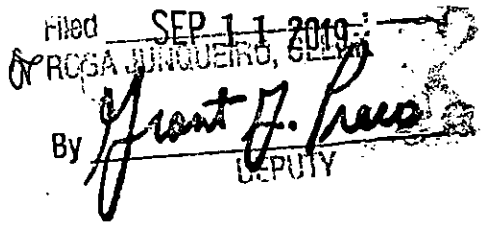


**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN JOAQUIN**

MARGARET MILLER and PAULINE TOY, on behalf of themselves and others similarly situated,

Plaintiff,

vs.

SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; BOARD OF RETIREMENT OF SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION and DOES 1-30, inclusive,

Defendants.

---

SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION; BOARD OF RETIREMENT OF SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,

Cross-Complainants,

vs.

THE COUNTY OF SAN JOAQUIN,

Cross-Defendants.

**CASE NUMBER: STK-CV-UBC-2017-10696**

**ORDER ON DEFENDANTS SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION'S, BOARD OF RETIREMENT OF SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION'S, AND CROSS-DEFENDANT COUNTY OF SAN JOAQUIN'S MOTIONS FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE BE ADVISED that the Motions of Defendants SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, BOARD OF RETIREMENT OF SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, and Cross-Defendant COUNTY OF SAN JOAQUIN'S for Summary Judgment or, in the alternative, Summary Adjudication came on regularly for hearing on June 14, 2019, in Department #10B of the above-entitled court, the Honorable Carter P. Holly presiding. John Parker, Jr., Esq., and Richard Chiurrazi, Esq., appeared on behalf of Plaintiffs. Ashley K. Dunning, Esq., and Aalia Taufiq, Esq., appeared on behalf of Defendants SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION and BOARD OF RETIREMENT OF SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, Arthur A. Hartinger, Esq., appeared on behalf of Cross-Defendant, COUNTY OF SAN JOAQUIN. The matter was argued and submitted on the pleadings.

The Court having fully read and considered the evidence presented, the written supporting and opposing points and authorities, and having heard and considered oral arguments of counsel, and good cause appearing therefor,

**IT IS HEREBY ORDERED** that the Defendants' Motions for Summary Judgment are hereby **GRANTED** as Defendants have made a prima facie showing that they are entitled to Summary Judgment and Plaintiffs have failed to meet their burden to present evidence indicating a triable issue of fact exists.

I

## FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a Settlement Agreement entered into between Defendants SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (hereinafter referred to as "SJCERA") and BOARD OF RETIREMENT OF SAN JOAQUIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (hereinafter referred to as "BOARD") and

Plaintiffs MARGARET MILLER, EDWARD ALLUM and PAULINE TOY on behalf of the class of Plaintiffs who consist of all individuals who have retired from employment with San Joaquin County on or after April 1, 1982, and before January 1, 2001 (hereinafter referred to as the "POST-'82 Group") regarding the alleged mismanagement of the Plaintiffs' retirement fund and the Settlement Agreement entered into regarding same. Plaintiffs' Second Amended Complaint alleges causes of action for: (1) Declaratory and Injunctive Relief; (2) Petition for Writ of Mandate; (3) Accounting; (4) Breach of Contract; and (5) Breach of the Covenant of Good Faith and Fair Dealing.

On August 22, 2001, Defendants entered into a Settlement Agreement to settle their post-*Ventura County Deputy Sheriffs' Assoc. v. County of Ventura* (1997) 16 Cal.4th 483, litigation (hereinafter referred to as the "Agreement"). The Agreement provided that all employees who retired between the period of April 1, 1982, and January 1, 2001, approximately 1800 employees (hereinafter referred to collectively as the "POST-'82 Retirees"), are entitled to receive an additional sum of $10.00 per month for every year of service, up to a maximum of $300.00 per month. The POST-'82 Retirees consist of approximately 80-year-old retirees and according to Plaintiffs are losing on average $170 per month. Plaintiffs allege Defendants have complied with all aspects of the Agreement except on two separate occasions when POST-'82 Retirees' benefit was cut off; to wit: from May of 2006 thru November of 2007, and in March of 2017. During January of 2001 thru May of 2006 and November of 2007 thru February of 2017 the POST-'82 Retirees were receiving their monthly supplement. As of March 1, 2017, the benefit was stopped.

Defendants SJCERA, the BOARD, and Cross-Defendant COUNTY OF SAN JOAQUIN (hereinafter referred to as the "COUNTY") have filed Motions for Summary Judgment or, in the alternative, for Summary Adjudication.

///

///

II

## DISCUSSION

### Defendants' Basis for MSJ/MSA

Defendants SJCERA and the BOARD seek Summary Judgment or, in the alternative, Summary Adjudication of the following 13 issues:

1. The Agreement did not require SJCERA to use a different year's Unappropriated Earnings Reserve ("UER") to fund the Post-'82 Reserve in 2001 than the SJCERA Board did.

2. The Agreement did not prohibit SJCERA Board from maintaining a 3% Contingency Reserve target as the public records establish it openly did for over forty (40) years from 1976 to 2017.

3. The Agreement did not prohibit the Board from establishing a Restricted UER as it did by Resolutions adopted publicly on December 13, 2002, December 12, 2003, December 12, 2004, December 9, 2005, December 8, 2006, and December 14, 2007.

4. The Agreement did not require the Board to transfer additional actuarially-determined "UER" to the Post-'82 Reserve in 2001 and 2009 when, according to SJCERA's Consulting Actuary, (i) no additional "surplus" existed in 2001 after the Board transferred approximately $123 million from its "Special Litigation Reserve" and UER calculated as of that time to fund benefits provided under the Agreement and (ii) no actuarially-determined "surplus" existed in 2009 when SJCERA had suffered over $350 million in deferred losses as a result of 2008-2009 Great Recession[1], and the funding for vested benefits SJCERA provides plummeted at that time.

5. The Agreement did not prohibit the Board from appropriating funds for administrative expenses up to the budgetary "cap" provided in the County Employees Retirement Law of 1937 ("CERL"), including a budgetary appropriation "provision for contingencies" of up to $3 million tracking underspending on prior year's budgets, as it did from at least 1994 to present.

6. The Agreement did not prohibit the Board from engaging in a prudent determination of its "actuarial assumed rate of return" (i.e., "discount rate") in consultation with its Consulting Actuary as shown in the accompanying evidence.

---

[1] The "Great Recession" is defined as a period of marked global economic decline beginning in December of 2007. Blodgett v. Shelter Mortg. Co., LLC (D. Ariz., Feb. 8, 2013, No. CIV-10-2233-PHX-MHB) 2013 WL 495501, at *18. See also Acosta v. Brown (2013) 213 Cal.App.4th 234, 245, 152 Cal.Rptr.3d 340, 347.

7. SJCERA did not fail to provide "proper notice" of UER "distributions" as SJCERA's Consulting Actuary has confirmed that no such "surplus" has existed or currently exists to make required distributions from the UER.

8. SJCERA did not "mislead" members of the Post-'82 Class in written communications regarding the Post-'82 Benefit and Post-'82 Reserve in the Delta Breeze publications of May 2004, May 2005, November 2005, November 2006, May 2008, Spring 2015, or in its individual notices to Post-'82 Reserve and anticipated suspension of the Post-82 Benefit. Those communications were accurate on the topics they summarized.

9. The Agreement did not prohibit the Board from amortizing, in its 2009 Valuation, "extraordinary" future actuarial gains in the same manner as it amortized its "extraordinary" investment losses caused by the Great Recession, nor did it prohibit the memorializing of that decision in SJCERA's 2009, 2011 and 2017 Funding Policies.

10. The Agreement did not prohibit the SJCERA Board from maintaining its 90% target for the plan's actuarial funded ratio, which has been in place since at least 1998 (at which time the funded ratio target was even higher - 95%-115%).

11. The Agreement did not prohibit SJCERA from allocating pro-rata investment losses to the Post-'82 Reserve in the same manner that the Board allocated pro-rata investment earning through interest credits to the Post-'82 Reserve, which resulted in a net gain to the Post-'82 Reserve of over $10 million.

12. The Agreement did not require the Board to transfer funds into the Post-'82 Reserve that derived from its settlement with the Internal Revenue Service ("IRS") under a Voluntary Correction Program ("VCP") relating to the administration of a sick leave bank created by the Agreement because - as SJCERA's Consulting Actuary confirms - those funds were not "surplus" earnings under the Agreement.

13. The Agreement did not require an accounting. . ., they should not be awarded an accounting or any other equitable relief that has been requested. (NOM, 3:13-8:14.)

Cross-Defendant COUNTY seeks Summary Judgment or, in the alternative, Summary Adjudication of the following five issues:

1. On Plaintiff's First Cause of Action for Declaratory and Injunctive Relief because their substantive claims fail as a matter of law.

2. On Plaintiff's Second Cause of Action for Writ of Mandate because mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity.

3. On Plaintiff's Third Cause of Action for Accounting because their substantive claims fail as a matter of law.

4. On Plaintiff's Fourth Cause of Action for Breach of Contract because:

a. This claim is barred by the statute of limitations and laches;

b. As a matter of law, neither the COUNTY nor SJCERA, nor the BOARD breached the Settlement Agreement.

5. On Plaintiff's Fifth Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing because:

a. This claim is barred by the statute of limitations and laches;

b. As a matter of law, neither the COUNTY nor SJCERA, nor the BOARD breached the Settlement Agreement or any implied covenant of good faith and fair dealing encompassed in the Agreement.

The Supreme Court has set forth the burdens of proof for the moving and responding parties as follows:

> First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.[11] That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. (See Evid.Code, §500.) There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.[12] . . Thus, a plaintiff bears the burden of persuasion that "each element of" the "cause of action" in question has been "proved," and hence that "there is no defense" thereto. (Code Civ. Proc., §437c, subd. (o)(1).) A defendant bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" thereto. (Id., §437c, subd. (o)(2).)
>
> Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima ***862 facie showing of the existence of a triable issue of material fact. . . A prima facie showing is one that is sufficient to support the position of the party in question. (Cf. Evid.Code, §602 [stating that a "statute

providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption"].) No more is called for.

Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial. . . Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact. By contrast, if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.[16] Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850–851 [107 Cal.Rptr.2d 841, 861–862, 24 P.3d 493, 510–511], as modified (July 11, 2001).

In this matter, Defendants have made a prima facie showing that they are entitled to Summary Judgment and Plaintiffs have failed to meet their burden to present evidence indicating a triable issue of fact exists.

The Settlement Agreement contains the relevant provision regarding the POST-'82 benefits at paragraph 20 and provides:

'All parties agree that, in settlement of this Action, the Board of Retirement shall establish a reserve account in the Retirement Fund for the purpose of providing supplemental benefits to retirees, or their surviving beneficiaries, covered by this Section 20. The supplemental benefits payable to each such retiree, or surviving beneficiary, shall be in a monthly amount equal to ten dollars ($10.00) times the number of years, including portions thereof, of County service of such retiree, not to exceed thirty (30) years of County service. Such monthly supplemental benefit shall not be considered as part of the retiree's or beneficiary's base retirement allowance for purposes of any cost of living adjustment provided by SJCERA. Each beneficiary receiving less than one hundred percent (100%) of deceased retiree's monthly allowance shall receive a pro-rata amount of the ten dollars ($10.00) monthly increase. **The supplemental benefits provided by this Section 20 shall be funded out of the UER reported to the Board of Retirement by its actuaries for calendar years**

**1999 and 2000 including any litigation reserves created by transfers from such UER.** The Board of Retirement shall transfer $16.2 million from such UER to the supplemental benefit reserve account established by the Board of Retirement pursuant to this Section 20 to fund this supplemental benefit. The Board of Retirement's actuaries have determined that an additional approximate $16.2 million will be necessary to fully fund this benefit. **To the extent that UER for the calendar years 1999 and 2000 are insufficient to fund the entire present value cost of this benefit as estimated by the Board of Retirement's actuaries, taking into account the appropriations and allocations from such UER necessary to fund the other benefits provided by this Settlement Agreement, the amount transferred by the Board of Retirement to this supplemental benefit reserve account shall be utilized to pay the monthly amounts calculated for this benefit until such funding is exhausted, at which time the supplemental benefits shall be suspended until funding is available as described hereafter in this Section 20. In anticipation of such a deficiency in the present funding of the cost of this supplemental benefit, the Board of Retirement shall transfer funds from each UER reported to it by its actuaries for calendar years after 2000 remaining after deduction of 'True-up Costs' but before any 'UER Split' until this benefit is fully funded. The requirement of the Board of Retirement to make such transfer(s) shall cease when the cost of this supplemental benefit is fully funded, as determined by the actuaries retained by the Board of Retirement.** Supplemental benefits provided by this Section 20 shall accrue to eligible retirees, or surviving beneficiaries as of January 1, 2001. All monthly payments due to eligible retirees, or surviving beneficiaries, between January 1, 2001, and the first month following the date of approval of this Settlement Agreement by the Superior Court shall be paid in lump sum, without interest, subject to all appropriate deductions and withholding, along with, or as part of the regular retirement warrant due to the eligible retiree, or surviving beneficiary, for the first month beginning after the month in which the Superior Court approves this Settlement Agreement." (Emphasis added.)

## Applicable Law

The California Constitution, Article 16, §17, provides, in part:

". . .

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system **shall have plenary authority and fiduciary responsibility for investment of moneys and**

**administration of the system**, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are **trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system**.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system **solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system.** A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

(d) The members of the retirement board of a public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.

(e) The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system. . ." (Emphasis added.)

Government Code §31592 provides:

Earnings of the retirement fund during any year in excess of the total interest credited to contributions and reserves during such year shall remain in the fund as a reserve against deficiencies in interest earnings in other years, losses on

investments and other contingencies, except as provided in Sections 31529.5 and 31592.2.

Government Code §31592.2(a) provides:

> "In any county, earnings of the retirement fund during any year in excess of the total interest credited to contributions and reserves during such year shall remain in the fund as a reserve against deficiencies in interest earnings in other years, losses on investments, and other contingencies, except that, when such surplus exceeds 1 percent of the total assets of the retirement system, the board may transfer all, or any part, of such surplus in excess of 1 percent of the said total assets into county advance reserves for the sole purpose of payment of the cost of the benefits described in this chapter."

**Issue No. 1: Did the Agreement require SJCERA to use a different year's Unappropriated Earnings Reserve ("UER") to fund the Post-'82 Reserve in 2001 than the SJCERA Board did?**

Plaintiffs argue that Defendants SJCERA and the BOARD were required to use the funds in the 1999 and 2000 UER to initially fund the POST-'82 benefit, but instead, they funded the account with funds from the Special Litigation reserve and the 2001 UER. All Defendants argue correctly that the POST-'82 benefits are supplemental benefits that are not vested until the contingency that UER monies are available is met. The Settlement Agreement specifically states:

> "The supplemental benefits provided by this Section 20 shall be funded out of the UER reported to the Board of Retirement by its actuaries for calendar years 1999 and 2000 including any litigation reserves created by transfers from such UER."

In his deposition, Robert Palmer, the former Administrator of the Plan, stated the POST-'82 supplemental benefits were to be funded with the 1999 and 2000 UER (Unappropriated Earnings Reserve, which is a reserve funded with money remaining after the members' reserves have been funded) and litigation reserves reported to SJCERA by its actuaries. (SJCERA Exhibit "583," Palmer Depo., 113:5-10.) In response to

Plaintiffs' Request for Admission, number 15, that SJCERA admit or deny that "Section 20 of the SETTLEMENT AGREEMENT states the supplemental benefits are to be paid from the year 1999 and year 2000 UER and litigation reserves," SJCERA admits same. (See SJCERA's Exhibit "552," 8:3-12.)

Actuary Graham A. Schmidt states in his Declaration, "The 2001 CAFR reported that SJCERA had utilized 'unappropriated earnings for 1999 and 2000, a sum of $123.6 million,' to pay for the benefits authorized by the 2001 Agreement. (See also SJCERA 000056, 2001-2000) (Compendium, Tab 59.)"

Defendants argue the decision to transfer the funds they did to fund the POST-'82 account was voted in favor of by a POST-'82 member and further the 2001 Valuation was adopted by some POST-'82 members (Victor Mow and Thomas Russell), who were members of the Retired Public Employees of San Joaquin County ('RPESJC") as well and, therefore, they knew or with reasonable diligence would have known of the transfer if they had requested copies of the financial records. (SJCERA Exhibit "76.")

Resolution 2001-09-01 states, in part:

> "WHEREAS, the Board of Retirement has agreed as part of the Settlement Agreement to utilize funds form its Special Litigation Reserve plus interest ($73,570,737) and its Year 2001 Unappropriated Earnings Reserve (UER) ($48,378,774) to fund certain benefits agreed upon in the class action settlement;
>
> WHEREAS, the Board of Retirement's actuary, Buck Consultants, has conducted cost studies for the proposed benefits in the class action settlement based upon a valuation date of December 31, 1999, (a copy of those cost studies is attached hereto and incorporated herein as Attachment B).
>
> . . .
>
> 8) The balance of the funds remaining in the Special Litigation Reserve and the UER are hereby allocated pursuant to section 25(3) of the Settlement Agreement to increase funding of the monthly $10 per year of County service retiree benefit established pursuant to section 20 of the Settlement Agreement." (SJCERA's Ex. 52.)

Although the Resolution refers to attachments, no attachments are attached thereto. Plaintiffs argue the reference to 2001 was a typographical error because those numbers were not known until August of 2002. This indicates that the monies were from the 2000 UER and, therefore, Plaintiffs' argument regarding the initial funding fails. Plaintiffs argue, "Funds in the 1999 and 2000 UER were used for the original funding as confirmed in (1) the Settlement Agreement (2) County Counsel's written description of the Settlement (3) the 2001 CAFR (4) Mr. Palmer's testimony and (5) Board Resolutions. (Tabs 46, 35, 59, and Palmer Deposition, Vol. V at pp.691:8-692:25, 716:18-25, 717:1-4.)" (Plaintiff's Oppo., 12:5-8.) Defendants clearly point this out in their Reply and argue Plaintiffs' concession of these facts entitle Defendants to Summary Adjudication of this issue. (Reply, 12:16-21.)

Plaintiffs state the Special Litigation Reserve funds and 2000 UER were used to initially fund the POST-'82 account. Plaintiffs' argument is confusing because they admit the funds were paid from 1999 and 2000 UER, then they argue they were not paid from those reserves. The Court determines that Plaintiffs have conceded that the 1999 and 2000 UER funds were used to initially fund the account and, therefore, Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 2: Did the Agreement prohibit SJCERA Board from maintaining a 3% Contingency Reserve target as the public records establish it openly did for over forty (40) years from 1976 to 2017?**

Plaintiffs allege the Defendants breached the Settlement Agreement by maintaining a Contingency Reserve of three percent (3%) of total fund assets instead of the statutorily required one percent (1%). Government Code §31592.2(a) only requires the retention of one percent. Plaintiffs contend the additional two percent held in the Contingency Reserve in 2001 and 2009 should have been used to fund the POST-'82 fund. Defendants argue Plaintiffs misinterpret the Settlement Agreement and ignore the BOARD'S construction of its terms.

The Settlement Agreement clearly states:

> "In anticipation of such a deficiency in the present funding of the cost of this supplemental benefit, the Board of Retirement shall transfer **funds from each UER reported to it by its actuaries for calendar years after 2000 remaining after deduction of 'True-up costs' but before any 'UER Split' until this benefit is fully funded.** The requirement of the Board of Retirement to make such transfer(s) shall cease when the cost of this supplemental benefit is fully funded, as determined by the actuaries retained by the Board of Retirement." (SJCERA Ex. "46," pp. 6-7; Emphasis added.)

The Agreement provides, in paragraph 25, that the priority for transfers from the UER is as follows:

> "(1) All transfers required by law, including but not limited to, by way of example, interest posting to reserve accounts, administrative costs, and investment management fees;
>
> (2) All transfers necessary to fund 'True-up Costs', as defined in Section 15 and described in Section 24;
>
> (3) All transfers necessary to fund the benefit prescribed by Section 20;
>
> (4) All transfers required by Section 22(c);
>
> (5) All transfers necessary to allocate remaining UER pursuant to the 'UER Split' as defined by Section 17 and described in this Section 25." (SJCERA Ex. "46," pp.14-15.)

Paragraph 16 of the Settlement Agreement defines UER as follows:

> "'UER': unappropriated earnings reserve, a reserve account established by the Board of Retirement in the Retirement Fund of the SJCERA pursuant to Government Code Sections 31592 and 31592.2."

The Agreement fails to include or even reference Defendants' Resolution dated March 12, 1976, which provides:

> "BE IT HEREBY RESOLVED that earnings of the Retirement Fund in excess of total interest credited to contributions and reserves, be established at 3% of the total assets of the Retirement System and shall remain in the fund as a reserve against deficiencies in interest earnings, losses on investments and other contingencies. Approved this 12th day of March,

1976." (SJCERA Ex. "1.")

This same resolution was again restated in the Defendants' Statement of Funding Policy, dated October of 2011 (10 years after the Settlement Agreement was entered into). Defendants' Statement of Funding provides:

> "The Board's primary funding objectives, in order of importance, are to:
>
> 1. Provide sufficient assets to permit the payment of all benefits under SJCERA.
>
> . . .
>
> 3. Minimize the volatility of the employers' annual contribution rate as a percentage of covered pay by:
>
> a. Maintaining 3% of total assets as a reserve against contingencies; . . ." (See SJCERA Ex. "374" and Ex. "583," Palmer Depo., 144:8-22; 145:4-6.)

The Fifth District Court of Appeal held:

> In light of this lack of authority, the question remains whether the transfer was per se illegal. We conclude it was not. The board has been granted plenary authority over administration and investment decisions concerning the retirement system, subject to its fiduciary duties. (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 78-79, 111 Cal.Rptr.3d 418.) With no statutory authority to the contrary, we see no reason why the board could not, if consistent with its fiduciary obligations, close or reduce a county advance reserve excess fund account and utilize that money for a different purpose. The funds are not being utilized to keep the system in actuarial balance and, assuming the funds remain within the retirement system, are not being improperly diverted from the trust as a whole. O'Neal v. Stanislaus County Employees' Retirement Assn. (2017) 8 Cal.App.5th 1184, 1213 [214 Cal.Rptr.3d 591, 610], review denied (May 10, 2017).

Robert Palmer testified that the BOARD did not direct any true-up calculations in any years other than 2003 through 2005. (SJCERA Exhibit "583," Palmer Depo., 155:20-156:5.) Plaintiffs point out that SJCERA's Summary of Reserve Balances at Year End 2000-2015, SJCERA's Exhibit "513," indicates: for 2001 there was a balance of $47.3

million, or 3.3% of total assets on hand, held in the Contingency Interest Fluctuation account and $16.8 million in the UER account; for 2005 there was a balance of $24 million in the Restricted UER; for 2006 there was a balance of $28.7 million in the Restricted UER account; for 2007 there was a balance of $66.8 million, or 3.0% of total assets on hand, held in the Contingency Interest Fluctuation account, $22.9 million in the UER account, and $22.7 million in the Restricted UER account; for 2009 there was a balance of $52 million, or 3.0% of total assets on hand, held in the Contingency Interest Fluctuation account and $9.8 million in the UER account.

Defendant's actuary Graham A. Schmidt states that the Comprehensive Annual Financial Report ("CAFR") for the years ending December 31, 2001, and 2000, notes on page 31, note 15, "After the transfer, the Unapportioned Earnings, including the Market Stabilization Account, was in a negative balance of $77.8 million at December 31, 2001." (SJCERA's Exhibit "59.")

Graham A. Schmidt states in his Declaration that Defendants' decision to allow the Contingency Reserve to exceed 1% of the total assets of SJCERA up to the BOARD'S target of 3% of the total assets was prudent for those assets to remain in the fund as a reserve against deficiencies in interest in other years, from an actuarial perspective, because if Defendants failed to do so, they would be unable to credit full interest the following year to its reserves. (Schmidt Decl., 15:23-16:4; 18:24-19:4.) Schmidt further stated that as of December 31, 2005, December 31, 2008, January 1, 2009, during 2010, as of December 31, 2011, December 31, 2012, December 31, 2015, and December 31, 2016, Defendants had insufficient actuarially-determined earnings to meet the statutory minimum of 1% for the Contingency Reserve. (Schmidt Decl., 24:10-11; 37:26-27; 38:21-23; 39:22-23; 44:25; 45:19-20; 51:19-52:2; 58:22-59:3; 61:2-11. See also Exhibit "246".)

The Court notes that Defendants did actually transfer the sum of $2,469,593 to the POST-'82 fund, which were amounts in excess of the 1% in the Contingency Reserve in

2007. (See Exhibit "253, Resolution No. 2007-10-02; Schmidt Decl., 28:21-29:16; 30:4-16.)

The Third District Court of Appeal held that the retirement board is obligated to administer the trust in the interest of the beneficiaries and to the exclusion of all other parties:

> Under well-established rules of the law of trusts, a trustee's primary duty of loyalty is to the beneficiaries of the trust. "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." (Rest.2d Trusts (1959) § 170, subsection (1).) The trustee must not "be guided by the interest of any third person." (Comment (g) to subd. (1).) This "unwavering duty of complete loyalty to the beneficiary of the trust" must be "to the exclusion of the interest of all other parties." (*NLRB v. AMAX Coal Co.* (1981) 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 [holding that employer-selected trustees of a trust fund created under section 302(c)(5) of the Labor Management Relations Act are not to be "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" under section 8(b)(1)(B) of the National Labor Relations Act].) Under the rule against divided loyalties, a "fiduciary cannot contend 'that although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' " (Id. at p. 330, 101 S.Ct. at p. 2794.) City of Sacramento v. Public Employees Retirement System (1991) 229 Cal.App.3d 1470, 1494 [280 Cal.Rptr. 847, 861].

Subsection (e) of Article 16, §17, of the Constitution provides: "The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." Government Code §31453 mandates that a County retirement system be evaluated by an actuary and any required changes as recommended by the actuary must be presented to the Board of Supervisors for approval. "Once a retirement board sets contribution rates based upon the recommendation of its actuary, those rates are binding on the county. (See §§31584–31586; see also *City of Oakland v. Public*

*Employees' Retirement System* (2002) 95 Cal.App.4th 29, 49, 115 Cal.Rptr.2d 151 (*City of Oakland* ) ['contribution rates are set by law'].)" In re Ret.Cases. Eight Coordinated Cases (2003) 110 Cal.App.4th 426, 453 [1 Cal.Rptr.3d 790, 813]. This statute clearly indicates the significance of an actuary's recommendations for maintaining the stability of a retirement plan.

The Third District Court of Appeal has held that pensioners have a contractual right to an actuarially sound retirement plan. Board of Administration v. Wilson (1997) 52 Cal.App.4th 1109, 1131 [61 Cal.Rptr.2d 207, 223]. The Court further held that it is for the courts to determine what is reasonable:

> As indicated, "[a]n employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material **227 relation to the theory of a pension system and its successful operation...." (*Betts v. Board of Administration, supra*, 21 Cal.3d at pp. 864–865, 148 Cal.Rptr. 158, 582 P.2d 614, internal quotations omitted.) The material relation requirement fulfills the purpose of "keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system...." (*Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 184, 265 P.2d 884.) Board of Administration v. Wilson (1997) 52 Cal.App.4th 1109, 1137 [61 Cal.Rptr.2d 207, 226–227].

Defendant COUNTY argues that because members, Victor Mow and Thomas Russell, of the Plaintiff class approved the Resolutions approving the 3% policy that they are barred from alleging a breach and are further barred by the doctrine of laches. It is true that if a plaintiff acquiesces to defendant's conduct, laches will apply as held by the Third District Court of Appeal:

> "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351,

> 359, 82 Cal.Rptr. 337, 461 P.2d 617, fns. omitted.) "[U]nreasonable delay by the plaintiff is not sufficient to establish laches. There must also be prejudice to the defendant resulting from the delay or **acquiescence by the plaintiff**." **220 (*Ragan v. City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1368, 261 Cal.Rptr. 219, original italics, fn. omitted.) "Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.] Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest *1127 injustice or a lack of substantial support in the evidence its determination will be sustained. [Citations.]" (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624, 166 Cal.Rptr. 826, 614 P.2d 258.) Board of Administration v. Wilson (1997) 52 Cal.App.4th 1109, 1126–1127 [61 Cal.Rptr.2d 207, 219–220]. (Emphasis added.)

Defendants correctly point out that the Settlement Agreement contains an integration clause which specifically bars parol or other evidence from being used to "explain, construe, contradict or clarify the terms of the Settlement Agreement" (Settlement Agreement, ¶36.) The Settlement Agreement clearly includes language indicating that Defendants will utilize actuarial services in order to determine the existence of UER funds for distribution to the POST-'82 fund.

Based on the evidence presented, including the Declaration of Actuary Graham A. Schmidt, the act of the Defendants maintaining the 3% Contingency Reserve did not violate the parties' Settlement Agreement as it was actuarially prudent to do so.

Accordingly, Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 3: Did the Agreement prohibit the Board from establishing a Restricted UER as it did by Resolutions adopted publicly on December 13, 2002, December 12, 2003, December 12, 2004, December 9, 2005, December 8, 2006, and December 14, 2007?**

Plaintiffs argue that Defendants SJCERA/BOARD breached the Settlement Agreement when they created a Restricted UER account during the years of 2004 thru 2007, which prevented the POST-'82 account from being properly funded. Defendants

argue that its decision to establish a Restricted UER fund was actuarially prudent. Defendants' actuary states in his Declaration:

> "Costs of administration of the retirement system must always be paid by a retirement system and, therefore, whether they are maintained in a restricted UER for the following year's administrative expenses, or simply paid the next year, will not impact the funding of a particular reserve to pay benefits. For this reason, in or about 2010 we advised SJCERA that such a 'restricted UER' reserve would not change SJCERA's responsibility to pay its expenses, and therefore whether the funds were designated as 'restricted UER' or not would have no bearing on the ultimate amount of actuarially-determined earnings to be credited to reserves." (Scmidt Decl., 19:26-20:5.)

Defendants SJCERA/BOARD state "The Restricted Unappropriated Earnings Reserve was established as a set-aside to fund the subsequent year's administrative expenses, investment management fees and active member interest crediting - funds that SJCERA is legally required to maintain pursuant to Government Code Section 31592." (SJCERA Exhibit "551," Response to Form Interrogatories, Interrog. No. 17.1, 4:6-9; SJCERA Exhibit "552," Response to Request for Admissions, Request No. 14, 7:24-8:2.)

At the time of the creation of the Restricted UER, Government Code §31580.2 provided that the maximum amount allowed for administrative expenses was .18% of one percent of the total assets held by SJCERA. That section stated:

> In counties where the board of retirement and board of investment have appointed personnel pursuant to Section 31522.1, the respective boards shall annually adopt a budget covering the entire expense of administration of the retirement system which expense shall be charged against the earnings of the retirement fund. The expense incurred in any year shall not exceed eighteen-hundredths of 1 percent of the total assets of the retirement system.

Defendants point out that Plaintiffs' own expert admits that the savings in the Restricted UER is prudent. (Sheffler Decl., 5:10.) Therefore, as both experts agree it was actuarially prudent to establish the Restricted UER, there is no breach of the Settlement

Agreement and Defendants are entitled to Summary Adjudication of this issue.

> **Issue No. 4: Did the Agreement require the Board to transfer additional actuarially-determined "UER" to the Post-'82 Reserve in 2001 and 2009 when, according to SJCERA's Consulting Actuary, (i) no additional "surplus" existed in 2001 after the Board transferred approximately $123 million from its "Special Litigation Reserve" and UER calculated as of that time to fund benefits provided under the Agreement and (ii) no actuarially-determined "surplus" existed in 2009 when SJCERA had suffered over $350 million in deferred losses as a result of 2008-2009 Great Recession, and the funding for vested benefits SJCERA provides plummeted at that time?**

Plaintiffs allege that Defendant SJCERA should have funded the POST-'82 account in 2001 and 2009 when the UER had a balance and by failing to do so it breached the Settlement Agreement. Defendants argue the Agreement did not require it to fund the POST-'82 account in 2001 and 2009.

Defendants point out that Note 15 of the 2001 CAFR indicates that there was a negative balance of $78 million in the UER after the initial funding of the accounts listed in the Settlement Agreement. (SJCERA's Exhibit "59, Note 15, page 32.) The Note specifically states, "After the transfer, the Unappropriated Earnings, including the Market Stabilization Account, was in a negative balance of $77.8 million at December 31, 2001." Note 11, item 7 of the 2001 CAFR defines the Market Stabilization Account as follows:

> "This 'designation' account is used to minimize the impact of the fluctuations in the market value of the investments owned by the Association. The designated amount of $27.8 million as of December 31, 2001, as reported, was determined at December 31, 2000; it represents the difference between the actuarial value of assets and the fair value of assets at December 31, 2000. This designated amount will be adjusted in 2002 to reflect the difference at December 31, 2001 upon receipt of the information from the actuary."

As discussed above, Defendant's actuary Graham A. Schmidt states the Comprehensive Annual Financial Report ("CAFR") for the years ending December 31, 2001, and 2000, notes on page 31, note 15, "After the transfer, the Unapportioned

Earnings, including the Market Stabilization Account, was in a negative balance of $77.8 million at December 31, 2001." (SJCERA's Exhibit "59.") Based on this evidence, there was no money in the UER to fund the POST-'82 account.

SJCERA Exhibit "76" is Resolution No. 2002-12-01 which provides, in part:

> "Whereas the Retirement Administrator has requested the retention of $16 million from the IFR to cover the 2003 expenses for administration, manager fees and specific reserves, . . .
>
> NOW, THEREFORE, BE IT RESOLVED, that the Board directs and authorizes the following actions:
>
> 1) the Unappropriated Earnings Reserve for 2001 and 2002 be used to credit all accounts for 2002.
> 2) With the exception of $16 million, that all of the Interest Fluctuation Reserve be utilized to credit accounts.
> 3) Should there be insufficient funds to fully credit all accounts, then the Retirement Administrator is authorized to:
>
> a) pay any remaining 2002 expenses for administration and manager fees;
> b) fully credit the Employees' Reserves for December 31, 2002; and
> c) equally credit all other Reserve Accounts with the balance remaining of the UER and the IFR."

Defendant COUNTY states that even when it appeared there were greater returns, the returns had to be "smoothed" over a five-year period. Robert Palmer defined this process as ". . .a methodology that the actuaries use. It's a technique of blending out over five years the ups and downs of the market to smooth it out." (SJCERA Exhibit 584, Palmer Depo., 370:12-15.) As a result of this smoothing method, even though SJCERA showed a market return of 26.3% in 2003, it still had shortfalls in the value of its assets of $19.88 million. (COUNTY MPA, 9:1-5.)

Page 28 of Defendant's 2009 CAFR, Exhibit "343," includes the following note regarding the POST-'82 account:

> "During 2008, the Board of Retirement approved additional transfers of $22.9 million from the Unappropriated Earnings Reserve to the Post 1982 Supplemental Benefit Reserve to continue payment of the Post 1982 Supplemental Benefit to

eligible payees for the next several years."

Contained within that same CAFR (Exhibit "343"), on page 46, note "g" provides:

> "The Unappropriated Earnings Reserve (UER) is used to accumulate investment income earned by SJCERA, net of the investment expenses and SJCERA's administration cost. From this unappropriated earnings account, interest is credited to various reserve accounts at an actuarially determined assumption rate. In addition, at the Board of Retirement's discretion and **subject to the *1999* class action settlement**, this account may also be used, from time to time, to fund the retirees' post-employment healthcare benefits, to stabilize the County's and the special districts' Annual Required Contribution (ARC), and to fund the market stabilization and contingency (interest fluctuation) accounts." (Emphasis added.)

The 2009 CAFR UER for 2009 shows a balance of $9,890,532 in the UER account.

Defendant's actuary Graham A. Schmidt states the following regarding same:

> ...Consequently, although reserve table 2.2 ostensibly shows $9.89 million sitting in an Undistributed Earnings Reserve as of January 1, 2010, because nearly $350 million in investment losses had not yet been recognized by SJCERA in its actuarial value of assets, there were, from an actuarial perspective, no 'surplus' or 'excess' assets as described in Government Code section 31592.2 that should be transferred to another reserve to pay for a non-vested benefit, other than through normal interest crediting that SJCERA performed. In addition, because of the large shortfall in assets available to credit interest in the prior year to reserves, including the Post-'82 Reserve, those reserves had been reduced by 12.5% resulting in shortfall of over 20% compared to the expected interest credit. In light of these significant funding deficiencies in the SJCERA plan as of January 1, 2010, the actuarially recommended course of action with respect to such funds in the 2009 UER (unrestricted) was for them to 'remain in the fund as a reserve against deficiencies in interest earnings in other years, losses on investments and other contingencies,' as provided in Government Code section 31592." (Schmidt Decl., 41:16-28.)

Defendants point out that Plaintiffs do not dispute the fact that in 2009 Defendants were advised by the consulting actuary, including their expert Graham A. Schmidt, that the Great Recession had caused substantial underfunding of the plan. (Plaintiffs' Response to Sep.Stmt., pp. 48-49.)

Defendants conduct was in accordance with the California Constitution, Article 16, §17, and Government Code §31453 in that they took the actions necessary to maintain an actuarially sound retirement system and did not violate the terms of the Settlement Agreement. Therefore, Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 5: Did the Agreement prohibit the Board from appropriating funds for administrative expenses up to the budgetary "cap" provided in the County Employees Retirement Law of 1937 ("CERL"), including a budgetary appropriation "provision for contingencies" of up to $3 million tracking underspending on prior year's budgets, as it did from at least 1994 to present?**

Plaintiffs argue that in every year from 2001 through 2018 there was a $3 million surplus in the administrative budget as evidenced by the 2001-06-02 Resolution, the 2009-07-01 Resolution and Robert Palmer's testimony. (SJCERA Exhibits "44," "327," "586," Palmer Depo., 603:19-605:5.) Resolution 2001-06-02 provides, in part:

> "WHEREAS, Section 31580.2 limits the funding for administrative budgets to .18% of the assets; and
>
> WHEREAS, Governmental Accounting Standards Board Rule 25 now requires the system to report and function at market value; and
>
> WHEREAS, on December 31, 2000 the total assets of the Fund was $1,574,581,879 at market, and the Board has elected to establish the administrative budget at .127% of assets and place the balance into the continuing Provision; for Contingencies of the budget (not to exceed $3,000,000); the total allocation shall be $4,992,683; and ..." (SJCERA Exhibits "26" and "44.")

SJCERA Exhibit "327" reflects an Administrative budget for 2009 of $3,404,997 plus a $3 million Contingency reserve. Plaintiffs argue that they were not apprised of the fund balances in the UER in 2009 until 2017. Ms. St. Urbain testified in her deposition that the administrative contingency reserve is not reported in the CAFR. (SJCERA Exhibit "588," St. Urbain Depo., 194:1-8.)

Defendants cite to a Sixth District Court of Appeal case for the definition of an

appropriation:

> An appropriation is a legislative act setting aside "a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purpose." (*Ryan v. Riley* (1924) 65 Cal.App. 181, 187 [223 P. 1027].) A continuous appropriation runs from year to year without the need for further authorization in the budget act.[11] (See Continuing Appropriations, 64 Ops.Cal.Atty.Gen. 809, 810-813 (1981); see Gov. Code, § 16304.) California Assn. for Safety Education v. Brown (1994) 30 Cal.App.4th 1264, 1282 [36 Cal.Rptr.2d 404].

Defendants argue in their Reply that the administrative budget appropriation has never been used, as testified to by Ms. St. Urbain. (SJCERA Exhibit "588," St. Urbain Depo. 196:8-13.) Graham A. Schmidt states in his Declaration:

> "The Board's administrative budgets include a detailed line item budget for each fiscal year, a calculation of the statutory cap on administrative expenses (.18% of assets until the cap changed in section 31580.2 to .21% of liabilities in or about 2010 after the 2008 market crash), and the Board policy to place the balance up to the statutory cap into a continuing 'Provision for Contingencies' in the budget (not to exceed $3,000,000). (See e.g., SJCERA 004786-4788.) The manner in which SJCERA appropriated funds in a 'Provision for Contingencies' as described in those resolutions had no bearing on the determinations of actuarial earnings used to the (sic) calculate either the UER or the Contingency Reserve. Rather, those actuarial calculations occur after a retirement system's fiscal year end books are closed, based on actual expenses of the fiscal year. Accordingly, there is no correlation between this administrative budget action that's been challenged in the SAC and the amounts deemed 'surplus' that could be considered to be transferred from a given year's UER to the Post-82 Reserve." (Schmidt Decl., 20:27-21:10.)

The Agreement provides, in part, in paragraph 25, that the priority for transfers from the UER is as follows:

> "(1) All transfers required by law, including but not limited to, by way of example, interest posting to reserve accounts, administrative costs, and investment management fees; . .."

The appropriation of the $3,000,000 was clearly for administrative expenses and,

pursuant to the Settlement Agreement, Defendants are required to first pay those expenses before funding any monies into the UER. The evidence reflects the $3 million appropriation for administrative expenses was never used, therefore, there has been no breach of the Settlement Agreement by the Defendants. Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 6: Did the Agreement prohibit the Board from engaging in a prudent determination of its "actuarial assumed rate of return" (i.e., "discount rate") in consultation with its Consulting Actuary as shown in the accompanying evidence?**

In footnote two of Plaintiffs' Opposition, Plaintiffs indicate they do not provide evidence to dispute Defendants' and the BOARD'S issues numbers 6 and 11. (Oppo., 3:28.) Therefore, Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 7: Did SJCERA fail to provide "proper notice" of UER "distributions" as SJCERA's Consulting Actuary has confirmed that no such "surplus" has existed or currently exists to make required distributions from the UER?**

Plaintiffs allege that Defendants failed to provide proper notice regarding UER distributions because Defendants represented to Plaintiffs there were no funds in the UER for distribution to fund the POST-'82 reserve. According to Plaintiffs, Defendants want the Court to interpret the Settlement Agreement as allowing Defendants to fund the POST-'82 reserve only if it is actuarially prudent to use UER funds to do so.

Paragraph 26 of the Settlement Agreement provides:

> "The Board of Retirement shall give timely written notice to all recognized employee organizations of all Board of Retirement committee meetings and all Board of Retirement meetings with respect to distribution of UER. The Board of Retirement shall provide all recognized employee organizations with all relevant materials provided to Board of Retirement members and members of Board of Retirement committees with respect to distribution of UER. Recognized employee organizations shall have the right to participate in such meetings, but shall not have any right to vote on matters discussed or actions taken in such meetings."

Plaintiffs argue the Settlement Agreement indicates the role of the actuary is to create an Actuarial Valuation and report fund balances, including the UER, but not to determine if the use of the UER to fund the POST-'82 account was "actuarially prudent." Plaintiffs further argue the Defendants did not give them the reason of "actuarial prudence" for why their benefits were eliminated any time prior to the filing of their Motion. Instead, Plaintiffs were told there was no UER to fund the POST-'82 benefit because the Settlement Agreement provided that the POST-'82 benefit shall be funded with UER. (Oppo., 21:1-9.)

Plaintiffs argue that in 2008, immediately before the recession hit, the Defendants funded POST-'82 with $22.9 million held in the UER pursuant to the Settlement Agreement. Plaintiffs point out that Defendants' actuary was well aware of the impending recession by August of 2008 when the monies were paid to fund POST-'82, as evidenced by the Contingency Reserve Analysis that was performed by Defendants' actuaries, dated August 8, 2008, wherein the actuaries indicate the UER will likely be reduced. (SJCERA Exhibit "298," p.2.) Plaintiffs also point out that there is no mention of the Restricted UER in any of the Delta Breeze Newsletters or Cattails Newsletters.

Defendants argue the Plaintiffs who were members of the RPESJC received copies of the CAFRs for the time periods they were Board members and, therefore, the Plaintiffs had notice of the balances held in the various funds. They also argue the "only 'changes' in the 'uses of excess funds of the retirement system,' which is all that is required by statute and the Agreement to be noticed, occurred during the 2007-2008 time period when *RPESJC* AND Plaintiffs' instant co-counsel Richard Chiurazzi *requested* that the Board change its Contingency Reserve policy from 3% target to 1% and transfer those amounts to the Post '82 Reserve. (Sep.Stmt., 45-51, 116.)" (SJCERA's Reply, 19:13-17.) Defendants also point out that SJCERA Board members were also RPESJC Board members who made regular reports about the finances of SJCERA at RPESJC meetings, such as Russell, Courtney, Mills, LeDuc, and Callistro. The Separate Statement of

Undisputed Facts, numbers 74, 76, 81, 83, and 145 clearly support Defendants' argument. Defendants point out that undisputed facts 45 thru 51 and 116 indicate notice was provided to Plaintiffs on the occasion when any "change" to the "use" of UER was proposed.

Additionally, the Supreme Court has held that a retirement Board is a legislative body of a local agency subject to the notice requirements set forth in the Brown Act:

> The Brown Act was adopted to ensure the public's right to attend the meetings of public agencies. (§54950.)[5] The Act provides that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§54953.) Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal.4th 821, 825 [25 Cal.Rptr.2d 148, 151, 863 P.2d 218, 221].

Government Code §54954.2 specifically provides for the publication of and access to all agendas of a legislative body of a local agency. As stated by the Third District Court of Appeal, an agenda must include the following:

> The agenda must contain "a brief general description of each item of business to be transacted or discussed at the meeting, **245 including items to be discussed in closed session. A brief general description need not exceed 20 words." (§54954.2, subd. (a)(1).) Importantly, with limited exceptions, "[n]o action or discussion shall be undertaken on any item not appearing on the posted agenda." (*Id.*, subd. (A)(2)(E)(3).)
>
> Additionally, "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2." (§ 54954.3, subd. (a).) This language has been construed to mean there must be a period of time provided for general public comment on any matter within the subject matter jurisdiction of the legislative body, as well as an opportunity for public comment on each specific agenda item before or during its consideration by the legislative body. (*Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461, 468-469, 9 Cal.Rptr.3d 336.) Olson v. Hornbrook Community Services Dist. (2019) 33 Cal.App.5th 502, 514 [244-245 Cal.Rptr.3d 236, 245].

The evidence indicates that Agendas were created and distributed and Resolutions were adopted and made available to the members.

Accordingly, Defendants are entitled to Summary Adjudication of this issue as Plaintiffs received the requisite notice.

**Issue No. 8: Did SJCERA "mislead" members of the Post-'82 Class in written communications regarding the Post-'82 Benefit and Post-'82 Reserve in the Delta Breeze publications of May 2004, May 2005, November 2005, November 2006, May 2008, Spring 2015, or in its individual notices to Post-'82 Reserve and anticipated suspension of the Post-'82 Benefit?**

Plaintiffs argue the Defendants falsely informed the Plaintiffs there was insufficient money available in the UER to fund the POST-'82 account in the Delta Breeze Newsletters issued in May 2004, 2005, November 2005, 2006, May 2008, and Spring 2015. Defendants argue that there were no misrepresentations made to Plaintiffs because there were insufficient monies in the UER to fund the POST-'82 account. As discussed above, the actions of the Defendants were taken in order to fund the Plan in an actuarially prudent manner and for the benefit of all of the pensioners, not merely the POST-'82 members. Plaintiffs received accurate communications from Defendants based upon the advice and recommendations provided to them by their actuaries in accordance with statutory and Constitutional requirements. Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 9: Did the Agreement prohibit the Board from amortizing, in its 2009 Valuation, "extraordinary" future actuarial gains in the same manner as it amortized its "extraordinary" investment losses caused by the Great Recession, and did it prohibit the memorializing of that decision in SJCERA's 2009, 2011 and 2017 Funding Policies?**

Plaintiffs argue the Defendants breached the Settlement Agreement when it enacted the October 2011 Statement of Funding Policy (adopted by Resolution 2011-10-01) which provides:

> "c. The Board has declared 50% of the actuarial loss from Fund investments during 2008 to be an Extraordinary Actuarial Loss, as defined in Section E. This Loss will be amortized as a percentage of expected payroll over a 30-year period beginning January 1, 2009 and ending January 1, 2038.
>
> In the event that the Board declares an Extraordinary Actuarial Gain during the amortization period of the 2008 Loss, the Gain will first be used to reduce the remaining unamortized balance of the 2008 Loss, and any amount remaining will be amortized as a percentage of expected payroll over a 30-year period beginning on the date of the Gain." (SJCERA Exhibit "374," pg. 2.)

Plaintiffs state they were never apprised of this policy of funding in either a newsletter or a notice, until they received the documents in response to discovery requests in 2017 and 2018. SJCERA's Exhibit "336" are Minutes from an October 9, 2009, closed session meeting wherein Lawrence Mills, one of the Plaintiffs herein, attended and the funding policy revisions were adopted unanimously.

Defendants argue there have been no "extraordinary investment gains" since 2008, and, therefore, there can be no breach of the Settlement Agreement or covenant of good faith and fair dealing. (Undisputed Facts 132, 133, and 135.) Defendants' expert Graham A. Schmidt states:

> "...,the amortization period that is applied to UAAL [unfunded accrued actuarial liabilities] (both positive and negative) does not impact the amount of 'excess' earnings generated in a particular year that may be available to transfer into the Post-'82 Reserve. Rather, the amortization period impacts the contributions required of *employers* and the length of time over which the unfunded liability is expected to be paid off through additional employer contributions. The goal of extending the amortization period for 'extraordinary' gains and losses in the investment market is to decrease the annual volatility of participating employer contribution rates.
>
> . . .
>
> . . . During 2008, due to the large decrease in the market (commonly referred to in retrospect as the 'Great Recession) no interest was credited to any reserves other than the active/deferred member reserves, as provided by CERL. (Gov. Code sec. 31591) Rather, the investment losses experienced during 2008 resulted in a 12.5% pro-rata deduction across all

> other reserves, which reflected the total investment losses across all assets of SJCERA. . .
>
> . . . It is my opinion, based on the manner in which defined benefit pension plans are to be actuarially funded and given that both valuation and non-valuation assets of SJCERA are pooled for investment purposes, that all reserves in SJCERA that receive interest credited to them as a result of investment gains (such as the Post-'82 Reserve) would not be immune from investment losses (except to the extent that the retirement board has determined that the actuarially assumed rate must be credited, at least for tracking purposes, to the member contribution reserve as has SJCERA's Board).
>
> . . .
>
> . . . From an actuarial perspective, the most important calculation shown on Table 2.2 of the 2009 Valuation is the Market Stabilization Designation, which is negative $347,313,005, because this number shows the absolute dollar difference between the actuarial value of assets and the market value assets, even after the 20% corridor was applied. (SJCERA002023, line 6). Consequently, although reserve table 2.2 ostensibly shows $9.89 million sitting in an Undistributed Earnings Reserve as of January 1, 2010, because nearly $350 million in investment losses had not yet been recognized by SJCERA in its actuarial value of assets, there were, from an actuarial perspective, no 'surplus' or 'excess' assets as described in Government Code section 31592.2 that should be transferred to another reserve to pay for a non-vested benefit, other than through normal interest crediting that SJCERA performed. In addition, because of the large shortfall in assets available to credit interest in the prior year to reserves, including the Post-'82 Reserve, those reserves had been reduced by 12.5% resulting in a shortfall of over 20% compared to the expected interest credit. " (Schmidt Decl., 36:21-27; 38:17-21; 38:26-39:4; and 41:12-24.)

Mr. Schmidt further states that the 2017 CAFR indicates the UER were insufficient to fully credit interest earnings for all of the reserves except for active and deferred members' reserve in 2017 and there were no excess earnings to fund the Contingency Reserve in 2017. (Schmidt Decl., 65:13-18.) Defendants acted in an actuarially prudent manner, based upon the advice of their actuary and, therefore, did not breach the Settlement Agreement. Defendants have made a prima facie showing they are entitled to Summary Adjudication of this issue.

**Issue No. 10: Did the Agreement prohibit the SJCERA Board from maintaining its 90% target for the plan's actuarial funded ratio, which has been in place since at least 1998 (at which time the funded ratio target was even higher - 95%-115%)?**

Plaintiffs argue the Settlement Agreement does not condition the payment of UER upon the plan being funded at 90% and the requirement of same breaches the Agreement. In the Defendants' Statement of Reserve Policy issued November of 2012, under section III, subsection (A)(5), it states:

> "The Unappropriated Earnings Reserve is reestablished yearly after all other requirements are met, in the following order: Full actuarial interest on Valuation Reserves and all other reserves, an amount necessary to bring the overall actuarial funded ratio of the Fund to 90% in accordance with the Board's Statement of Funding Policy, and an amount necessary to bring the Contingency Reserve to at least the 1% minimum but not more than 3%.
>
> The amount in the Unappropriated Earnings Reserve can then be transferred to other reserves, subject to the limitations contained in the Board's Statement of Funding Policy and in other applicable legal obligations and settlements." (SJCERA Exhibit "399," pg.4.)

Plaintiffs state they were never apprised of this policy of funding in either a newsletter or a notice, until they received the documents in response to discovery requests in 2017 and 2018. Plaintiffs argue this 90% funding policy violates paragraph 26 of the Settlement Agreement as well as Government Code §31592.5 and evidences Defendants' fraudulent intent.

Defendant's actuary, Graham A. Schmidt, states in his Declaration:

> "That longstanding funding policy, as now stated also in the Statement of Reserve Policy as of February 2012, is of course simply aspirational in the sense that any board of retirement of a defined benefit pension plan must adjust its actuarial methodologies and policies over time to reflect the realties of how experience may have been different from expectations. For example, SJCERA has been more than 20% below its target of 90% funded since the Great Recession of 2009. In addition, SJCERA has not been funded at 90% or above on an actuarial value of assets since its January 1, 2006 Valuation

(over 13 years ago). Accordingly, the policy funding goal of 90% has not yet been met and therefore no aspect of the 2012 Reserve Policy relating to the Funded Ratio has impacted any transfers of funds among reserves." (Schmidt Decl., 47:18-27.)

Defendants' July 1998 Statement of Funding Policy indicates an actuarial value of assets between 95% and 115%. (SJCERA Exhibit "13.") The October 2003 Statement of Funding Policy indicates an actuarial value of assets between 120% and 80% and states, "This Actuarial Allocation Percentage should be maintained at 90%, and is subject to class-action settlement requirements." (SJCERA Exhibit 92, pg. 2, Section C(1)(b). Defendants argue because they have not maintained a 90% funding ratio since 2006, there is no breach of the contract by this Statement of Funding Policy.

The Actuarial Report dated December 31, 1998, clearly shows that the Plan was funded above 90% from January 1, 1990, thru January 1, 1999, when it was funded at 107.7%. (Defendants' Exhibit "14," pg. 27.)

As Defendant's policy was in place prior to the execution of the Settlement Agreement and the 90% goal has not been met since 2006, Defendants are correct that there can be no breach on this issue. Accordingly, Defendants are entitled to Summary Adjudication as to this issue.

**Issue No. 11: Did the Agreement prohibit SJCERA from allocating pro-rata investment losses to the Post-'82 Reserve in the same manner that the Board allocated pro-rata investment earning through interest credits to the Post-'82 Reserve, which resulted in a net gain to the Post-'82 Reserve of over $10 million?**

As discussed above, Plaintiffs concede to this issue in footnote number two, in their Opposition. Therefore, Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 12: Did the Agreement require the Board to transfer funds into the Post-'82 Reserve that derived from its settlement with the Internal Revenue Service ("IRS") under a Voluntary Correction Program ("VCP") relating to the administration of a sick leave bank created by the Agreement because - as SJCERA's Consulting Actuary**

**confirms - those funds were not "surplus" earnings under the Agreement?**

Plaintiffs allege the Defendants breached the Agreement by funding the sick leave bank instead of funding the POST-'82 account. Resolution 2014-11-02, which was passed by the BOARD on November 7, 2014, provides:

> "WHEREAS, on January 29, 2014, the Internal Revenue Service (IRS) issued to SJCERA a favorable determination letter regarding its continued tax-qualified status, considering the 2009 Cumulative List of Plan Qualification Requirements, and a related compliance statement under the voluntary corrections program (VCP); and
>
> WHEREAS, such favorable determination letter and VCP compliance statement are conditioned on SJCERA completing the corrective actions it proposed and the IRS approved; and
>
> WHEREAS, it is desirable that the tax-qualified status of SJCERA be maintained through compliance with the IRS requirements;
>
> NOW, THEREFORE, BE IT RESOLVED, that the Board of Retirement authorizes staff to complete the following actions upon the year-end closing as of December 31, 2014:
>
> 1. Transfer the balance of the Post-Employment Health Care Agency Fund as of December 31, 2014, approximately $19.8 million, to the pension trust in accordance with SJCERA's proposal under its Voluntary Corrections Program (VCP) filing to correct the plan's failure, for plan years 1989 to 2011, to comply with the requirements of Internal Revenue Code (IRC) section 401(h) (identified as 'SJCERA Failure #13) in the IRS VCP Compliance Statement issued January 29, 2014." (SJCERA Exhibit "456.")

Plaintiffs argue the following in their Opposition:

> "As of 2014 employer members of SJCERA contributed into the fund on a 'pay as you go' basis. As of that time, the promised sick leave bank benefit was fully funded and the employees were guaranteed the benefit. In 2014 Defendants transferred, from an account not required by law, the sum of $19.9 million from the Post-Employment Healthcare Agency Fund to the Defined Benefit Pension Plan. The Board established the Post Employment Healthcare Fund to fund the sick leave bank payments and employers contribute to it each year. The sick leave bank benefit was therefore fully funded

> prior to full funding of the Post-'82 Supplemental benefit in violation of the Settlement Agreement, a breach of the Settlement Agreement."

Robert Palmer testified that POST-'82 has priority over the sick leave funding per the Settlement Agreement and the tiered payments set forth therein. (SJCERA Exhibit "583," Palmer Depo., 160:21-162:6.)

Defendants argue the funds in the sick leave bank were not actuarially-determined surplus earnings, that they were not generated by surplus, but instead were actually in a separate trust fund administered by the San Joaquin Auditor-Controller and previously established by the Agreement before they were transferred as part of the IRS settlement and, therefore, were not excess earnings. Defendant COUNTY argues that even if Defendants had transferred the money from the Sick Leave Bank for another reason than to comply with the IRC, it had no obligation to transfer the funds to POST-'82 reserve. Defendants' expert states, "Removal of the sick leave bank from an (sic) SJCERA reserve that was dedicated to payment of the benefit meant that SJCERA retained no assets to pay that benefit." (Schmidt Decl., 56:10-11.) Schmidt further states that the funds in the sick leave bank were not surplus earnings, but were actually monies paid by employers:

> "The 2014 CAFR also reports on the Post-Employment Healthcare Agency Fund that was established to account for the sick leave bank contribution for eligible members, as follows: 'In 2011, SJCERA filed a request for the determination letter and Voluntary Compliance Program (VCP) with the IRS. As the result of the IRS filing, the Board decided to 'freeze' the Post-Employment Healthcare Agency Fund pending the response from the IRS. SJCERA received a favorable plan determination letter from the IRS dated January 29, 2014. In compliance with SJCERA's VCP filing as approved by the IRS, $19.9 million was transferred from the Post-Employment Healthcare Agency Fund to the Defined Benefit Pension Plan in 2014. The Post-Employment Healthcare Agency Fund is used for cash flows in from employers to fund Sick Leave Bank Benefits for their eligible retired employees on a pay-as-you-go basis, and for cash flows out for payment of Sick Leave Bank Benefits.' . . . Removal of the sick leave bank from an (sic) SJCERA reserve that was dedicated to payment of the benefit meant that SJCERA retained no assets to pay that benefit.

> Any further payments of that benefit would be provided directly by SJCERA's participating employers, if at all, and not by SJCERA. Accordingly, the closing of that fund in compliance with SJCERA's VCP with the IRS did not create any 'surplus' earnings to be transferred to the Post-'82 Reserve. Rather, the participating employers had assumed a payment responsibility from SJCERA, and, from an actuarial funding perspective, the transfer of those funds into the county advance reserve fund within SJCERA reflected that fact." (Scmidt Decl., 55:16-56:18.)

Plaintiffs have provided no evidence that the funds were not from employer contributions. As the funds deposited into the Post-Employment Healthcare Agency Fund were initially funded with employer contributions, the Plaintiffs were not entitled to receive those funds into the POST-'82 account. Accordingly, Defendants are entitled to Summary Adjudication of this issue.

**Issue No. 13: Did the Agreement require an accounting?**

Defendants argue Plaintiffs are not entitled to an accounting or equitable relief in the form of a Writ of Mandate as Plaintiffs have received all of the information necessary to make a calculation through the CAFRs previously provided. Plaintiffs, however, argue that those documents fail to explain what happened to the UER and Contingency Reserve in 2009. The Third District Court of Appeal has held:

> A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. (*Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 460, 39 P.2d 877; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §819, p. 236.)
>
> An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation. (*St. James Church of Christ Holiness v. Superior Court* (1955) 135 Cal.App.2d 352, 359, 287 P.2d 387.) A plaintiff need not state facts that are peculiarly within the knowledge of the opposing party. (*Brea v. McGlashan, supra,* 3 Cal.App.2d at p. 460, 39 P.2d 877.) Teselle v. McLoughlin (2009) 173 Cal.App.4th 156, 179 [92 Cal.Rptr.3d 696, 715].

Government Code §7503 requires all state and local public retirement systems to prepare an annual report in accordance with generally accepted accounting principles.

The Second District Court of Appeal, Division One, held:

> An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be *1137 determined without an examination of the debits and credits on the books to determine what is due and owing. (*St. James Church v. Superior Court* (1955) 135 Cal.App.2d 352, 359, 287 P.2d 387; *Peoples Finance etc. Co. v. Bowman* (1943) 58 Cal.App.2d 729, 734, 137 P.2d 729.) Equitable principles govern, and the plaintiff must show the legal remedy is inadequate. Thus, where the books and records are so complicated that an action demanding a fixed sum is impracticable, an accounting is appropriate. (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14, 135 Cal.Rptr. 915.) If an ascertainable sum is owed, an action for an accounting is not proper. (*St. James Church,* at p. 359, 287 P.2d 387.) Generally, an underlying fiduciary relationship, such as a partnership will support an accounting, but the action does not lie merely because the books and records are complex. (*San Pedro Lumber Co. v. Reynolds* (1896) 111 Cal. 588, 596–597, 44 P. 309; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 594, 37 Cal.Rptr.2d 653.) Some underlying misconduct on the part of the defendant must be shown to invoke the right to this equitable remedy. (*Union Bank,* at pp. 593–594, 37 Cal.Rptr.2d 653.) Prakashpalan v. Engstrom, Lipscomb and Lack (2014) 223 Cal.App.4th 1105, 1136-37 [167 Cal.Rptr.3d 832, 859].

As all of Plaintiffs' claims fail, there is no showing of Defendants' underlying misconduct, therefore, Plaintiffs have failed to establish they are entitled to an Order for an accounting.

**Writ of Mandate**

As Defendants are entitled to Summary Adjudication of all of Plaintiffs' claims set forth above, Plaintiffs' claim for a Writ of Mandate also fails.

**Statute of Limitations and Laches**

All Defendants argue Plaintiffs' claims are barred by the applicable statute of limitations and laches. Defendants SJCERA/BOARD argue they are prejudiced from the

passage of time. Plaintiffs argue that when a contract is breached on multiple occasions, each breach gives rise to a new cause of action and further argue that the continuous accrual doctrine applies to this action for each time the Defendants failed to make a payment. Plaintiffs also argue, "Defendants' failure to fund the benefit occurred on several different, successive occasions, but the actual loss and damages to the Class did not result until the Board failed to pay the benefit in March 2017." (Oppo., 34:1-3.) Plaintiffs further argue that because they were receiving their supplemental benefits through February 2017, they had no reason or duty to monitor the Defendants.

Plaintiffs correctly argue that Defendants are subject to "sole and exclusive fiduciary responsibility over the assets" of the system. They also argue that the application of delaying accrual of the statute of limitations prevents the Defendants from obtaining immunity for an initial breach of duty by a subsequent breach of disclosure. Plaintiffs argue the Defendants may not use the defense of laches because of their continued concealment through the use of misrepresentations and omissions to prevent Plaintiffs' legitimate claims.

The Third District Court of Appeal held laches applies in a retirement case when:

> "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359, 82 Cal.Rptr. 337, 461 P.2d 617, fns. omitted.) "[U]nreasonable delay by the plaintiff is not sufficient to establish laches. **There must also be prejudice to the defendant resulting from the delay or acquiescence by the plaintiff.**" **220 (*Ragan v. City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1368, 261 Cal.Rptr. 219, original italics, fn. omitted.) "Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. [Citation.] Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest *1127 injustice or a lack of substantial support in the evidence its determination will be sustained. [Citations.]" (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624, 166 Cal.Rptr. 826, 614 P.2d 258.) Board of Administration v.

> Wilson (1997) 52 Cal.App.4th 1109, 1126–1127 [61 Cal.Rptr.2d 207, 219–220]. (Emphasis added.)

Defendants argue that Plaintiffs had a duty to investigate further when they had a reasonable suspicion that Defendants were not properly funding the POST-'82 account. Defendant COUNTY argues that because attorney Chiurazzi began communications in 2007 regarding the Contingency Reserve and was arguing for the funding of POST-'82 account, the Plaintiffs are estopped from arguing equitable estoppel or tolling of the statute of limitations. Attorney Chiurazzi states in his Declaration:

> "Mr. Palmer sent a letter to me dated May 3, 2007 in which he set forth a summary of the Post 82 reserve balances. (TAB 211) He stated in that letter, that other than a cost of living reserve in the amount of $77,859, no other proceeds were added to the Post 82 reserve since 2001. I knew that he was a fiduciary and I knew he was obligated to act honestly and in the best interest of the beneficiaries and I trusted that if there was money in the UER or in funds not required by law prior to the date of his letter, he would have disclosed those funds to the Retired Public Employees of San Joaquin County and made every effort to make sure the Retirement Board contributed those funds to the Post 82 reserve." (Chiurazzi Dec., 3:21-4:1.)

Defendants also argue that Plaintiffs, Victor Mow, Judy Courtney, Larry Mills, and Marcel Leduc, all served on the SJCERA Board while also serving as a RPESJC Board member and consistently voted in favor of actions that are now being challenged. Defendants argue that members of Plaintiffs' class sat on the Board and, therefore, were informed of Defendants' decisions and had notice.

The Fourth District Court of Appeal held that equitable estoppel will apply to pension actions if certain elements are met:

> We recently had occasion to review the law relating to estoppel in the public pension context and summarized it as follows: "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. [Citation.] ' "Generally speaking, four elements must be

> present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." ' " (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 239, 169 Cal.Rptr.3d 51 (*City of Oakland* ).) "Where, as here, a party seeks to invoke the doctrine of equitable estoppel against a governmental entity, an additional element applies. That is, the government may not be bound by an equitable estoppel in the same manner as a private party unless, 'in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.' " (*Id.* at p. 240, 169 Cal.Rptr.3d 51; *125 see *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497, 91 Cal.Rptr. 23, 476 P.2d 423 (*Mansell*); *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 306, 61 Cal.Rptr. 661, 431 P.2d 245 ["doctrine of equitable estoppel may be applied against the government where justice and right require it"].) Finally, as we acknowledged in *City of Oakland*, "there is a line of cases holding that estoppel cannot lie to contravene any statutory limitation on an agency's authority." (*City of Oakland*, *supra*, 224 Cal.App.4th at pp. 243-244, 169 Cal.Rptr.3d 51 [citing cases]; but see *Mansell*, *supra*, 3 Cal.3d at pp. 496-499, 91 Cal.Rptr. 23, 476 P.2d 423 [declining to decide the issue but positing that this line of cases may be included within its general analysis and rule].)[25] Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn. (2018) 19 Cal.App.5th 61, 124–125 [227 Cal.Rptr.3d 787, 834], as modified (Feb. 5, 2018).

Defendants argue prejudice will result to all of them if the Court allows this action to proceed as several witnesses are no longer alive or are incapacitated and memories have faded. COUNTY additionally argues that SJCERA/BOARD will look to the COUNTY and other employers to cover any damages awarded to Plaintiffs in this action and the payment of money in and of itself constitutes prejudice. COUNTY further argues in its Reply that the application of estoppel would "nullify several strong rules of public policy." (Reply, 10:6.)

Plaintiffs could have conducted in 2007 the same research they did in 2017 without any interference from Defendants, therefore, they are barred from asserting estoppel as

to the 2007 claim. Attorney Chiurazzi commenced discussions regarding the alleged improper funding the POST-'82 account, however, he failed to properly pursue remedies to seek a resolution.

Accordingly, Defendants are correct that Plaintiffs' action is barred by the statute of limitations.

**Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**

COUNTY argues that under the Constitution Defendants are required to discharge their duties with regard to the pension solely in the interest of and for the exclusive purpose of their participants and beneficiaries and shall do so with due care, skill and prudence of person acting in a like capacity. The COUNTY cites to the Sixth District Court of Appeal holding:

> "The constitutional obligations of a public retirement board such as the CalSTRS Board have been interpreted to include a duty 'to "ensure the rights of members and retirees to their full, *earned* benefits." ' [Citation.] Such obligations therefore do not permit the payment of benefits not otherwise authorized. [Citation.] Rather, 'the statutory scheme governs the scope of the benefits earned.' [Citation.] Thus, while ' "[p]ension provisions should be broadly construed in favor of those who were intended to be benefitted *355 thereby ... [,] they cannot be construed so as to confer benefits on persons not entitled thereto." ' [Citation.]" (*Duarte*, *supra*, 232 Cal.App.4th at p. 385, 181 Cal.Rptr.3d 169, original italics.) Baxter v. State Teachers' Retirement System (2017) 18 Cal.App.5th 340, 354–355 [227 Cal.Rptr.3d 37, 47], reh'g denied (Jan. 9, 2018), review denied (Feb. 21, 2018).

The COUNTY argues Plaintiffs' allegations of breach misconstrue the duties of the Defendants, misinterpret the Settlement Agreement and fail as a matter of law. As this Court has determined that the actions of the Defendants were done in compliance with the law and not in breach of the Settlement Agreement, Plaintiffs' claim for breach of the covenant of good faith and fair dealing also fails.

///

///

## III

## EVIDENTIARY OBJECTIONS

All parties filed objections to evidence which are hereby ruled upon as follows:

As to Plaintiffs' Objections to the Declaration of Actuary Graham Schmidt, all objections are Overruled.

As to Defendants SJCERA's and the BOARD's Objections to the Declaration of William Sheffler, all objections are Sustained.

As to Defendants SJCERA's and the BOARD's Objections to the Declaration of Marcel Leduc:

Numbers 1 thru 3, 5 thru 7, 8, and 10 thru 13 are Overruled.

Numbers 4 and 9 are Sustained.

As to Defendants SJCERA's and the BOARD's Objections to the Declaration of Michael Smith:

Numbers 1 thru 4 and 6 thru 10 are Overruled.

Number 5 is Sustained.

As to Defendants SJCERA's and the BOARD's Objections to the Declaration of Richard Chiurazzi:

Numbers 2 thru 7, 9 thru 11, 13, and 14 are Overruled.

Numbers 1, 8, and 12 are Sustained.

As to Defendants SJCERA's and the BOARD's Objections to the Declaration of William Mitchell:

Numbers 1 thru 4, 6, 7, 9, 11, and 12 are Overruled.

Numbers 5, 8, and 10 are Sustained.

## IV

## JUDICIAL NOTICE

Defendants SJCERA and the BOARD have requested the Court to take judicial

notice of all of the documents contained within their Compendium of Evidence (592 documents) which consist of records of SJCERA, records of Retired Public Employees of San Joaquin County ('RPESJC"), newspaper articles, Journals/Publications, discovery responses, and deposition transcripts.

Defendant COUNTY has requested this Court to take judicial notice of its Annual Financial Report for the fiscal year ending June 30, 2017, and of its Proposed Budgets for years 2015 thru 2019.

Plaintiffs have requested this Court to take judicial notice of items A thru G and K thru M of their Compendium of Evidence.

Defendants SJCERA and the BOARD further request this Court to take judicial notice of the unpublished decision of the Trial Court case in the Stanislaus County Superior Court of *Michael R. O'Neal, Rhonda Biesemeier, and Dennis J. Nasrawi v. Stanislaus County Employees' Association*, case number 648469. While it is proper for the Court to take judicial notice of this case as a "record of any court of this State" under Evidence Code §452(d), the Court may not rely on or cite to the unpublished opinion pursuant to California Rules of Court, Rule 8.1115. (See also Aguirre v. Amscan Holdings, Inc. (2015) 234 Cal.App.4th 1290, 1299, fn. 5, [184 Cal.Rptr.3d 415, 422].)

Defendants argue the Court is allowed to take judicial notice of the requested documents under Evidence Code §452(h) which provides:

> Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:
>
> (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

The Fourth District Court of Appeal, Division Three, held:

> As evidentiary support for the request for judicial notice, Ragland offers 12 exhibits, consisting of an audit report of Downey Savings, prepared by the Office of the Inspector General of the United States Department of the Treasury

(exhibit 1), printed pages from various Web sites and blogs (exhibits 2–6 & 8–12), and a recorded grant deed (exhibit 7). Ragland's request for judicial notice requires us (with one exception) to take judicial notice of, and accept as true, the contents of those **52 exhibits. While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true. (*Unruh–Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364, 76 Cal.Rptr.3d 146.) "When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]" (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9, 84 Cal.Rptr.2d 843, 976 P.2d 214.)

Although the audit report is a government document, we may not judicially notice the truth of its contents. In *Mangini v. R.J. Reynolds Tobacco *194 Co.* (1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73, overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, 63 Cal.Rptr.3d 418, 163 P.3d 106, the plaintiff sought judicial notice of a report of the United States Surgeon General and a report to the California Department of Health Services. The California Supreme Court denied the request: "While courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' [Citations.] '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " (*Mangini v. R.J. Reynolds Tobacco Co., supra,* at pp. 1063–1064, 31 Cal.Rptr.2d 358, 875 P.2d 73.)

Nor may we take judicial notice of the truth of the contents of the Web sites and blogs, including those of the Los Angeles Times and Orange County Register. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6, 119 Cal.Rptr.2d 709, 45 P.3d 1171 ["The truth of the content of the articles is not a proper matter for judicial notice"]; *Unlimited Adjusting Group, Inc. v. Wells Fargo Bank, N.A.* (2009) 174 Cal.App.4th 883, 888, fn. 4, 94 Cal.Rptr.3d 672 [statements of facts contained in press release not subject to judicial notice].) The contents of the Web sites and blogs are "plainly subject to interpretation and for that reason not subject to judicial notice." (*L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180, fn. 2, 29 Cal.Rptr.3d 710.) Ragland v. U.S. Bank Nat. Assn. (2012) 209 Cal.App.4th 182, 193–94 [147 Cal.Rptr.3d 41, 51–52].

The Court takes judicial notice of the Plaintiffs' and Defendants' requested documents, with the exception of Exhibit "270," the newspaper article, but not the truth of the matters asserted therein.

**IT IS SO ORDERED.**

DATED: September 11, 2019

HONORABLE CARTER P. HOLLY
JUDGE OF THE SUPERIOR COURT