

1 Petition for writ of Mandamus

2 ordering action by the

3 Board of the Marin County Employees' Retirement

4 Association

5
6 Petitioner:

7 David C Brown

8 25 Country Club Drive

9 Mill Valley, California, 94941

10 415-987-1619

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Verification:

I, David C Brown, residing at 25 Country Club Drive, Mill Valley, CA, 94941
certify that everything I have written in this document is true to the best of my
knowledge.

Word Count:

I, David C Brown, certify that this document is less than 14,000 words.

Table of Contents:

- 1. List of interested parties.
- 2. Table of authorities.
- 3. Body of petition.
- 4. List of Exhibits

1. List of interested Parties

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Mr. Jeff Wickman, Administrator
Marin County Employees' Retirement Association
1 McInnis Pkwy #100
San Rafael, CA 94903
[\(415\) 499-6147](tel:(415)499-6147)

Board of Supervisors
Marin County
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903

City Council
San Rafael
1400 5th Ave
San Rafael, CA 94901
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1 District Board
2 Novato Fire Protection District
3 95 Rowland Way, Novato, CA 94945
4 [415\) 878-2690](tel:4158782690)

5
6 District Board
7 Southern Marin Fire District
8 308 Reed Blvd, Mill Valley, CA 94941
9 [\(415\) 388-8182](tel:4153888182)

10
11 Daniel Kronowitz
12 Euclid/Hudson Insurance
13 380 Maple Avenue West, Suite 302
14 Vienna, VA 22180
15 [\(571\) 730-4810](tel:5717304810)

16

17

2. Table of Authorities

18 1. *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91
19 Cal.App.4th 730, 734-735.

- 1 2. *Protect Our Benefits v. City and County of San Francisco* (2015) 235
2 Cal.App.4th 619
3 3. *County of Orange v. Assoc. of Orange County Deputy Sheriffs* (2011) 192
4 Cal.App.4th 21
5 4. *City of Santa Monica v. Gonzales* (2008) 43 Cal.4th 905),
6 5. *Cal-Air Conditioning, Inc. v. Auburn Union School District* (1993) 21
7 Cal.App.4th 655, 673)

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3. Body of Petition

12 The writ I am seeking is for the court to order the Board of the Marin County
13 Employees' Retirement Association to 1) acknowledge that there is at least a
14 prime facie case that certain retirement benefit enhancements were granted
15 unlawfully/improperly and 2) acknowledge that there is a legitimate question
16 as to whether MCERA is allowed to pay these benefits. Most important, I ask
17 the court to evaluate the situation in order to determine if the benefits were
18 unlawfully/improperly adopted. In light of its hostility to the requirement and
19 its refusal to investigate, or to even place the item on its agenda, the board has
20 forfeit its right to do so.

1

2 My name is David C Brown. I am not an attorney. I live in the County of Marin
3 at 25 Country Club Drive, Mill Valley, California, 94941. I have lived at this
4 address since approximately November 2000. During that time I have paid
5 taxes that have been used for, among other things, public employee salaries,
6 pensions and benefits.

7

8 This document is being submitted to the First District Court of Appeal because
9 it is my understanding that all matters having to do with a retirement board
10 governed by the County Employee Retirement Law (CERL), also known as the
11 1937 Act, must be addressed to a Court of Appeal.

12

13 The Marin County Employees' Retirement Association (MCERA) is a County
14 Retirement System established under the above-mentioned County Employee
15 Retirement Law (CERL). The Board administers the Association according to
16 the California Government Code, the CERL, its own by-laws and its own
17 policies. The Board is composed of nine members: four members of the public
18 appointed by the Marin County Board of Supervisors, four members elected
19 by members of the plan, and one Ex-Officio member, The County Director of

1 Finance. The Board retains outside counsel, Ms. Ashley Dunning of the firm
2 Nossaman LLP.

3

4 I have followed the rules for approaching a public board. I have emailed. I
5 have written. I have spoken at public meetings. I have requested that this item
6 be placed on the Board's agenda. All have been to no avail. I am frustrated and
7 so I approach this court. My correspondence with the Board, its
8 correspondence with me, and the text of my presentations to the board are
9 attached as exhibits.

10

11 In April 2015 the Marin County Civil Grand Jury issued a report (EXHIBIT 1) in
12 which it found multiple (38) violations by four Marin Agencies of section 7507
13 of the California Government Code. (Specifically, the version of section 7507 in
14 force at the time.) The violations occurred between 2001 and 2006. Two of
15 the four agencies, The County of Marin and The City of San Rafael, stated in
16 their required responses to the Grand Jury they "substantially complied" with
17 the statute. Obviously, "substantial" is not synonymous with "fully", which is
18 what the statute requires. Please see EXHIBITS 11 and 12 for an analysis of
19 the failures by each agency to comply with section 7507.

20

1 The other two agencies, the Southern Marin Fire District (SMFD) and the
2 Novato Fire Protection District (NFPD), either did not respond directly or said
3 they cannot find evidence they complied with 7507. They, too, effectively
4 conceded the increases were not lawfully adopted.

5
6 Section 7507 (EXHIBIT 2) essentially has only two parts. The first is that the
7 legislative body “*shall* secure the services of an actuary to provide a statement
8 of the actuarial impact upon future annual costs, including normal cost and
9 any additional accrued liability, before authorizing changes in public
10 retirement plan benefits or other postemployment benefits.” The second is
11 that these costs “*shall* be made public at a public meeting at least two weeks
12 prior to the adoption of any changes in public retirement plan benefits or
13 other postemployment benefits.” Because the purpose of 7507 is to ensure
14 that the public has the information calculated by the actuary, both parts,
15 working in tandem, are necessary for section 7507 to have its desired
16 meaning.

17
18 There is no confusion about the purpose or intent of section 7507. EXHIBIT 3
19 is a letter dated September 12, 1977 from the bill’s (SB 439) author, Senator
20 Newton R. Russell, to then-Governor Edmund G. Brown, Jr. stating Senator

1 Newton's reasons for submitting the bill. In the letter he speaks of "...end-
2 running" local government by employee groups asking the legislature to grant
3 "permissive" legislation with *the final result being that local government*
4 *approves employee retirement benefit increases without the taxpayers ever*
5 *knowing the real cost.*" (Italics mine.)

6
7 This is exactly what happened in Marin County. Because this required
8 information was not properly made public, the harm against which Section
9 7507 was intended to protect did, in fact, occur. Unfunded liabilities
10 skyrocketed. For example, the County and Districts' unfunded liability was
11 approximately \$10.9 million as of June 30, 2001. It was \$343 million as of June
12 30, 2013 - an increase of thirty times the amount just twelve years earlier.

13 This does not take into consideration that the County issued \$112.8 million in
14 pension obligation bonds in 2003 to fund its pension liability, of which \$106
15 million was outstanding as of June 30, 2014. It also does not take into
16 consideration the impact of a new valuation methodology. All else equal, the
17 unfunded liability would have risen from \$10.9 million to \$477 million as of
18 the end of fiscal 2014. The unlawfully/improperly adopted benefit
19 enhancements were not the sole reason for these increases but I believe they
20 represent a substantial part of the increase. At a meeting of the Marin County

1 Board of Supervisors I requested that the amount be calculated and made
2 available to public. I was told by the County Administrator, who had consulted
3 with the MCERA Retirement Administrator, that this was too much work or
4 too difficult. (Not a direct quotation, but close.)

5
6 To put this failure to fully comply with section 7507 in some perspective, The
7 California Public Employee Retirement System (CalPERS) considers
8 compliance with 7507 so important that it now requires agencies to certify in
9 writing that they have complied with its requirements. (See page two of
10 EXHIBIT 4.)

11
12 Please note that CalPERS does not require certification of partial compliance,
13 substantial compliance, or some other less-than-full measure of compliance. It
14 requires certification of compliance. Importantly, CalPERS will not fund a
15 retirement benefit unless an agency has certified such compliance.

16
17 If the benefits in question were unlawfully/improperly adopted, the MCERA
18 Board is failing in its duties.

19

1 First, the board is failing in its fiduciary duty to the substantial minority
2 (perhaps a majority, it is very hard to know) of plan members who are not
3 receiving or will not receive the enhanced benefits. Because the pool of funds
4 available for retirement benefits is not infinite, if the board is making
5 payments for benefits that were not lawfully adopted, it is improperly
6 advantaging some beneficiaries at the expense of others whose benefits are
7 entirely legitimate. Also, the board has a fiduciary duty to preserve the pool of
8 assets available to pay legitimate benefits. It is failing in that duty as well.

9
10 A retirement board is “required to administer the retirement system in a
11 manner to best provide benefits to participants of the plan. It cannot fulfill this
12 mandate unless it investigates applications and *pays benefits only to those*
13 *members who are eligible for them.* (Italics mine.) The Board, not the
14 employer, has the constitutional and statutory duty to manage the retirement
15 fund and to determine whether the fund is obligated to pay benefits to any
16 particular applicant." (*McIntyre v. Santa Barbara County Employees'*
17 *Retirement System* (2001) 91 Cal.App.4th 730, 734-735.)

18

1 Second, the board is failing to meet its obligation under Article 16, section 17,
2 paragraph (b) of the California Constitution, the so-called “employer
3 minimization provision”:

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

11
12 If the benefits were unlawfully adopted, the last sentence of the above section
13 is moot and the “employer minimization provision” dominates. By making
14 improper payments the board is increasing employer contributions, not
15 minimizing them.

16
17 In a letter dated September 14, 2015 (EXHIBIT 5) I asked the MCERA Board to
18 place this matter on its agenda and to discuss whether an investigation is
19 warranted. It has not done so. On October 5, 2015 I received a letter (EXHIBIT
20 6) from Ms. Ashley Dunning, counsel to the board, listing various reasons why
21 there is “no basis” for the board to undertake the investigation I propose.

22
23 In her letter Ms. Dunning states, *“While this letter is not intended to analyze all*
24 *the legal issues potentially implicated by the Grand Jury report...”*

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Common sense and probably legal ethics would seem to require that before foreclosing *even the possibility* of an investigation into a situation where tens, perhaps hundreds, of millions of taxpayer dollars are at stake, and some plan members are being advantaged at the expense of others, Board counsel *would* analyze all the legal issues potentially implicated.

In her letter Ms. Dunning cited both *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619 and *County of Orange v. Assoc. of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21. Both of these cases concern attempts by *granting agencies themselves to then rescind benefits that were originally lawfully granted*. These were cases of buyer’s remorse.

The cases cited by the Marin Grand Jury are not cases of buyer’s remorse. The issue in Marin is *whether the benefits were lawfully granted in the first place*. It is not that they were originally lawfully granted and the granting party is now trying to rescind them. The question is whether the failure to meet the requirements of a statute for public disclosure renders the grant of benefits unlawful in the first place. ‘Protect Our Benefits’ and ‘County of Orange...’ are simply not relevant here.

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The fact that Counsel for the Board can only cite two non-relevant cases to support her position suggests strongly that the matter I am raising in this request for a writ may well be one of first impression, which provides an additional reason for the Court to grant the writ.

Ms. Dunning also cited *County of Orange v. Assoc. of Orange County Deputy Sheriffs* to say,

“The Second District Court of Appeal rejected that effort too and restated, once again, the well-established vested rights principles under California law that do not permit unwinding of benefit enhancements because of later claims that the grantor of the benefits had insufficient financial information needed to grant the benefit ...”

Once again, Counsel has sited a case that is not relevant. In “County of Orange...” the benefits were properly granted which meant they were vested and could not be rescinded. This writ is *only* about whether the benefits were lawfully granted in the first place. One is not entitled to vest in a benefit that was never lawfully given because "vesting" presupposes a lawful grant in the first place. The only way “County of Orange...” can have any potential application here is AFTER the Court determines pursuant to the writ that the benefits were lawfully bestowed, which is what Counsel is refusing to

1 entertain on behalf of the Board.

2

3 In her letter Ms. Dunning said, “*Typically, questions of prior public notice and*
4 *financial data are deemed to be procedural.*” In this context, typically means
5 “usually but not always”. If I were on trial for my life and the prosecutor said,
6 “Judge, typically, we hang people under these circumstances,” I would very
7 much want to know whether my circumstances qualified as *atypical*, so that I
8 might avoid being hanged.

9

10 Similarly, when Ms. Dunning says, “*Typically, questions of prior public notice*
11 *and financial data are deemed to be procedural,*” it is vital to know whether the
12 circumstances in Marin are *typical* or *atypical*. Yet that question is never
13 explored. Section 7507 has only two parts. One involves “*financial data*”: Have
14 an actuary calculate the future costs. The other involves “*prior public notice*”:
15 Make public at a public meeting at least two weeks prior to adoption.
16 Without both of these items operating together, 7507 ceases to exist. It is
17 gutted, a blank page. In two cases Ms. Dunning chose not to cite, the court
18 said:

19 “... if the failure to comply with the procedural requirement invalidates the
20 purpose of the statute, the statute is mandatory.” *City of Santa Monica v.*
21 *Gonzales* (2008) 43 Cal.4th 905),

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“... if the procedure is essential to promote the statutory design, it is 'mandatory' and *noncompliance has an invalidating effect.*” (Italics mine.) *Cal-Air Conditioning, Inc. v. Auburn Union School District* (1993) 21 Cal.App.4th 655, 673)

Referring back to Senator Russell’s letter to Governor Brown, one wonders if section 7507 is the *atypical* case. One wonders if its requirements are substantive. It certainly sounds like it to me. But it is not my opinion that matters. Nor is it Ms. Dunning’s. Nor even should it be the MCERA Board’s.

Much is at stake. It is possible that large amounts of public money are being spent improperly; that the legitimate, vested benefits of many plan members are being put at risk because improper payments may be reducing the funds available to pay them; that the financial health of the plan is being put at risk; that employer contributions are not being minimized.

Simply put, a court must decide whether the circumstances surrounding the violations of 7507 qualify as *atypical*, whether its requirements are substantive or procedural, and whether they are mandatory.

1 In her letter Ms. Dunning says, *“Courts have made clear that ... actions taken in*
2 *violation of a statute must challenged within the applicable statute of*
3 *limitations, unless there is a continuing violation of the statute that may be*
4 *challenged.”*

5

6 The four agencies did not comply with section 7507. No one knew this until
7 the Grand Jury report was published in April 2015. This is when the statute of
8 limitations must begin. Otherwise the government is encouraged to hide
9 violations from the public for as long as possible and then, when the public
10 ultimately finds out, the government is able to say: “Sorry, too late, too bad.
11 You should have known sooner.” In any event, the position Ms. Dunning takes
12 is moot. With each enhanced benefit payment, the statute of limitations runs
13 all over again as the underlying payments MIGHT be illegal.

14

15 In the conclusion of her letter to me, Ms. Dunning states, *“MCERA is ... required*
16 *by the California Constitution to follow the terms of the plan ... unless and until a*
17 *court of appeals orders otherwise. In that context, there does not appear to be a*
18 *basis for MCERA to engage in the investigation that you propose, because*
19 *MCERA would have no power to invalidate the enhanced benefits based on any*
20 *such investigation, absent such a judicial determination.”*

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This paragraph was the clincher in causing me to apply for this writ. In plain English, what Ms. Dunning has said is that unless this Court has already given the MCERA Board the authority to *invalidate* the benefits in question, the Board does not have a basis to even *investigate* them. Yet how can the Board get such authority if it does not investigate and present the information to this Court?

To carry this position to its logical conclusion would result in agencies knowingly continuing to pay benefits that have been unlawfully granted in violation of a mandatory state statute. Counsel has not cited any case or principle of law to justify such a novel outcome.

In summary, there is a prima facie case the benefits in question were unlawfully/improperly adopted. I have asked the board by mail, email and in person to address this matter. It has done nothing. I have exhausted the procedures available to a citizen. A higher authority, this Court, must take action.

1 I am asking the Court to issue a writ orders the Board of the Marin County
2 Employees' Retirement Association to 1) acknowledge that there is at least a
3 prime facie case that certain retirement benefit enhancements were granted
4 unlawfully/improperly and 2) acknowledge that there is a legitimate question
5 as to whether MCERA is allowed to pay these benefits. Most important, I ask
6 the court to evaluate the situation in order to determine if the benefits were
7 unlawfully/improperly adopted. In light of its hostility to the requirement and
8 its refusal to investigate, or to even place the item on its agenda, the board has
9 forfeit its right to do so.

10

11 Sincerely,

12

13 David C. Brown

14

4. Exhibits:

- 15 1. Report by Marin County Grand Jury: Pension Enhancements: A Case of
16 Government Code Violations and A Lack of Transparency. April 9, 2015.
- 17 2. California Government Code Section 7507.
- 18 3. Letter from Senator Newton R. Russell to Governor Edmund G. Brown,
19 September 12, 1977.

- 1 4. CalPERS Circular Letter, June 9, 2009. Page 2, paragraph 2: Certification
2 of compliance with Government Code section 7507.
- 3 5. Letter dated September 14, 2015 from David C Brown to MCERA Board
4 asking the Board to place the matter of violations of 7507 on its agenda.
- 5 6. Letter dated October 5, 2015 on behalf of MCERA Board from Board
6 Counsel Ashley Dunning responding to David Brown's letter of
7 September 14, 2015.
- 8 7. Letter dated December 7, 2015 from David C Brown to MCERA Board
9 again asking the Board to place the matter of violations of 7507 and
10 possible failures to meet its fiduciary duty on its agenda. This document
11 was also presented orally at the MCERA Board's December 9, 2015
12 meeting.
- 13 8. Letter dated December 7, 2015 critiquing Board Counsel Dunning's
14 letter of October 5, 2015. This document was also presented orally at
15 the MCERA Board's December 9, 2015 meeting.
- 16 9. Letter dated December 16, 2015 containing a list of questions for the
17 MCERA Board pertaining to violations of Section 7507 and possible
18 failures to meet its fiduciary duty.
- 19 10. Letter dated January 13, 2016 from David C Brown to MCERA
20 Board again asking the Board to place the matter of violations of 7507

1 on its agenda. This document was also presented orally at the MCERA
2 Board's January 13, 2016 meeting.

3 11. Memorandum by M. Thum, Esq. on behalf of Citizens for
4 Sustainable Pension Plans to the Marin County Board of Supervisors
5 regarding its required response to the Marin County Grand Jury 2015
6 report on pensions enhancements.

7 12. Memorandum by M. Thum, Esq. on behalf of Citizens for
8 Sustainable Pension Plans to the San Rafael City Council regarding its
9 required response to the Marin County Grand Jury 2015 report on
10 pension enhancements.

11