Case No. A155286

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

GEORGE W. LUKE,

Petitioner and Appellant,

vs.

SONOMA COUNTY, AND ITS BOARD OF SUPERVISORS, AND ITS AUDITOR-CONTROLLER-TREASURER-TAX COLLECTOR, AND ITS DIRECTOR OF HUMAN RESOURCES, AND ITS COUNTY COUNSEL, AND ITS COUNTY ADMINISTRATOR; AND THE SONOMA COUNTY EMPLOYEES RETIREMENT ASSOCIATION AND ITS CEO/RETIREMENT ADMINISTRATOR; AND THE SONOMA COUNTY LAW ENFORCEMENT ASSOCIATION; AND THE SERVICE EMPLOYEES' INTERNATIONAL UNION; AND THE SONOMA COUNTY DEPUTY SHERIFFS' ASSOCIATION,

Defendants and Respondents.

From the Judgment of the Superior Court of the County of Sonoma
The Honorable René A. Chouteau, Judge
Superior Court Case No. SCV-261187

APPELLANT'S REPLY BRIEF

Jeffrey A. Robinson (SBN 132262)
Email: jar@rrlawyers.com
Charles R. Patterson (SBN 310656)
Email: cpatterson@rrlawyers.com
ROBINSON & ROBINSON, LLP
2301 Dupont Drive, Suite 530
Irvine, CA 92612
(949) 752-7007
(949) 752-7023 (fax)
Attorneys for Petitioner and Appellant
GEORGE W. LUKE

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I. INTRODUCTION

In their oppositions, Respondents Sonoma County ("County"), Sonoma County Employees Retirement Association ("SCERA"), and the Sonoma County Law Enforcement Association ("SCLEA") (collectively "Respondents") do not correctly address the doctrines of continuous accrual and estoppel. Respondents fail to distinguish the controlling decisions of the California Supreme Court. Instead, Respondents ask this court to apply non-existent rules of their own invention.

Respondents make the bulk of their arguments jointly in the County's brief, in which SCERA and SCLEA join. The separate briefs of SCERA and SCLEA only touch on limited issues, such as estoppel (SCERA) and SCLEA's position as a non-necessary party. In this Reply, the points made in County's Opposition, which have been broadly joined by SCERA and SCLEA, are referred to as the opposition of "Respondents". The specific arguments made by SCERA or SCLEA are addressed separately. For all of the reasons discussed herein, nothing in any of the three opposition briefs justifies an affirmance of the judgment.

II. THE JUDGMENT OF DISMISSAL MUST BE REVERSED BECAUSE THE LOWER COURT MISAPPLIED THE DOCTRINE OF CONTINUOUS ACCURAL

Through careful, detailed analysis of the California Supreme Court's decisions, Luke demonstrated in his opening brief why the doctrine of continuous accrual was improperly applied by the lower court, requiring reversal of the judgment of dismissal. (Appellant's Opening Brief ["AOB"] 30-31, 37-45). Respondents are unable to distinguish the California Supreme Court's holdings. Instead, they invent their own erroneous standards, create supposed exceptions that have never been applied in the case law, and argue alleged public policies that the high court has already rejected. As shown

below, none of Respondents' baseless arguments supports the judgment below.

A. Respondents Completely Misstate The Doctrine Of Continuous Accrual As Applied By The California Supreme Court

In *Howard Jarvis Taxpayers' Ass'n v. City of La Habra* (2001) 25 Cal.4th 812, the City of La Habra engaged in multiple acts of misfeasance. It first adopted a new tax without complying with the requirements of Proposition 62. However, because the tax was approved more than three years before taxpayers brought a lawsuit challenging its legality, the claim against that first act of misfeasance was barred by the three-year statute of limitations established by California Civil Code Section 338, subdivision (a), the same statute applicable in this case.

The ensuing acts of misfeasance occurred when the city collected the unauthorized tax. Because the original tax approval was unlawful for failing to abide by Proposition 62, there was no legal basis for the city to collect the tax, and since the city had collected taxes within the three years preceding the lawsuit, each unlawful collection gave rise to a new claim that triggered its own period of limitations. Accordingly, the statute of limitations did not preclude the taxpayer lawsuit as to those unlawful acts. (*Howard Jarvis, supra* 25 Cal. 4th at 818-825.)

Because of estoppel/delayed accrual, the statute of limitations in this case has not run on Luke's right to challenge the original approval of increased pension benefits. (Part III, *infra*.) But even if the Court disagrees with Luke about delayed accrual, he is still entitled to pursue his challenges for unlawful pension payments made within the applicable statutory period based on continuous accrual.

Respondents acknowledge that it is unlawful for a public entity to spend money without legal authority. (*Infra* at Part II.B.) Yet that is precisely what Respondents do each time they pay pensions at the level unlawfully approved as alleged in Luke's petition. Each of those unlawful payments is actionable, and--when made within the applicable period of limitations (three years before Luke filed his lawsuit)--*Howard Jarvis* holds that the statute of limitations does not preclude taxpayers such as Luke from challenging the wrongful payments even if the time has lapsed to challenge the legality of the original approval.

In their Opposition, Respondents do not respond directly to this logic; they simply assert in one of their headings that "Luke Reads *[Howard Jarvis v.] La Habra* Too Broadly." (Sonoma County Respondents' Brief ["County RB"], p. 35.) Respondents are wrong.

1. Respondents Are Wrong About What *Howard Jarvis* "Teaches"

According to Respondents, *Howard Jarvis* "teaches that continuous accrual applies when statute [sic] 'clearly' creates an ongoing obligation but not otherwise." (County RB, p. 36.) Applying this "teaching" to the present case, Respondents argue that continuous accrual should not apply because the Public Protection Laws do not "clearly create an ongoing obligation" but instead impose one-time requirements and therefore "accrue but once." (County RB, pp 36-41.) Respondents' argument misstates both the holding and the reasoning of the California Supreme Court's decision.

a. Respondents' Misinterpretation of *Howard Jarvis* Was Expressly Rejected By The California Supreme Court

Respondents cannot be correct about what *Howard Jarvis* supposedly "teaches," because their analysis was expressly rejected by the high court in that case. Respondents assert the proper inquiry for determining continuous

accrual must focus exclusively on a single wrongful act-- the County' Board's illegal *enactment* of the pension benefit in violation of the Public Protection Laws. According to Respondents: "Those [Public Protection Laws'] requirements [for an actuarial analysis, etc.] apply and thus a claim accrues, only once—when an agency approves an increase in benefits. They do not apply, and thus a claim under them does not accrue, each time benefits are paid thereafter." (County RB, p. 37.) Respondents thus would disregard the other acts that occurred during the applicable limitations period—making pension payments without lawful authority.

Strikingly, the position taken by Respondents is the same as the holding and reasoning offered by the court of appeal that was reversed by the California Supreme Court in *Howard Jarvis*. The court of appeal found that the taxpayer's lawsuit to stop the ongoing assessment of taxes, and to recover for taxes unlawfully collected, was barred because "the gravamen of" the plaintiffs' lawsuit was a challenge to the "legality of the adoption of" the ordinance that imposed the tax. (*Howard Jarvis*, 25 Cal.4th at 814.) The court of appeal "disagreed with plaintiffs' contention that their causes of action accrue continually as the tax is collected and paid." (*Id.*) The court of appeal concluded that the lawsuit was entirely barred by the three-year statute of limitations. In other words, the *Howard Jarvis* court of appeal erroneously adopted the very rule suggested by Respondents in their briefs; it focused only on the initial wrongful act—unlawful adoption of a local tax—without considering the later wrongful acts and harm they inflicted—collecting the unlawfully adopted taxes.

On appeal, the California Supreme Court expressly rejected this approach in the key part of its *Howard Jarvis* holding. The high court agreed with the logic of taxpayer plaintiffs: "they are seeking redress for *two* types of injury: the violation of their right to vote on new taxes, **and** the City's continued collection of the tax without valid legal authority. The City is

under no compulsion to continue collecting the tax, they note, and'[e]very month the City chooses ... to send out another round of bills and collect more money without voter approval, it commits a new injury.'" (*Id*. at 819; emphasis added.) Thus, while the adoption of a tax in violation of Proposition 62 was "an" event giving rise to a cause of action, "it was not the *only* such event." (*Id.* at 818-19; emphasis added). The city's "continued collection of the tax without valid legal authority" constituted other such events. (*Id.* at 819.) Every time the city levied and collected an unlawfully adopted tax, a new cause of action arose. (*Id.* at 821-25.) The policy behind this holding was that "cities and counties must eventually obey the laws… and cannot continue indefinitely to collect unauthorized taxes." (*Id.* at 825.)

Respondents' opposition briefs nowhere discuss this reasoning. Our situation in the present case is identical to *Howard Jarvis*. The Public Protection Laws require that a pension benefit increase be lawfully approved in accordance with statutory requirements before it can be adopted. Just as the city in *Howard Jarvis* was acting illegally by collecting a tax that had not been lawfully adopted, the County is acting illegally by paying out pension benefit increases that have not been lawfully adopted. The mere passage of time did not make an illegal tax lawful in *Howard Jarvis*, just as the passage of time does not make the County's illegal pension benefit increase lawful in the present case. The County "must eventually obey the laws" and "cannot continue indefinitely to" pay unauthorized pension benefit increases. (*Howard Jarvis*, 25 Cal.4th at 825.) Thus, *Howard Jarvis* does not "teach" that courts should focus exclusively on the initial wrong—in this case violation of the Public Protection Laws—to determine application of continuous accrual; it "teaches" that Luke's (the taxpayer's) claim is timely under the doctrine of continuous accrual where, as here, later wrongful acts are committed within the applicable limitations period.

b. The Limited Passage From *Howard Jarvis* Cited By Respondents Does Not Support Their View

In support of their made-up "teaching" of *Howard Jarvis*, Respondents cite only one passage from the decision. (County RB, pp. 35-36, *citing Howard Jarvis, supra* 25 Cal.4th at 821 and 823-24.) Respondents argue that "the Court applied continuous accrual because [Government Code] section 53727, subdivision (b) 'provides that no such tax "shall continue to be imposed" without a vote,' and 'a taxing jurisdiction that fails to obtain a majority vote "shall cease to impose such tax."'" (County RB, p. 35-36, *citing Howard Jarvis*, 25 Cal. 4th at 823 and the Government Code.) Respondents contend that continuous accrual applies only when the initial wrong and subsequent wrong are both based on a statute containing language like this. (County RB, pp. 35-36, *citing Howard Jarvis, supra* 25 Cal.4th at 823-24.)

But the quoted language is taken out of context. In the quoted passage, the high court was merely responding to the defendant city's contention that an unrelated case, *Ponderosa Homes v. City of San Ramon* (1994) 23 Cal. App. 4th 1761, 1769-1771, supported the city's position that the illegal tax was only "imposed" when enacted, and not when subsequently collected, and that only the original "imposition" could give rise to a breach of rights. (*Howard Jarvis, supra*, 25 Cal. 4th at 823.) Respondents make the same argument to this court, asserting that the statute of limitations should be deemed to have run only from the date of the illegal enactment of the void pension benefit increases, and not the subsequent collection and payment of the unlawful increases. Our Supreme Court rejected this argument. The first reason it gave was that the statute of limitations construed in *Ponderosa Homes* expressly ran from "'imposition'" of the fee. (*Id.*) The high court noted that the statute of limitations in *Howard Jarvis* (the same one

applicable to our case) did not expressly run from "imposition," so there was no reason to apply the restrictive rule offered by the defendant. (*Id.*) *Howard Jarvis* compels rejection of Respondents' argument in this case for the same reason.

As an additional reason for rejecting this argument, the high court cited Government Code section 53727, subdivision (b). This statute governed certain taxes enacted prior to Proposition 62, and stated that unless these were subsequently approved, no such tax could continue to be collected. However, that statute was not even directly applicable in *Howard Jarvis*, because the tax imposed by the city was enacted after Proposition 62, not before. (*See Howard Jarvis, supra* 25 Cal.4th at 813-14.) The high court cited this statue as one indication that there was no legislative intent to apply the statute of limitations restrictively. The high court did not hold or suggest that it was necessary for a statute to contain specific language prohibiting the "continuing imposition" of an illegal tax before the doctrine of continuous accrual could apply, as Respondents mistakenly suggest.

There is no such requirement. We know this from the many cases cited in Luke's opening brief in which the doctrine has been applied without meeting Respondents' criteria. (*See* AOB, p. 38.) These cases include *Aryeh v. Canon Business Solutions* (2013) 55 Cal.4th 1185, in which the California Supreme Court cited and discussed the *Howard Jarvis* case in support of the application of continuous accrual, but made no mention of the alleged prerequisite of statutory "continuing imposition" language invented by Respondents. (*Aryeh v. Canon Business Solutions* (2013) 55 Cal.4th 1185, 1199.) For a more recent case that found no such requirement, see *Blaser v. State Teachers' Retirement System* (July 10, 2019, No. H045701) ___ Cal.App.5th ___, 2019 WL 3002865, at p. *9.

c. *California Cannabis Coalition* Does Not Even Address Continuous Accrual, Much Less Support Respondents' Assertion About What *Howard Jarvis* "Teaches"

Respondents cite only one reported decision in support of their contention that *Howard Jarvis* "teaches" that continuous accrual only applies when the statute on which the initial misfeasance is based "clearly creates an ongoing obligation": *California Cannabis Coalition v City of Upland* (2017) 3 Cal. 5th 924, 944-45 ("*CCC*"; see County RB, p. 36.) But no such rule was established in *CCC.*

The timeliness of filing was not before the high court in any way, and continuous accrual was not an issue in the case. Before the high court in that case were issues concerning the validity of a voter tax initiative under a sister provision to Proposition 62, not the timeliness of the lawsuit. The Court found that when taxpayers vote on a tax in a special election, that authorizes the tax even though the Constitution requires local governments to obtain permission for taxes in the general election. In the passage cited by Respondents, the Court also decided that collection of taxes approved in this manner were also lawful. *Howard Jarvis* only addressed the application of the statute of limitations when challenges were made to unlawful acts; since the decision in CCC addressed neither subject, it has nothing to say about continuous accrual.

2. The Misapplication of *Howard Jarvis* Asserted By Respondents Would Violate The Fundamental Purposes Of Continuous Accrual As Enforced By The California Supreme Court

By asserting a narrow, distorted interpretation of *Howard Jarvis*, Respondents are really arguing for a rule that would convert an illegal and void act into enforceable law by the passage of time. That, however, is

contrary to the purpose and intent of the doctrine of continuous accrual as applied by the California Supreme Court since *Howard Jarvis*.

As noted in Luke's initial brief, in *Aryeh v. Canon Business Solutions* (2013) 55 Cal.4th 1185 ["*Aryeh*"], the high court explained the reason for the doctrine of continuous accrual. (AOB, pp. 41-42.) "Inequities" would arise if the first breach of a duty, or instance of misconduct, were treated as a sufficient bar for claims arising out of subsequent breaches or misconduct. (*Aryeh, supra,* 55 Cal.4th at 1198.) If the rule were not applied, parties engaged in "long-standing misfeasance" (such as repeatedly obtaining money not rightfully theirs) would obtain future immunity from ongoing misfeasance, just because they had not been stopped within sufficient time from the first wrongful act. (*Id.*) But such a result would be wrong: the mere passage of time from the first wrongful act does not validate recent and all future wrongful acts. (*Id.*) Since the misfeasance is ongoing, the principal reason for application of the statute of limitations—repose—is not violated by the doctrine of continuous accrual. (*Id.*)

By claiming that *Aryeh* does not authorize application of continuous accrual in the present case, Respondents place themselves in the position of the misfeasors condemned by *Aryeh*. Respondents ask this court to allow them to continue their ongoing misfeasance, illegally collecting funds from taxpayers to pay void pension benefit increases. They ask for "future immunity" because Luke did not sue within three years of the date they commenced their illegal actions. Nothing in *Aryeh* supports this result.

According to Respondents, the decision in *Aryeh* is "the opposite of Luke's claim." Plaintiff sued under the Unlawful Competition Law (Bus. & Prof. Code, § 17200 *et seq*.) for recovery and restitution of unauthorized charges by plaintiffs under a long-term photocopier lease. Respondents contend that when plaintiff Aryeh challenged each act of misfeasance committed within the applicable statute, he "sought to enforce, not to

challenge, a standard fixed previously [by] ... the copier lease agreement," while "Luke challenges the fixed standard itself"—"the establishment of benefits in 2002 and 2003, and only consequently their ongoing administration." (County RB, p. 48.) According to Respondents, the key distinguishing feature is that in *Aryeh*, unlike the present case, "[t]here was no challenge to the validity of the lease—only continuing breaches of it" (*Id.*) In other words, Respondents contend that if the plaintiff in *Aryeh* had challenged the validity of the lease and accused the defendant of ongoing unlawful behavior relating to the invalid lease, the plaintiff would not have been allowed to invoke continuous accrual, and his lawsuit would have been barred by the statute of limitations.

Respondents completely misrepresent the holding in *Aryeh*. The application of continuous accrual had nothing to do with whether the plaintiff did or did not challenge the underlying validity of the lease. The plaintiff merely wanted to stop unauthorized charges. As the high court explained, "By its nature, the duty Canon [the defendant] owed—the duty not to impose unfair charges in monthly bills—was a continuous one, susceptible to recurring breaches." (*Aryeh*, *supra*, 55 Cal.4th at 1200.) The "nature of the obligation allegedly breached" and not the "claim's label" controls. (*Id.*)

Respondents do not cite any cases that adopt or apply their misguided interpretation. The essence of the California Supreme Court's ruling in *Aryeh* was its "long settled" holding that "separate, recurring invasions of the same right can each trigger their own statute of limitations." (*Aryeh, supra,* 55 Cal.4th at 1189) Contrary to Respondents' assertions, the high court did not distinguish between defendants who are wrongfully forced to pay money on an ongoing basis under a void contract from those wrongfully forced to pay money under a breached contract. In both situations, the charges are ongoing and wrongful; that is sufficient to support the application of continuous accrual.

In the present case, the duty owed by Respondents was to not take taxpayer money without authorization to pay illegal pension benefit increases. By its nature, that is a continuing obligation of Respondents, and is being breached today on a regular and ongoing basis. (*See, e.g.*, 1 AA p. 13 at ¶4, p.14 at ¶5, p. 32 at ¶27, p. 38 at ¶41, p. 40 at ¶47; 4 AA 1020 at ¶446, p. 1021 at ¶47.) Thus, regardless of the "label" put on Luke's claims by Respondents (i.e., challenging the "validity" of the enactment versus the "administration" of the increases) Luke's claim alleges ongoing violations of law. That places Luke's case squarely within the holding of *Aryeh*.

B. Respondents Concede That Pension Payments Made Without Authority Are Unlawful Acts

Government Code section 23006 provides that any "contract [or] authorization… made in violation of law is void" and "shall not be the foundation or basis of a claim against the treasury of any county." (Gov. Code, § 23006.) Accordingly, each time someone applies for or receives, and the County pays, an unlawful benefit, a new harm is committed against taxpayers because a new and separate unlawful act occurs. With each new unauthorized, unlawful payment, the elements of a new claim are complete. Luke's opening brief cites other statutes, constitutional provisions, and cases that overwhelmingly establish this principle. (AOB 21-27.)

Respondents do not dispute this rule, do not cite cases to the contrary, and indeed appear to have admitted this rule applies here; they accept that "an unlawful [pension benefit] contract may be invalidated." (*See* County RB, p. 43, admitting that *San Diego City Firefighters, Local 145 v. Bd. Of Admin. Of San Diego City Emp. Ret. Sys.* (2012) 206 Cal.App.4th 594, 606 stands for this position.)

Respondents argue, nevertheless, that this law is not relevant to continuous accrual because "[a]n action alleged to exceed an official's authority—an allegedly 'ultra vires' act—can only be challenged within the

statute [of limitations].” (County RB, p. 41.) This begs the question whether unlawful pension payments made within three years before Luke filed this lawsuit have been “challenged within the statute of limitations.” Except for their unfounded assertion about what *Howard Jarvis* “teaches,” Respondents provide no reason to suggest they are not.

For example, Luke seeks declaratory and injunctive relief against future pension payments made in reliance on the approvals by the County. Such payments are ultra vires because the original authorization failed to comply with state law, and no valid authorization has intervened. Even though proof of these facts involves events that occurred more than three years before this lawsuit was filed, there can be no doubt that if the facts are proven as alleged in the Petition, the acts complained of would occur well within the applicable statute. So Respondents agree that the acts complained of would be unlawful if proven.

Respondents’ only defense seems to be the same one discussed in Part IA, *supra*—the statute that Respondents violated cannot be the basis for continuous accrual. Therefore, according to Respondents, the pension payments, even if unlawful, cannot be pursued due to the passage of time. As already seen, Respondents are simply wrong about that. (*See* Part I.A, *supra*.)

Respondents attempt to distinguish Luke’s authorities for the principle that unlawfully enacted pension benefits are void (AOB, pp. 30-35), on the grounds that they did not involve the “statute of limitations” or “did not address continuous accrual.” (County RB, p. 41-44.) But this line of reasoning is inconsistent with their admission that continuous accrual protects “vested” (not void) benefits. (*See* County RB, p. 35.) For their attempt to meaningfully distinguish these cases as not involving statutes of limitation or continuous accrual, they would also have to assert that an unlawful enactment becomes valid by the passage of time if not challenged when enacted. As seen above (*supra* Part I.A), the holdings of the California

Supreme Court applying the doctrine of continuous accrual do not permit that result. Respondents' rule would perpetuate the non-existent rights of wrongdoers and cannot be a correct statement of the law.

Moreover, it is simply not true, as Respondents assert, that the cases cited by Luke only involved enforcement of obligations of public entities during the applicable period of limitations. In *Medina v Board of Retirement* (2003) 112 Cal. App. 4th 864, two retirees received pensions based upon a status to which they were not legally entitled long after the period of limitations had expired, but the court of appeal agreed that the pensions could be terminated even after the lapse of time. (*Medina, supra*, 112 Cal. App. 4th at 871-72 ("The contract clause does not protect expectations that are based upon contracts that are invalid, illegal**,** unenforceable, or which arise without the giving of consideration.").)

Respondents argue that *Medina* is distinguishable for two reasons: (1) it did not rely on continuous accrual in its rationale; and (2) the wrongful pension payment in *Medina* was based on substance, whereas Luke's claim is supposedly based on "procedural" noncompliance. As for the first point, it does not matter what the legal theory is; *Medina* makes it clear that pension payments made without authority are wrongful and will be discontinued even after the statute of limitations has lapsed. There is no special rule that converts such wrongful payments into lawful payments due to the passage of time. Respondents' second point is a distinction without a difference. Either Respondents followed the law or they didn't; no statute or case law carves out a special exception to the rule requiring authority for a local agency to spend money from its treasury.

Finally, *Blaser v. State Teachers' Retirement System* (July 10, 2019, No. H045701) ___ Cal.App.5th ___, 2019 WL 3002865—a case which specifically dealt with continuous accrual and the statute of limitations—also rejects Respondents' position. In *Blaser*, the court of appeal held that pension

holders cannot claim vested rights in unauthorized benefits. Pension provisions "cannot be construed to as to confer benefits on persons not entitled thereto." (*Blaser, supra,* 2019 WL 300286, at p. *13; quoted citations omitted.)

C. Continuous Accrual Is Not "Narrowly Applied" As Respondents Contend

Respondents declare that "[c]ontinuous accrual applies only in narrow circumstances." (County RB, p. 35.) They cite no cases that say this; nor do they cite cases where courts have declined to apply continuous accrual because of this supposed limiting principle. Nor do they mention *Aryeh,* where the California Supreme Court states the rule broadly: "continuous accrual applies *whenever* there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues *each time* a wrongful act occurs, triggering a new limitations period.'" (*Aryeh, supra,* 55 Cal.4th at 1199; emphasis added).

The only case cited by Respondents for this "narrow circumstances" assertion never uses those words. (County RB, p. 35, citing *Universal Media LLC v. Superior Court* (2014) 225 Cal. App.4th 1222, 1238 fn. 10.) That case involved dismissal of an untimely suit for violation of intellectual property rights, and no special standard was discussed in the cited footnote. In Luke's opening brief, by contrast, eleven cases are cited for the proposition that "[t]he doctrine of continuous accrual is robust . . . and has been applied to negate a variety of limitation statutes in a number of circumstances." (AOB, p 28.) Respondents make no attempt to show how these cases are consistent with their "narrow circumstances" assertion.

Respondents' assertion that "continuous accrual is a narrow doctrine was rejected in a recently decided case, *Blaser v. State Teachers' Retirement System* (July 10, 2019, No. H045701) ___ Cal.App.5th ___, 2019 WL 3002865. In *Blaser*, the court cited and numbered thirteen separate

factual/legal scenarios in which continuous accrual has been widely used. (*Id.*, 2019 WL 2002865, at p.*9.) Significantly, the *Blaser* court upheld the right of the pension payor to recover excessive, unauthorized, pension benefits. (*Id.*)

Accordingly, there is no reason to apply a limiting standard to continuous accrual. It plainly applies here based on the case law.

D. There Is No Exception To Continuous Accrual That Prevents Taxpayers From Enforcing Claims For Unauthorized Pension Payments

Respondents urge this Court to adopt a new exception, never before seen in the case law, to sustain the trial court's ruling in this case. According to Respondents, in the pension context, the rule of continuous accrual should be applied only "to **protect** pension benefits to those who have vested rights to them, it does not apply to **defeat** a pension claim." (County RB, p. 35; emphasis original.) They do not cite a single decision, nor is Luke aware of any, in which this exception has been applied. Nor do they explain why collecting and using taxpayer money to pay an unlawful pension should be treated differently than collecting an unauthorized tax in *Howard Jarvis* or committing any other act that the law prohibits, such as the unlawful conduct in *Aryeh.* So there is no reason for this court to take their proposed exception seriously; unlawful pension payments made within the three-year statute of limitations must be subject to challenge under *Howard Jarvis* even if the court determines that the time to challenge the original approval has lapsed.

This is supported by case law.

As noted in Luke's opening brief, the case of *Baxter v. California State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, *reh'g denied* (Jan. 9, 2018), *review denied* (Feb. 21, 2018) squarely supports this result. The retirement system known as CALSTRS sought to recover unauthorized pension payments made to the retirees for many years; the benefits were

excessively high because they had been improperly computed. The retirees argued that CALSTRS could not challenge future payments because the statute of limitations had lapsed; the unauthorized payments had continued for more than three years. (*Baxter*, 18 Cal.App.5th at 349.) The court of appeal reversed, holding that payments made within three years before of the CALSTRS challenge, and challenges to all future payments, were allowed under the doctrine of continuous accrual. (*Id.*) The "statute of limitations for periodic payments such as the …. monthly retirement benefits here commenced with the due date of each payment." (*Id.*)

The *Baxter* court, relying on the same authorities applicable in the present case, held that the "kinds of cases" in which continuous accrual applies "include a variety of instances in which the plaintiff asserted a right to, or challenged, periodic payments under contract or under California statutes and regulations." (*Baxter*, 18 Cal.App.5th at 379; emphasis added). Thus, the *Baxter* court rejected the assertion made by Respondents here--that continuous accrual only protects pension *holders* attempting to enforce benefits but does not protect persons attempting to stop unlawful benefits.

The *Baxter* court noted that a retirement beneficiary cannot be permitted to receive unauthorized benefits, "potentially for years," just as the pension paying agency cannot be permitted to fail to pay authorized benefits; on both sides, the rights to complain about recent past and future benefits are not "forfeited." (*Baxter*, 18 Cal.App.5th at 380-281.) *Baxter* squarely rejects the exception to continuous accrual proposed by Respondents, which would only protect the retiree and not the agency or the public.

The *Baxter* decision was recently reinforced by the court of appeal in *Blaser v. State Teachers' Retirement System* (July 10, 2019, No. H045701) ___ Cal.App.5th ___, 2019 WL 3002865, a case decided after Respondents filed their opening briefs. The same substantive issues addressed in *Baxter* were presented by a different group of teachers in *Blaser*. Teachers who had

worked during an extra sixth period were paid an unauthorized pension benefit when their employer (the school district) improperly credited this extra time under a defined benefit pension plan (DB Plan), while California law required that it be credited to a different plan, called DB Supplemental, which provided for an annuity. In 2010, an auditor discovered the unauthorized payments. When it learned of the error, CALSTRS reduced ongoing pension payments to recover the past overpayments. The teacher/plaintiffs brought an action for mandamus on the ground that CALSTRS had not acted within the three-year limitations period permitted for correcting pension errors. The *Blaser* court specifically reiterated the *Baxter* holding that continuous accrual could be invoked by the pension system (pension payor) to recover unauthorized pension payments within the recent statutory period, and not just by pensioners to recover for nonpayment of benefits. (*Blaser, supra*, 2019 WL 3002865 at p. *10.) The court expressly denied the plaintiffs' suggestion that continuous accrual "does not apply … because it 'can only be asserted by the holder of a benefit, and not by the public and/or private entity providing the benefit." (*Blaser, supra*, 2019 WL 3002865 at p. *13; emphasis in original.)

Respondents cannot dispute that *Baxter* and *Blaser* allow the enforcing agency to discontinue pension payments after the initial period of limitations has lapsed under continuous accrual, but they try to distinguish *Baxter* (and presumably *Blaser*) on the grounds that *Baxter* involved a dispute "regarding the proper calculation of pension benefits," which they contend "differ[s] from disputes regarding the right to benefits at all." (County RB, p. 47.) But nothing in *Baxter* or *Blaser*—and more importantly, nothing in *Howard Jarvis* or *Aryeh*—suggests that this purported distinction in the facts is at all relevant to the application of continuous accrual. In fact, if a person has no "right to benefits at all," a taxpayer has the right to

challenge that payment as ultra vires, and Respondents have admitted it. (*See* Part II.B, *supra* at pp. 17-18; *Blaser, supra*, 2019 WL 3002865 at p. *13.)

Nor is there any basis for the distinction Respondents are trying to make. While Respondents would prefer to characterize *Baxter* (and presumably *Blaser*) as lawsuits about "the proper calculation of pension benefits" (County RB, p. 47), the teacher/plaintiffs in both *Baxter* and *Blaser* lost their pension rights because California law did not allow the arrangement they thought they had made with their local school district. (*Blaser. supra,* 2019 WL 3002865 at p. *4 ["The audit revealed [that] the District's practice" of coding sixth period time to the DB Plan "was improper. . . . Under state law, these extra duty assignment payments should have been credited to" the DBS Program.].) Nothing in the record before this court describes the effects, if any, on pension recipients in Sonoma County if Luke were to prevail on remand. But there is no logical difference between the teachers in *Baxter* and *Blaser* (whose pensions were reduced because state law did not allow their school districts to "credit" their sixth period time to their DB Plan) and pension recipients in Sonoma County (who receive pension amounts that were not lawfully authorized).

Respondents also cite the pension cases decided by the California Supreme Court, apparently hoping that they will lend support for their made-up distinction between those who receive pensions and those who pay them. (County RB, pp. 44-47, *citing Dryden v. Board of Pension Com'rs of City of Los Angeles* (1936) 6 Cal. 2d 575; *Dillon v. Board of Pension Comm'rs of City of Los Angeles* (1941) 18 Cal.2d 427; and *Abbott v. City of Los Angeles* (1958) 50 Cal. 2d 438.) According to Respondents, "*Dryden* and *Abbot* establish only that the right to receive payments of a vested pension benefit is continuing. Under *Dillon*, a claim to establish entitlement to a pension benefit—or here, to disestablish such a right—is not." (County RB, p. 47.) From this they apparently hope the Court will infer the opposite—that when

pension providers fail to comply with legal requirements when they approve pensions, the same rules do not apply to them. But no such inference should be made given the way the courts of appeal and the California Supreme Court treated these cases.

The recent decision in *Blaser* (*Blaser, supra*, 2019 WL 3002865 at p, *10), and (as noted in Luke's opening brief) *Baxter* reviewed all of the California Supreme Court cases cited by Respondents and reached the conclusion advanced by Luke, not Respondents. (AOB, p. 45.)

Dillon and *Abbot* are both cited in *Howard Jarvis;* and in *Aryeh*, both *Howard Jarvis* and *Dryden* are cited in the same paragraph. In none of those cases did our Supreme Court suggest that the rules would be different if taxpayers were to challenge unlawful pension payments. In fact, in *Howard Jarvis*, the high court explained that in *Dillon* "[o]ur holding depended . . . on the premise that the plaintiff could not establish the right to a pension in an action to compel payment of a particular installment" due to her failure to follow specific procedures peculiar to that case. (*Howard Jarvis, supra* 25 Cal. 4th at 822.) This is an important explanation because the facts in *Dillon* are quite similar to *Dryden*, decided only five years earlier, where a pensioner was allowed to proceed with her pension claim based on continuous accrual.[1] Since no similar obstacle was present in *Howard Jarvis*, the high court held

[1] Even though the court found that a pensioner's claim was untimely in *Dillon*, that case has never been interpreted as limiting continuous accrual and does not support a contrary conclusion, as Respondents claim. (County RB, p. 45.) The unsuccessful defendants in *Howard Jarvis* made the same argument based on *Dillon* and the California Supreme Court squarely rejected it. "No statute or decision requires an aggrieved taxpayer to establish the tax's invalidity *before* suing for refund or to prevent its collection." (*Howard Jarvis*, 25 Cal.4th at 823.) The same principle applies here; no statute or decision requires an aggrieved taxpayer to sue to establish a pension benefit's invalidity before suing for refund or to prevent its collection.

that "plaintiffs' failure to establish the tax's invalidity within three years of its enactment does not preclude them from complaining, on grounds of such invalidity, of the tax's continuing collection." (*Howard* Jarvis, supra, 25 Cal.4th at 822.)

For all of these reasons, the Court should reject Respondents' invitation to create a new exception to continuous accrual where none existed before.

E. Respondents' Policy Arguments Must Be Rejected

Respondents try to sidestep the controlling case law by appealing to alleged public policy on the subject of continuous accrual. This gets them nowhere. These arguments have been consistently rejected by the courts.

1. Respondents' Claim For Repose Has Been Rejected By The California Supreme Court

Respondents argue that continuous accrual should not apply because it would set off "a perpetual litigation season" that would burden them with defending claims that "concern facts from 2002 and 2003" and require this Court to "evaluate stale evidence decades after the fact." (County RB, p. 49) In other words, Respondents contend that if this Court reverses the trial court on continuous accrual, there would be no repose for public agencies that knowingly make unauthorized payments from the public treasury, and "[t]hat cannot be the law if statutes of limitation are to have any meaning." (*Id.*)

But the California Supreme Court already rejected this argument in *Aryeh*: "[W]here misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated." (*Aryeh, supra,* 55 Cal.4th at 1198 (emphasis added).) Parties "engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance." (*Aryeh, supra*, 55 Cal.4th at 1198.)

Respondents attribute the "immunity in perpetuity" rationale to Luke (County RB, p. 48) instead of to the highest court of this State, which is

Luke's cited source. Then they disparage the avoidance of "immunity in perpetuity" by claiming the contrary to be good policy: "statutes always confer perpetual immunity when the time for suit runs," they argue. (*Id.*) Regardless of Respondents' own views on this, they have no bearing in this Court because our Supreme Court was unequivocal that avoiding "immunity in perpetuity" is one of the reasons why serial wrongdoers are held accountable for misdeeds committed even years after the statute of limitations has expired on their original infraction.

Finally, the continuous accrual doctrine does not permit perpetual litigation, as Respondents suggest, but only allows recovery for conduct within the limitations period "immediately preceding" the filing of suit. (*Aryeh*, supra, 56 Cal.4th at 1199-1200). In this way, the defendant is not forced to disgorge funds from stale claims, and the plaintiff is not prevented from stopping wrongful conduct and recovering for the immediate limitations period preceding filing of the action. The legitimate interests of all parties are balanced and preserved by the continuous accrual doctrine.

2. No Settled Expectations Are At Issue In This Case

As another policy argument, Respondents inveigh this Court not to apply the law of continuous accrual because it would supposedly disrupt "settled expectations." (County RB, p. 10) But the law "does not protect expectations that are based upon contracts that are invalid, illegal [or] unenforceable …." (*Medina v Board of Retirement* (2003) 112 Cal.App.4th 864, 871; s*ee* other cases cited in AOB, p. 36.) When a government agency enters an agreement to make pension payments without complying with all statutory legal requirements, that contract is void. (AOB, pp. 31-35.) Accordingly, the alleged "expectations" that Respondents invoke to bolster their legal case have no merit as a matter of law. (*See Blaser v. State Teachers' Retirement System* (July 10, 2019, No. H045701) ___ Cal.App.5th ___, 2019 WL 3002865, at *p. 13 (no vested right to benefits to which there

is no legal claim).)

Nor has the record even been developed to support any findings on how expectations would be affected by the outcome in this case. Were the case to proceed based only on payments beginning within three years before Luke's lawsuit, there is no record from which to determine who (or how many) would be affected and who would not.

Respondents cite no case holding that pension holders acquire vested rights in perpetuity based on unlawful contracts due solely to the passage of time based on unproven "expectations." This policy argument too should be disregarded.

III. THE JUDGMENT BELOW SHOULD ALSO BE REVERSED BECAUSE THE COURT BELOW FAILED TO APPLY ESTOPPEL/DELAYED ACCRUAL CORRECTLY

On the question of equitable estoppel to assert the statute of limitations, the fundamental issue is whether Respondents' actions following the Grand Jury report constituted a **disclosure** of the material facts establishing illegality of the pension benefit increases, or a **concealment and misstatement** of the material facts.

Respondents claimed in their lawyers' reports (and echo these assertions in their briefs) that there was full compliance with the substantive actuarial requirements of the Public Protection Laws. Thus, they cannot at the same time argue seriously that these reports actually **disclosed their wrongdoings** in a way that put the public on inquiry notice.

A central point of Luke's Petition is that Respondents' actions (including the reports of their lawyers, County Counsel and Steptoe & Johnson) were **fundamentally a concealment** of the material facts, intended

to lull the public into not taking action.[2] Luke alleges **specific facts** showing how the illegalities were concealed by these reports.[3]

The trial court accepted Respondents' story that the County Counsel's response to the Grand Jury was a truthful disclosure of the relevant facts, not as Luke alleges, a concealment of material facts giving rise to an estoppel. The lower court should be reversed because is accepted Respondents' version of the facts as true even though they are contradicted by Luke's pleadings and disputed.

A. Respondents' Arguments Are Based Upon Disputed Facts Which Are Contrary To Those Alleged In Luke's Petition

Respondents' briefs substantially minimize their obligations under the Public Protection Law in an attempt to claim "substantial compliance" with the law, when Luke's Petition clearly alleges there was no compliance. (*E.g.*, 4 AA 1012 at ¶33, line 24.)

Respondents mistakenly describe the Public Protection Laws as simply "requiring the County to provide public notice before approving

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[2] *See, e.g.*, 4 AA p. 1008 at ¶26 ("public at all times was deceived"); p. 1012 at ¶33 (no "full and honest" investigation); 4 AA p. 1012:24 ("The facts were that there was no compliance;" this was concealed by a "misleading report"); *id,* p. 1015 at ¶38 (County obstructed efforts by the public to obtain transparency); June 20, 2018 Hearing Transcript, p. 68 (County response to Grand Jury report was a stonewalling coverup).

[3] *See, e.g.*, 1 AA p. 25 at ¶22, line 23 (provided misleading and incomplete information); 1 AA 29:1-8 (contrary to the representations made by County Counsel or Steptoe & Johnson in their reports, the purported actuary cited in their reports as having prepared the necessary substantive actuarial analyses required by Gov. Code § 7507 admitted that he never was hired to prepare an analysis under Gov. Code § 7507; he did not in fact prepare such analyses; he never satisfied the requirements of Section 7507; he did not work for the County and the work he did was controlled by SCERA—all facts that Luke's pleadings allege that he discovered and that are contrary to Respondents' factual assertions in the County Counsel and Steptoe & Johnson reports); see also 4 AA 1009; p. 1033 at ¶62, lines 1-8; AOB p. 22, second para.; AOB p. 48.) S*ee infra* pp. 29-34, 36-43 for a more detailed discussion.

salary or [pension] benefit increases…." (County RB, p. 12.) Respondents misstate Luke's petition as merely alleging a "procedural error." (*Id.*, p. 10.) Respondents ignore the express, mandatory, language of the Public Protection Laws that the County must first analyze "the financial impact that the proposed benefits change… will have on the funding status of the county employee retirements system," and then provide an "explanation" of that financial impact. (Gov. Code § 31515.5) Respondents ignore the substantive, not merely procedural, obligations of the County "to secure the services of an enrolled actuary" to "provide a statement of the actuarial impact upon future annual costs before authorizing increases in benefits." (Gov. Code § 31516, § 7507.) The County was required by law to, but did not, take affirmative, statutorily mandated substantive steps to determine the effect of proposed pension increases on the public before adopting any such increases. Respondents brief ignores these facts. Luke's petition goes to the substance of the Public Protection Laws, and not mere procedural notice issues. (*See, e.g.*, 1 AA pp. 19-21, 35-37; 2 AA pp. 1001-16; AOB, pp. 19-20.)

After giving short shrift to their mandatory obligations, Respondents proceed to materially misstate the facts alleged in the Petition, by omitting what had actually occurred. For instance:

- Respondents assert that in 2002 and in 2003 the County Board of Supervisors ("Board") "discussed" pension increases. (County RB, p. 14)

Disputed: The Board went far beyond "discussing" the pension increases in this meeting; it had actually approved them. The Pension Increases to which the county refers were approved and adopted between July 2002 and February 2003. (*See* citations to record at AOB, pp. 55, 1st full paragraph). It is inherently misleading to assert that mere "discussions" were taking place, when Luke's petition challenges all increases adopted since

2002, and Respondents' records apparently show that adoption of pension benefits occurred between July 2002 and February 2003.) [4]

- Respondents assert that on "December 31, 2002" SCERA actuaries supposedly "submitted a report to SCERA" "analyzing the costs" of these enhanced benefits. (County RB, p. 15.)

Disputed: Once again, this is false, misleading, contrary to the facts alleged in Luke's Petition, and vigorously disputed. As Luke has pointed out, no such report existed on December 31, 2002. (AOB, p. 55.) Respondents' own proposed records show that the SCERA report, although purporting to cover the period ending on December 31, was not finished by December 31, 2002. According to the April 29, 2003 transmittal letter accompanying it, the so-called SCERA report was prepared in April 2003 and delivered months after the pension increases were adopted. (2 AA 765, 767; AOB, p. 55 and record citations therein.) Respondents misleadingly failed to inform the lower court of these facts which support Luke's Petition, just as their Briefs also omitted to address it, even though Luke brought it to the attention of this court in his opening brief. (AOB, p. 55.)

- By "February 25, 2003, the Board had approved several collective bargaining agreements… granting the benefits the December 2002 … Report had analyzed." (County RB, p. 15.)

Disputed: This assertion is misleading and disputed because Respondents imply that this decision was taken by the Board based on the SCERA Report which Respondents falsely date before February 25, 2003, when it was not released until months after. This statement is misleading

[4] This is consistent with Luke's allegations in the Petition challenging all benefit increases since 2002. (*See* 1 AA 11:8; 2 AA 997, ¶ 55, 1st full paragraph; AOB, p. 19 footnote 1.)

because it fails to mention the earlier adoptions. This statement also fails to mention that the so-called SCERA report was prepared for SCERA and was not a report obtained by the County; and there is no evidence it was delivered to the County before it adopted the pension increases. (AOB, pp. 55-56.) This statement fails to disclose and inherently contradicts the facts discovered by Luke, such as: (1) the purported actuary claimed by Respondents as having prepared the necessary substantive actuarial analyses required by Government Code section 7507 admitted that he never was hired to prepare an analysis under section 7507; (2) the purported actuary did not in fact prepare such an analysis; (3) he never satisfied the requirements of Section 7507; (4) he did not work for the County and the work he did was controlled by SCERA. (*See, e.g.*, 4 AA 1009; p. 1033 at ¶62, lines 1-8 and discussion at AOB 48, 54-56.) All of these facts were pleaded in Luke's Petition, and are contrary to Respondents' factual assertions in the County Counsel and Steptoe & Johnson reports, and in Respondents' briefs. (*Id.*) All of these items were in the record before the lower court, especially the Petition, and were discussed in Luke's opening brief. Respondents and the lower court simply ignored the concealed facts Luke alleged he discovered and instead assert contrary ones.

Disputed Further: Notwithstanding the *existence* of this report, the substance of the report and its usage in relation to the pension benefit increases are all very much disputed. The fact that any so-called SCERA actuarial report existed does not mean that its contents met the requirements of the Public Protection Laws; or that the Board itself had secured an actuary for the purpose of making the statutory analyses; or even that that the Board actually saw, considered, and made statutory findings based on the SCERA report. (*See, e.g,* facts cited at AOB, p. 54-55.) No such findings were made or assumed by the lower court at the demurrer stage, and it would be error for this court to do so. (*See Ramsden v. Western Union* (1977) 71 Cal. App.3d

873, 879 and other authorities cited at AOB, p. 53, none of which were distinguished by Respondents.)

- In "April, 29, 2003, the Board took "two further steps" to "finalize these benefits" in April and May 2003 (County RB, pp. 15-16.)

Disputed: The pension benefits had already been adopted and were binding long before April 29, 2003. Luke alleges that the pension benefit increases were voted upon and approved by the Board before and without compliance with the Public Protection Laws. (1 AA p. 11:4-7; pp. 35-38 at ¶¶ 36-41.) Nothing in the record cited by Respondents establishes otherwise, and Luke has disputed, and continues to dispute, all contentions to the contrary.

These and many others of these supposed factual statements contained in Respondents' briefs are materially false descriptions of what actually happened and what Luke has pleaded.[5] Respondents have asserted or implied facts not in the record, and omitted other facts in the record consistent with Luke's pleadings, to make it seem like County might have obtained a statutorily qualifying actuarial report before adopting the challenged pension increases. Luke has pleaded in his Petition that the County adopted pension benefit increases beginning in 2002-2003, without securing the services of an enrolled actuary, and without complying with the Public Protection Laws.

[5] For instance, it is not true that "Luke does not dispute" the purported facts listed at County RB, p. 18, as Respondents falsely claim without any citation to Luke's briefs on appeal or below. Nor is it true that there is "no dispute as to the events of 2002 and 2003." (County RB, p. 11). As noted above and in Part III.B below, these characterizations are contrary to the facts alleged in Luke's Petition and briefs below and to this court. Respondents are improperly alleging disputed factual interpretations based on cherry-picked documents without reference to the only relevant facts (those alleged in Luke's Petition) and the contrary facts apparent elsewhere in their purported records.

(*See* AOB, pp. 19-20, and 1 AA p. 29:1-9.) Those factual pleadings control.

B. Like The Lower Court, Respondents Ignore Facts Pleaded By Luke That Respondents Concealed And That Establish Estoppel

Respondents contend that there could have been no misrepresentation or concealment of material facts because "***all material facts*** are of public record" (County RB, at p. 54; SCERA Br., p. 10-11; emphasis added) and Luke "does not identify concealed facts, but disagreements of law." (County RB, at 55.) Both of these statements are wrong.

1. Governmental Entities Are Bound By Principles Of Equitable Estoppel; Luke Has Raised Factual Issues That Cannot Be Resolved At The Demurrer Stage

It is undisputed that the principles of equitable estoppel may be applied to government entities. (*See John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 445 and other cases cited at AOB p. 49; *Cruise v. City and County of San Francisco* (1051) 101 Cal.App.2d 558, 562-63; 565 (whether an estoppel against government exists should be tested generally by the same rules applicable to private persons; estoppel is usually determined by the trier of fact and not as a matter of law).)

When a trusted public officer, such as County Counsel, purports to conduct a neutral investigation on behalf of the public in response to a grand jury inquiry—not as an advocate in litigation but representing the interests of all concerned citizens and public servants—and after reviewing a lengthy, detailed and complex record, purports to summarize the facts in that record, the public is entitled to rely on County Counsel to do so accurately and in good faith. And when the County Counsel's report of the results of that investigation misrepresents what is in the record in a manner that misleads the public into believing that actions were taken in a different manner than they actually occurred—in a manner that would be exculpatory of

Respondents—members of the public are not on inquiry notice to find the wrongdoing in the public record. That is where the factual dispute lies here.

2. The Material Facts Were Not All In The So-Called Public Record And Luke Was Not Subject To Inquiry Notice

It is obvious that "all material facts" demonstrating the illegality of Respondents' actions are not and were not in the public record through 2012, when the County Grand Jury released its report. If the material facts demonstrating the illegality of Respondents' actions were a matter of public record, the Grand Jury would have so stated and concluded that the actions were illegal or legal. Instead, the Grand Jury merely raised the issue and found that it could not make any conclusions; it turned the matter over to conflicted interests at the County for response. (4 AA 1074; *see* AOB, p. 21.) At that point, the cover-up phase of Respondents' actions kicked into high gear. Respondent County, still controlled by persons with a direct financial interest in the outcome, prepared their misleading report, and hired a law firm to do the same, on behalf of their client, the Board, and not the public.

Although Luke himself was unaware of the Grand Jury proceedings, the trial court held that he was on "inquiry notice" of facts contrary to those stated in the proceedings because some members of the public were theoretically aware of them. (4 AA 1458.) Basically, the court held that Luke was on constructive notice of the claims, based on purported implied knowledge of matters of which it took judicial notice. (*Id.*)

This was erroneous as matter of law. The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only once the plaintiff (here, Luke) has such knowledge. (*Unruh-Haxton v. Regents of the University of California* (2008) 162 Cal.App.4th 343, 364 (rejecting "constructive suspicion" based on widespread publicity as a proper basis for triggering the statute of

limitations.) It is error to take judicial notice of public knowledge of a generalized public event "unless the plaintiff admits to having knowledge of the publicity." (*Id*. at 365.) A "hearing on demurrer cannot be turned into a contested evidentiary hearing" about what was known to the public absent express allegations that the plaintiff knew those facts too. (*Id.*) That is exactly what the lower court did. As a matter of law, the court wrongly imputed the knowledge that some members of the public had in the Grand Jury proceedings to Luke, who had no such knowledge at the time. Since Luke was not aware of any of the facts relating to the unlawful pension increases until immediately before the lawsuit was filed (4 AA 1391), we do not even need to reach the issue of estoppel.

The lower court compounded that error by failing to acknowledge that Luke had pleaded facts which, if true, would have shown that a reasonable person would have been misled by Respondents' fraudulent statements, even if he had known about them at the time they were made.

3. The Record Before This Court Establishes That Luke Pleaded Concealment Of Material Facts By Respondents, Contrary To Disputed Facts Asserted By Respondents; Luke's Pleaded Facts Control At The Demurrer Stage

Respondents contend that Luke's claim that the public was misled is confined to their misstatements of law, but the record shows that lawyers and other fiduciaries for Respondents misled the public about the facts. Respondents' responses to the Grand Jury report asserted, as a factual matter, that Respondents had materially complied with all substantive requirements of the Public Protection Laws, and thus that Respondents had not violated these laws in any meaningful way. This factual nature of these misstatements is easy enough to see in County Counsel's response to the Grand Jury concerning actuarial work, six of which are itemized for this Court by

Respondents. (County RB, pp 17-18.)

These so-called facts were presented by the County lawyers as if they were true, supported by evidence identified during their investigation, and satisfied the requirements of the Public Protection Laws. The comments below them show that each statement made is either false or misleading because of factual misstatements or important omissions.

- Fact Represented By County Counsel: "The County obtained the services of Gabriel Roeder Smith & Company, an enrolled actuary, by early 2002, paying over $63,000 for the services." (2 AA 467)" (See County RB, p. 18.)

Disputed: (1) This description of what happened is false. The County never retained any actuary for any purpose. This falsehood is important: Government Code Section 7507 requires that "local legislative bodies" (here, the County) must "secure the services of an enrolled actuary" to perform the tasks already described to this Court "before authorizing increases in public retirement plan benefits, and since the Board of Supervisors [not SCERA] is the legislative body that authorized the benefits at issue in this case, it is an important fact for the public to know whether the supposed actuary was retained by SCERA or the Board. By telling the public the "County obtained" the actuary company's services, County Counsel plainly intended to assure the public that the Board had "secured the services" of the actuary (Rick Roeder) as required by law, which was factually untrue.

(2) Although Respondents contend that an actuary named Rick Roeder prepared a report that satisfied the Public Participation Laws, there are many fact disputes that accompany the legal disputes on this subject. For example, the record shows that Roeder was retained by SCERA, not the Board of Supervisors. Respondents acknowledge that SCERA is "an entity distinct from the County." (County RB, p. 14.) So this misstatement of fact, which was made in a 2012 public document by County Counsel, was

misleading. It attempted to reassure the public that the Board of Supervisors had retained an actuary as required by the Public Participation Laws. This does the opposite of placing Luke on inquiry.

(3) The actuary that SCERA is relying on (Rick Roeder) has admitted that he was never commissioned by anyone to do an analysis under the Public Protection Laws, and he therefore did no such analysis. (4 AA 1033, lines 3-4.) This material fact, concealed by Respondents, is alleged in the Petition by Luke. The misrepresentation of fact in the County Counsel's report was plainly designed to leave the misimpression that the County had obtained the requisite actuarial report from Roeder. It turns out, they were not telling the truth.

(4) SCERA disregarded the actuarial assumptions of the actuary (Rick Roeder) on which it now attempts to rely, and SCERA not the County controlled his analysis (AA 1033, lines 4-5) Therefore, the work product of the alleged actuary could not have been attributable to the County. These material facts were concealed.

(5) The County Lawyers failed to explain that, not only did Roeder not do any analysis under the Public Protection Laws, but the report on which they were apparently relying was not done until April 2003, months after the pension benefit increases had been adopted. They failed to disclose that no qualifying report was in existence or disclosed to the public before the pension benefit increases were adopted.

- Fact Represented by County Counsel: "GRS produced at least four reports, including the December 2002 Actuarial Report. (*Ibid.*)" (*See* County RB, p. 18.)

Disputed: In this lawsuit, Luke is not required to accept the truthfulness of a hearsay statement such as this (or indeed any of the above-cited statements) contained in the public records. (*See* authorities cited at AOB, p. 53.) However as a factual statement presented to the public, the

impact of this statement of fact is misleading because the public would assume that Roeder had produced compliant documents for the proper entity, which he did not do on either count. In addition, the readers would assume that all such reports were completed and presented to the Board before any of the Pension Increases were adopted, and Luke has alleged that none of them were. (*See, e.g.*, 1 AA p. 36:3-4 (Board did not obtain a report of the future annual costs); p. 36:13-14 (Board never obtained accurate, complete, and reliable information to fulfil its duty); p. 29:1-4 (whatever was provided by the alleged SCERA actuary did not satisfy the requirements of Section 7507), p. 32 at ¶26 (Respondents failed to follow mandatory statutory requirements).)

- Fact Represented by County Counsel: "Those reports 'were sent directly to SCERA,' the pension administrator. (2 AA 466.)" (*See* County RB, p. 18.)

Disputed: County Counsel implies that all four of the alleged Roeder's reports have something to do with evaluating future costs of the pension increases in compliance with the Public Participation Laws. As it turned out, none of them did, because Roeder himself stated that he was never retained to do this analysis. (AA 1033, lines 3-4.) In addition, County Counsel does not disclose that these reports were not provided to, nor were they relied upon, by County prior to implementing the illegal pension benefit increases. But because they misled the public into believing there was compliance, they achieved their goal of making taxpayers wait until the statute of limitations had run.

- Fact Represented by County Counsel: "SCERA discussed the December 2002 Actuarial Report at public meetings on May 22, 2003 and June 19, 2003. (*Ibid*.)" (*See* County RB, p. 18.)

Disputed: County Counsel makes a factual statement here that, even if technically true, is highly misleading because it omits key facts. For

example, it fails to explain that Roeder did not prepare actuarial estimates about future costs for consideration by the Board of Supervisors and that these meetings of SCERA had nothing to do with the Board's decision. Moreover, the dates of these meetings is misleading because Counsel omits to tell the public that the applicable memoranda of understanding had been adopted by binding votes of the Board long before Roeder issued his disputed "report," and the Board could not have relied upon them. (*See* AOB at pp. 54-55.) In other words, County Counsel presented the facts to make it look like Roeder was somehow involved in decision making about the pension increases when the Board had agreed to the increases before his report was even prepared. The reassuring and misleading facts presented by County Counsel were presented so that no reasonable taxpayer would expend the resources to look for such contradictory entries in the record. In other words, the false facts presented by County Counsel in 2012 negated any inquiry notice that might otherwise be inferred from the presence of the public record.[6]

- Fact Represented by County Counsel: "The Board cited the December 2002 Actuarial Report at its April 29, 2003 and June 24, 2003 meetings. (2 AA 466-467)." (*See* County RB, p. 18.)

Disputed: County Counsel makes a factual statement here that, even if technically true (the underlying record is not cited by County Counsel, nor is it in Respondents' Brief; County RB, p. 18) is misleading because it omits key facts. For example, it fails to explain that the Board had already bound itself to the illegal pension benefit increases before it allegedly saw the

[6] *See, e.g.*, 4 AA p. 1008 at ¶ 26:8-11 (public at all times deceived into thinking that the necessary legislative requirements had been fulfilled prior to adoption of the reports); p. 1012: 24 (contrary to the assertions by Respondents, there was "no compliance"); p. 1013:21-22 (Respondents intentionally failed to follow the mandatory statutory requirements); 1 AA pp. 35-37 at ¶¶35-39 (violations of mandatory requirements).

purported SCERA report—if it ever did. The dates of these meetings are misleading because Counsel omits to tell the public that the memoranda of understanding were entered long before Roeder issued his report, which bound the Board to the pension increases, and the Board could not have relied upon them.

- Fact represented by County's lawyers (Steptoe & Johnson): "The available record indicates the cost of pension enhancements were actuarially determined in accordance with the law in effect at the time…." and thus "the County substantially complied with the procedural requirements." (2 AA 481-482)

Disputed: These purported independent lawyers continued and amplified the misleading portrayal of the facts. As noted above and in Luke's opening brief, Luke has pleaded numerous facts that were misrepresented and concealed by Respondents, including the key facts going to the heart of this case: (1) County did not obtain a valid actuarial report meeting the standards of the Public Protection Laws. (AA 1033, lines 2-3) (2)The actuary that SCERA is relying on (Rick Roeder) has admitted that he was never commissioned by anyone to do an analysis under the Public Protection Laws (AA 1033, lines 3-4), and he therefore did no such analysis. (*Id.*) (3) Respondent SCERA actually disregarded the actuarial assumptions of the actuary (Rick Roeder) on which it now attempts to rely, and (4) SCERA not the County controlled the analysis. (AA 1033, lines 4-5; AOB, pp. 48, 52.)

These are all examples of misleading facts. These, and others like them, present a classic example of deceitful actions intended by Respondents to cause the public to believe that they had complied with the law. *See, e.g.*, Civil Code section 1710, defining "deceit" as including "The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

(Civ. Code, § 1710, subd. (3) (emphasis added); *see also id.* § 1752, subd. (3) (suppression of that which is true); *id.* § 1752, subd. (5) "Any other act fitted to deceive").

It was not merely a misstatement of the law that Luke alleges, but a manipulation of the factual record to make the public believe that events occurred that did not. While lawyers and other fiduciaries tried to make those facts look like they were supported by the record, this was really part of a scheme to make the public go away. And they did—until Luke figured it out in 2017. As a matter of law, at this stage of the proceedings it cannot be said with certainty that the conduct of Respondents, whether in an official capacity, or by individuals acting on their behalf, could not have amounted to an estoppel. (*See* cases at AOB, p. 49. *See also E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315-16 (the "alleged defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred").)

For the same reasons, SCERA's argument that the Board or SCERA allegedly retroactively approved valuations by following a process not approved by the Public Protection Laws gets them nowhere. (SCERA Br., p. 11-12.) SCERA's brief is based upon the unsupported claim, not accompanied by any citation, that "SCERA's actuary properly performed and provided [this] analysis to SCERA's board, and the County properly relied on it." (SCERA Br., p. 13.) These are mere assertions of SCERA's counsel, contradicted by the disputed facts and pleadings. The argument based on these assertions is nonsensical, because SCERA seems to be claiming that its version of the facts purporting to establish its compliance put the public on notice of its noncompliance. Even if these disputed assertions were true (and Respondents' interpretations of alleged judicially noticed documents are not properly considered in opposition to a demurrer)

they would neither establish compliance nor have put the public on notice as to noncompliance.

4. Because Luke Pleaded And Demonstrated That Respondents Concealed The Material Facts Concerning Their Illegal Actions From The Public, The Lower Court Erred By Accepting Contrary Assertions From Respondents At The Demurrer Stage Based On Respondents' Disputed Characterizations Of Alleged Public Records

So we have a direct factual conflict between the facts alleged in the pleadings, and those alleged in the demurrers—which attempted to contradict the Petition based on disputed facts taken from Respondents' interpretations of records in their requests for judicial notice. Respondents claimed material compliance with all substantive aspects of the Public Protection Laws and attempted to persuade the public that they had not violated the substance or purposes of these laws. Having made those claims at the time, and Luke having pleaded that they were deliberately misleading, in this litigation—especially at the demurrer stage—Respondents cannot be heard to asserting that they actually gave the public notice of their wrongdoing sufficient to bar a lawsuit when the true facts were later discovered. Respondents cannot have it both ways—asserting that they complied with the law and so notified the public, and at the same time that the public had any meaningful notice of their wrongful conduct.

Luke has asserted facts contrary to the Respondents' statements—facts which establish deceit, and which demonstrate that, there was "no compliance" with the Public Protection Laws. These factual conflicts cannot be resolved on appeal, and nor could they below. (*See cases* cited at AOB, p. 53-54.)

Resolution of the conflict will depend, not on the existence of a so-

called actuarial report—but on whether the author of the report was asked by the County to prepare findings meeting the requirements of the Public Protection Laws; whether he did so; whether the report meets the criteria of the Public Protection Laws; whether the report was ever submitted to the County; whether the County read or relied upon it before approving the pension increases at issue, and so forth. Resolution of these disputed issues will depend on the meaning and interpretation of these records, which can only be determined by the trier of fact after evidence has been gathered through discovery, and not at the demurrer stage.

The trial court erred by ignoring all of these matters. Luke is entitled to his day in court on the issue of estoppel.

IV. NONE OF LUKE'S MATERIAL ISSUES ON APPEAL ARE UNTIMELY OR WAIVED

In their introduction Respondents vaguely assert that Luke "cannot raise new factual issues" without specifying which new facts supposedly have been asserted. (County RB, p. 11) "Even new legal theories are forbidden," they admonish, while failing to identify any purported forbidden theories. (*Id.*)

No material issues on appeal have been waived or asserted in an untimely manner by Luke. "The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court. … There is no requirement that a trial court objection be supported by extensive argumentation to avoid forfeiture." (*See Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649 (emphasis added).) A party is not precluded from raising an issue on appeal where the record indicates the grounds for a party's objection were before the court at the time the court ruled on the objection. Legal authorities that were not presented to the trial court may properly be cited for the first time on appeal, so long as the issue on which those authorities are cited was presented to the trial court.

(*Giraldo v. California Dept. of Corrections & Rehabilitation* (2008) 168 CA4th 231, 251.)

Respondents assert, without justification, that Luke has "abandoned" his position asserted below that the purported pension benefit increases were never truly "adopted." (County RB, p. 24, no. 5) This assertion is unfounded since Luke's opening brief contains a thorough discussion establishing the void and ultra vires character of the purported pension increases. (AOB, pp. 31-35.) A void measure cannot be said to have been adopted in the legal sense. (*See* Black's Law Dict. (11th ed. 2019), "ultra vires" p. 1833 col. 2.)

Respondents try to give the impression that the unrepresented Luke failed to preserve continuous accrual for appeal. (*See id*. p. 24 ["Luke's opposition [to the second demurrer] did not argue continuous accrual."]; *id.* p. 26.) This is also a red herring. Luke raised the issue of continuous accrual beginning in the first sections of Luke's first petition (1 AA pp. 17-19), and consistently through his oppositions to the first demurrers (4 AA pp. 929:17-20), oral argument at the first hearing (December 20, 2017 Transcript, p. 28:10-13), in his amended petition (4 AA 1001 at ¶8; 1041:23-1042:12), his opposition to the second round of demurrers (4 AA p. 1407, lines 3-4, incorporating previous arguments), as well as the second hearing (June 0, 2018 Transcript, p. 47:17-19, citing *Baxter, supra*, and continuous accrual)—every stage of the proceedings.

The lower court expressly rejected continuous accrual in sustaining the first demurrer. (4 AA 994.) The ruling asserted that Luke's estoppel allegations in the first Petition were allegedly "vague and lack[ed] factual support" (*id.*) which likely explains why Luke focused on facts relating to estoppel in the amended petition. The trial court improperly and expressly sustained demurrers to the first Petition as failing to satisfy continuous accrual. The lower court also raised the issue of *Baxter* and continuous accrual at the second demurrer hearing, inquiring about Respondents'

position on the issue. (June 20, 2018 Transcript, p. 58:4-21.) The law is clear that this legal issue, once raised, is preserved for appeal. (*See Boyle v. CertainTeed Corp.* (2006) 137 C.A.4th 645, 649.)

Respondents expressly challenge only two arguments on grounds that they were not raised below. The first is Luke's point that the lower court was involved in the Grand Jury proceedings upon which his estoppel claim turns. (County RB, pp. 30-33.) Luke does not dispute that judicial disqualification was not raised in the court below, but he does not seek disqualification on appeal. The point is simply that facts not in the public record were apparently considered by the lower court in rejecting Luke's estoppel claim, and because those circumstances are apparent from the record on appeal and pertain directly to an issue preserved by Luke on appeal, he has not waived the right to include that point in his argument.

Respondents contend that Luke has supposedly raised "new facts on appeal" in support of his estoppel claim. (County RB, p. 33.) The supposed "new facts" are identified as "no actuary tasked to prepare a 'qualifying' analysis," "false narrative," and/or "misleading statements." which Respondents find at pages 47-49 of Luke's opening brief. But Respondent's citations to the record demonstrate (County RB, p. 33), as do Luke's citations in the opening brief, these are not new facts. They were contained in the amended petition. (AOB, pp. 47-49 and citations therein.) All of the facts cited in Luke's briefs are from the record before the lower court. These facts may have been disregarded or ignored by Respondents and the lower court, but that does not make them new facts outside the record. Even Respondents admit that such facts, contained in the pleadings, are to be taken into consideration and accepted as true. (County RB, p. 26, *citing Aryeh, supra*, 55 Cal.4th at 1189 note 1.)

Respondents adopted the unusual tactic of trying to prove their innocence, as a matter of law, by arguing that the entire public record was

undisputed. Luke objected to notice being taken of Respondents' selective records and argued that nothing in such records could deprive him of his day in court.[7] Below, and on appeal, he has the right to respond to the claims being made by Respondents based on the record submitted by Respondents. On appeal, he has the right to argue from that same record upon which Respondents purport to rely This is not "a new theory of equitable estoppel" as Respondents assert; it is an argument supporting reversal of the judgment below based on the record before that court.

V. RESPONDENT COUNTY'S SUGGESTION THAT THIS COURT SHOULD DEFER TO AN ALLEGED "POLITICAL" OPTION IGNORES THE RULE OF LAW WHICH RESPONDENTS MUST FOLLOW AND THIS COURT SHOULD ENFORCE

Respondents begin and end their defense of the judgment below not with a legal argument but with a political one: "the solution" to the issues raised by Luke, they say, "is not a lawsuit claiming procedural error 16 years ago—a lawsuit that [they contend without proof] would unsettle the reasonable expectations of thousands of current and former employees who have relied on promised pensions. Rather, [Luke's] recourse is with the political branches." (County RB, pp. 10, 64.) This is wrong. Even SCERA does not join in this suggestion, finding this political "policy" option to be inapplicable to it. (SCERA Br., p. 7, last sentence.)

To begin with, nothing in the record suggests that there is any "political" option. The record suggests the opposite. The County Board of Supervisors is a political entity, elected by the public. If the Board were

[7] *See* 4 AA p. 938 (objection to request for judicial notice); pp. 1408-1410, 1413-1415 (noting some of the many issues raised by the records); June 20, 2018 Transcript, pp. 61-67 (discussion of various purported public records; questions raised by Luke).

willing to implement a political solution it would have done so long ago.

The Legislature is also a "political branch" and it has already spoken—by adopting the Public Protection Laws. As demonstrated in Luke's opening brief, the Public Protection Laws were intended to prevent the very situation now faced in this case, in which a county triggers a pension funding crisis by failing to take the steps prescribed by the Legislature before adopting huge pension increases. (AOB, pp. 15-16.) Thus, there is no legitimate "political" issue facing this court, but only a "rule of law" issue. There is no reason in law or policy why Luke must be sent back to the Legislature to enforce laws already enacted. Luke's remedy for Respondents' legal violation is in the courts.

VI. SCLEA'S POSITION AS A NON-NECESSARY PARTY DOES NOT SUPPORT THE LOWER COURT'S JUDGMENT OF DISMISSAL

SCLEA is a union representing a group of County employees whose pensions may be affected by the outcome of this lawsuit. Luke joined SCLEA at the direction of the lower court, but SCLEA took the position below, which it repeats on appeal, that its interests are adequately protected by County and SCERA, such that SCLEA need not be a party. (4 AA 1163-64) The corollary to that position is that SCLEA will be bound by the results of the lawsuit even though it declined to participate. (*See* Cal. Code Civ. Proc. § 389(a); *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 84-85 (parties declining to participate would have had the same object as the party participating in the litigation). Accordingly, Luke does not have any objection to that portion of the lower court's order which concluded that SCLEA does not need to be a party to this litigation and can be dismissed at SCLEA's request.

SCLEA's brief does not add any other basis upon which the lower court's erroneous decision can be salvaged.

VII. CONCLUSION

For all the reasons stated above, the judgment should be REVERSED on the grounds of continuous accrual and estoppel to assert the statute of limitations.

Dated: August 2, 2019

ROBINSON & ROBINSON, LLP

By: */s/ Jeffrey A. Robinson*
Jeffrey A. Robinson
Attorneys for Petitioner and Appellant
George W. Luke

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c), I certify that this Appellant's Reply Brief contains 13,299 words. In making this certification, I have relied on the word count of the computer used to prepare the brief.

Dated: August 2, 2019

ROBINSON & ROBINSON, LLP

By: */s/ Jeffrey A. Robinson*
Jeffrey A. Robinson
Attorneys for Petitioner and Appellant
George W. Luke

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is **2301 Dupont Drive, Suite 530, Irvine, California 92612.**

On 8/2/2019, I served the documents described as **APPELLANT'S REPLY BRIEF** on interested parties in this action, as follows:

Kenneth E. Bacon, Esq.
David P. Mastagni, Esq.
Mastagni Holstedt, A.P.C.
Civil Litigation Department
1912 I Street
Sacramento, CA 95811
PH: 916-446-4692 / FX: 916-447-4614
(Electronically Served Via EFS)

(Attorneys for Respondent Sonoma County Law Enforcement Association)

Ashley K. Dunning, Esq.
Nossaman LLP
50 California Street, 34th Floor
San Francisco, CA 94111
PH: 415-398-3600 / FX: 415-398-2438
E: adunning@nossaman.com
(Electronically Served Via EFS)

(Attorneys for Respondents Sonoma County Employees' Retirement Association (SCERA))

Michael G. Colantuono, Esq.
Jon R. di Cristina
Colantuono, Highsmith & Whatley, PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945-5091
PH: 530-432-7357 / FX: 530-432-7356
E: jdicristina@chwlaw.us
(Electronically Served Via EFS)

(Attorneys for Sonoma County Respondents)

Hon. René A. Chouteau
c/o Clerk of Court
County of Sonoma
3055 Cleveland Avenue
Santa Rosa, California 95403
Civil and Family Law Courthouse
(Brief Only)
(*Sent Via U.S. Mail*)

(Trial Judge)

Supreme Court, State of California (Supreme Court)
350 McAllister Street
San Francisco, CA 94102
(Electronically Served Via EFS)

[ ] (BY MAIL)[C.C.P. § 1013(a)(1)Person Depositing In Mail] I deposited an envelope, containing the listed documents, addressed to the persons listed above as "Sent via U.S. Mail" in the mail at **Irvine, California**. The envelope was mailed with postage thereon fully prepaid.

[X] I caused the above documents to be submitted to the Court for filing and electronic service on the persons listed above as served "Electronically Served Via EFS" through the EFS [electronic filing system operated by TrueFiling] in accordance with (Cal. Rule of Court, rule 8.78(a).)

Executed on February 25, 2019, at Irvine, California

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Charles Patterson	*/s/ Charles Patterson*
(Type or print name)	(Signature)