. City of Los Angeles*, 67 Cal. 2d 297, 306 (1967). In *Driscoll*, for example, the California Supreme Court concluded a city was estopped to rely on a statute of limitations where an agency erroneously advised widows of retired policemen and firemen as to the relevant law regarding their entitlement to pension benefits, and that misinformation prevented the widows from filing claims for pension benefits within the limitations period. *Id.* Simply stated, there are remedies for the harm Respondent has suffered.<sup>6</sup>

Lastly, the Proposed Decision entirely ignores several of Respondent’s bases for relief. The Proposed Order notes Mr. Hershman’s argument that CalPERS breached its fiduciary duty to him to provide timely and accurate information and cites the California Supreme Court’s decision in *Hittle v. Santa Barbara County Employees Retirement Assn.*, 39 Cal. 3d 374, 392–93 (1985). The court in *Hittle* concluded that by providing just a single handwritten note to the pensioner to inform him of his retirement options, a public retirement association’s actions were “tantamount to . . . misrepresentation and

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<sup>6</sup> The Proposed Decision similarly ignores sources of Constitutional and statutory authority that permit CalPERS to provide relief to Mr. Hershman, regardless of the language of Section 20039. *See, e.g.*, Cal. Const. art. XVI, § 17 (providing that CalPERS Board has “plenary authority” for “administration of the system,” and has “sole and exclusive responsibility to administer the system”); Cal. Atty. Gen. No. 99-907, 83 Ops. Cal. Atty. Gen. 45, 46–47 (2000) (finding early retirement annuities offered in exchange for releases of employment-related claims which would allow for litigation expense savings not a gift of public funds).

concealment,” thus breaching its fiduciary duty and entitling the pensioner to relief against the pension administrator. *Id.* at 394. However, the Proposed Decision did not address this argument or discuss *Hittle* in finding CalPERS’s decades-long material misrepresentations and omissions warrant no relief. The Proposed Decision likewise notes Mr. Hershman’s argument that he is entitled to relief based upon promissory estoppel, but does not engage in any analysis with respect to that claim. Promissory estoppel involves: (1) a promise clear and unambiguous in its terms;<sup>7</sup> (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance. *Flintco Pac., Inc. v. TEC Mgmt. Consultants, Inc.*, 1 Cal. App. 5th 727, 734 (2016). As explained in the briefing before the OAH, Mr. Hershman has met these elements. Over more than 20 years, CalPERS promised Mr. Hershman, through its repeated and unambiguous representations through different CalPERS departments and individuals, that his pension would be determined by applying his highest public sector salary from across *all* public sector employment. Mr. Hershman was injured by his reasonable reliance on these representations. But the Proposed Decision entirely ignores promissory estoppel as a basis for relief.<sup>8</sup>

### Conclusion

CalPERS publicly states that its “Core Values” include the following: “Take ownership of, and responsibility for, actions, risks, and results”; “be truthful in all actions and communications”; and “Honor commitments, keep promises, and build trust.”<sup>9</sup> Yet, CalPERS’s actions in this case tell a very different story. CalPERS itself states that Mr. Hershman “did everything right” and there was nothing he could do to prevent what happened. Still, CalPERS contends, and the Proposed Order found, there are no grounds to rectify the harm the Agency caused. If CalPERS’ blatant misrepresentations are swept aside in a case as egregious as this, what is the incentive for CalPERS to get it right? If not under these circumstances, when will CalPERS “take ownership of, and responsibility for” its actions?

Sincerely,



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<sup>7</sup> A representation is a “promise” subject to promissory estoppel, where the party communicating it “should reasonably expect [it] to induce action or forbearance of a definite and substantial character.” *Kajima/Ray Wilson v. Los Angeles City. Metro. Transp. Auth.*, 23 Cal. 4th 305, 310 (2000).

<sup>8</sup> Respondent’s legal arguments are more fully set forth in the written closing arguments, which are Exhibits DS and DT in the record.

<sup>9</sup> <https://www.calpers.ca.gov/page/about/organization/calpers-story/our-mission-vision>