Appeal No. 11-16268

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD R. LANE,

Plaintiff-Appellant,

vs.

ANNE STAUSBOLL, CEO; ROB FECKNER, PRESIDENT OF THE BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CalPERS); JOHN DOES 1-20,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of California
Hon. Harold R. Lloyd
Case No. CV 10-05779

APPELLEES' ANSWERING BRIEF

D. Gregory Valenza, Bar No. 161250
SHAW VALENZA LLP
300 Montgomery Street, Suite 788
San Francisco, California 94104
Telephone: (415) 983-5960
Facsimile: (415) 983-5963

Attorneys for Defendants-Appellees
ANNE STAUSBOLL, ROB FECKNER

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I. STATEMENT OF JURISDICTION

This is an appeal from final judgment entered April 28, 2011 (Supp. Excerpts of Record ("SER") 002). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had federal question subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343.

II. ISSUE ON APPEAL

Whether the District Court properly granted Defendants-Appellees Anne Stausboll and Rob Feckner's motion to dismiss Plaintiff-Appellant Richard Lane's Complaint, without granting leave to amend, because res judicata bars his claims, or because these defendants cannot be held liable in their individual or official capacities under 42 U.S.C. § 1983 in any event?

III. SUMMARY OF ARGUMENT

Plaintiff-Appellant Richard Lane has been involved in a dispute with the California Public Employees' Retirement System (CalPERS) for close to eight years. At the center of the dispute is Lane's desire for a bigger pension. To get one, he wants CalPERS to calculate his pension benefits using a statute borrowed from the County Employees' Retirement Law (CERL). But CalPERS is the agency responsible for calculating pension benefits for CalPERS members, and it is bound to do so under the Public Employees Retirement Law (PERL), not CERL, as Lane would like. Thus, CalPERS does not agree with Lane's proposed methodology for calculating his pension.

To obtain the calculation he seeks, Lane has had hearings before CalPERS's Board, has filed two petitions for writs of mandamus in California Superior Court, appealed to the Court of Appeal and even the California Supreme Court. He has lost every time.

Lane then re-packaged his rejected arguments regarding state law into a civil rights lawsuit, alleging a violation of the United States Constitution. He sued two individuals who work for CalPERS: Defendant-Appellees Stausboll and Feckner under 42 U.S.C. § 1983 and for state-law torts. They filed a motion to dismiss based on several grounds.

The District Court dismissed the federal claim and declined supplemental jurisdiction over the state law claims. The District Court correctly held that res judicata bars Lane's claim under 42 U.S.C. § 1983.

Having found the res judicata issue to be dispositive, the District Court did not reach Defendants' alternative arguments. But Lane's claim under 42 U.S.C. § 1983 also is barred for nearly every reason applicable to these claims. The § 1983 claims against Defendants in their "official capacity" are barred by the Eleventh Amendment and the statute of limitations. The claims against Defendants in their personal capacity are barred by the doctrine of qualified immunity, by the statute of limitations, because § 1983 does not vindicate alleged misapplication of a state statute, and because these Defendants cannot be held liable for alleged violations of the constitution by others. Therefore, even if res judicata did not bar

Lane's claims, this Court should affirm the dismissal thereof on one or more of these alternative grounds.

To the extent this Court dismisses the federal § 1983 claims, this Court should affirm the District Court's decision to decline supplemental jurisdiction over the pendent state law claims.

However, even assuming arguendo the District Court should have exercised supplemental jurisdiction, the state law claims are barred as a matter of law. Lane did not comply with California's Tort Claims Act by presenting a claim to California's Victims Compensation Board, and the claims therefore are barred. The IIED claim also cannot lie based on these allegations.

In sum, the District Court's rulings were correct. Lane's claims could not be repaired via amendment. As such, this Court should affirm the judgment.

IV. STATEMENT OF FACTS

A. LANE'S COMPLAINT

Plaintiff-Appellant Richard Lane was a part-time lecturer at San Jose State University (Complaint ¶ 6, SER 00045). He retired on May 30, 2002 (Complaint ¶ 14, SER 00046). As a San Jose State employee, Lane was a member of the California Public Employees Retirement System (CalPERS) (Complaint ¶ 14, SER 00046).

Defendant Anne Stausboll is the current Chief Executive Officer of CalPERS (Complaint ¶ 15, SER 00046). Defendant Rob Feckner is President of

CalPERS Board of Administration, both located in Sacramento, California (Complaint ¶ 15, SER 00046).

The balance of the Complaint contains Lane's arguments and explanations regarding his belief that CalPERS mis-calculated his pension benefits. Thus, between 2003 and 2005, Lane sought to have CalPERS calculate his retirement benefits based on his actual, total compensation (Complaint p. 3:21-4:13, SER 00046-47). The crux of Lane's complaint appears to be that, to calculate Lane's retirement benefits, CalPERS divided his total compensation during his final year of employment by 12 months, rather than by 7.5 months (Complaint p. 4:10-24, SER 00047). As a result, Lane avers, his monthly retirement benefit was lower than it would have been had CalPERS divided his compensation by 7.5 (Complaint ¶¶ 27, 40, SER 00050, 52).[1]

Lane appealed the calculation of his benefits through CalPERS's administrative appeals. He expressly admits he litigated the issue of whether his pension should be calculated via a denominator of 12 or 7.5 months at the administrative level (Complaint p.4:12-20, SER 00048). He then filed an action in California Superior Court for the County of Santa Clara to overturn the

[1] CalPERS relied on Cal. Gov't Code Section 20035(a) to determine Lane's final compensation. Lane contended, as he does here, that CalPERS should have relied on a part of the County Employees' Retirement Law, Gov't Code Section 31461, et. seq. According to Lane's argument, if CalPERS were to borrow Section 31461 from the County Employees' Retirement Law – never mind that Lane was not a county employee and therefore is not covered by the CERL – his compensation for retirement purposes would be higher. For a brief, but more complete, discussion regarding Lane's and CalPERS's disagreement regarding the calculation of Lane's retirement benefit, see Lane v. Cal. Pub. Emples. Ret. Sys., 2008 Cal. App. Unpub. LEXIS 4679 (Cal. App. 6th Dist. June 10, 2008) (copy attached to Req. Jud. Not. as Exhibit C, SER 00033-41.

administrative determination. (Id.; see Pet. for Writ of Mandate etc. Case No. 106CV067807; Def.'s Request for Judicial Notice Exhibit A, SER 00019-27).

The Superior Court denied Lane's petition and issued Judgment for CalPERS (Complaint p. 4:23, SER 00048; Request for Judicial Notice Exh. B, SER 00030). Lane next appealed to the California Court of Appeal, which denied Lane relief as well (Complaint p.4:20-27, SER 00048; see also SER 00033-41). Relevant to the instant action, the Court of Appeal wrote in its unpublished opinion:

> Lane seeks to require CalPERS to calculate his service retirement benefit by dividing his "final compensation" by seven and one half months, the period he "actually worked," rather than 12 months. We conclude that CalPERS has properly calculated Lane's retirement benefit in accordance with Government Code section 20035, subdivision (a) (hereafter "section 20035(a)") n1 and will affirm.

Lane v. Cal. Pub. Emples. Ret. Sys., No. H031345, 2008 Cal. App. Unpub. LEXIS 4679 (Cal. App. 6th Dist. June 10, 2008) (fn omitted; emphasis added) (Request for Judicial Notice Exh. C, SER 00033).

The Court of Appeal also rejected Lane's argument that CalPERS neglected to apply Cal. Government Code Section 31461.3(a) in calculating Lane's retirement benefits:

> Lane seizes on the use of the phrase "number of days worked" to support his argument that the four and a half months during which he did not work should not be included in the calculation of "compensation earnable." However, he conveniently ignores the language immediately preceding this phrase, in which the court notes that "compensation earnable" "is the average

> monthly pay . . . ." (Ibid., italics added.) Consequently, we do not agree that Ventura County [Deputy Sheriffs' Assn. v. Board of Retirement, 16 Cal. 4th 483 (1997)] is particularly helpful to Lane's position in this matter. There is no reference in that decision to annualizing the pay of a part-time employee who has worked less than a full year.

Id., SER 00039-40. The California Supreme Court summarily denied Lane's Petition for review of the Court of Appeal's decision (Complaint p.4:25, SER 00048).

Lane again requested CalPERS to re-calculate his benefits (Complaint p.4:25-26, SER 00048). He then filed, on July 1, 2009, a new Petition for Writ of Mandate in Superior Court (Complaint p.5:11, SER 00049). On March 4, 2010, the Superior Court sustained CalPERS's demurrer to the Petition without leave to amend. (Complaint p.5:23-25, SER 00049). Lane as yet has not appealed this ruling.

B. ABOUT CALPERS

CalPERS's retirement fund was established as a trust, to be administered in accordance with the provisions of the California Public Employees' Retirement Law ("PERL"), solely for the benefit of the participants. See Cal. Gov't Code § 20170.

The CalPERS Board of Administration manages the system. Id. § 20120. The Board controls the administration and investment of the retirement fund. Id. § 20171.

As the Court of Appeal explained in Hudson v. Board of Administration, 59 Cal. App. 4th 1310, 1316 (1997):

> PERS determines employees' retirement benefits based on their years of service, final compensation, and ages at retirement. The system is funded by employer and employee contributions calculated as a percentage of employee compensation. PERS determines employer contribution rates based on compensation figures and actuarial assumptions. PERS periodically adjusts employers' rates of contribution to compensate for any inaccuracy in those assumptions. Employee contribution rates, in contrast, are fixed by statute.

CalPERS has exclusive and sole authority to "determine benefits for service in accordance with the PERL." Cal. Gov't Code § 20123. CalPERS benefits are entirely statutory; the Legislature has the exclusive authority to set them. Hudson v. Posey, 255 Cal.App.2d 89, 91 (1967).

V. LEGAL DISCUSSION

A. STANDARD OF REVIEW

1. Appellate Review of Order Granting Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)

This Court reviews de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). See Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010). This Court may affirm the judgment based on "any ground supported by the record." Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008).

2. Fed. R. Civ. P. 12(b)(6) Standards

Rule 12(b)(6) permits the district court to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint. See North Star Int'l v. Arizona Corporation Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief." Krainski v. State ex rel. Bd. of Regents, 616 F.3d 963, 972 (9th Cir. 2010). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

A general allegation of constitutional violations, or simply tracking statutory language, is insufficient to properly raise a claim for relief. See id. at 555. Further, a complaint will be insufficient and a motion to dismiss will be granted if the facts in the complaint are "not only compatible with, but indeed . . . more likely

explained by lawful . . . behavior." Ashcroft v. Iqbal, 566 U.S. 662, 129 S. Ct. 1937, 1951 (2009).

While this Court accepts as true well-pleaded, factual allegations, conclusory statements and legal conclusions are not entitled to a presumption of truth. See Iqbal, 556 U.S. at 662, 129 S. Ct. at 1949-50; Twombly, 550 U.S. at 555. “In sum, for a complaint to survive a motion to dismiss, the nonconclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

3. Fed. R. Civ. P. 12(b)(1) Standards

“Federal Rule of Civil Procedure 12(b)(1) allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction.” Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001). “When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion.” Id.; Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). “’A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be

corrected by amendment.'" Tosco, 236 F.3d at 499 (quoting Smith v. McCullough, 270 U.S. 456, 459, 46 S. Ct. 338, 70 L. Ed. 682 (1926)).

4. Order Declining Supplemental Jurisdiction

This Court reviews for abuse of discretion the district court's decision to decline supplemental jurisdiction under 28 U.S.C. § 1367(c)(3). See Brown v. Lucky Stores, 246 F.3d 1182, 1189 (9th Cir. 2001).

5. Denial of Leave to Amend

This Court reviews the denial of leave to amend under the abuse of discretion standard of review. See Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038 (9th Cir. 2002).

B. THIS COURT SHOULD AFFIRM THE DISMISSAL OF PLAINTIFF'S FIRST AND SECOND CAUSE OF ACTION FOR VIOLATION OF 42 U.S.C. § 1983

Lane claimed to sue Defendants under 42 U.S.C. § 1983 for denial of due process under the 14th Amendment of the Constitution (Complaint ¶¶ 55-60, SER 00054). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The District Court correctly held that res judicata barred Lane's federal claim and then dismissed the pendent state claims under 28 U.S.C. § 1367(c)(3) (SER 00013-14).

However, Lane's claim fails for several additional reasons. As stated, this Court may affirm the judgment based on any reason supported by the record. See Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008). Here, Lane cannot sue these defendants under § 1983 for the acts of others under a vicarious liability theory. Further, § 1983 does not provide relief for Lane's claim that Defendants miscalculated his pension. The statute of limitations bars the claims, too. Each argument is discussed below.

1. The District Court Correctly Found Lane's Section 1983 Claims Are Barred by Res Judicata

The federal courts give full faith and credit to the decisions of state courts. 28 U.S.C. § 1738. Under § 1738, the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) apply when plaintiffs bring suit in federal district court following the resolution of identical claims in state court. These doctrines apply with equal force to state court proceedings initiated to review the decisions of administrative agencies, as occurred in the instant case. See Kremer v. Chem. Constr. Corp., 456 U.S. 461, 485 (1982) (holding state court's review of New York Human Rights Division binding on district court); Garcia v. Vill. of Mt. Prospect, 360 F.3d 630, 644 (7th Cir. 2004) (Section 1983 claim based on denial of

disability benefits barred where the plaintiff initially litigated state agency decision in Illinois state courts).

Issue and claim preclusion also apply to federal claims under § 1983 where, as here, the plaintiff attempts to re-litigate a state court case. See id. See also Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 83 (1984) ("issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered."). "Claims under 42 U.S.C. § 1983 are subject to claim preclusion even if the litigants did not actually litigate the federal claim in state court." Holcombe v. Hosmer, 477 F.3d 1094, 1097 (9th Cir. 2007) (emphasis added).

To decide if a subsequent suit is barred by res judicata, the court looks to the law of the state in which the state court issued the judgment; here, California. See Allen v. McCurry, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so").

a. California Law Regarding Res Judicata

Under California law, "all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 897 (2002). As the California Court of Appeal has explained:

> Claim preclusion applies when "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding." . . . . Upon satisfaction of these conditions, claim preclusion bars "not only … issues that were actually litigated but also issues that could have been litigated."

Planning & Conservation League v. Castaic Lake Water Agency, 180 Cal. App. 4th 210, 226 (2009) (internal citations omitted).

b. Final Decision on the Merits

As shown above, Lane alleges in his Complaint that he challenged CalPERS's determination of his pension administratively and in court. The trial court entered judgment in favor of CalPERS, and the Court of Appeal and Supreme Court denied review of his claim. Thus, there is a final decision on the merits.

c. Same Cause of Action

Under California law, "a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." Mycogen Corp., 28 Cal.4th at 904 (citations omitted). The California Supreme Court explained that a "primary right" refers to the injury suffered. "It must therefore be distinguished from the legal theory on which liability for that injury is premised." Id. "The primary right must also be distinguished from the remedy sought: 'The violation of one primary right

constitutes a single cause of action, though it may entitle the injured party to many forms of relief . . . ." Id.

Section 1983 is not a new substantive claim; it is merely a federal remedy. "Section 1983 does not confer rights, but instead allows individuals to enforce rights contained in the United States Constitution and defined by federal law." Vinson v. Thomas, 288 F.3d 1145, 1155 (9th Cir. 2002). The issue, therefore, is whether Lane already has litigated the alleged mis-calculation of his pension. That is the injury he claims to have suffered.

Lane alleges in his Complaint CalPERS miscalculated his pension benefits by failing or refusing to divide his compensation by 7.5 months rather than 12 (Complaint ¶¶ 23-42, SER 00050-52). He raised the identical issue beginning in May 2005 (Complaint p.4:10, SER 00048) via CalPERS's administrative process. He pursued an administrative appeal (Complaint p. 4:15-20, SER 00048). Then he filed a Petition for Writ of Mandamus "on the issue of 12 months." (Complaint p.4:21, SER 00048). Having lost there, he appealed to the Court of Appeal and then the California Supreme Court (Complaint p. 4:23-27, SER 00048).

In his prayer for relief in the instant action, he seeks an injunction "to ensure Plaintiff's retirement benefit is calculated in accordance with Government Code § 31461.3(a)." As stated above, that is precisely the issue he litigated – and lost - in state court. See Lane v. Cal. Pub. Emples. Ret. Sys., No. H031345, 2008 Cal. App. Unpub. LEXIS 4679 (Cal. App. 6th Dist. June 10, 2008) (Request for Judicial

Notice Exh. C, SER 00033-41). Therefore, Lane has fully litigated the primary right – the alleged mis-calculation of his pension – in state courts.

d. Same Parties

Lane's § 1983 action is asserted against two of CalPERS's officers in their official capacity, whereas his state court claims were against CalPERS itself. However, a lawsuit against state employees in their official capacity is in fact a lawsuit against the state itself, thereby establishing the necessary privity for res judicata purposes. See Escamilla v. Giurbino, 2008 U.S. Dist. LEXIS 76235 (S.D. Cal. Sept. 30, 2008) ("In lawsuits involving government officers, privity exists between officers of the same governmental organization so that a judgment in a suit against one officer precludes a suit by the same plaintiff against other officers of that same government."). See also Mandarino v. Pollard, 718 F.2d 845, 850 (7th Cir. 1983) ("A government and its officers are in privity for purposes of res judicata.").

In sum, all the elements of res judicata are satisfied. Therefore, this Court should dismiss Lane's § 1983 claims as barred by claim preclusion.

2. Even if Res Judicata Does Not Bar Lane's § 1983 Claims, They Are Time-Barred

The statute of limitations for § 1983 claims is the two-year California limitations period for personal injury actions contained in Code of Civil Procedure Section 335.1. See Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). The § 1983 cause of action accrues "when the plaintiff has 'a complete and present cause of

action.'" Wallace v. Kato, 549 U.S. 384, 388 (2007) (citation omitted). That is, "when 'the plaintiff can file suit and obtain relief . . . .'" Id. There is no equitable tolling for the period when the plaintiff pursued state court remedies in lieu of § 1983 relief. Id. at 396.

Here, Lane himself alleges that "the violation of his right to due process started with the CalPERS bureaucracy's implementation of its board's decision of April 20, 2005." (Complaint ¶ 28, SER 00051). He also alleges that "from his retirement in May 2002 until April 2005, CalPERS refused to calculate Lane's retirement benefit on the basis if his actual earnings." (Complaint ¶ 10, SER 00045). He avers that he learned on January 18, 2006 that the administrative law judge "refused to overturn the 12-month provision of the statute and CalPERS board adopted the ALJ's decision." (Complaint p.4:16-20, SER 00048). He then filed a Petition for Writ of Mandate on July 24, 2006 (Complaint p.4:21-22, SER 00048).

Thus, Lane had a "complete and present" cause of action – and his § 1983 claim accrued – more than two years before he filed the instant action on December 20, 2010 and is time barred.

3. The Eleventh Amendment Bars Lane's § 1983 Claims Against Defendants in Their Official Capacity

Finding the res judicata issue dispositive, the District Court also did not reach whether the Eleventh Amendment barred Lane's claims against Defendants in their "official capacity." However, this Court may affirm on this ground as well.

Lane alleges: "CalPERS' refusal to apply this statute [Gov't Code § 31461.3] to calculate Lane's pension is the basis for his claim of a violation of his constitutional right to due process." (Complaint ¶ 11, SER 00045). This allegation is fatal to his § 1983 claim.

The Eleventh Amendment[2] bars a § 1983 suit against state officials "when 'the state is the real, substantial party in interest.'" Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-102 (1984) (citations omitted). Thus, "[the] general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Id. (citation omitted).

Here, Lane seeks § 1983 relief nominally against two California officials, but the "decree would operate" against the state of California – CalPERS. Thus, Lane asks in his prayer for relief for Defendants "to ensure Plaintiff's retirement benefit is calculated in accordance with Government Code § 31461.3(a)." Naturally, as Lane alleges at Complaint ¶ 11, SER 00045, this injunction would be directed at the way CalPERS calculates benefits and the resulting change would affect CalPERS's coffers, not Defendants' wallets. Therefore, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when – as here – the relief sought and ordered has an impact directly on the State itself." Pennhurst, 465 U.S. at 117.

[2] The Eleventh Amendment to the U.S. Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Lane appears to argue that the 11th Amendment does not apply to CalPERS's officials in their official capacity based on Ex Parte Young, 209 U.S. 123 (1908). See AOB 16.

"In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Verizon Md., Inc. v. PSC, 535 U.S. 635, 645 (2002) (internal quotation and citation omitted; emphasis added).

Here, the Complaint does not allege an "ongoing violation of federal law." Rather, Lane merely alleges a mis-application of state law which, he contends, amounts to a violation of the Fourteenth Amendment's Due Process Clause, essentially because the hearings he had resulted in adverse rulings. Lane acknowledges in his opening brief he presented the issues involved here to the California Court of Appeal, but that the court's reasoning was flawed (AOB 9-11). Allegedly flawed reasoning is not a federal due process violation.

Moreover, Lane in the Complaint does not seek prospective relief, but rather seeks damages, including punitive damages, and allegedly lost pension benefits. The Supreme Court's decision in Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("the relief awarded in Ex parte Young was prospective only . . . . "), "and its progeny clearly prevent the federal courts from achieving through the artful use of injunctive relief the identical result obtained by a retroactive award of money

damages." Friendship Villa-Clinton, Inc. v. Buck, 512 F. Supp. 720, 728 (D. Md. 1981). To that end, Lane "cannot by artful pleading transform the failure to provide a remedy for a completed, past wrong into the continuing violation of the 'right' to that remedy." Nelson v. Univ. of Tex., 491 F. Supp. 2d 672, 679 (N.D. Tex. 2007) ("wrongful termination" lawsuit cannot be a "continuing violation of federal law," merely because the state does not reinstate the fired employee).

In sum, the claim against Defendants has nothing to do with 1) prospective injunctive relief to remedy a 2) continuing, federal constitutional violation.

4. Section 1983 Does Not Provide a Remedy for Alleged Misapplication of a State Law

Section 1983 is not a general tort law remedy for state employees' alleged misapplication of state law. Thus, "[t]o state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). "[M]erely because the acts are performed by public officials, a state-law tort claim is not thereby transmuted into one for the deprivation of rights secured under the Fourteenth Amendment." Havas v. Thornton, 609 F.2d 372, 375 (9th Cir. 1979). "Ordinary torts or violations of local law by state officials, such as pleaded here, cannot be elevated to federal civil rights violations merely by making passing references to the Constitution." Duffy v. City of Long Beach, 201 Cal. App. 3d 1352, 1360 (1988).

Here, there is no "constitutional right" to have one's pension calculated a certain way. The gravamen of Lane's Complaint, which he repeatedly alleges, is that CalPERS must apply Government Code section 31461.3 to the calculation of his pension benefits (see e.g., Complaint ¶¶ 3, 4, SER 00044-45). The California Court of Appeal reviewed CalPERS's methodology and determined it was consistent with state law.

The U.S. Constitution does not guarantee a pension, and certainly does not prescribe how one calculates it. No one took Lane's vested pension away, and no one deprived him of notice or an opportunity to be heard. Lane's own Complaint alleges a chronology of state court proceedings to vindicate his alleged wrong, albeit unsuccessfully. As such, the Fourteenth Amendment has no relevance to this case.

5. There Is No Basis for Holding Defendants Personally Responsible Under § 1983 for the Acts Alleged

a. Defendants May Not Be Held Individually Liable for the Actions of Others Based on Respondeat Superior

"A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." Robertson v. Sichel, 127 U.S. 507, 515-516 (1888). "Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own

individual actions, has violated the Constitution." Ashcroft v. Iqbal, 566 U.S. 662, 129 S. Ct. 1937, 1948 (2009). As the Supreme Court elaborated:

> In a § 1983 suit . . . the term "supervisory liability" is a misnomer. . . . [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose Bivens liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

Id., 129 S. Ct. at 1949.

Here, Lane utterly fails to allege how Defendants themselves have violated Lane's constitutional rights. Lane merely alleges that Defendants are ultimately responsible for the employees of CalPERS and how they go about their duties. He does not claim that either Defendant was in some manner personally involved with calculating Lane's pension benefits, or requiring CalPERS employees to use a certain formula, etc.

b. Qualified Immunity Bars Lane's § 1983 Claim Asserted Against Defendants in Their Individual Capacities

Even if Lane had a cognizable claim under § 1983, Lane has not alleged a basis to hold them personally liable. "State officials are entitled to qualified immunity from suits for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Krainski v. Nevada ex rel Board of Regents of the Nevada System of Higher Education, 616 F.3d 963, 968 (9th Cir. 2010) (citation omitted).

"Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case." Id. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

Even when a plaintiff alleges a violation of a clearly-established right, that "legal right cannot be so general as to allow [her] to 'convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1998) (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

Here, Lane alleges no "conduct" by these Defendants that violates any provision of the constitution. There is no "clearly established" constitutional right to have one's pension calculated in the way Lane desires. In fact, the California Court of Appeal already determined that CalPERS calculated Lane's pension correctly. Lane does not allege that either of the Defendants knew about Lane's pension, were employed when Lane's pension was calculated, etc. Therefore, Lane cannot possibly prove that Defendants themselves (1) violated a "clearly

established" right or (2) engaged in any conduct that would have violated that right. As such, Lane cannot overcome Defendants' qualified immunity.

Lane's argument on appeal that qualified immunity "does not exist for officers of a state agency that operates independently of the state" (AOB 15) is without merit. Lane relies on Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994). There, the U.S. Supreme Court held that the Port Authority of NY and NJ was not entitled to 11th Amendment immunity, rather than qualified immunity.

In any event, the Eleventh Amendment applies to suits against CalPERS as an "arm" of the state of California. See Retired Public Employees' Ass'n, Chapter 22 v. California, 614 F. Supp. 571, 581 (N.D. Cal. 1984) (holding Eleventh Amendment barred state law claim against CalPERS), rev'd on other grounds, 799 F.2d 511 (9th Cir. 1983). See also Ernst v. Rising, 427 F.3d 351, 361 (6th Cir. 2005) (collecting cases in which state retirement boards are determined to be "arms" of the state entitled to Eleventh Amendment immunity). Congress created the Port Authority as an independent agency run by two states. Hess, 513 U.S. at 35. CalPERS is not analogous to the Port Authority.

Contrary to Lane's argument (incorrectly asserted against qualified immunity), "the proper inquiry is not whether the state treasury would be liable in this case, but whether, hypothetically speaking, the state treasury would be subject to 'potential legal liability' if the retirement system did not have the money to cover

the judgment." Ernst, 427 F.3d at 362 (quoting Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 431 (1997) ("with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.")).

Here, as in Ernst, CalPERS's "retirement benefits are contractual obligations of the state and if the CalPERS fund is insufficient to pay the benefits owed to state employees, the state is obligated to pay the money to pensioners from other sources." Westly v. Board of Administration, 105 Cal. App. 4th 1095, 1116 (2003). See also Cal. Pub. Emples. Ret. Sys. v. Moody's Corp., 2009 U.S. Dist. LEXIS 110756 (N.D. Cal. Nov. 10, 2009) (holding "CalPERS is an arm of the state" for purposes of measuring diversity jurisdiction).

C. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DECISION TO DISMISS PLAINTIFF'S PENDENT STATE LAW CLAIMS

Lane's Third through Sixth Causes of Action asserted against Defendants are for negligence, negligent supervision, intentional infliction of emotional distress, and negligent infliction of emotional distress. Having dismissed Lane's federal claims, the District Court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3).

To the extent this Court affirms dismissal of Lane's § 1983 claims, it should also affirm the District Court's decision to decline jurisdiction over Lane's state law claims. See Ove v. Gwinn, 264 F.3d 817, 826 (9th Cir. 2001) ("A court may

decline to exercise supplemental jurisdiction over related state-law claims once it has "dismissed all claims over which it has original jurisdiction."). Federal courts "have indicated a strong preference for the dismissal of pendent or ancillary claims whenever the district court disposes of the federal claims prior to trial." Lee-Hillman v. Allegiance Corp. (In re Latex Glove Prods. Liab. Litig.), 373 F. Supp. 2d 1205, 1207 (W.D. Wash. 2005). See also Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) ("in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims.").

D. THIS COURT SHOULD AFFIRM DISMISSAL OF THE PENDENT STATE LAW CLAIMS

As stated, this Court may affirm the judgment based on any ground presented in the record. Lane's Third through Sixth Causes of Action are state law tort claims. None has merit as a matter of law.

1. Lane Failed to File the Prerequisite Claim With the State

Lane here alleges he was injured by Defendants. Defendants are state employees, acting within the scope of their employment by making decisions on behalf of CalPERS and supervising CalPERS employees (Complaint ¶¶ 14-15, 18-19, SER 00046). "An employee acts within 'the scope of his employment' when he is engaged in work he was employed to perform or when an act is incident to his

duty and was performed for the benefit of his employer and not to serve his own purpose." See Fowler v. Howell, 42 Cal. App. 4th 1746, 1750-51 (1996).

As a prerequisite to maintaining a lawsuit against Defendants as state employees acting within the scope of employment, Lane was required to file a claim with the California Victim's Compensation and Government Claims Board. Thus, "a cause of action against a public employee . . . for injury resulting from an act or omission in the scope of his employment as a public employee is barred unless a timely claim has been filed against the employing public entity." Id. (internal quotation omitted) (quoting Cal. Gov't Code § 950.2).

Lane's non-compliance with California's Tort Claims Act dooms his state law claims. "Failure to allege facts in a complaint demonstrating or excusing compliance with prelitigation governmental claims presentation requirements of the Tort Claims Act subjects the complaint to a motion to dismiss for failure to state a cause of action." Comm. for Immigrant Rights v. County of Sonoma, 644 F. Supp. 2d 1177, 1205 (N.D. Cal. 2009).

Lane does not allege in the Complaint that he filed a claim with the Victim's Compensation and Government Claims Board. He was required to do so within six months of the accrual of his claim. See Gov't Code §§ 911.2, 945.6, 950.6. He did not dispute this failure below or in this Court. Therefore, Lane's claims are barred as a matter of law.

2. The Sixth Cause of Action Is Barred Absent Outrageous Conduct

Lane's Sixth Cause of Action alleges intentional infliction of emotional distress. To recover on a claim for intentional infliction, Lane must satisfy the following elements:

> "The elements of a prima facie case for the tort of intentional infliction of emotional distress [are] … as follows: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " The conduct must be "so extreme and outrageous 'as to exceed all bounds of that usually tolerated in a civilized society.' " (Ibid.)

Bosetti v. United States Life Ins. Co., 175 Cal. App. 4th 1208, 1242 (2009). There is no allegation of outrageous conduct in the Complaint. At most, similar to the situation in Bosetti, there is a disagreement over a benefits determination.

E. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF LEAVE TO AMEND

Granting leave to amend is not appropriate when allegations of new facts consistent with the complaint cannot possibly cure the deficiency. Miller v. Yokohama Tire Corp., 358 F.3d 616, 622-23 (9th Cir. 2004). Although Lane is in pro per, leave to amend should not be granted where it appears amendment would be futile. Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

Given Lane's claims are barred by res judicata, there is no set of facts that can revive them. The deficiencies in Lane's Complaint are fatal on a host of other grounds as well. Therefore, leave to amend would have been a futile gesture that

would have wasted the District Court's and Defendants' money and time. This Court should affirm the District Court's proper exercise of its discretion.

VI. CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment.

VII. STATEMENT OF RELATED CASES

Appellees are not aware of any related cases.

Dated: November 9, 2011

Respectfully submitted,
SHAW VALENZA LLP
300 Montgomery Street, Suite 788
San Francisco, California 94104

By: /s/ D. Gregory Valenza
D. Gregory Valenza
Attorneys for Appellees
ANNE STAUSBOLL and ROB FECKNER

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 6595 words as measured by the word processing program used to prepare the brief.

Dated: November 9, 2011

Respectfully submitted,
SHAW VALENZA LLP
300 Montgomery Street, Suite 788
San Francisco, California 94104

By: /s/ D. Gregory Valenza
D. Gregory Valenza
Attorneys for Appellees
ANNE STAUSBOLL and ROB FECKNER

9th Circuit Case No. 11-16268

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 10, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Richard Lane
1266 Sandia Avenue
Sunnyvale, CA 94089

/s/D. Gregory Valenza
D. Gregory Valenza

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