

No.

SUPREME COURT OF THE UNITED STATES

Case: Lucio A. Barroga V. Board Of Admiistration
California Public Employees
Retirement System (PERS)

APPENDIX

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SUPREME COURT OF THE UNITED STATES
APPENDIX

LIST OF ACTIONS

Barroga V. Board of Adminisration, PERS

1) May 22, 2019 (19-CV-00921) COMPLAINT FOR DECLARATORY RELIEF UNDER CODE OF CIVIL PROC. SEC. 1062 ON NEW OR SAME ACTION BASED ON THE SAME FACTS WHICH OVERCOMES RES JUDICATA in Sacramento, U.S. District Court.

FACTS p.3-4

After reaching 50 year old in April 1979 and retirable, I submitted an application for retirement pensions. . . PERS offered me two choices: 1) to receive a monthly pension of \$135, or 2) as alternative, to receive a lump sum of my member contributions (approx. 7% of salaries), but the employer's contributions on my behalf (approx. 7.75% of salaries under Gov't Code Sec. 20750.1 [new 20795]), will remain with PERS. I received approximately \$10,000 of my accumulated member contributions, with the employer's contributions on my behalf remaining in deposit with PERS.

Later in some years, I requested that the offered monthly pension shall pay and redeposit for the withdrawn member contributions as a loan . PERS claimed I ceased to be a member. . . . I have contended that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS and are "normal contributions".

ISSUES OR CAUSES OF ACTION p.4-6

Proof that I am still a PERS member: 'A person ceases to be a member :

(b) if he or she is paid his or her "normal contributions".

The employer's contributions was not paid and remain in deposit with PERS.

ISSUE I: ARE THE EMPLOYERS' CONTRIBUTIONS TO THE RETIREMENT FUND IN BEHALF OF MEMBERS, "NORMAL CONTRIBUTIONS" UNDER THE STATUTE, (CAL) GOV'T CODE SEC. 20691?

(Cal) Gov't Code Sec. 20691. Payment of member normal contributions by contracting agencies or school employer.

Notwithstanding any other provision of law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. The payment shall be reported simply as normal

contributions and shall be credited to member accounts. . .

The employer's contributions are explicit "normal contributions", therefore I am still a PERS member entitled retirement benefits.

ISSUE II: IS PERS'S ALTERNATIVE OFFER FOR THE WITHDRAWAL OF THE ACCUMULATED MEMBER CONTRIBUTIONS TO DEPRIVE PLAINTIFF OF LIFETIME RETIREMENT ALLOWANCE AFTER PLAINTIFF HAD QUALIFIED FOR RETIREMENT AFTER REACHING 50 YEARS OLD, A VIOLATION OF (CAL) GOV'T CODE SEC. 21203 (NEW 21259)?

(Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement

Subject to compliance with this part, after a member has qualified as to age and service for retirement for service, nothing shall deprive him or her of the right to retirement allowance as determined under this part.

ISSUE III : IS PERS'S DENIAL FOR CONSIDERING THE WITHDRAWN MEMBER CONTRIBUTIONS AS LOANS A VIOLATION OF PERS'S LOAN LAWS WHICH ALLOW WITHDRAWALS AS LOANS? OR DISCRIMINATORY?

(Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest. .

. .member may file an election with the board to redeposit in the retirement fund, in lump sum or by installment payment (1) an amount equal to the accumulated contributions.. .withdrawn, and (2) an amount equal to the interest. .

(Cal) Gov't Code Sec. 20211 (new 20202) Natural disaster relief loan.

(Cal) Gov't Code Sec. 20215 (new 20200) Home financing program.

ISSUE IV: CONSTITUTION, AMENDMENT 13 IS VIOLATED. PERS HAS DENIED PLAINTIFF RETIREMENT BENEFITS DERIVED FROM THE EMPLOYER'S CONTRIBUTIONS TO THE RETIREMENT FUND ON MY BAHALF, WHICH EMPLOYER'S CONTRIBUTIONS I HAD WORKED AND TOILED FOR, to quote:

Amendment 13, Section 1. Neither slavery nor involuntary servitude . . shall exist within the United States, . .

ISSUE V: CALIFORNIA CONSTITUTION PREVAILS OVER 11TH AMENDMENT IMMUNITY

California Constitution Article 3, Sec. 6 (d)

(d) Personal Right of Action and Jurisdiction of Courts.

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section, .

2) Jun. 22, 2019 (19-CV-00921) DEFENDANT'S MOTION TO DISMISS

2 Reasons: p.i Eleventh Amendment Immunity; p.i Claim and Issue Preclusion and Res Judicata

3) Aug. 1, 2019 (19-CV-00921) OBJECTION TO DEFENDANT'S MOTION TO DISMISS,

p.5-6 Cal Constitution Article 3, Sec. 6(d) providing "Any .Calif.. resident.. . shall have standing to sue . .California" prevails over 11th Amendment immunity; p.6 Answering Claim and Issue preclusion: On Defendant Status of Sept. 27, 2012, p.3 PERS wanted settlement, but attorney did not respond for request for settlement. (See also letter dated Apr. 18, 1996 from Richard Koppes, Deputy Executive Officer and General Counsel). Answering res judicata: p.7-9 The ISSUES . . have NOT been interpreted and determined, so there is no basis for charge of res judicata.

4) 9-9-19 (19- CV- 00921) FINDINGS AND RECOMMENDTIONS TO DISMISS . . by

Magistrate Judge Newman, Recommended:

p.3 (dismissal) as in 11th Amendment immunity of 2012 action .

p.3 Barroga deemed vexatious litigant,

5) 9-20-19 (19-CV-00921) OBJECTION TO .FINDINGS AND RECOMMENDATIONS,

Answering: p.2-3 California Constitution Article 3. Sec. 6(d). .Prevails Over Eleventh Amendment Immunity . .Of The Order of Dec. 19, 2012

p.4 Refusing To Determine And Interpret The Issues And Controversies Before Charging Vexatious Litigant Is Plain Obstruction Of Justice,

6) 9-30-19 (19-CV-00921) ORDER, adopted Findings and Recommendations

Notice: ORDER dismissed, violating laws, did not interpret and determine ISSUES.

7) 10-22-19, 2-8-20 (19-17418) (in US Court of Appeals for 9th Circuit) MOTION

FOR RELIEF FROM ORDER OF SEPT. 30, 2019 with

p.1-2 FACTS and p.2-5 ISSUES I, II, III, IV, V Cal Constitution Article 3, Sec 3d

p.11 PERS in violation of Fifth Amendment . .without due process of law;
p.12 From .litigant law, because the ISSUES I, II, III, IV ..and Cal Constitution Article 3, Sec 6(d) were never determined and interpreted . .as basis, therefore, . . the charge of vexatious litigant is false and wrong.

8) 5-29-20 (19-17418) APPELLEE'S BRIEF, with 3 ISSUES PRESENTED

p.3 1. Whether . . . PERS is entitled to Eleventh Amendment Immunity
2 Whether . . . Barroga's claim are barred by res judicata
3. Whether . . . Barroga is a vexatious litigant

9) 6-11-20 (19-17418) OBJECTION TO APPELLEE'S BRIEF OF MAY 29, 2020

Answering the 3 ISSUES PRESENTED

1. p.5 California Constitution Article 3, Sec. 6(d). provides, ".resident. ,have .standing to sue . . California" prevails over Eleventh Amendment Immunity.
2. p.6 The courts refused to interpret the . . ISSUES I, II, III, IV, and Cal Constitution Article 3, Sec.6(d), therefore there is no basis to. . res judicata.
3. p.7-8 . . because the ISSUES . . were never determined and interpreted. . . as basis, the charge of vexatious litigant is false and wrong.

10) Feb. 23, 21 (19-17418) MEMORANDUM , AFFIRMED , U.S. 9TH Circuit

p.2 (a) dismissed.. action.. on the basis of claim preclusion because the action involved the same primary rights raised in prior administrative proceeding or state court case that resulted In a final judgment
p.2 (b) . . The district court did not abuse its discretion for declaring Barroga a vexatious litigant.

11) 3-5-21(19-17418) PETITION FOR REHEARING UNDER FRAP 40

The MEMORANDUM is wrong, did not comply to laws, violated laws:

p.1 5 U.S. Code Sec. 706 Scope of review
...the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions , (MEMORANDUM did not comply.)
p.8 Code of Conduct for U.S. Judges
Canon 2 (A) *Respect for Law*. A judge should respect and comply with. . law
p. 5 The MEMORANDUM regarding claim preclusion, overlooked ..that . prior administrative judge and state judges were wrong in deciding that I ceased to be a member when I withdraw the . .member contributions.

Notice: In ISSUE I, I am still a member of PERS because the employers' contributions on my behalf remain with PERS. See ISSUE I.

7-8 The MEMORANDUM overlooked the fact that plaintiff is not a vexatious litigant, under . .Cal Code of Civil Proc. Sec. 391.

The . .litigant law requires that issues must be first addressed and finally determined, but judges refused to interpret the laws in dispute, so there is no basis for charge of vexatious litigant.

12) 5-26-21(19-17418) ORDER by panel denying petition of rehearing. U.S. 9th Circuit Court of Appeals

MISCELLANEOUS (MS);

Apr. 18, 1996 Letter of Richard Koppes, Deputy Executive Officer and General Counsel argued that the employers' contributions are not "normal contributions" which is wrong. Please see ISSUE I on TABLE OF AUTHORITY

Sept. 27, 2012 Defendant's STATUS REPORT p.3 wanted settlement, but attorney did not respond for request of settlement on my letters to Atty. General Kamela Harris on Nov. 26, 2012 and Atty. General Xavier Becerra on Aug. 14, 2017

Date: July 26, 2021 Respectfully submitted:

Lucio A. Barroga
Lucio A. Barroga

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ORIGINAL
FILED

MAY 22 2019

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

LUCIO A. BARROGA, PRO SE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO A. BARROGA, CASE NO. 2:19-cv-0921-TLN-EFB
Plaintiff COMPLAINT FOR DECLARATORY PS
V. RELIEF UNDER CAL CODE OF CIVIL
BOARD OF ADMINISTRATION, ACTION BASED ON THE SAME FACTS
CAL PUBLIC EMPLOYEES' WHICH OVERCOMES RES JUDICATA.
RETIREMENT SYSTEM (PERS),
Defendant(s) !

MEMORANDUM OF POINTS AND AUTHORITIES

THE U.S. DISTRICT COURT HAS JURISDICTION UNDER:

A) Violation of Constitution, Amendment 13, prohibition of slavery. ISSUE IV, for Defendant PERS denying me benefits derived from the employer's contributions on my behalf which I had worked and toiled for.

B) Statute of limitation shall not apply, Cal Gov't Code Sec. 20181(new 20164) see AUTHORITIES on p.6C, is quoted:

- Duration of obligation; limitation of actions
- (b)(2) In cases where the system owes money to a member or beneficiary, . the period of limitation shall not apply.

C) U.SCA. Constitution Amendment 14 Sec. 1 Supporting precedents:

a) State action, for purpose of this clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial actions. *Moose Lodge No 107 v. Irvis* , Pa. 1972, 92 S.Ct. 1965, 407 US 163

b) State has obligation to insure that actions of its agencies do not deprive any person of equal protection of laws. *U.S. v. State of Tex.* 1970, 321 F. Supp. 1043, 92 S. Ct. 675, 404 U.S. 1016, 30 L.Ed. 2d 663.

c) The action of state courts and judicial officers in their official capacities is to be regarded as action of state within this amendment. *Shelly v. Kraemer*, Mich. & Mo. 1948, 68 S.Ct. 836, 334 U.S. 1, 912 L.Ed. 1116.

E) State judges are members of PERS, even the Hon. U.S. District Court Judge Florence –Marie Cooper recused herself on this case, because she was a “participant of CalPERS”. EXHIBIT 21A . Also, see Notice on EXHIBIT 8, Superior Court Judge McVittie gave judgment not consistent with the law, and said “you know how to appeal. .”

F) Defendant PERS wants settlement Sept 27, 2012 EXHIBIT 152 Defendant's p.3 PERS STATUS REPORT, to quote:

13. CalPERS prefers to have a settlement conference conducted by someone other than the district court judge and the magistrate judge assigned to this matter.

G) California CONSTITUTION Article 3, Sec. 6(d), provides any resident can sue the state, so there is no immunity, the reason of dismissal on judgment of Dec. 19, 2012 , also on p.10, to quote:

d) Personal Right of Action and Jurisdiction of Courts.

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section,

H) 28 USC § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

Note: The issues in the complaint – ISSUES I, II, III, & IV are new and never determined by any court, The December 19 , 2012 judgment had been immunity.

G) Cal Code of Civ. Proc. Sec. 657 Relief available on motion for new trial, causes. .

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. (Calif Constitution Article 3, Sec 6(d), see above).
6. Insufficiency of evidence to justify the. . decision, or the decision is against the law.

FACTS

After reaching 50 year old in April 1979 and retirable, I submitted an application for retirement pensions from previous services with the City of El Segundo, and later I went to Sacramento PERS office to follow up application. PERS offered me two choices: 1) to receive a monthly pension of \$135, or 2) as alternative, to receive a lump sum of my member contributions (approx. 7% of salaries), but the employer's contributions on my behalf (approx. 7.75% of salaries under Gov't Code Sec. 20750.1 [new 20795]), will remain with PERS. I received approximately \$10,000 of my accumulated member contributions, with the employer's contributions on my behalf remaining in deposit with PERS.

Later in some years, I requested that the offered monthly pension shall pay

and redeposit for the withdrawn member contributions as a loan which PERS maliciously omitted to inform the monthly pension can redeposit per statute (Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of Withdrawals, and when the loan or withdrawal is fully paid with interest, then monthly pension will start to me. But PERS claimed the employer's contributions which have remained with PERS are NOT "normal contributions", therefore I ceased to be a member when the member contributions were withdrawn, and I am not anymore entitled any pension benefits. I have contended that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS and are "normal contributions" under the laws, and therefore, I am entitled retirement benefits. .

ISSUES OR CAUSES OF ACTION

Proof that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS, to quote:

(Cal) Gov't Code Sec. 20390 (new 20340) Condition of cessation

A person ceases to be a member :

(b) if he or she is paid his or her "normal contributions".

Therefore, IF the employer's contributions which have remained in deposit with PERS are "normal contributions", then I am still a PERS member.

ISSUE I: ARE THE EMPLOYERS' CONTRIBUTIONS TO THE RETIREMENT FUND ON BEHALF OF MEMBERS, "NORMAL CONTRIBUTIONS" UNDER THE NEW DISCOVERED STATUTE, (CAL) GOV'T CODE SEC. 20691? (New Issue, different from prior Issues)

(Cal) Gov't Code Sec. 20691. Payment of member normal contributions by contracting agencies or school employer

Notwithstanding any other provision of law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. The payment shall be reported simply as normal contributions and shall be credited to member accounts.

The employer's contributions are explicit "normal contributions", therefore I am still a PERS member, entitled retirement benefits.

ISSUE II: IS PERS'S ALTERNATIVE OFFER FOR THE WITHDRAWAL OF THE ACCUMULATED MEMBER CONTRIBUTIONS TO DEPRIVE PLAINTIFF OF LIFETIME RETIREMENT ALLOWANCE AFTER PLAINTIFF HAD QUALIFIED FOR RETIREMENT AFTER REACHING 50 YEARS OLD, A VIOLATION OF (CAL) GOV'T CODE SEC. 21203 (NEW 21259)?

(Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement

Subject to compliance with this part, after a member has qualified as to age and service for retirement for service, nothing shall deprive him or her of the right to retirement allowance as determined under this part.

ISSUE III : IS PERS'S DENIAL FOR CONSIDERING THE WITHDRAWN MEMBER CONTRIBUTIONS AS LOANS A VIOLATION OF PERS'S LOAN LAWS WHICH ALLOW WITHDRAWALS AS LOANS? OR DISCRIMINATORY?

(Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest. .

. .member may file an election with the board to redeposit in the retirement fund, in lump sum or by installment payment (1) an amount equal to the accumulated contributions.. .withdrawn, and (2) an amount

equal to the interest. .,and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance at date of election to redeposit.

(Cal) Gov't Code Sec. 20211 (new 20202) Natural disaster relief loan.

(Cal) Gov't Code Sec. 20208.5 (new 20203) Security loan.

(Cal) Gov't Code Sec. 20215 (new 20200) Home financing program.

(Cal) Gov't Code Sec. 20201 Secured home loan.

ISSUE IV: AMENDMENT 13, PROHIBITION OF SLAVERY, IS VIOLATED.
PERS HAS DENIED PLAINTIFF RETIREMENT BENEFITS DERIVED FROM THE EMPLOYER'S CONTRIBUTIONS TO THE RETIREMENT FUND ON MY BAHALF, WHICH EMPLOYER'S CONTRIBUTIONS I HAD WORKED AND TOILED FOR, to quote:

Amendment 13, Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States, . . .

If any of the ISSUES is YES, in fact, all are yes, then I am entitled retirement benefits and the redeposit of the withdrawn member contributions.

Note: ISSUE I, ISSUE II, ISSUE III, and ISSUE IV are new and have no prior determination or judgment from any court.

TABLE OF OTHER CITED AUTHORITIES

RETIREMENT ALLOWANCE STATUTE BUT WHICH PERS DISOBEYTED

(Cal) Gov't Code Sec. 20393 (new 20731) . .retirement allowance. .

After qualification of the member for retirement by reason of age., . the member shall be entitled to receive a retirement allowance based upon the amount of member's accumulated contributions and service , .and on the employer's contributions held for the member and calculated in the same manner as for the other members . .

STATUTE OF LIMITATION DOES NOT APPLY

(Cal) Gov't Code Sec. 20181 (new 20164) Duration of obligation; limitation of actions

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

MEMBER

(Cal) Gov't Code Sec. 20013 (new 20370) Member . .

“Member” means an employee who has qualified for membership in this system and on whose behalf an employer has become obligated to pay contributions.

RES JUDICATA DOES NOT APPLY UNDER DECLARATORY RELIEF LAW

(Cal) Code of Civil Proc. Sec. 1062 Cumulative remedy

The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

RELIEF AVAILABLE ON MOTION FOR NEW TRIAL

(Cal) Code of Civil Proc. Sec. 657 Relief available on motion for new trial, causes. . :

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.
6. Insufficiency of evidence to justify the. . decision, or the decision is

against the law.

EXPLICIT "NORMAL CONTRIBUTIONS", BUT THE COURT SAID IT IS NOT, AND WRONGLY USED AS BASIS FOR RES JUDICATA (Former ISSUE)

(Cal) Gov't Sec 20027 (new 20053) **Normal contributions**

(2nd Part) "Normal contributions" also include contributions required to be paid by a member that are in fact paid on behalf of member by an employer as defined in Sec. 20011 (new 20030) (In EXHIBITS 6, 17, 21, 29)

BEING CALLED A VEXATIOUS LITIGANT IS WRONG BECAUSE THE ISSUES – ISSUE I, II, III, & IV IN THE COMPLAINT ARE NOT FRIVOLOUS, AND ARE NEW AND NEVER DETERMINED BY ANY COURT, VIOLATING VEXATIOUS LITIGANT LAW,

Cal Code of Civ. Proc. Sec. 391:

(b) "Vexatious litigant" means a person who does any of the following:
(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant . . as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant ..

L.R. 7-17 RESUBMISSION Of Motion Previously Acted Upon For Same Relief

If any motion, application or petition has been made to any judge of this Court and has been denied. . .any subsequent motion for the same relief . .whether upon the same or any allegedly different state of facts, shall be presented. . If presented to a different judge, it shall be the duty of the

moving party to file and serve a declaration setting forth the material facts and circumstances as to each prior motion . . claimed to warrant relief.(emphasis added.)

DISQUALIFICATION OF JUSTICES, JUDGES, OR MAGISTRATE JUDGES

Title 28 Sec. 455 Disqualification of justices, judges, or magistrate judges

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

RESTRICTION OF PREJUDICIAL JUDGE TO TRY A CASE

Cal Code of Civ. Proc. Sec. 170.6 Prejudice against party , attorney or interest there of:

(a) (1) No judge, . . shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge. . is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

DISMISSAL ORDERS NOT "FILED" ARE INEFFECTIVE AND INVALID

Code of Civil Proc. Sec. 581d

All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case.

CALIFORNIA CONSTITUTION PROVIDES RESIDENT CAN SUE THE STATE, AND STATE AGENCIES, AND THEREFORE THERE IS NO IMMUNITY

Cal Constitution Article 3, Sec. 6:

(d) Personal Right of Action and Jurisdiction of Courts.

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section,

FEDERAL RULE OF APPEAL PROC. SEC 60, GROUNDS FOR RELIEF

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial . .;

(4) the judgment is void;

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to: (3) set aside a judgment for fraud on the court.

Title 28 Sec 351 COMPLAINT AGAINST JUDGES

(a) FILING OF COMPLAINT BY ANY PERSON.—

Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, . ., may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

PLAINTIFF, PERMITTED TO CONDUCT HIS CASE PERSONALLY, IS ACCORDED THE SAME RIGHT AS COUNSEL UNDER TITLE 28 SEC. 1654 , THEREFORE RESTRICTING PLAINTIFF TO FILE A COMPLAINT WITH NEW ISSUES NEVER DETERMINED IS VIOLATION OF THE LAW IN SUCH NUMEROUS NOTICES AND ORDERS BY CHIEF JUDGE COLLINS, IN EXHIBITS 44, 48, 54, 66, 72, 75, 77, 90, 92, 94, 97, 100, 108, 110, 114, & 122.

Title 28 Sec. 1654: In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as, by the rules of such

court, respectively, are permitted to manage and conduct causes therein.

A JUDGE IS PROHIBITED TO DESIGNATE A MAGISTRATE JUDGE TO HEAR AND DETERMINE MOTIONS FOR RELIEF AND MOTIONS TO DISMISS UNDER TITLE 28 SEC. 636 (b)(1)(A):

A judge may designate a magistrate judge to hear and determine any pretrial matter . . except a motion for . . relief, for judgement on the pleadings, for . . judgment . . to dismiss. .

A JUDGE HAS DUTY TO DECIDE

Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified."

CONCEALMENT, REMOVAL, MUTILATION GENERALLY UNDER 18 USC § 2071.

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, . . book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 2 :

A judge should respect and comply with the law . .

PROCEDURAL BACKGROUND

After a May 3, 1990 administrative hearing (EXHIBIT 7), an administrative law judge determined on Sept. 21, 1990, "the evidence failed to establish that respondent is eligible to redeposit his retirement contributions. . .", from Feb. 25, 1998 (B115924) Cal Court of Appeals judgment, p.3 EXHIBIT 9.

1. **Feb. 14, 1991** case KC03981 EXHIBIT 1, Complaint for Breach of Contract and Fraud – to correct error or omission under (Cal) Gov't Code Sec. 20180.

PERS request for judgment on the pleading was initially denied, then after request for reconsideration, was granted on Oct. 14, 1992, EXHIBITS 2, 9.

2. Jan. 25, 1994 case B077855 EXHIBIT 2, Cal Court of Appeals AFFIRMED, because of untimely filing, but found, "Appellant makes a valid point in arguing that plaintiff's pleading .as plaintiff states facts entitling him to some type of relief.

3. Apr. 12, 1994 case S038365 EXHIBIT 3, Cal Supreme Court, IN BANK Denied petition for review.

4. Sept. 5, 1995 EXHIBIT 4, In letter, Dep. Gen. Counsel K. Gillan, wanted the case tried in court, to quote: p.2 "We cannot grant your request. . . We cannot change this position unless and until we are ordered to do so by a court. . I sincerely urge you to seek the counsel of an attorney. .

5 Apr. 18, 1996 EXHIBITS 5. In letter, Dep. Exec. Officer and Gen. Counsel Koppes, supported, Deputy Gen. Counsel Gillan, argued in determining membership that the employer's contributions are NOT "normal contributions".,p.1.

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Notice. PERS's arguments were wrong, because the employer's contributions are explicit "normal contributions" as shown in the complaint.

6. **Jan. 10, 1997** case KC 0024567 EXHIBIT 6, Complaint for Declaratory Relief, whether the employer's contributions are "normal contributions" under statutes Gov't Code Sec. 20027 (new 20053) Normal contributions and Gov't Code Sec. 20750.1 (new 20795) Miscellaneous members. . normal contributions.

7. **Aug. 11, 1997** EXHIBIT 7, Superior Court ORDER, ". . this proceeding is barred by doctrine of res judicata. . .", p.2.

8. **Sept. 19, 1997** EXHIBIT 8, p.2 Superior Court Order , "Employer's contributions to the system are not 'normal contributions' as defined in Gov't Code Sec. 20053 and 20011 ." (See Table of authorities, for 2nd part) which is wrong. Employer's contributions are explicit "normal contributions", which is the title. Later Court Orders wrongly used the above wrong decision as basis of res judicata.

Notice. During the hearing on Aug. 22,1997, I read the statute on whether the employer's contributions are normal contributions, then I asked the Hon. Judge McVittie whether the employers' contributions are normal contributions. He said NO, so I said, Your Honor, but that is not consistent with the law. Then he said, I know, but I have to give a decision I feel comfortable with. Then he said, you know how to appeal.

9. **Feb. 25, 1998** case B115924 EXHIBIT 9, Cal Court of Appeals Affirmed.

10. **May 13, 1998** case S069199 EXHIBIT 10. Cal Supreme Court Denied petition for review.

11. **May 1998** case 98-5585 EXHIBIT 11, U.S. Supreme Court, filed was

petition for writ of certiorari, later Denied the petition and then Denied petition for rehearing, 142 L.Ed 2d 210.

12. Mar. 12, 1999 EXHIBIT 12, In his letter , Sen. Staff Counsel Plasencia argued wrongly interpreting statute Gov't Code Sec. 21259, "... after you received a refund. . . you were no longer a 'member' of CalPERS." But PERS was wrong because the law (Cal) Gov't Code Sec. 21203(new 21259) is mandatory. After I was 50 years old and qualified to retire, "... after a member has qualified as to age and service . . .nothing shall deprive him or her of right to retirement allowance. . ." And I am still a PERS member because the employer's contributions to the retirement fund on my behalf have remained in deposit with PERS.

13. Apr. 30, 1999 case KC030508 EXHIBIT 13. Complaint on Intentional Tort on violation of Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement. p.1.

14. July 12, 1999 case KC030508 EXHIBIT 14. Superior Court ORDER . Dismissed, ". .complaint is barred by doctrine of res judicata. . ." . Also on July 12,1999. Prefiling Order.

15. Sept. 17, 1999 case 99-09457 EXHIBIT 15, Petition For Leave Of Presiding Judge Of Court Where Any Litigation Against Defendant PERS Is Proposed To Be Filed For Call For Determination Of Identical Question Of Law, Which The Superior Court Refused To Interpret Because Of Its Claim That The Action Is Barred By Doctrine Of Res Judicata And The Superior Court Dismissed The Action, on issue: whether PERS's alternative offer for the withdrawal of the accumulated member contributions to deprive plaintiff of retirement allowance a violation of statute Cal Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement.

16. Dec. 8, 1999 case 99-09457 EXHIBIT 16. District Court Order dismissed action for lack of subject matter jurisdiction under 11th Amendment. .in absence of consent of suit, without prejudice. p.5.

17. **Oct. 27, 2003.** CV03-07673 EXHIBIT 17, Complaint for Declaratory Relief Under Amendment Fourteen Of Constitution On Cal Retirement Laws PERS Wrongly Interpreted, And Cal Courts Wrongly Interpreted Or Refused To Interpret By Reason Of Res Judicata, on 3 issues: whether PERS's alternative offer for the withdrawal of the accumulated member contributions to deprive plaintiff of lifetime retirement allowance a violation of statute Cal Gov't Code Sec.21203 (new 21259) Nonforfeiture after qualification for retirement, and whether the employer's contributions are "normal contributions" under statutes Cal Gov't Code Sec. 20027 (new 20053) Normal contributions, and Gov't Code Sec. 20750.1 (new 20795) Miscellaneous members. .normal contribution.

18. Feb. 25, 2004 case CV03-07673 EXHIBIT 18. 1ST Plaintiff's Request for Entry of Default.

19. May 6, 2004 EXHIBIT 19. 2ND Plaintiff's Request for Entry of Default.

20- Jun. 25, 2004. EXHIBIT 20. District Court Order Dismissed complaint without prejudice, because "Plaintiff failed to file an application for entry of default".

Notice. This order was very wrong, because there were two prior applications for entry of default on Feb. 25,2004 and May 6,2004 EXHIBITS 18 & 19..

21. **July 30, 2004.** Case 04-06315 EXHIBIT 21. Complaint For Declaratory Relief Under Amendment Fourteen Of Constitution On Cal Retirement Laws PERS Wrongly Interpreted, And The Cal Courts Wrongly Interpreted Or Refused To

“NOTICE: Magistrate Judge Newman, without authority and in violation of law 28 USC 636 (A)(B), rendered judgment ORDER on the motion for new judgment denying motion, which ORDER is fraud.”

“NOTICE: . . Federal Rule of Civ. Proc. Sec. 60. OTHER POWER TO GRANT RELIEF 3) set aside a judgment for fraud in the court. “

332 May 17, 2018 EXHIBIT 332 MANDATE

“The judgment of this court, entered April 25, 2018, takes effect this date.”

333 May 21, 2018 EXHIBIT 333 Re-MANDATE objection to MANDATE

“Federal Rule of Appeal Procedure.41(b) is the right procedure, to quote:

When Issued. The court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition”.

336 May 31. 2018 Order showing misplaced Petition for panel rehearing

346 Oct 2, 2019 EXHIBIT 346 Appeal ORDER closed case, giving its reasons, to quote:

“The court’s April 25, 2018 order dismissed this appeal for lack of jurisdiction and the mandate issued May 17, 2018. . . .The motion to recall the mandate is denied because there are no ‘extraordinary circumstances’ to support such relief.”

Notice: The court failed to consider the mandate law in the PETITION FOR PANEL REHEARING and the Re-MANDATE and that is fraud in the court (FRAP 60) and that is violation of the Code of Conduct for U.S Judges, Canon 2, A Judge Should Avoid Impropriety . , ,A judge should respect and comply with the law. .

CONCLUSION

On p.4- 6 in this Complaint, ISSUE I regarding Cal Gov't Code Sec. 20691, employer's contributions are normal contribution; ISSUE II Cal Gov't Code Sec. 21203 (new 21259) Non forfeiture after qualification; ISSUE III on loan laws, Cal Gov't Code Sec. 21203 (new 20654) which allows withdrawals as loans, and ISSUE IV, Amendment 13, prohibition of slavery, are new and have no prior judgments that determined from any court, so res judicata does not apply to these issues in declaratory relief action in new or same action based on the same facts, Code of Civ. Proc. Sec. 1062, see p.7.

STATUTE OF LIMITATION DOES NOT APPLY under Cal Gov't Code Sec. 20181(new 20164) , see p.6.

On Sept. 27, 2012 EXHIBIT 152 on Defendant's p.3 STATUS REPORT, PERS wanted settlement, Plaintiff appreciates it very much if Honorable Judge will encourage settlement which Defendant PERS wanted. Defendant PERS just pays me the values asked for in the complaint and that settles everything.

(Cal) Code of Civil Proc. Sec. 657 **Relief available on motion for new trial with material causes for newly discovered evidence:** the Cal Constitution Article 3, Sec. 6 (d), see p.10, provides any resident can sue state and therefore state agencies, so there is no immunity under 11 Amendment that is the ground for dismissal of the judgment of Dec. 19, 2012..

FEDERAL RULE OF APPEAL PROC. SEC 60, GROUNDS FOR RELIEF

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING

- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial . .;

(4) the judgment is void;

The new discovered evidence, California Constitution Article 3 voided the judgment of 11th Amendment immunity of December 19, 2012 with no time limitation to file relief.

From the foregoing, res judicata does not apply in declaratory relief action, this Court has jurisdiction, see on p. 1-3. for the many above reasons cited. CalPERS is in violations of the California public employees' retirement laws, the equal protection clause of Amendment Fourteen and Amendment 13, on p.6 prohibition of slavery. Therefore, Defendant Board of Administration, PERS shall pay Plaintiff Barroga the accumulated pensions, see EXHIBIT 34, in the amount of \$3,565,573.45 up to December 2018 and a monthly pension of \$6,192.39 starting from January 2019, accruing and accumulating.

The Complaint for declaratory relief is entitled precedence because Defendant PERS is a state agency, under Cal Code of Civ. Proc. Sec. 1062.5(2), to quote:

The action shall be set for trial at the earliest possible date and shall take precedence over all cases other than those in which the state is a party.

Date: May 21, 2019

Respectfully submitted,

Lucio A. Barroga
Lucio A. Barroga

ATTACHED ARE THE CITED EXHIBITS , Vol. I, & Vol. II. The first page bottom of documents has its date.

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12 LUCIO A. BARROGA,

2:19-CV-00921-MCE-KJN

13 Plaintiff,
14 v.
15
16 **BOARD OF ADMINISTRATION, CAL**
17 **PUBLIC EMPLOYEES' RETIREMENT**
18 **SYSTEM,,**
19
Defendant.

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS PURSUANT
TO RULES 12(b)(1) AND 12(b)(6) OF
THE FEDERAL RULES OF CIVIL
PROCEDURE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: August 29, 2019
Time: 10:00 a.m.
Courtroom: 25
Judge: The Hon. Kendall J. Newman
Action Filed: May 22, 2019

21 TO: LUCIO A. BARROGA, plaintiff in pro per;

22 PLEASE TAKE NOTICE that, on August 29, 2019, at 10:00 a.m., or as soon thereafter as
23 the matter may be heard in Courtroom 25 of the United States District Court, Eastern District of
24 California, located at 501 "I" Street, Sacramento, CA 95814, defendant California Public
25 Employees' Retirement System (CalPERS) will move the court for an order dismissing plaintiff's
26 complaint and it as a defendant. Defendant will move the court to dismiss it and plaintiff's
27 complaint pursuant to Rule 12, subdivision (b)(1), of the Federal Rules of Civil Procedure on the
28 basis that the court lacks subject matter jurisdiction and pursuant to Rule 12, subdivision (b)(6),

1 of the Federal Rules of Civil Procedure on the basis that the complaint fails to state a claim
2 against defendant CalPERS in that plaintiff's claims are barred by the doctrine of res judicata.

3 This motion is based on this notice of motion and motion, the attached memorandum of
4 points and authorities, the court file herein, and any such matters as may be presented to the court
5 at the time of hearing.

6 Dated: June 22, 2019

Respectfully submitted,

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8 Attorney General of California
9 ISMAEL A. CASTRO
10 Supervising Deputy Attorney General

11 */s/ Brenda A. Ray*

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO A. BARROGA,

Plaintiff,

v.

BOARD OF ADMINISTRATION, CAL
PUBLIC EMPLOYEES' RETIREMENT
SYSTEM.,

Defendant.

2:19-CV-00921-MCE-KJN

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

Date: August 29, 2019
Time: 10:00 a.m.
Courtroom: 25
Judge: The Hon. Kendall J. Newman
Action Filed: May 22, 2019

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PRELIMINARY STATEMENT

2 In the late 1970s, plaintiff retired from government service and elected to withdraw his
3 employee retirement contributions from defendant CalPERS in a lump sum rather than collect a
4 monthly pension benefit. Nearly ten years later, plaintiff has sought to have defendant CalPERS
5 allow him to recontribute his withdrawn contributions and grant him a monthly pension benefit.
6 Following an administrative hearing, defendant CalPERS ruled plaintiff was not entitled to
7 redeposit withdrawn contributions in order to obtain a CalPERS pension. Plaintiff then appealed
8 the administrative decision numerous times over the next 28 years before the California Superior
9 Court for the County of Los Angeles, the California Court of Appeal, the California Supreme
10 Court, the United States District Court for the Central and Eastern Districts of California, and the
11 United States Supreme Court. Plaintiff now once again seeks to re-litigate the complaint with
12 prejudice because (1) the court lacks subject matter jurisdiction because defendant CalPERS is
13 entitled to immunity under the Eleventh Amended and (2) plaintiff has failed to state a valid
14 cause of action because his case is barred by the doctrines of res judicata and collateral estoppel.

STATEMENT OF FACTS

16 The City of El Segundo employed plaintiff from 1969 to 1977. See *Barroga v. Bd. of*
17 *Admin. CalPERS*, California Court of Appeal Case No. B077855, attached as Exhibit 2 to the
18 Complaint, at p.2. In 1979, plaintiff elected to withdraw his employment contributions from
19 CalPERS *Ibid*; April 18, 1996, Letter from Richard Koppes, Deputy Executive Officer and
20 General Counsel of CalPERS to Plaintiff, attached as Exhibit 5 to Complaint. CalPERS remitted
21 to plaintiff his employee contributions of nearly \$10,000 and terminated his membership from
22 CalPERS. *Barroga v. Bd. of Admin. CalPERS*, B077855, p.2; Koppes 4-18-1996 Letter, p.1; see
23 also Complaint, p.3. Almost ten years later in 1988, plaintiff wrote to CalPERS requesting
24 retirement benefits, asserting that he had withdrawn his contributions by mistake. *Barroga v. Bd.*
25 *of Admin. CalPERS*, B077855, p. 2; Koppes 4-18-1996 Letter; see also Complaint pp. 3-4.
26 Plaintiff requested that CalPERS treat its remittance of his employee contributions as a loan.
27 *Ibid.*; see also Complaint, pp. 3-4.

1 CalPERS denied plaintiff's request, informing him that, because he was not a current
2 member of CalPERS, he was not eligible to redeposit his contributions and that CalPERS' prior
3 remittance to him could not be treated as a loan. Sept. 5, 1995, Letter from Kayla Gillian, Deputy
4 General Counsel to CalPERS, to Plaintiff, attached as Exhibit 4 to the Complaint, Koppes 4-18-
5 1996 Letter; *Barroga v. Gillian, et al.*, Los Angeles Superior Court Case No. KC 024567, Order
6 Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion, attached
7 as Exhibit 7 to the Complaint, 2:3-8 (appealed in *Barroga v. Gillian, et al.*, California Court of
8 Appeal Case No. B115924 and California Supreme Court Case No. B115924, attached as
9 Exhibits 9 & 10 to the Complaint); see also Complaint p. 4. Plaintiff appealed this decision at an
10 administrative hearing. *Ibid*; Complaint, p. 12. An administrative hearing was conducted on or
11 about May 3, 1990, and the ALJ ruled against plaintiff, finding plaintiff was not entitled to
12 redeposit withdrawn contributions in order to obtain a CalPERS pension. *Ibid*. In November
13 1990, the Board of Administration of CalPERS adopted the ALJ's proposed decision. *Ibid*.

14 On February 14, 1991, Plaintiff filed suit in Los Angeles County Superior Court against
15 CalPERS for breach of contract and fraud. Complaint, p.12; *Barroga v. Bd. of Admin. CalPERS*,
16 KC003981, attached as Exhibit 1 to the Complaint. CalPERS' answer asserted the affirmative
17 defense that Barroga's sole remedy was a petition for administrative mandamus (Code of Civ.
18 Proc., § 1094.5), not a lawsuit for damages. *Barroga v. Bd. of Admin. CalPERS*, B077855, at pp.
19 2-3, attached as Exhibit 2 to the Complaint. CalPERS ultimately obtained a judgment on the
20 pleadings on that basis. *Ibid*. The Court of Appeal for the Second Appellate District affirmed that
21 judgment in an unpublished opinion filed on January 25, 1994 in *Barroga v. Board of*
22 *Administration CalPERS*, B077855. *Ibid* The California Supreme Court denied plaintiff's
23 petition for review on April 12, 1994. Complaint, p. 12; *Barroga v. Bd. of Admin. CalPERS*,
24 S038365, attached as Exhibit 3 to the Complaint.

25 On January 10, 1997, plaintiff filed a declaratory relief action against CalPERS, making the
26 same claims he had already made in his administrative action and in prior lawsuits. Complaint, p.
27 13; *Barroga v. Gillian*, Los Angeles Superior Court Case No. KC024567, attached as Exhibit 6 to
28 the Complaint. Plaintiff and CalPERS filed cross-motions for summary judgment. *Barroga v.*

1 and legal issues which were the subject of the prior proceeding." *Barroga v. Gillian*, KC024567,
2 Ex. 7, 2:18-20. The Los Angeles Superior Court dismissed that action finding that plaintiff's
3 claim was barred by the doctrines of claim and issue preclusion. *Id.* at Ex. 7. In addition to
4 dismissing plaintiff's complaint on procedural grounds, the trial court also reviewed the substance
5 of plaintiff's claim, ruling on August 11, 1997, that plaintiff's claim for CalPERS retirement
6 benefits was "erroneous as a matter of law" because "the undisputed facts establish that upon
7 separation from the City of El Segundo he received all of his normal contributions and thus
8 ceased being a PERS member. In the absence of any evidence establishing that Barroga remains a
9 member of PERS, he is not entitled to redeposit his contributions." *Id.* Ex. 7, at pp. 2-3. Plaintiff
10 moved to vacate the trial court's dismissal of his complaint, which the trial court denied on
11 September 19, 1997. *Id.* Ex. 8. Again, the Superior Court reviewed the merits of plaintiff's claim
12 for CalPERS retirement benefits and found them unpersuasive:

13 After considering all of the papers filed by both plaintiff and defendants, and upon
14 hearing the arguments of counsel, the court denies the motion. The court finds that
15 plaintiff is not currently a member of the Public Employees' Retirement System
16 ("PERS") because upon separation from PERS-covered employment, he elected to
17 receive all of the contributions which he made into the system pursuant to
18 Government Code section 20340. Employer contributions to the system are not
19 'normal contributions' as defined in Government Code sections 20053 and 20011.
20 Accordingly, because plaintiff is not currently a member of PERS, plaintiff is
21 ineligible to participate in the redeposit program as required by Government Code
22 section 20750.

23 *Id.* Ex. 8, 2:11-19.

24 Plaintiff appealed the Superior Court's decision, which was denied by the Second District
25 Court of Appeal on February 25, 1998. *Id.* Ex. 9, California Court of Appeal Case No. B115924.
26 The California Supreme Court denied plaintiff's petition for review on May 13, 1998. *Id.* Ex. 10,
27 California Supreme Court Case No. SD69199. On October 5, 1998, the Supreme Court of the
28 United States denied plaintiff's petition for writ of certiorari. Complaint, pp. 13-14; *Barroga v.*
Gillan et al., 525 U.S. 911 (1998). Plaintiff filed a petition for rehearing and the Supreme Court
of the United States denied the petition on December 7, 1998. Complaint, pp. 13-14; *Barroga v.*
Gillan et al., 525 U.S. 1049 (1998). Hence, the Los Angeles Superior Court's decision finding
plaintiff ineligible for CalPERS retirement benefits has become final and operates to preclude him

1 from relitigating the issue now.

2 The doctrine of res judicata applies here because: (1) this case involves the same claim for
3 CalPERS retirement benefits plaintiff has repeatedly litigated, including in the cases of *Barroga*
4 *v. Board of Administration, Public Employees' Retirement System* (Los Angeles Superior Court
5 Case No. KC003981, California Second District Court of Appeal Case No. B077855) and
6 *Barroga v. Gillan, et al.*, (Los Angeles Superior Court Case No. KC024567, California Second
7 District Court of Appeal Case No. B115924); (2) the instant case involves the identical parties or
8 privies, specifically plaintiff Barroga and CalPERS or an official from CalPERS; and (3) the
9 previous state Court of Appeal matters reached a final judgment on the merits of plaintiff's claim
10 to retirement benefits. Thus, the doctrine of res judicata applies precluding the instant suit and the
11 Court should grant defendant's motion to dismiss with prejudice.

CONCLUSION

13 Defendant CalPERS respectfully requests that the court grant its motion to dismiss without
14 leave to amend because (1) the court lacks subject matter jurisdiction because defendant CalPERS
15 is entitled to immunity under the Eleventh Amendment and (2) plaintiff has failed to state a valid
16 cause of action because his case is barred by the doctrine of res judicata.

17 Dated: July 22, 2019

Respectfully Submitted,

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ISMAEL A. CASTRO
Supervising Deputy Attorney General

/s/ Brenda A. Ray

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO A. BARROGA, ! CASE NO. 2- 19 CV 00921
Plaintiff ! OBJECTION
V. ! TO DEFENDANT'S
! MOTION TO DISMISS
BOARD OF ADMINISTRATION, CAL PUBLIC ! THE COMPLAINT
EMPLOYEES' RETIREMENT SYSTEM (PERS), !
Defendant !

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

After reaching 50 year old in April 1979 and retirable, I submitted an application for retirement pensions from previous services with the City of El Segundo, and later I went to Sacramento PERS office to follow up application. PERS offered me two choices: 1) to receive a monthly pension of \$135, or 2) as alternative, to receive a lump sum of my member contributions (approx. 7% of salaries), but the employer's contributions on my behalf (approx. 7.75% of salaries under Gov't Code Sec. 20750.1 [new 20795]), will remain with PERS. I received approximately \$10,000 of my accumulated member contributions, with the employer's contributions on my behalf remaining in deposit with PERS.

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Later in some years, I requested that the offered monthly pension shall pay and redeposit for the withdrawn member contributions as a loan which PERS maliciously omitted to inform the monthly pension can redeposit per statute (Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of Withdrawals, and when the loan or withdrawal is fully paid with interest, then monthly pension will start to me. But PERS claimed the employer's contributions which have remained with PERS are NOT "normal contributions", therefore I ceased to be a member when the member contributions were withdrawn, and I am not anymore entitled any pension benefits. I have contended that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS and are "normal contributions" under the laws, and therefore, I am entitled retirement benefits. .

NOTICE: Defendant's MOTION TO DISMISS omitted to mention or show the fact that the employer's contributions to the retirement fund in my behalf still remain in deposit with PERS which entitles me to retain my membership with PERS, and which in the complaint is ISSUE IV Violation of Amendment 13, prohibition of slavery for being denied benefits derived from the employer's contributions to the retirement fund on my behalf which I had worked and toiled for.

ISSUES OR CAUSES OF ACTION, p. 4-6 Complaint.

Proof that I am still a PERS member, because the employer's contributions on my behalf to the retirement fund have remained in deposit with PERS, to quote:

- . A person ceases to be a member : . . .
- . (b) if he or she is paid his or her "normal contributions".

Therefore, IF the employer's contributions which have remained in deposit with PERS are "normal contributions", then I am still a PERS member.

ISSUE I: ARE THE EMPLOYER'S CONTRIBUTIONS TO THE RETIREMENT FUND ON BEHALF OF MEMBERS, "NORMAL CONTRIBUTIONS" UNDER THE NEW DISCOVERED STATUTE, (CAL) GOV'T CODE SEC. 20691? (New Issue, different from prior Issues)

(Cal) Gov't Code Sec. 20691. Payment of member normal contributions by contracting agencies or school employer

Notwithstanding any other provision of law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. The payment shall be reported simply as normal contributions and shall be credited to member accounts.

The employer's contributions are explicit "normal contributions", therefore I am still a PERS member, entitled retirement benefits.

ISSUE II: IS PERS'S ALTERNATIVE OFFER FOR THE WITHDRAWAL OF THE ACCUMULATED MEMBER CONTRIBUTIONS TO DEPRIVE PLAINTIFF OF LIFETIME RETIREMENT ALLOWANCE AFTER PLAINTIFF HAD QUALIFIED FOR RETIREMENT AFTER REACHING 50 YEARS OLD, A VIOLATION OF (CAL) GOV'T CODE SEC. 21203 (NEW 21259)?

(Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement

Subject to compliance with this part, after a member has qualified as to . . age and service for retirement for service, nothing shall deprive him or her of the right to retirement allowance as determined under this part.

ISSUE III : IS PERS'S DENIAL FOR CONSIDERING THE WITHDRAWN MEMBER CONTRIBUTIONS AS LOANS A VIOLATION OF PERS'S LOAN LAWS WHICH ALLOW

WITHDRAWALS AS LOANS? OR DISCRIMINATORY?

(Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest. .

. . . .member may file an election with the board to redeposit in the retirement fund, in lump sum or by installment payment (1) an amount equal to the accumulated contributions.. .withdrawn, and (2) an amount equal to the interest. .,and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance at date of election to redeposit.

(Cal) Gov't Code Sec. 20211 (new 20202) Natural disaster relief loan.

(Cal) Gov't Code Sec. 20208.5 (new 20203) Security loan.

(Cal) Gov't Code Sec. 20215 (new 20200) Home financing program.

(Cal) Gov't Code Sec. 20201 Secured home loan.

ISSUE IV: CONSTITUTION, AMENDMENT 13 IS VIOLATED. PERS HAS DENIED PLAINTIFF RETIREMENT BENEFITS DERIVED FROM THE EMPLOYER'S CONTRIBUTIONS TO THE RETIREMENT FUND ON MY BEHALF, WHICH EMPLOYER'S CONTRIBUTIONS I HAD WORKED AND TOILED FOR, to quote:

Amendment 13, Section 1. Neither slavery nor involuntary servitude . . .shall exist within the United States, . .

If any of the ISSUES is YES, in fact, all are yes, then I am entitled retirement benefits and the redeposit of the withdrawn contributions.

The Complaint and Summons filed May 22, 2019 required a response within 21 days, but Defendant's Request To Extend Time To Respond up to July 22, 2019 served June 21, 2019 was late and untimely, therefore Defendant's Motion To Dismiss the Complaint is invalid, to quote, in Motion For Request For Entry Of

Default, . . served July 5, 2019:

Fed Rule of Civ. Proc. 6, (b) Extension time

In General: When an act may or must be done within a specified time , .
. .the court may, for good cause, extend the time ..

(A) . . if a request is made, before the original time or its extension expires

The Defendant Request To Extend Time To Respond was not signed by the attorney,
another reason the Request is invalid.

ADDITIONAL reasons to Plaintiff's Objections to Defendant's MOTION TO DISMISS
the complaint.

The Defendant's Motion To Dismiss the Complaint gave two reasons to dismiss the
Complaint, to quote:

I The Complaint Should Be Dismissed Pursuant To Federal Rule of Civ Proc.
12(B)(1) for Lack of Subject Matter Jurisdiction Because Defendant CalPERS is
Entitled to Eleventh Amendment Immunity p.10

II. Plaintiff's Complaint Should Be Dismissed Pursuant To Federal Rule of Civ.
Proc. 12(B)(6) on the Basis of Claim and Issue Preclusion

The Complaint Fails to State a Claim for Relief Because Plaintiff's Claims are
Barred by Res Judicata and Collateral Estoppel

ANSWERING I: Defendant's reason for Eleventh Amendment immunity is because
Defendant PERS is a state agency and therefore cannot be sued. Defendant's reason
is wrong. In new discovered evidence, the California Constitution provides any
California resident can sue the state and therefore state agencies, including CalPERS

pursuant to law, in Complaint, p. 10:

Cal Constitution Article 3, Sec. 6 (d)

(d) Personal Right of Action and Jurisdiction of Courts.

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section

STATUTE OF LIMITATION DOES NOT APPLY p.6. Complaint

.Cal Gov't Code Sec. 20181 (new 20164) Duration of obligation; limitation of actions . . . (b)(2) In cases where the system owes money to a member or beneficiary, the period of limitation shall not apply.

Defendant's STATUS REPORT, p.3 EXHIBIT 152 Defendant PERS wanted settlement, to quote:

CalPERS prepares to have a settlement conference conducted by someone other than the district court judge and the magistrate judge assigned to this matter.

But Defendant's attorney does not reply for request for settlement. EXHIBIT 313.

Newly discovered evidence: the Cal Constitution Article 3, Sec. 6(d) see p.10, provides any resident can sue the state, including therefore state agencies, so therefore 11th Amendment immunity that is the ground for the dismissal in the judgment of Dec. 19, 2012 does not apply.

RELIEF AVAILABLE ON MOTION FOR NEW TRIAL

(Cal) Code of Civil Proc. Sec. 657 Relief available on motion for new trial,

causes. .

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

6. Insufficiency of evidence to justify the. . decision, or the decision is against the law.

FEDERAL RULE OF CIVIL PROC. 60

(b) Grounds For Relief From A Final Judgment, Order, Or Proceeding

(2) newly discovered evidence, that with reasonable diligence, could not . have been discovered in time to move for a new trial.

(4) the judgment is void

The new discovered evidence, California Constitution Article 3, Sec. 6 voided the judgment of 11th Amendment immunity of December 19, 2012 with no time limitation to file relief.

28 US CODE SEC. 1652 STATE LAWS AS RULES OF DECISION

ANSWERING II: Defendant PERS's 2nd (II) reason to dismiss the complaint is quoted: Plaintiff's Claims are Barred by Res Judicata and Collateral Estoppel

Defendant PERS's argument on the issue on res judicata and collateral estoppel is wrong as shown by the following Plaintiff's arguments:

The title of the Complaint, COMPLAINT FOR DECLARATORY RELIEF UNDER CAL CODE OF CIV. PROC. SEC. 1062 IN NEW OR SAME ACTION BASED ON SAME FACTS WHICH OVERCOMES RES JUDICATA.

RES JUDICATA DOES NOT APPLY UNDER DECLARATORY RELIEF LAW

(Cal) Code of Civil Proc. Sec. 1062 Cumulative remedy

The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

The ISSUES I, II, III, and IV answerable by yes or no in the complaint have NOT been interpreted and determined by any court. So the court has jurisdiction on issues.

28 US CODE § 1331.

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

And newly discovered evidence: the Cal Constitution Article 3, Sec. 6(d), see above, provides any resident can sue the state,

The law decrees that a judge has duty to interpret law pursuant to:

Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified

The Honorable judge should therefore render judgment to the 4 ISSUES I, II, III, and IV answerable by yes or no to comply with the law.

CODE OF CONDUCT FOR UNITED STATES JUDGES

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and . . integrity and impartiality of the judiciary

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.

CONCLUSION

COMPLAINT AND SUMMONS were served May 22, 2019 . Defendant did not respond to the COMPLAINT AND SUMMONS. The Hon. Magistrate Judge Edmund Brennan and Hon. Judge Troy Nunley were assigned to this case. A REQUEST FOR ENTRY OF DEFAULT was served on June 24, 2019 . The Hon Magistrate Judge Kendall Newman's ORDER dated June 11, 2019 ordered that he be the judge to replace Magistrate Judge Brennan, My letter of June 14, 2019 to the Clerk objected. A Defendant's Request To Extend Time To Respond was served July 23, 2019, but was untimely, violating the law , repeating:

Fed Rule of Civ. Proc. 6, (b) Extension time

In General: When an act may or must be done within a specified time , . .the court may, for good cause, extend the time . .

(A) . . if a request is made, before the original time or its extension expires .

Defendant's MOTION TO DISMISS served July 23, 2019 is therefore untimely and invalid for the untimely Defendant's Request To Extend Time To Respond. The Defendant's MOTION TO DISMISS gave two reasons to dismiss the complaint:, 1) 11th Amendddment immunity because PERS being a state agency can not be

sued, 2) and Plaintiff claim is barred by res judicata and collateral estoppel. A new discovered California Constitution Article 3, Sec, 6 provides that any resident has standing to sue the state and therefore Defendant PERS can be sued. Statute of limitation does not apply where PERS owes money to a member or beneficiary.

Res judicata does not apply under Declaratory Relief law with Cal Code of Civ. Pro. Sec. 1062 in new or same action based on the same facts. And 28 USC 1331 provides district courts have original jurisdiction of civil actions. Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified". The Defendant never responded to the ISSUES I, II, III, and IV answerable by yes or no. In Defendant's Status Report of Sept 27, 2012 EXHIBIT 152 p.3, defendant wanted settlement, but attorney does not respond for plaintiff's request for settlement.

From the foregoing, Defendant's MOTION TO DISMISS the COMPLAINT on July 23, 2019 is untimely which MOTION is based on an untimely Defendant's Request To Extend Time To respond should be denied. The REQUEST FOR ENTRY OF DEFAULT of June 22, 2019 should be granted.

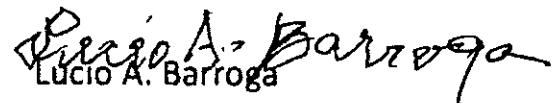
I may not be able to attend a hearing because I will just be reciting and repeating what are already in the documents submitted. As precedent, the Hon. Judge Morrison England rendered judgment of Order Dec. 19, 2012 without a hearing.

In a case in the US Court of Appeals for the Federal Circuit, Case 89-1376, 90-1080 In Re Lucio A. Barrago 904 F.2d 44, the court asked me to go and argue my case in 15 minutes hearing, but I was homeless, and court decided the case without me in the hearing. Also the US Supreme Court in Case 90-6210 Barroga v. US Patent and

Trade Mark Office 914 F.2d 270, asked me to go and argue in 20 minutes hearing, but I was homeless and cannot afford to go. I just relied on the integrity of courts to decide, See attached ORDERS.

Date: August / , 2019

Respectfully submitted:


Lucio A. Barroga

Attached: EXHIBITS

Note: At the senate confirmation hearing, Justice Brett Kavanaugh said: If you cite the law, you win; RULE OF LAW; judgment without fear or favor.

Foot Notes: I objected to Magistrate Judge Kendall Newman because of his repeated rendering of adverse judgment without authority in violation of law, 28 USC 636 (A)(B), see orders, EXHIBITS 135, 137A. 299. Even the US Court of Appeals in an order cited the violation without authority, see order EXHIBIT 329, to quote:

(9th Cir. 1992.) holding that absent consent, a federal magistrate judge lacked authority to a post-judgment decision that has dispositive effect on the parties

28 USC 636 B

. . a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion . .

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO A. BARROGA,

Plaintiff,

4

BOARD OF ADMINISTRATION,
CAL. PUBLIC EMPLOYEES'
RETIREMENT SYSTEM.

Defendant.

No. 2:19-cv-0921-MCE-KJN PS

FINDINGS AND RECOMMENDATIONS
TO DISMISS WITH PREJUDICE AND
TO DECLARE PLAINTIFF
A VEXATIOUS LITIGANT,
ORDER TO STAY ACTION WHILE
F&R IS PENDING

(ECF Nos. 20, 22)

18 Plaintiff Lucio Barroga, proceeding without counsel, brings suit against Defendant
19 "CalPERS" concerning his retirement benefits. (ECF No. 1.) CalPERS moves to dismiss for lack
20 of subject matter jurisdiction (11th Amdt. immunity) and for failure to state a claim (claim and
21 issue preclusion). (ECF No. 20.) CalPERS also requests the Court declare Barroga a vexatious
22 litigant and issue a pre-filing order against him, given that these claims have been denied
23 multiple times by both state and federal courts since the early 1990s. (ECF No. 22.)

24 After a review of the record, the undersigned recommends this action be dismissed with
25 prejudice. Further, the undersigned finds Barroga to be a repeat, serial litigant whose multiple
26 suits against CalPERS have made it clear that he will only continue to abuse the judicial process
27 and inundate this district with frivolous complaints. Therefore, the undersigned recommends
28 Barroga be deemed a vexatious litigant and a pre-filing order be instituted against him.

Background¹

On May 22, 2019, Barroga filed a complaint entitled “complaint for declaratory relief under Cal Code of Civil Proc. Sec. 1062 on new or same action based on the same facts which overcomes res judicata.” (ECF No. 1.) This 382-page complaint asserts that when Barroga reached fifty years of age in 1979, he retired from his employment with the City of El Segundo. (*Id.* at p. 3.) Barroga opted to withdraw his retirement contributions from CalPERS, but ten years later requested by letter that he be allowed to repay these amounts so he could start receiving a monthly benefit. CalPERS denied his request. (*Id.*)

From the point of CalPERS denial in the early 90s through the present, Barroga has attempted to litigate this same issue in a variety of settings. (See, generally, exhibits attached to ECF Nos. 1 and 21 (various complaints, letters, orders, judgments and appeals re: Barroga's suits against CalPERS)). Notably, Barroga's 2019 complaint raises the same issues as were raised in 2012 by Judge England of this district court. (See 2:12-cv-1121 MCE-KJN (PS), at ECF No. 1, "Complaint for declaratory relief under Cal Code of Civil Proc. Sec. 1062 on new or same action based on the same facts which overcomes res judicata."); ECF No. 21 at p. 215.)

CalPERS moved to dismiss in this action, asserting the same defenses as were raised in the 2012 action. (See ECF No. 20.) These issues are the same that, in 2012, Judge England deemed dispositive in his judgment and order, and are the same that the Ninth Circuit affirmed on two years later. (See 2:19-cv-921 MCE-KJN (PS) at ECF No. 32 (recommending dismissal on 11th Amendment Immunity grounds); see also Barroga v. CalPERS, 579 F. App'x 613 (9th Cir. 2014) (affirming dismissal on issue and claim preclusion grounds, as well as on the Rooker-Feldman doctrine)). Barroga opposed. (ECF Nos. 26–27.)

CalPERS also moved to declare Barroga a vexatious litigant, and requested judicial notice of Barroga's extensive litigation history. (ECF Nos. 21-22.) Barroga did not respond.

¹ These facts are based on information contained in the Complaint, and on documents submitted by CalPERS that are part of the public record—of which the undersigned takes judicial notice. See Fed. R. Evid. 201; Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (“In addition to the complaint, it is proper for the district court to take judicial notice of matters of public record outside the pleadings and consider them for purposes of the motion to dismiss.”)

1 I. Barroga's claims fail on the same grounds as in the 2012 action.

2 Given that Barroga is attempting to litigate the same issues as he raised in 2012
3 (reinstatement of his pension), and given that CalPERS has raised the same issues in their motion
4 to dismiss, the Court will not burden the parties with a lengthy analysis. Instead, the Court refers
5 the parties to the findings and recommendations, order, judgment, and memorandum disposition
6 in the 2012 action. (See 2:19-cv-921 MCE-KJN (PS) at ECF No. 32 (recommending dismissal
7 on 11th Amendment Immunity grounds); ECF No. 45 (adopting the F&R and dismissing
8 Barroga's complaint with prejudice); see also Barroga v. CalPERS, 579 F. App'x 613 (9th Cir.
9 2014) (affirming dismissal of the 2012 action on issue and claim preclusion grounds, as well as
10 on the Rooker-Feldman doctrine—which bars litigation that seeks relief from a state court
11 decision based on an alleged error therein)).

12 For the same reasons as was stated in the dismissal orders, judgment, and Ninth Circuit
13 memorandum in the 2012 action, the undersigned recommends dismissal of Barroga's current
14 complaint with prejudice.

15 II. Barroga should be deemed a vexatious litigant, and a pre-filing order should
16 be imposed.

17 Alongside the motion to dismiss, CalPERS moved to deem Barroga a vexatious litigant,
18 and requested the Court either require Barroga post security before the action is to proceed or
19 issue a pre-filing order “prohibiting him from filing any new litigation without first obtaining
20 leave of court to do so.” (ECF No. 22.) Barroga did not respond in writing to this motion.

21 Legal Standard

22 The district courts have the power under the All Writs Act, 28 U.S.C. § 1651(a), to issue
23 pre-filing orders that restrict a litigant's ability to initiate court proceedings. De Long v.
24 Hennessey, 912 F. 2d 1144, 1146 (9th Cir. 1990). “[S]uch pre-filing orders are an extreme
25 remedy that should rarely be used.” Molski v. Evergreen Dynasty Corp., 500 F. 3d 1047, 1057
26 (9th Cir. 2007). However, “[f]lagrant abuse of the judicial process cannot be tolerated because it
27 enables one person to preempt the use of judicial time that properly could be used to consider the
28 meritorious claims of other litigants.” De Long, 912 F. 2d at 1148.

1 Barroga without further action of the court;

2 b.) The Clerk of the Court shall not file any future filings from Plaintiff against Defendant

3 CalPERS or their related entities, nor shall the Clerk file any lawsuit initiated by

4 Plaintiff concerning his defunct pension, unless and until the filing is reviewed and

5 determined by the Court to constitute a non-frivolous claim;

6 c.) If Mr. Barroga submits an action as a self-represented plaintiff accompanied by the

7 required declaration, the Clerk shall open the matter as a miscellaneous case to be

8 considered by the General Duty Judge of this court. The Duty Judge will issue

9 necessary orders after making a determination whether the case is in fact related to a

10 previous case filed by Mr. Barroga, and whether it is non-frivolous; and

11 d.) The requirements of subparagraphs (b) and (c) shall be waived if Plaintiff's filing is

12 made on Plaintiff's behalf by a licensed attorney at law in good standing who signs the

13 filing as the attorney of record for Plaintiff.

14 **FINDINGS AND RECOMMENDATIONS, ORDER**

15 Accordingly, IT IS HEREBY RECOMMENDED that:

16 1. Defendant's Motion to Dismiss (ECF No. 20) be GRANTED;

17 2. Defendant's Motion to Declare Plaintiff Vexatious (ECF No. 21) be GRANTED

18 IN PART and DENIED IN PART;

19 3. Plaintiff be DECLARED a vexatious litigant; and

20 4. The Court ISSUE a pre-filing order as described in Section II.D. above.

21 These findings and recommendations are submitted to the United States District Judge

22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)

23 days after being served with these findings and recommendations, any party may file written

24 objections with the court and serve a copy on all parties. Such a document should be captioned

25 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

26 shall be served on all parties and filed with the court within fourteen (14) days after service of the

27 objections. The parties are advised that failure to file objections within the specified time may

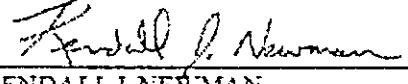
28 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th

1 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

2 In light of those recommendations, IT IS ALSO HEREBY ORDERED that all pleading,
3 discovery, and motion practice in this action are stayed pending resolution of the findings and
4 recommendations. With the exception of objections to the findings and recommendations and
5 any non-frivolous motions for emergency relief, the court will not entertain or respond to any
6 motions and other filings until the findings and recommendations are resolved.

7 IT IS SO ORDERED AND RECOMMENDED.

8 Dated: September 9, 2019

9 
10 KENDALL J. NEWMAN
11 UNITED STATES MAGISTRATE JUDGE

12 barr.921

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LUCIO A. BARROGA, PRO SE
P.O. BOX 2516
LONG BEACH, CA 90801
Tel. 562-243-1024

LUCIO A. BARROGA, ! CASE NO. 2-19CV00921
Plaintiff !
V. ! OBJECTIONS TO MAGISTRATE
BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC ! JUDGE NEWMAN'S FINDINGS
EMPLOYEES' RETIREMNT SYSTEM (PERS), ! AND RECOMMENDATIONS
Defendant !

MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant's Request To Extend Time To Respond To The Complaint Was Late And Untimely, And Therefore On Default, So The Subsequent Actions Are Untimely And Invalid Or Void Including FINDINGS AND RECOMMENDAIONS

The Complaint , EXHIBIT (EX) 357 was filed May 22, 2019, with causes of action, the new discovered evidence, California Constitution Article 3, Sec. 6(d) and the 4 ISSUES I, II, III and IV in the p.4-6 Complaint, EX 357, but Defendant PERS did not respond to the Complaint (EX 357) and Summons (EX 357A) of May 22, 2019, so a REQUEST TO CLERK FOR ENTRY OF DEFAULT (EX 368) was filed on June 24, 2019. Defendant's Request to Extend Time to Respond to the Complaint (EX 370) of June 20, 2019 was late and untimely, therefore in default, for violation of Fed Rule of Civ. Proc. 6: to quote:

(b) EXTENDING TIME.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

388

(A) . .if a request is made, before the original time or its extension expires. Because of untimely Defendant's Request to Extend Time to Respond, (EX 370) of Jun 20, 2019, the subsequent Defendant's Motion to Dismiss the Complaint (EX 381) of July 22, 2019 is untimely, unlawful and void, which was explained in my Objection to Defendant's Motion to Dismiss the Complaint filed Aug. 1, 2019. And so, the court hearing on Aug. 29, 2019 is untimely, unlawful and void, and therefore the Finding and Recommendation to Dismiss of Sept 9, 2019 by Magistrate Judge Newman is untimely, unlawful and void.

For abundance of reasons to void Magistrate Judge Newman's Findings and Recommendation to Dismiss , even if unlawful and void, the issues raised in the Finding and Recommendations will be answered.

The untimely Defendant's Motion To Dismiss the Complaint of July 22, 2019 p.10, 13 gave two reasons to dismiss, in bold letters: 1) Defendant CalPERS Is Entitled To Eleventh Amendment Immunity, (p.10 Defendant's Motion to Dismiss . .) . 2) Plaintiff's Claim Are Barred By Res Judicata And Collateral Estoppel.(p.14).

Notice: The issue of vexatious litigant is not listed on the Defendant's Motion to Dismiss the Complaint, but it was created by Magistrate Judge Newman, proof of prejudicial.

California Constitution Article 3, Sec. 6(d) That Provides Any Person Who Is A Resident Of . . California Shall Have Standing To Sue The State Of California Invalidates And Prevails Over 11th Amendment Immunity As Basis For The Dismissal Of Order Of December 19, 2012

California Constitution Article 3, Sec. 6(d) and the 4 issues, ISSUES I, II, III, & IV in the Complaint p. 4-6 (EX 257) of May 22, 2019, which issues, are answerable by

yes or no, were never determined by any court, so res judicata or collateral estoppel does not apply. Or vexatious litigation does not apply.

ISSUES IN THE FINDINGS AND RECOMMENDATIONS TO DISMISS THE COMPLAINT

I. BARROGA'S Claims fails on the same grounds as in the 2012 action, p.3 .

FINDINGS AND RECOMMENDATION TO DISMISS ..

Responding I. The Findings and Recommendations in this issue is wrong. In the 2012 action, the case was dismissed by Order of Dec. 19, 2012, EXHIBIT 176, on the ground of 11th Amendment Immunity, because Defendant PERS being a state agency cannot be sued.

Again, the new discovered evidence, California Constitution Article 3, Sec.6(d) proved the dismissal Order of Dec. 19, 2012, EXHIBIT 176, was wrong, to quote:

California Constitution Article 3, Sec. 6(d)

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section.

ADDITIONAL AUTHORITIES

STATUTE OF LIMITATION DOES NOT APPLY, to quote:

Cal Code of Civil Proc. Sec. 20181 (new 20164) Duration of obligation, limitation of actions. . . (b)(2) in cases where the system owes money to a member or beneficiary, the period of limitation shall not apply

In Defendant's Status Report of Sept. 27, 2012, p.3 EXHIBIT 152, Defendant PERS wanted settlement, to quote:

CalPERS prefers to have settlement conference conducted by someone other than the district court judge and the magistrate judge assigned to this matter.

But Defendant's Attorney does not reply for request for settlement, see EX 313.

RELIEF AVAILABLE ON MOTION FOR NEW TRIAL, authority PERS can be sued.

Cal Code of Civil Proc. Sec. 657 Relief available on motion for new trial , causes. .

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

6. Insufficiency of evidence to justify the... decision, or the decision is against the law.

Notice: The final judgment order of Dec. 19, 2012 on 11th Amendment Immunity is against the law, Cal Constitution Article 3, Sec 6(d).

FEDERAL RULE OF CIVIL PROCEDURE RULE 60 , authority that PERS can be sued.

(b) Ground for relief from a final judgment, order, or proceeding

(2) newly discovered evidence, that with reasonable diligence, could not have been discovered in time to move for a new trial

(4) the judgment is void

The new discovered evidence, California Constitution Article 3, Sec 6 (d) voided the judgment order, EXHIBIT 176, of 11th Amendment Immunity of Dec. 19, 2012 with no time limitation to file relief.

28 US CODE SEC. 1652 STATE LAWS AS RULES OF DECISION

Refusing To Determine And Interpret The Issues And Controversies Before Charging Vexatious Litigant Is Plain Obstruction Of Justice

The litigant law: California Code of Civil Proc. Sec. 391:

Under the law, the determining factor is whether the causes of action, controversies, issues of law or facts are determined or interpreted first before charging vexatious litigant . In these case, the ISSUES I, II, III and IV answerable by yes or no , and California Constitution Article 3, Sec. 6(d) in the Complaint have never been determined or interpreted by any court. Prior defendant's motions for dismissals and court judgments had always been aimed for 11th Amendment immunity, intentionally ignoring and bypassing issues or controversies as required by above litigant law. Therefore being deemed vexatious litigant is wrong and fraud.

Under the law, it is not the length of time that determines vexatious litigant. Only if there is no reasonable probability to prevail over defendant's objections to the complaint is vexatious litigant imposed. But the California Constitution Article 3, Sec. 6(d) that provides any resident of California has standing to sue the state of California prevails over the 11th Amendment immunity that PERS being state agency cannot be sued. And any one of the 4 ISSUES I, II, III, and IV, if determined, prevails in the litigation. To quote prevailing law :

Cal Code of Civ. Pro. Sec. 391.3.

(a) Except as provided in subdivision (b), if, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the . . defendant, .

A judge has the duty to decide the law, pursuant to Cal Code of Civ. Proc. Sec.170, to quote:

a judge has the duty to decide any proceeding in which he or she is not disqualified."

But Magistrate Judge Newman, in violation of law, refused to interpret, determine and decide the issues in controversy, after he ordered himself in usurpation of power to replace assigned Magistrate Judge Edmund Brennan, so his deeming me a vexatious litigant is plain obstruction of justice. He violated the Code of Conduct for US Judges, Canon 2:

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY A. *Respect for the law.* A judge should respect and comply with law.. B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence conduct or judgment, Magistrate judge Newman repeatedly rendered judgment without authority in violation of law, 28 USC 636 (A)(B), see orders EXHIBITS 135, 137A, 299. Even the US Court of Appeals in an order of Apr. 25, 2018 cited the violation without authority, see EXHIBIT 329, to quote:

(9th Cir. 1992) holding that absent consent, a federal magistrate judge lacked authority to a post-judgment decision that has dispositive effect on the parties.

Not addressing case on the merits because it is pro se is violation of law. A similar case, in the U.S. Court of Appeals for the Federal Circuit Case 89-1376, 90-1080, In Re Lucio A. Barroga F.2d 44, (See EXHIBIT Order attached to Objection to Defendant Motion to Dismiss.), is quoted:

We find it troubling that the Commissioner did not address Barroga's petition on the merits. We find troubling the Commissioner granted a petition where a counsel was involved. . . while he denied it here where a

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO A. BARROGA,

No. 2:19-cv-921-MCE-KJN PS

Plaintiff,

ORDER

V.

(ECF No. 29)

BOARD OF ADMINISTRATION,
CAL.PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Defendant.

On September 9, 2019 the magistrate judge filed findings and recommendations (ECF No. 29), which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen (14) days. On September 23, 2019, plaintiff filed objections to the findings and recommendations (ECF No. 31), which have been considered by the court.

This Court reviews *de novo* those portions of the proposed findings of fact to which an objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981); see also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the matter on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's

1 conclusions of law are reviewed *de novo*. See Britt v. Simi Valley Unified School Dist., 708 F.2d
2 452, 454 (9th Cir. 1983).

3 The Court has reviewed the applicable legal standards and, good cause appearing,
4 concludes that it is appropriate to adopt the findings and recommendations in full. Accordingly,
5 **IT IS HEREBY ORDERED** that:

- 6 1. The findings and recommendations (ECF No. 29) are **ADOPTED** in full;
- 7 2. Defendant's Motion to Dismiss (ECF No. 20) is **GRANTED**;
- 8 3. Defendant's Motion to Declare Plaintiff Vexatious (ECF No. 21) is **GRANTED** in part
9 and **DENIED** in part;
- 10 4. Plaintiff is hereby **DECLARED** a vexatious litigant; and
- 11 5. The Court **ISSUES** a pre-filing order as described in Section II.D. of the Magistrate
12 Judge's findings and recommendations; and
- 13 6. The Clerk of the Court is directed to **CLOSE** this case.

14 **IT IS SO ORDERED.**

15 Dated: September 30, 2019



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17 MORRISON C. ENGLAND, JR.
18 UNITED STATES DISTRICT JUDGE
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#560 Filing to e

UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT

.. LUCIO A. BARROGA, .. NO 19-17418 ..
.. Plaintiff - Appellant ..
.. V. .. CASE NO. 2-19CV 00921
BOARD OF ADMINISTRATION, CALIFORNIA .. (Sacramento District Court)
PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS), .. MOTION FOR RELIEF FROM ..
Defendant-Appellee .. ORDER OF SEPT. 30, 2019 ..

MEMORANDUM OF POINTS AND AUTHORITIES

**MOTION FOR RELIEF FROM DISTRICT COURT ORDER OF SEPT. 30, 2019
ADOPTING IN FULL FINDINGS AND RECOMMENDATIONS AND GRANTING
DEFENDANT'S MOTION TO DISMISS**

**Because the ORDER of Sept. 30, 2019 adopted in full the Findings and
Recommendations, therefore the Plaintiff's OBJECTIONS TO THE FINDINGS AND
RECOMMENDATIONS of Sept. 20, 2019 EX 388 also answer the ORDER of Sept.
30, 2019. Please read EX. 388.**

**The fact that the ORDER of Sept. 30, 2019 blindly adopted a wrong Findings and
Recommendation and did not consider the merits of Plaintiff's OBJECTIONS TO
THE FINDINGS AND RECOMMENDATIONS of Sept. 20, 2019, the judgment is
prejudicial.**

FACTS

**After reaching 50 year old in April 1979 and retireble, I submitted an
application for retirement pensions from previous services with the City of**

423

El Segundo, and later I went to Sacramento PERS office to follow up application. PERS offered me two choices: 1) to receive a monthly pension of \$135, or 2) as alternative, to receive a lump sum of my member contributions (approx. 7% of salaries), but the employer's contributions on my behalf (approx. 7.75% of salaries under Gov't Code Sec. 20750.1 [new 20795]), will remain with PERS. I received approximately \$10,000 of my accumulated member contributions, with the employer's contributions on my behalf remaining in deposit with PERS.

Later in some years, I requested that the offered monthly pension shall pay and redeposit for the withdrawn member contributions as a loan which PERS maliciously omitted to inform the monthly pension can redeposit per statute (Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of Withdrawals, and when the loan or withdrawal is fully paid with interest, then monthly pension will start to me. But PERS claimed the employer's contributions which have remained with PERS are NOT "normal contributions", therefore I ceased to be a member when the member contributions were withdrawn, and I am not anymore entitled any pension benefits. I have contended that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS and are "normal contributions" under the laws, and therefore, I am entitled retirement benefits. .

ISSUES OR CAUSES OF ACTION

Proof that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS, to quote:

Cal Gov't Code Sec. 20390 (new 20340)

Condition of cessation A person ceases to be a member :

(b) if he or she is paid his or her "normal contributions".

Therefore, if the employer's contributions which have remained in deposit with PERS are "normal contributions", then I am still a PERS member.

ISSUE I: ARE THE EMPLOYERS'S CONTRIBUTIONS TO THE RETIREMENT FUND ON BEHALF OF MEMBERS, "NORMAL CONTRIBUTIONS" UNDER THE NEW DISCOVERED STATUTE, (CAL) GOV'T CODE SEC. 20691? . (New Issue, different from prior issues)

(Cal) Gov't Code Sec. 20691 Payment of member normal contributions by contracting agencies or school employer

Notwithstanding any other provision of law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. The payment shall be reported simply as normal contributions and shall be credited to member accounts.

The employer's contributions are explicit "normal contributions", therefore I am still a PERS member, entitled retirement benefits.

ISSUE II: IS PERS'S ALTERNATIVE OFFER FOR THE WITHDRAWAL OF THE ACCUMULATED MEMBER CONTRIBUTIONS TO DEPRIVE PLAINTIFF OF LIFETIME RETIREMENT ALLOWANCE AFTER PLAINTIFF HAD QUALIFIED FOR RETIREMENT AFTER REACHING 50 YEARS OLD, A VIOLATION OF (CAL) GOV'T CODE SEC. 21203 (NEW 21259)?

Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement

Subject to compliance with this part, after a member has qualified as to . age and service for retirement for service, nothing shall deprive him or her

of the right to retirement allowance as determined under this part.

ISSUE III : IS PERS'S DENIAL FOR CONSIDERING THE WITHDRAWN MEMBER CONTRIBUTIONS AS LOANS A VIOLATION OF PERS'S LOAN LAWS WHICH ALLOW WITHDRAWALS AS LOANS? OR DISCRIMINATORY?

(Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest. .

. . .member may file an election with the board to redeposit in the retirement fund, in lump sum or by installment payment (1) an amount equal to the accumulated contributions... withdrawn, and (2) an amount equal to the interest. .,and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance at date of election to redeposit.

(Cal) Gov't Code Sec. 20211 (new 20202) Natural disaster relief loan.

(Cal) Gov't Code Sec. 20208.5 (new 20203) Security loan.

(Cal) Gov't Code Sec. 20215 (new 20200) Home financing program.

(Cal) Gov't Code Sec. 20201 Secured home loan.

ISSUE IV: CONSTITUTION, AMENDMENT 13 IS VIOLATED. PERS HAS DENIED PLAINTIFF RETIREMENT BENEFITS DERIVED FROM THE EMPLOYER'S CONTRIBUTIONS TO THE RETIREMENT FUND ON MY BAHALF, WHICH EMPLOYER'S CONTRIBUTIONS I HAD WORKED AND TOILED FOR, to quote:

Amendment 13, Section 1. Neither slavery nor involuntary servitude . . .shall exist within the United States, . .

New discovery: California Constitution Article 3, Sec. 6 (d)

.(d) Personal Right of Action and Jurisdiction of Courts.

Any person who is a resident of or doing business in the State of California shall have standing to sue the state of California

If any of the ISSUES is YES, in fact, all are yes, then I am entitled retirement benefits and the redeposit of the withdrawn member contributions

Defendant PERS wanted settlement, see defendant's Status Report Ex 152, but Attorney did not respond to request for settlement, see EX 294.

357 May 22, 2019 filed Case No 19CV 00921 COMPLAINT FOR DECLARATORY RELIEF UNDER CAL CODE OF CIVIL PROC. SEC. 1062 ON NEW OR SAME ACTION BASED ON THE SAME FACTS WHICH OVERCOMES RES JUDICATA and SUMMONS ~~Ex 357A~~ requiring a respond within 21 days. Magistrate Judge Edmund Brennan and District Judge Troy Nunley were assigned to this case.

Plaintiff did not respond to the complaint.

367 Jun. 11, 2019 Order by Magistrate Judge Newman ordered himself as Magistrate Judge to replaced assigned Magistrate Judge Edmund Brennan. (This action is usurpation of power in violation of law.)

Jun 14, 2019 My letter to Clerk objecting to Magistrate Judge Newman's involvement because of prior repeatedly rendering adverse judgment without authority, see EXs 135, 137A, 299.

368 Jun 24, 2019 Request For Entry of Default

370 Jun 21, 2019 Defendant's Request For Extension Of Time To Respond,

374 July 5, 2019 Plaintiff's REQUEST FOR ENTRY OF DEFAULT citing reasons: 1) FRCP Sec. 55 entry of default, 2) minute order declining entry of default unlawful,

3) Defendant request for extension to respond to the complaint, untimely, violates FRCP Sec. 6 Extending Time.

381 July 22, 2019 Defendant's MOTION TO DISMISS, giving 2 reasons to dismiss:

1) Eleventh Amendment Immunity, because Defendant PERS being a state agency cannot be sued.

2) Res Judicata and Collateral Estoppel.

382 Aug 1, 2019 OBJECTION TO DEFENDANT'S MOTION TO DISMISS

Federal Rule of Civ. Proc. Sec. 6 (b) Extension time is cited, shown violated which is reason for default in untimely Request for Extension of Time to Respond.

For abundance of reasons for Objection to Motion to Dismiss, the issues raised are answered.

Answering 1): California Constitution Article 3, Sec. 6(d) providing any person who is a resident of California has standing to sue the state of California prevails over Eleventh Amendment immunity of ORDER of Dec. 19, 2012 EX 176 because defendant PERS being a state agency cannot be sued.

Answering 2): Res judicata and collateral estoppel.

Res judicata and collateral estoppel depend on prior determined issues, but the 4 issues in the complaint ISSUE I, II, III, IV and California Constitution Article 3, Sec. (6)(d) were never determined by any court. In fact courts including Magistrate Judge Newman refused to determine the issues, because they aimed for 11th Amendment immunity. So without determined issues, there is no basis to apply for res judicata and collateral estoppel.

Aug. 29, 2019 Court hearing. Plaintiff argued the ISSUES have never been determined in court, against charge of vexatious litigant by Magistrate Judge.

387 Sept 9, 2019 Magistrate Judge Newman's FINDINGS AND RECOMMENDATION

VEXATIOUS LITIGANT CHARGE

Other issues raised in Findings and Recommendations:

- I. Barroga's claim fails on the same grounds as in the 2012 action. p.3
- II . Barroga should be deemed a vexatious litigant, and a pre-filing order should be imposed, p.3

Barroga's lack of counsel.

388 Sept 20, 2019 OBJECTION TO FINDINGS AND RECOMMENDATIONS

Answering I : The judgment ORDER of Dec. 19, 2012 Dismissed the case on the ground of Eleventh Amendment immunity, because defendant PERS being a state agency can not be sued.

But California Constitution Article 3, Sec. 6(d) providing any person who is a resident of California has standing to sue the state of California prevails over 11th Amendment immunity of the ORDER of Dec19, 2012.

Answering II): Vexatious Litigant Charge:

The litigant law: California Code of Civil Proc. Sec. 391 is quoted:

- (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined

adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly re-litigates or attempts to re-litigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

Under the litigant law, the issues or controversies must first be determined and interpreted, and only after final determination that there be a charge of vexatious litigant for repeatedly re-litigating the determined issues.

But the issues in the complaint in controversy , ISSUES I, II, III and IV answerable by yes or no, and the new discovered evidence, California Constitution Article 3, Sec. 6(d) have never been determined in court. Courts and Magistrate Judge Newman refused to determine and interpret the law. From the above law, without prior finally determined issues, there is no basis for charge of vexatious litigant, so the charge of vexatious litigant is wrong. Please see Plaintiff's OBJECTIONS TO FINDINGS AND RCOMMENDATIONS of Sept. 20, 2019 EX 388 for more explanations of wrong to charge of vexatious litigant.

Answering Barroga's lack of counsel. To quote law:

28 US Code Sec. 1654 Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein

Not addressing case on the merits because it is pro se is violation of law. A similar case, in the U.S. Court of Appeals for the Federal Circuit Case 89-1376, 90-1080, In Re Lucio A. Barroga 904 F.2d 44, (See EXHIBIT 01), is quoted:

We find it troubling that the Commissioner did not address Barroga's petition on the merits. We find it troubling that the Commissioner granted a petition where a counsel was involved. . . while he denied it here where a pro se was involved. . . we determine, that the Commissioner abused his discretion. . . IT IS ORDERED THAT: The Commissioner's. . . order is vacated.

Magistrate judge Newman repeatedly rendered judgment without authority in violation of law, 28 USC 636 (A)(B), see orders EXHIBITS 135, 137A, 299. Even the US Court of Appeals in an order of Apr. 25, 2018 cited the violation without authority, see EXHIBIT 329, to quote:

(9th Cir. 1992) holding that absent consent, a federal magistrate judge lacked authority to a post-judgment decision that has dispositive effect on the parties.

391 Sept 30, 2019 ORDER adopting in full FINDINGS AND RECOMENDATIONS AND GRANTING DEFENDANT'S MOTION TO DISMISS, enumerating:

1. The Findings and Recommendation (ECF No. 29) are ADOPTED in full.
2. Defendant's Motion to Dismiss (ECF 20) is GRANTED
3. Defendant's Motion To Declare Plaintiff Vexatious (ECF No. 21) is GRANTED in part and DENIED in part.

4. Plaintiff is hereby DECLARED a vexatious litigant, and
5. The court ISSUES a pre-filing order as described in Section II D of the Magistrate Judge's Findings and Recommendations
6. The Clerk of the Court is directed to CLOSED this case.

IT IS SO ORDERED, Signed MORRISON C. ENGLAND JR. United States District Judge

PLAINTIFF'S OBJECTIONS TO ORDER OF SEPT. 30, 2019

Answering 1. The ORDER adopting in full Findings and Recommendations is wrong because it is not consistent with facts and law. See ARGUMENTS below.

Answering 2. The ORDER granting the Defendant's Motion to Dismiss is wrong because it is not consistent with facts and laws.

Answering 3, 4, 5. The vexatious litigant charge is wrong because it is not based on facts and laws. This issue of vexatious litigant charge is well answered in the Plaintiff's OBJECTIONS TO THE FINDING AND RECOMMENDATIONS of Sept. 20, 2019, see EX 388, but the ORDER of Sept. 30, failed to consider the merits of the OBJECTIONS, thus the judgment is prejudicial.

ARGUMENTS:

Again, because the ORDER of September 30, 2019 by Judge England adopted in full the Finding and Recommendation of Sept. 9, 2019, therefore Plaintiff's Objection to Findings and Recommendations of Sept. 20, 2019 answers also the issues of the ORDER of Sept. 30, 2019. Please see Plaintiff's Objections to Findings and Recommendations of Sept. 20, 2019 EX 388.

Defendant Cal Public Employees' Retirement System (PERS) depriving me of benefits derived from the employer's contributions to the retirement fund on my behalf which remain in deposit with PERS is violation of Fifth Amendment, to quote:

No person shall be . . .deprived of property without due process of law. .

Violation of Thirteen Amendment, ISSUE IV in the Complaint, to quote:

Section 1. Neither slavery nor involuntary servitude . . .shall exist within the United States, .

The Request for Extension of Time to Respond to the Complaint was untimely in violation of FRCP 6(b) and therefore on default, so the subsequent Findings and Recommendation is therefore on default.

Reprinted is vexatious litigant law, Cal Code Civ. Proc. Sec. 391, to quote:

(b) "Vexatious litigant" means a person who does any of the following:

(2) After a litigation has been finally determined against the person, repeatedly re-litigates or attempts to re-litigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

} {

From the above litigant law, because the ISSUES I, II, III, IV answerable by yes or no and California Constitution Article 3, Sec 6(d) were never determined and interpreted by any court , therefore for lack of finally determined issues repeatedly re-litigated as basis, the charge of vexatious litigant is false and wrong. And for the same reason, res judicata and collateral estoppel does not apply. To be declared a VEXATIOUS LITIGANT is wrong and prejudicial.

A judge has the duty to decide issues in controversy, to quote:

Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified."

And 28 USC Sec. 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

The refusal of Magistrate Judge Newman and the court to determine and interpret the ISSUES I, II, III, IV and California Constitution Article 3, Sec. 6(d) before charge of vexatious litigant is plain obstruction of justice.

Refusal to interpret the law in controversy violates the Code of conduct for U.S. Judges, to quote:

CANON 2: A judge should avoid impropriety and the appearance of impropriety

Respect of law. A judge should respect and comply with the law.

Outside influence. A judge should not allow...

Reiterating, California Constitution Article 3, Sec 6(d) which provides any resident of California has standing to sue the state of California prevails over 11th

Amendment immunity which is the basis of the dismissal ORDER of Dec. 19. 2012, EX 176, which provides Defendant PERS being a state agency cannot be sued.

Against res judicata, Relief available on trial on new discovered evidence:

Calif Code of Civ. Proc. Sec. 657 New trial, causes, .

1. abuse of discretion... .

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and . . . produced at the trial.

6. Insufficiency of evidence to justify the. . decision, or the decision is against the law.

Notice: The final order of Dec. 19, 2012 dismissing by 11th Amendment immunity is against the prevailing California Constitution Article 3, Sec. 6(d) providing any resident of California has standing to sue the state of California.

CIV/1
Federal Rule of Appeal Proc. Sec. 60, to quote:

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING...

for the following reasons:

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under ;

(4) the judgment is void;

Cal Constitution Article 3 Sec.6(d) voided Order of Dec. 19, 2012 on Eleventh Amendment immunity.

Statute of limitation shall not apply, quote:

(Cal) Gov't Code Sec. 20181 (new 20164)

Duration of obligation; limitation of actions

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

Anybody can represent himself personally in any court per 28 USC Sec. 1654. Not considering pro se on the merit violates the law, See In Re Lucio A. Barrago 904 F,2d 426 (Fed. Cir. 1990) US Court of Appeal for Federal Circuit

Defendant PERS wanted settlement, see Defendant's Status Report, EX 152, but Attorney did not respond for request for settlement , see EX 294.

RELIEF SOUGHT:

From the foregoing, the ORDER of September 30, 2019 by US District Judge Morrison England is wrong and should be reversed.

Therefore Defendant Board of Administration, PERS should pay Plaintiff Barroga the accumulated pension in the amount of \$3,565,573.45 up to December 2018 and a monthly pension of \$6,192.39 starting January 2019 , accruing and accumulating. See EXHIBIT 34. (Calculation of pension benefits.)

Date: October 22, 2019

Respectfully submitted:

Feb. 8, 2020

Lucio A. Barroga
Lucio A. Barroga

Lucio A. Barroga

Attached: EXHIBITS numbered at the right bottom of first page of documents.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIO A. BARROGA,
Plaintiff and Appellant,

v.

**BOARD OF ADMINISTRATION, CAL
PUBLIC EMPLOYEES' RETIREMENT
SYSTEM,**

Defendant and Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:19-CV-00921-MCE-KJN
Kendall J. Newman, Judge

APPELLEE'S BRIEF

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INTRODUCTION

In the late 1970s, plaintiff/appellant Lucio Barroga (Barroga) retired from government service and elected to withdraw his employee retirement contributions from defendant/appellee CalPERS (CalPERS) in a lump sum rather than collect a monthly pension benefit. Nearly ten years later, Barroga sought to re-contribute his withdrawn contributions and have CalPERS grant him a monthly pension benefit. Following an administrative hearing, CalPERS determined that Barroga was not entitled to redeposit withdrawn contributions in order to obtain a CalPERS pension. Barroga appealed this administrative decision through the California state court system and the case reached a final determination upholding the administrative decision in 1994. Notwithstanding that final determination, Barroga has sought to re-litigate his claim for CalPERS benefits numerous times over the past 25 years before the California Superior Court for the County of Los Angeles, the California Court of Appeal, the California Supreme Court, the United States District Court for the Central and Eastern Districts of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

This instant lawsuit arises from Barroga's attempt to re-litigate the matter, once again, before the United States District Court for the Eastern

District of California. The district court correctly dismissed the matter because CalPERS is entitled to immunity under the Eleventh Amendment. Further, the district court's dismissal may also be affirmed on the alternative grounds, not reached by the district court but fully supported by the record, that Barroga's case is barred by the doctrine of res judicata. Indeed, this lawsuit is Barroga's twenty-second attempt to re-litigate his claim against CalPERS for pension benefits, which was fully and finally adjudicated in 1994.

The district court also appropriately declared Barroga to be a vexatious litigant and imposed a pre-filing order, finding that his litigation history – which includes twenty-one separate lawsuits over the past 25 years attempting to re-litigate his claim against CalPERS for pension benefits, and two vexatious litigant orders previously issued against him by the California Superior Court and the Central District of California -- demonstrates a pattern of frivolous, duplicative, and harassing complaints and motions. Barroga has made no showing that the district court abused its discretion in declaring him a vexatious litigant or subjecting him to a pre-filing order.

For these reasons, this Court should affirm the judgment of the district court.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331. Barroga appeals from a final judgment following an order granting CalPERS' motion to dismiss Barroga's complaint without leave to amend. Appellee's Suppl. Excerpts of Record (SER) 1108-1109. Barroga timely filed a notice of appeal on October 24, 2019. SER 1285-1286; Fed. R. App. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court properly dismissed the complaint because CalPERS is entitled to Eleventh Amendment immunity.
2. Whether the district court's dismissal of Barroga's complaint should be affirmed on the alternative ground that Barroga's claims are barred by res judicata.
3. Whether the district court abused its discretion when it declared Barroga a vexatious litigant and issued a pre-filing order.

STATEMENT OF THE FACTS

The City of El Segundo employed Barroga from 1969 to 1977. *See* SER 40. In 1979, Barroga elected to withdraw his employment contributions from CalPERS. *Ibid*; SER 47-48. CalPERS remitted to Barroga his employee contributions of nearly \$10,000 and terminated his membership

from CalPERS. SER 8, 40, 45, 47. Almost ten years later in 1988, Barroga wrote to CalPERS requesting retirement benefits, asserting that he had withdrawn his contributions by mistake. SER 8-9, 40, 47-48. Barroga requested that CalPERS treat its remittance of his employee contributions as a loan. *Ibid.*

CalPERS denied Barroga's request, informing him that, because he was not a current member of CalPERS, he was not eligible to redeposit his contributions and that CalPERS' prior remittance to him could not be treated as a loan. SER 9, 45-48, 52. Barroga appealed this decision at an administrative hearing. *Ibid*; SER 17. An administrative hearing was conducted on or about May 3, 1990, and an Administrative Law Judge (ALJ) ruled against Barroga, concluding that he was not entitled to redeposit withdrawn contributions in order to obtain a CalPERS pension. *Ibid*. In November 1990, the Board of Administration of CalPERS adopted the ALJ's proposed decision. *Ibid*.

Barroga first attempted to appeal the administrative decision denying him CalPERS retirement benefits via a lawsuit for damages against CalPERS' Board of Administration for breach of contract and fraud filed in Los Angeles Superior Court on February 14, 1991. *Barroga v. Bd. of Admin. CalPERS*, KC003981, SER 17, 37-38. SER 39-43. The Superior Court

finding that a litigant has a history of vexatious litigation, and is likely to “continue to abuse the judicial process and harass other parties,” will support the imposition of a pre-filing order. *Molski*, 500 F.3d at 1061 (citing *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986)). Barroga’s long history of repeatedly filing or attempting to file near identical complaints against CalPERS regarding the same claim to retirement benefits and requesting the same relief, even after that claim was conclusively and finally determined against him and the requested relief denied, establishes the frivolous and vexatious nature of this lawsuit. *Molski*, 500 F.3d at 1052. Barroga even persisted after judicial determinations that his claim for CalPERS retirement benefits was barred by res judicata. SER 1256.

Furthermore, there is no indication that Barroga’s unmeritorious filings will cease absent a pre-filing order requiring him to obtain leave of court prior to filing a new lawsuit against CalPERS. One of the substantive factors considered for issuance of a pre-filing order, and which weighs heavily in favor of one here, is “whether other sanctions would be adequate to protect the courts and other parties.” *Ringgold-Lockhart v. County. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (quoting *Molski*, 500 F.3d at 1058). Given Barroga’s extensive record of persistent unmeritorious actions and filings, merely requiring him to furnish security will not deter him from

future continued abuse of the judicial process. Hence, a pre-filing order prohibiting him from filing future actions against CalPERS without first obtaining leave of court is necessary and the district court properly issued one.

CONCLUSION

The District Court correctly granted CalPERS' motion to dismiss without leave to amend because CalPERS is entitled to immunity under the Eleventh Amendment. The district court's dismissal may also be affirmed on the additional, alternative ground that Barroga's case is barred by the doctrine of res judicata. Additionally, the district court properly determined that Barroga is a vexatious litigant and appropriately issued a pre-filing order because Barroga has repeatedly filed abusive lawsuits in propria persona against CalPERS over the past 29 years, seeking to re-litigate his long-ago adjudicated claim for pension benefits from CalPERS. Accordingly, the district court's orders and judgment should be affirmed.

LUCIO A. BARROGA
P.O. BOX 2516
LONG BEACH, CA 90801
TEL 562-243-1024

UNITED STATES COURT OF APPEALS

LUCIO A. BARROGA, ! NO. 19-17418
Plaintiff - Appellant ! CASE NO. 2-19CV 00921
V. ! DC SACRAMENTO

BOARD OF ADMINISTRATION, CALIFORNIA ! OBJECTIONS TO APPELLEE'S
PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS), ! BRIEF OF MAY 29, 2020

Defendant-Appellee !

MEMORANDUM OF POINTS AND AUTHORITIES

THIS IS PLAINTIFF-APPELLANT'S OBJECTIONS TO DEFENDANT-APPELLEE'S BRIEF
FACTS on p. 3-4 COMPLAINT FOR DECLARATORY RELIEF. . of May 22, 2019 and on
p. 1-2 MOTION FOR RELIEF FROM ORDER OF SEPT. 30, 2019 of Oct. 22, 2019, Feb.
8, 2020

After reaching 50 year old in April 1979 and retireable, I submitted an application for retirement pensions from previous services with the City of El Segundo, and later I went to Sacramento PERS office to follow up application. PERS offered me two choices: 1) to receive a monthly pension of \$135, or 2) as alternative, to receive a lump sum of my member contributions (approx. 7% of salaries), but the employer's contributions on my behalf (approx. 7.75% of salaries under Gov't Code Sec. 20750.1 [new 20795]), will remain with PERS. I received approximately \$10,000 of my accumulated member contributions, with the employer's contributions on my

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behalf remaining in deposit with PERS.

Later in some years, I requested that the offered monthly pension shall pay and redeposit for the withdrawn member contributions as a loan which PERS maliciously omitted to inform the monthly pension can redeposit per statute (Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of Withdrawals, and when the loan or withdrawal is fully paid with interest, then monthly pension will start to me. But PERS claimed the employer's contributions which have remained with PERS are NOT "normal contributions", therefore I ceased to be a member when the member contributions were withdrawn, and I am not anymore entitled any pension benefits. I have contended that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS and are "normal contributions" under the laws.

ISSUES on p. 4-6 COMPLAINT FOR DECLARATORY RELIEF . . of May 22, 2019 and on p. 2-5 MOTION FOR RELIEF FROM ORDER OF SEPT. 30, 2019

Proof that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS, to quote:

(Cal) Gov't Code Sec. 20390 (new 20340) Condition of cessation

A person ceases to be a member :

(b) if he or she is paid his or her "normal contributions".

Therefore, IF the employer's contributions which have remained in deposit with PERS are "normal contributions", then I am still a PERS member.

ISSUE I: ARE THE EMPLOYERS' CONTRIBUTIONS TO THE RETIREMENT FUND ON

BEHALF OF MEMBERS, "NORMAL CONTRIBUTIONS" UNDER THE NEW DISCOVERED STATUTE, (CAL) GOV'T CODE SEC. 20691?

(Cal) Gov't Code Sec. 20691. Payment of member normal contributions by contracting agencies or school employer

Notwithstanding any other provision of law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. . The payment shall be reported simply as normal contributions and shall be credited to member accounts.

The employer's contributions are explicit "normal contributions", therefore I am still a PERS member, entitled retirement benefits.

ISSUE II: IS PERS'S ALTERNATIVE OFFER FOR THE WITHDRAWAL OF THE ACCUMULATED MEMBER CONTRIBUTIONS TO DEPRIVE PLAINTIFF OF LIFETIME RETIREMENT ALLOWANCE AFTER PLAINTIFF HAD QUALIFIED FOR RETIREMENT AFTER REACHING 50 YEARS OLD, A VIOLATION OF (CAL) GOV'T CODE SEC. 21203 (NEW 21259)?

(Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement

Subject to compliance with this part, after a member has qualified as to . age and service for retirement for service, nothing shall deprive him or her of the right to retirement allowance as determined under this part.

ISSUE III : IS PERS'S DENIAL FOR CONSIDERING THE WITHDRAWN MEMBER CONTRIBUTIONS AS LOANS A VIOLATION OF PERS'S LOAN LAWS WHICH ALLOW WITHDRAWALS AS LOANS? OR DISCRIMINATORY?

(Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest. .

. .member may file an election with the board to redeposit in the

retirement fund, in lump sum or by installment payment (1) an amount equal to the accumulated contributions.. withdrawn, and (2) an amount equal to the interest. ,and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance at date of election to redeposit.

(Cal) Gov't Code Sec. 20211 (new 20202) Natural disaster relief loan.

(Cal) Gov't Code Sec. 20208.5 (new 20203) Security loan.

(Cal) Gov't Code Sec. 20215 (new 20200) Home financing program.

(Cal) Gov't Code Sec. 20201 Secured home loan.

ISSUE IV: CONSTITUTION, AMENDMENT 13 IS VIOLATED. PERS HAS DENIED PLAINTIFF RETIREMENT BENEFITS DERIVED FROM THE EMPLOYER'S CONTRIBUTION WHICH HAVE REMAINED IN DEPOSIT WITH PERS, WHICH EMPLOYER'S CONTRIBUTIONS PLAINTIFF HAD WORKED AND TOILED FOR, to quote:

Amendment 13, Section 1. Neither slavery nor involuntary servitude . . .shall exist within the United States, . .

New discovery: California Constitution Article 3, Sec. 6(d)

(d) Personal Right of Action and Jurisdiction of Courts

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California

If any of the ISSUES is YES, in fact, all are yes, then I am entitled retirement benefits and the redeposit of the withdrawn member contributions..

Sept. 30, 2019 filed DISMISSAL ORDER

Oct. 22, 2019, Feb. 8, 2020 served MOTION FOR RELIEF FROM THE ORDER OF SEPT. 30, 2019

3 ISSUES PRESENTED ON APPELLEE'S BRIEF OF MAY 29, 2020

4

1. Whether the district court properly dismissed the complaint because CalPERS is entitled to Eleventh Amendment immunity, p.3 on APPELLEE'S BRIEF, also (in bold letters) p.17.
2. Whether the district court's dismissal of Barroga's complaint should be affirmed on the alternative ground that Barroga's claims are barred by res judicata. p. 3, also (in bold letters) p. 21,22.
3. Whether the district court abused its discretion when it declared Barroga a vexatious litigant and issued a pre-filing order. p.3, also (in bold letters) p. 28, 32.

ANSWERING THE 3 ISSUES PRESENTED IN APPELLEE'S BRIEF of May, 29.2020

ANSWERING ISSUE 1. Whether CalPERS is entitled Eleventh Amendment Immunity because CalPERS being a state agency cannot be sued.

But California Constitution Article 3, Sec. 6 (d) which provides "any person who is a resident of or doing business in the State of California shall have standing to sue the State of California" prevails over Eleventh Amendment Immunity. See p. 12-13 MOTION FOR RELIEF FROM ORDER OF SEPT. 30, 2019 of Oct. 22, 2019, Feb. 8, 2020. APPELLEE'S BRIEF omitted mention of California Constitution Article 3, Sec.6(d). The dismissal ORDER of Sept. 30, 2019 is wrong and therefore should be reversed. .

Federal Rule of Civil Proc. Sec. 60 is quoted:

b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING.

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial. .

(4) the judgment is void

The California Constitution Article 3, Sec. 6(d) voided the ORDER of Dec. 19,2012 (EXHIBIT 176) on Eleventh Amendment Immunity and likewise, the ORDER of Sept. 30, 2019. And the refusal of the courts to interpret the issues in controversies, ISSUES I, II, III, IV and California Constitution Article 3, Sec. 6(d) is fraud in the court and is reason for relief,

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:
(3) set aside a judgment for fraud on the court.

In complete disregard of rules and laws, such as CANON 2 : " (2) A judge should hear and decide matters assigned unless disqualified", and against law of judge's duty to interpret and determine Issues in controversies, judges always dismissed the complaint on ground of Eleventh Amendment Immunity, which is unlawful, starting in the p.5 ORDER of Dec. 8, 1999, EX 16, see COMPLAINT of May 22, 2019. For unlawful actions,. to quote 5 U.S. Code § 706. Scope of review:

(2) hold unlawful and set aside ~~agency action~~, findings, and conclusions found to be—
(A) an abuse of discretion,
(B) contrary to constitutional right,. (Calif. Constituion Article 3, Sec. 6(d)) .
(D) without observance of procedure required by law;

ANSWERING ISSUE 2: Whether Barroga's claims are barred by res judicata

The courts refused to interpret the issues in controversies, ISSUE I, II, III & IV and California Constitution Article 3, Sec. 6(d) answerable by Yes or No, therefore there is no basis to apply res judicata, and Barroga's claims are NOT therefore barred by res judicata. The judges' refusal to interpret or decide the issues or laws in

controversies violated laws.

Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified."

CODE OF CONDUCT FOR UNITED STATES JUDGES

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY . . .

A. Respect for Law. A judge should respect and comply with the law

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings

The refusal of the judges to interpret the laws or issues in controversies such as ISSUES I, II, III & IV and California Constitution Article 3, Sec. 6(d) answerable by Yes or No violated laws and is plain obstruction of justice and prejudicial. For unlawful refusal to determine laws, see 5 U.S. Code § 706. Scope of review cited above.

See p.12- 13 MOTION FOR RELIEF FROM THE ORDER OF SEPT. 30,2019 of Oct. 22, 2019, Feb. 8, 2020.

ANSWERING ISSUE 3: Whether Barroga is a vexatious litigant.

The vexatious litigant law California Code of Civil Proc. Sec. 391, to quote:

b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

From the above litigant law, because the ISSUES I, II, III, IV and California Constitution Article 3, Sec. 6(d) answerable by yes or no were never determined and interpreted by any court, therefore for lack of finally determined issues repeatedly re-litigated as basis, the charge of vexatious litigant is false and wrong. See p. 11-12 MOTION FOR RELIEF FROM THE ORDER OF SEPT. 30,2019 of Oct. 22, 2019, Feb. 8, 2020.

Again, for the same reasons as preceding ANSWERING ISSUE 2, the refusal of the judges to interpret the laws or issues in controversies such as ISSUES I, II, III & IV and California Constitution Article 3, Sec. 6(d) answerable by Yes or No violated laws and is plain obstruction of justice and prejudicial.

The above cited violated laws regarding refusal of judges to interpret laws or issues in controversies in ANSWERING ISSUES 1 & 2 also apply here

to ANSWERING ISSUE 3. Therefore, the charge of vexatious litigant is false and wrong and unlawful. For unlawful refusal of judges to determine laws or issues in controversies, 5 U.S. Code § 706. Scope of review is cited again:

(2) hold unlawful and set aside ~~agency, or judge~~, findings, and conclusions found to be—

- (A) an abuse of discretion,
- (B) contrary to constitutional right, (Calif. Constituion Article 3, Sec. 6(d)) .
- (D) without observance of procedure required by law;

Calif. Gov't Code Sec. 20164 is quoted:

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

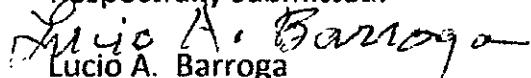
OTICE: Defendant PERS wanted settlement, see Defendant Status Report, Exhibit 152, but attorney did not respond for request for settlement, see Exhibit 294.

From the foregoing, the dismissal ORDER of September 30, 2019 by U.S. District Judge Morrison England is wrong and should be reversed or be set aside. And the MOTION FOR RELIEF FROM ORDER OF SEPT. 30, 2019 should be granted.

Therefore, Defendant Board of Administration, PERS should pay Plaintiff Lucio A. Barroga the accumulated pension in the amount of \$3,565,573.45 up to December 2018 and a monthly pension of \$6,192.39 starting January 2019, accruing and accumulating. See EXHIBIT 34 (Calculation of pension benefits)

Date: June 11, 2020

Respectfully submitted:


Lucio A. Barroga

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 23 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LUCIO A. BARROGA,

Plaintiff-Appellant,

v.

BOARD OF ADMINISTRATION OF
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Defendant-Appellee.

No. 19-17418

D.C. No. 2:19-cv-00921-MCE-KJN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Submitted February 17, 2021**

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

*Lucio A. Barroga appeals pro se from the district court's judgment
dismissing his action alleging federal claims related to pension benefits from the
California Public Employees' Retirement System. We have jurisdiction under*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

28 U.S.C. § 1291. We review de novo a dismissal on the basis of claim preclusion.

Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002). We affirm.

The district court properly dismissed Barroga's action on the basis of claim preclusion because the action involved the same primary right raised in a prior administrative proceeding or state court case that resulted in a final judgment on the merits. *See San Diego Police Officers' Ass'n v. San Diego City Emps. 'Ret. Sys.*, 568 F.3d 725, 734 (9th Cir. 2009) (federal court must follow state's preclusion rules to determine effect of a state court judgment; discussing elements of claim preclusion under California law); *see also White v. City of Pasadena*, 671 F.3d 918, 927 (9th Cir. 2012) (under California law, a prior administrative decision is "binding in later civil actions to the same extent as a state court decision if the administrative proceeding possessed the requisite judicial character" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion by declaring Barroga a vexatious litigant and entering a pre-filing review order against him because all of the requirements for entering a pre-filing review order were met. *See Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (setting forth standard of review and requirements for pre-filing review orders).

We reject as without merit Barroga's contentions that the judgment is void, the district court obstructed justice or otherwise acted improperly, and defendant's

request for extension of time to respond to the complaint was untimely.

Barroga's motion for judgment on the pleadings is denied.

AFFIRMED.

LUCIO A. BARROGA

P.O. BOX 2516

LONG BEACH, CA 90801

Tel. 562-243-1024

UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT

LUCIO A. BARROGA,	No. 19-17418
Plaintiff-Appellant	
V.	Case No. 2-19CV0921
BOARD OF ADMINISTRATION, CALIFORNIA	(Sacramento District Court)
PUBLIC EMPLOYEES RETIREMENT SYSTEM, PERS	PETITION FOR REHEARING
Defendant-Appellee	UNDER FRAP 40

MEMORANDUM OF POINTS AND AUTHORITIES

PETITION FOR REHEARING UNDER FRAP 40 FOR POINT OF LAWS AND FACTS
THAT WERE OVERLOOKED OR MISAPPREHENDED FROM THE MEMORANDUM OF
FEBRUARY 23, 2021 BY CIRCUIT JUDGES FERNANDEZ, BYBEE and BADE

A petition for rehearing en banc also will be filed.

FRAP Sec. 40:

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition

5 U.S. Code § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall **(2) hold unlawful and set aside** agency action, findings, and conclusions found to be—
A) arbitrary, capricious, an abuse of discretion, or otherwise not in

/

PL

accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the . . . of prejudicial error (Emphasis added)

Judicial Notice: The panel judges did not address to "decide all relevant questions of law, interpret constitutional and statutory provisions," as mandated by 5 U.S.

Code § 706 Scope of review. The issues of laws are the following:

ISSUE I: Involving (Cal) Gov't Code Sec. 20691. Payment of member normal contributions p.3.

ISSUE II: Involving (Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement p.3.

ISSUE III: Involving (Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest. . p.4.

ISSUE IV: Involving **Amendment 13, Section 1.** Prohibition of slavery p.4.

ISSUE V: Involving **Cal Constitution Article 3, Sec. 6 (d)** Personal Right of Action to sue PERS, a California state agency prevails over Amendment 13 immunity. p.4-5.

FACTS:

For previous services with the City of El Segundo, 7% of salaries of employee and also approximately 7% of salaries of employee from employer were contributed to the retirement fund with Cal Public Employees' Retirement System, (PERS).

The employee's contributions were withdrawn, but the employer's contributions on my behalf have remained in deposit with PERS.

ISSUES in the p.2-5 MOTION FOR RELIEF FROM THE ORDER OF SEPT. 30, 2019

Proof that I am still a PERS member, because the employer's contributions on my behalf have remained in deposit with PERS, to quote:

(Cal) Gov't Code Sec. 20390 (new 20340) Condition of cessation

A person ceases to be a member: . .

(b) if he or she is paid his or her "normal contributions".

Therefore, IF the employer's contributions which have remained in deposit with PERS are "normal contributions", then I am still a PERS member.

ISSUE I: ARE THE EMPLOYERS' CONTRIBUTIONS TO THE RETIREMENT FUND ON BEHALF OF MEMBERS, "NORMAL CONTRIBUTIONS" UNDER STATUTE, (CAL) GOV'T CODE SEC. 20691?

(Cal) Gov't Code Sec. 20691. Payment of member normal contributions by contracting agencies or school employer.

Notwithstanding any other provision of law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. The payment shall be reported simply as normal contributions and shall be credited to member accounts.

The employer's contributions are explicit "normal contributions", therefore I am still a PERS member, entitled retirement benefits.

ISSUE II: IS PERS'S ALTERNATIVE OFFER FOR THE WITHDRAWAL OF THE ACCUMULATED MEMBER CONTRIBUTIONS TO DEPRIVE PLAINTIFF OF LIFETIME RETIREMENT ALLOWANCE AFTER PLAINTIFF HAD QUALIFIED FOR RETIREMENT AFTER REACHING 50 YEARS OLD, A VIOLATION OF (CAL) GOV'T CODE SEC. 21203 (NEW 21259)?

(Cal) Gov't Code Sec. 21203 (new 21259) Nonforfeiture after qualification for retirement

Subject to compliance with this part, after a member has qualified as to age and service for retirement for service, nothing shall deprive him or her of the right to retirement allowance as determined under this part.

ISSUE III : IS PERS'S DENIAL FOR CONSIDERING THE WITHDRAWN MEMBER CONTRIBUTIONS AS LOANS A VIOLATION OF PERS'S LOAN LAWS WHICH ALLOW WITHDRAWALS AS LOANS? OR DISCRIMINATORY?

(Cal) Gov't Code Sec. 20654 (new 20750) Redeposit of withdrawals, interest.

. .member may file an election with the board to redeposit in the retirement fund, in lump sum or by installment payment (1) an amount equal to the accumulated contributions.. .withdrawn, and (2) an amount equal to the interest. .,and (3) if he or she elects to redeposit in other than one sum, interest on the unpaid balance at date of election to redeposit.

(Cal) Gov't Code Sec. 20211 (new 20202) Natural disaster relief loan.

(Cal) Gov't Code Sec. 20208.5 (new 20203) Security loan.

(Cal) Gov't Code Sec. 20215 (new 20200) Home financing program.

(Cal) Gov't Code Sec. 20201 Secured home loan.

ISSUE IV: AMENDMENT 13, PROHIBITION OF SLAVERY, IS VIOLATED. PERS HAS DENIED PLAINTIFF RETIREMENT BENEFITS DERIVED FROM THE EMPLOYER'S CONTRIBUTIONS TO THE RETIREMENT FUND ON MY BAHALF, WHICH EMPLOYER'S CONTRIBUTIONS I HAD WORKED AND TOILED FOR, to quote:

Amendment 13, Section 1. Neither slavery nor involuntary servitude . . .shall exist within the United States, . .

ISSUE V: California Constitution Article 3, Sec. 6 (d)

(d) Personal Right of Action and Jurisdiction of Courts.

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section, .

Cal Constitution Article 3, Sec. 6(d) prevails over Eleventh Amendment Immunity that Defendant PERS being a state agency is immune from being sued , which Eleventh Amendment immunity is basis for the dismissal of the complaint.

If any of the ISSUES is YES, in fact, all are yes, then I am entitled retirement benefits and the redeposit of the withdrawn member contributions.

The MEMORANDUM of Feb. 23, 2021 is quoted:

The district court properly dismissed Barroga's action on the basis of claim preclusion because the action involved the same primary right raised in a prior administrative proceeding or state court case that resulted on a final judgment on the merit.

The MEMORANDUM regarding claim preclusion, overlooked and misapprehended the facts that the prior administrative law judge and state judges were wrong in deciding that I ceased to be a member when I withdraw the accumulated member contributions and therefore I am not anymore entitled retirement benefits from the employer's contributions remaining in deposit with PERS. See wrong arguments of PERS, which was the basis of prior court dismissal orders, p.2 letter (EX4) dated Sept 5, 1995 by Kayla Gillan, Deputy General Counsel and letter (EX 5) dated Apr. 18, 1996 by Richard H. Koppes, Deputy Executive Officer and General Counsel. But the MEMORANDUM overlooked that the district court's refusal to interpret the issues in controversies, ISSUES I, II, III and IV, and (V) Calif Constitution Article 3 Sec 6(d) answerable by yes or no is unlawful. Please see above ISSUE I, that I am still a PERS member because the employees' contributions to the retirement fund on my behalf remain in deposit with PERS

and are "normal contributions". The court's refusal to interpret the issues, ISSUES I, II, III and IV and (V) Calif Constitution Article 3 Sec (6d) in controversies violated laws:

[] Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified."

CANON 3 CALIFORNIA CODE OF JUDICIAL ETHICS

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

The panel judges did not address to determine and interpret the issues of laws as mandated by 5 U.S. Code § 706. Scope of review and other laws cited that could prove the district court is wrong. .

Federal Rules of Civil Procedure Sec 60

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial

(4) the judgment is void;

(6) any other reason that justifies relief. (Note: Cal Constitution Article 3 Sec 6(d) prevails over Eleventh Amendment immunity.)

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(2) grant relief. , to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court. (Note: Refusal of court to address and interpret the issues is fraud on the court)

The MEMORANDUM is quoted:

The district court did not abuse its discretion by declaring Barroga a vexatious litigant. .

The MEMORANDUM overlooked the fact that plaintiff is not a vexatious litigant under the law.

California Vexatious Litigant Law, CODE OF CIVIL PROCEDURE SECTION 391:

- 1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person
- (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

The California vexatious litigant law requires that issues must be first addressed and finally determined, but judges refused to address and interpret the laws in dispute so there is no basis for charge of vexatious litigant. The judge's refusal to interpret issues in dispute is unlawful, and therefore is abuse of discretion. The panel judges overlooked the fact that the district court refused to address and decide the issues of laws in dispute, ISSUES I, II, III and IV and California Constitution, Article 3, Sec. 6(d) answerable by yes or no, so the district court's refusal to address and interpret the issues of laws and constitutions is abuse of discretion for violation of laws: 5 USC Sec. 706 Scope of reviews, See above.

[] Cal Code of Civ. Proc. Sec. 170 decrees that "a judge has the duty to decide any proceeding in which he or she is not disqualified."

CANON 3 CALIFORNIA CODE OF JUDICIAL ETHICS

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

CODE OF CONDUCT FOR US JUDGES

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(A) *Respect for Law.* A judge should respect and comply with the law . .

(B) *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

(2) A judge should hear and decide matters assigned, unless disqualified,

A similar case of abuse of discretion for not addressing issues on the merit in:

In Re Lucio A. Barroga, 904 F.2d 44 (Fed.Cir. 1990) (US COURT OF APPEALS FOR THE FEDERAL CIRCUIT) is quoted:

We find it troubling that the Commissioner did not address Barroga's petition on the merits. We find it troubling that the Commissioner granted a petition. . . where counsel was involved while he denied it here where a pro se was involved. July 13, 1989 Order at 2-3. In view of all the circumstances here, we determine that the Commissioner abused his discretion. . . . Accordingly, IT IS ORDERED THAT: The Commissioner's September 15, 1989 order is vacated."

The MEMORANDUM of Feb. 23, 2021 misapprehended or overlooked that the district court's refusal to interpret and determine the issues in dispute answerable by yes or no, ISSUES I, II, III and IV and California Constitution Article 3 Sec 6(d) for any resident of California has standing to sue the state of California, is violation of laws: 5 USC Sec.706 Scope of review, and the many above other cited laws.

From the foregoing, the district court dismissing the Barroga's action on the basis of claim preclusion is wrong, because the prior administrative proceeding was wrong in its decision that I ceased to be a member of PERS when the member contributions were withdrawn, and the courts wrongly interpreting or refusing to interpret the issues in dispute is unlawful, so the district court abused its discretion for declaring Barroga a vexatious litigant, which the panel overlooked or misapprehended. And the reviewing panel judges did not consider to "decide all relevant questions of law, interpret constitutional and statutory provisions" of the issues as mandated under 5 USC Sec 706, which not consider to decide is unlawful. Therefore the petition for rehearing should be granted, and set aside the dismissal order of Sept. 30, 2019 and grant the motion for relief.

Date: March 5, 2021

Respectfully submitted:

Lucio A. Barroga
Lucio A. Barroga

Attached: 1) MEMORANDUM of Feb. 23, 2021
2) Letter (EX4) dated Sept 5, 1995 by Kayla Gillan, Deputy General Counsel
3) Letter (EX 5) dated Apr. 18, 1996 by Richard H. Koppes, Deputy Executive Officer and General Counsel
4) **In Re Lucio A. Barroga, 904 F.2d 44 (Fed.Cir. 1990) (US COURT OF APPEALS FOR THE FEDERAL CIRCUIT)**

President Obama said: RULE OF LAW

Justice Brett Kavanaugh, at the senate confirmation hearing, said: If you cite the law, you win; judgment without fear or favor; the RULE OF LAW

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2 Attorney General of California
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6 Fax: (916) 324-5567
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7 *Attorneys for Defendant, Public Employees'*
8 *Retirement System*

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11
12
13 LUCIO A. BARROGA,

14 Plaintiff,

15 v.

16
17 BOARD OF ADMINISTRATION CAL
18 PUBLIC EMPLOYEES' RETIREMENT
SYSTEM,

19 Defendant.

20
21 12 CV 1179 MCE-KJN

22
23 DEFENDANT CALIFORNIA PUBLIC
EMPLOYEES' RETIREMENT
SYSTEM'S STATUS REPORT

24 Date: October 4, 2012
Time: 10:00 a.m.
Courtroom: 25
Judge: The Honorable Kendall J.
Newman

25 Action Filed: May 2, 2012

26
27 Defendant California Public Employees' Retirement System (CalPERS) submits the
following status report pursuant to the Court's May 2, 2012 Order:

28 1. CalPERS was personally served on August 21, 2012.
2. CalPERS knows of no additional party to be joined or served.
3. CalPERS noticed and filed a motion to dismiss the complaint on September 11, 2012,

on the grounds that it has immunity under the Eleventh Amendment to the United States
Constitution and the suit is barred by res judicata. The matter involves plaintiff's election in 1979

1 to withdraw his employment contributions from CalPERS. CalPERS remitted to plaintiff his
2 employee contributions of nearly \$10,000 and terminated his membership from CalPERS. Almost
3 ten years later in 1988, plaintiff wrote to CalPERS requesting retirement benefits, asserting that
4 he had withdrawn his contributions by mistake. Plaintiff requested that CalPERS treat its
5 remittance of his employee contributions as a loan. CalPERS denied plaintiff's request, informing
6 him that, because he was not a current member of CalPERS, he was not eligible to redeposit his
7 contributions and that CalPERS' remittance to him could not be treated as a loan.

8 4. The court lacks jurisdiction because CalPERS is immune from suit under the
9 Eleventh Amendment to the United States Constitution.

10 5. CalPERS' motion to dismiss is to be heard on October 18, 2012 at 10:00 a.m. in
11 Courtroom 25.

12 6. In the event CalPERS' motion to dismiss is granted, no discovery is necessary.

13 7. Until the Court rules upon CalPERS' motion to dismiss, a scheduling order is
14 premature.

15 8. No special procedures are necessary.

16 9. If this matter goes to trial, CalPERS estimates it will take three days.

17 10. No modifications to the standard pretrial procedures are anticipated.

18 11. This matter is related to many previous matters filed by plaintiff in other venues, both
19 administrative, state, and federal. Those matters include:

- 20 • Board of Administration of CalPERS ..
- 21 • Los Angeles Superior Court (case numbers KC003981, KC024567, and KC030508),
- 22 • California District Court of Appeal for the Second Appellate District (case numbers
23 B077855 and B115924),
- 24 • California Supreme Court (case numbers S038365 and S069199),
- 25 • United States District Court for the Central District of California (case numbers CV 99-
9457, CV 03-7673, CV 04-06315, CV 06-03696, and CV 09-56),
- 26 • United States Court of Appeal for the Ninth Circuit (case numbers 05-55232, 06-56415,
27 and 09-55595), and
- 28 • United States Supreme Court (case number 98-5585).

1 12. CalPERS does not anticipate requiring a settlement conference as it believes
2 plaintiff's claims are barred by res judicata.

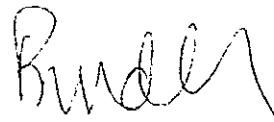
3 13. CalPERS prefers to have a settlement conference conducted by someone other than
4 the district court judge and magistrate judge assigned to this matter.

5 14. CalPERS knows of no further matters that may add to the just and expeditious
6 disposition of this matter.

7 Dated: September 27, 2012

Respectfully submitted,

9 KAMALA D. HARRIS
10 Attorney General of California
11 NIROMI W. PFEIFFER
12 Supervising Deputy Attorney General



13 BRENDA A. RAY
14 Deputy Attorney General
15 *Attorneys for Defendant*
16 *Public Employees' Retirement System*

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To: Xavier Becerra, Attorney General of California
Niromi Pfeiffer, Superv. Deputy Atty. General
Brenda A. Ray, Deputy Attorney General
1300 I St. Suite 125
Sacramento, CA 95814

From: Lucio A. Barroga
P.O. Box 2516 Long Beach,
CA 90801

Sir/Madam:

RE: Case No. 12CV01179 MCE-KJN BARROGA V. BRD. OF ADMINISTRA., PERS

I request you implement settlement which Defendant PERS wanted on this case, as shown on the DEFENDANT PERS'S STATUS REPORT served Sept 27, 2012, to quote:

13. CalPERS prefers to have a settlement conference conducted by someone other than the district court judge and the magistrate judge assigned to this matter.

Defendant PERS just pays me the present claim in the complaint, and that settles every thing.

Your earliest favorable reply is appreciated.

Date: August 14, 2017

Sincerely,
Lucio A. Barroga

Attached: DEFENDANT PERS'S STATUS REPORT served Sept. 27, 2012

Total	\$3.84
Cash	\$5.00
Change	(\$1.16)
In a hurry? Self-service kiosks offer quick and easy check-out. Any Retail Associate can show you how.	
Text your tracking number to 28777 (2USPS) to get the latest status. Standard message and data rates may apply. You may also visit USPS.com USPS Tracking or call 1-800-222-1811.	
Order stamps at usps.com/shop or call 1-800-Stamp24. Go to usps.com/clicknship to print shipping labels with postage. For other information call 1-800-ASK-USPS.	

08/14/2017	(800) 275-8777	2.44	PM
Product Description	Sale Qty	Final Price	
First-Class Mail	1	\$0.49	
Letter			
(Domestic) (SACRAMENTO, CA 95814) (Weight: 0.10 Lb 0.50 Oz) (Expected Delivery Day) (Thursday 08/17/2017)			
Certified (#USPS Certified Mail #) (7017019000045292324)	\$3.35		

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 26 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LUCIO A. BARROGA,

Plaintiff-Appellant,

v.

BOARD OF ADMINISTRATION OF
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Defendant-Appellee.

No. 19-17418

D.C. No. 2:19-cv-00921-MCE-KJN
Eastern District of California,
Sacramento

ORDER

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Barroga's petition for panel rehearing (Docket Entry No. 22) and petition for rehearing en banc (Docket Entry No. 23) are denied.

No further filings will be entertained in this closed case.

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EX 5 4/18/96

PERS KOPPES

PERS

Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
Telecommunications Device for the Deaf - (916) 326-3240
(916) 326-3673
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April 18, 1996

Lucio Barroga
P.O. Box 662006
Mar Vista, CA 90066

Re: In the Matter of the Application of Lucio A. Barroga for Cancellation of Refund and Redeposit of Contributions Withdrawn from PERS,
LUCIO A. BARROGA, Respondent, and CITY OF EL SEGUNDO,
Respondent. Case No. 576-58-5765, OAH No. L-49409

Dear Mr. Barroga:

I am in receipt of your letter dated February 8, 1996. I have reviewed your letter, the authority that you cite and the attachments. In reviewing the applicable law, I must inform you that employer contributions are not considered "normal contributions" under the law. I have also read the correspondence from Deputy General Counsel, Kayla J. Gillan, and Senior Staff Counsel, F. Javier Plasencia, and I agree with their interpretation and explanations provided regarding "normal contributions".

In 1979, you requested a lump sum payment at retirement and you withdrew your "normal contributions" (i.e. those contributions that you paid into the system). The contributions made by an employer are not "normal contributions" and cannot be withdrawn from PERS. Also, the employer contributions do not remain on account of a member when they withdraw their normal contributions, as you did. In response to your election to receive a lump sum payment, PERS provided you a refund and informed you that your membership in the retirement system was terminated. It was not until approximately ten years later that you claimed that a mistake occurred and that you wished to have your refund to be considered a loan and be redeposited with PERS. This was not an option then or now. Redepositing a refund is not an option unless you become a PERS member again, and redeposit while you are a PERS member. You have never become a PERS member since your membership was terminated in 1979, consequently, you have never had the option of redepositing your refund.

It is unfortunate that I cannot provide you with a more favorable response, however, the Public Employees' Retirement Law does not allow PERS to do what you request. I do not believe that I nor anyone else at PERS can assist you anymore on this matter.

EX 7

P.1.2

Lucio Barroga

- 2 -

April 18, 1996

I also note that previous correspondence to you from the legal office suggest that you seek the assistance of an attorney to review your case. I urge you to do the same, although I believe that their review of this matter will provide you with a similar interpretation of the law.

Very truly yours,



RICHARD H. KOPPES
Deputy Executive Officer and General Counsel

cc: Kayla J. Gillan

1 KAMALA D. HARRIS, State Bar No. 146672
2 Attorney General of California
3 NIROMI W. PFEIFFER, State Bar No. 154216
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Attorneys for Defendant, Public Employees' Retirement System

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUCIO A. BARROGA,

Plaintiff,

12 CV 1179 MCE-KJN

**DEFENDANT CALIFORNIA PUBLIC
EMPLOYEES' RETIREMENT
SYSTEM'S STATUS REPORT**

**BOARD OF ADMINISTRATION CAL
PUBLIC EMPLOYEES' RETIREMENT
SYSTEM.**

Defendant.

Date: October 4, 2012
Time: 10:00 a.m.
Courtroom: 25
Judge: The Honorable Kendall J.
Newman

Action Filed: May 2, 2012

Defendant California Public Employees' Retirement System (CalPERS) submits the following status report pursuant to the Court's May 2, 2012 Order:

1. CalPERS was personally served on August 21, 2012.
2. CalPERS knows of no additional party to be joined or served.
3. CalPERS noticed and filed a motion to dismiss the complaint on September 11, 2012,

on the grounds that it has immunity under the Eleventh Amendment to the United States Constitution and the suit is barred by res judicata. The matter involves plaintiff's election in 1979

1 to withdraw his employment contributions from CalPERS. CalPERS remitted to plaintiff his
2 employee contributions of nearly \$10,000 and terminated his membership from CalPERS. Almost
3 ten years later in 1988, plaintiff wrote to CalPERS requesting retirement benefits, asserting that
4 he had withdrawn his contributions by mistake. Plaintiff requested that CalPERS treat its
5 remittance of his employee contributions as a loan. CalPERS denied plaintiff's request, informing
6 him that, because he was not a current member of CalPERS, he was not eligible to redeposit his
7 contributions and that CalPERS' remittance to him could not be treated as a loan.

8 4. The court lacks jurisdiction because CalPERS is immune from suit under the
9 Eleventh Amendment to the United States Constitution.

10 5. CalPERS' motion to dismiss is to be heard on October 18, 2012 at 10:00 a.m. in
11 Courtroom 25.

12 6. In the event CalPERS' motion to dismiss is granted, no discovery is necessary.

13 7. Until the Court rules upon CalPERS' motion to dismiss, a scheduling order is
14 premature.

15 8. No special procedures are necessary.

16 9. If this matter goes to trial, CalPERS estimates it will take three days.

17 10. No modifications to the standard pretrial procedures are anticipated.

18 11. This matter is related to many previous matters filed by plaintiff in other venues, both
19 administrative, state, and federal. Those matters include:

- 20 • Board of Administration of CalPERS
- 21 • Los Angeles Superior Court (case numbers KC003981, KC024567, and KC030508),
- 22 • California District Court of Appeal for the Second Appellate District (case numbers
23 B077855 and B115924),
- 24 • California Supreme Court (case numbers S038365 and S069199),
- 25 • United States District Court for the Central District of California (case numbers CV 99-
26 9457, CV 03-7673, CV 04-06315, CV 06-03696, and CV 09-56),
- 27 • United States Court of Appeal for the Ninth Circuit (case numbers 05-55232, 06-56415,
28 and 09-55595), and
- United States Supreme Court (case number 98-5585).

1 12. CalPERS does not anticipate requiring a settlement conference as it believes
2 plaintiff's claims are barred by res judicata.

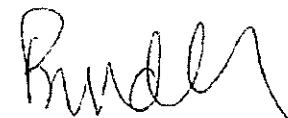
3 13. CalPERS prefers to have a settlement conference conducted by someone other than
4 the district court judge and magistrate judge assigned to this matter.

5 14. CalPERS knows of no further matters that may add to the just and expeditious
6 disposition of this matter.

7 Dated: September 27, 2012

8 Respectfully submitted,

9 KAMALA D. HARRIS
10 Attorney General of California
11 NIROMI W. PFEIFFER
12 Supervising Deputy Attorney General



13 BRENDA A. RAY
14 Deputy Attorney General
15 *Attorneys for Defendant*
16 *Public Employees' Retirement System*

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