S226779

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANK FLETHEZ,
Plaintiff and Respondent,

vs.

SAN BERNARDINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,
Defendant and Appellant.

San Bernardino Superior Court Case No. CIV-DC-1212542
The Honorable David Cohn

California Court of Appeals
Fourth District, Division One, Case No. D066959

ANSWER BRIEF ON THE MERITS

Christopher D. Lockwood, SBN 110853
Arias & Lockwood
225 W. Hospitality Lane, Suite 314
San Bernardino, CA 92408
Telephone: (909) 890-0125
Facsimile: (909) 890-0185
Email: Christopher.Lockwood@ariasLockwood.com

Michael P. Calabrese, SBN 237682
Chief Counsel
San Bernardino County Employees' Retirement Association
348 West Hospitality Lane
San Bernardino, CA 92414
Telephone: (909) 915-2039
Facsimile: (909) 885-7446
Email: mcalabrese@sbcera.org

Attorneys for Defendant and Appellant
San Bernardino County Employees' Retirement Association

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Telephone: (909) 915-2039
Facsimile: (909) 885-7446
Email: mcalabrese@sbcera.org

Attorneys for Defendant and Appellant
San Bernardino County Employees' Retirement Association

TABLE OF CONTENTS

Table of Authorities ..... ii-iii

I. INTRODUCTION 1

II. DETAILED STATEMENT OF FACTS AND PROCEDURAL HISTORY 10

III. STANDARD OF REVIEW. 14

IV. ARGUMENT. 14

A. Summary of the Argument 14

B. The Explicit Requirements of Section 3287(a) are Not Met. 17

1) Respondent's Right to a Disability Retirement Allowance with an Effective Date Prior to His Filing an Application With SBCERA Was Not Vested Until the Condition that He Prove His Entitlement to All Aspects of It Had Been Fulfilled. 17

2) Respondent's Claim was Not "Certain or Capable of Being Made Certain by Calculation" Prior to His Presentation to the Board of that Claim. 35

3) SBCERA was Prevented by Law from Paying Respondent's Claim Until He Proved His Entitlement Thereto. 39

4) The Application of These Rules to this Case 42

V. CONCLUSION. 45

TABLE OF AUTHORITIES

Cases

Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd. (1996)
13 Cal.4th 1017 ..... *passim*

Austin v. Bd. of Ret. (1989)
209 Cal.App.3d 1528 ..... 30, 31, 32, 33, 34

Ball v. City of Los Angeles (1978)
82 Cal.App.3d 312 39

Benson v. City of Los Angeles (1963)
60 Cal.2d 355 ..... 25, 26

Brophy v. Employees Ret. Sys. (1945)
71 Cal.App.2d 455 24

Collins v. City of Los Angeles (2012)
205 Cal.App.4th 140 36

Currie v. Workers' Comp. Appeals Bd. (2001)
24 Cal.4th 1109 ..... 25, 29, 30

Goldfarb v. Civil Service Comm. (1990)
225 Cal.App.3d 633 30

Leatherby Ins. Co. v. City of Tustin (1977)
76 Cal.App.3d 678 38

Levy-Zentner Co. v. S. Pac. Trans. Co. (1977)
74 Cal.App.3d 762 36

Lungren v. Deukmejian (1988)
45 Cal.3d 727 24

Mass v. Bd. of Educ. (1964)
61 Cal.2d 612 ..... *passim*

Masters v. San Bernardino Cnty. Employees Ret. Assn. (1995)
32 Cal.App.4th 30 41

McIntyre v. Santa Barbara Cnty. Employees Ret. Sys. (2001)
91 Cal.App.4th 730 41

Olson v. Cory (1983)
35 Cal.3d 390 ..... 24, 25

People v. S. Pac. Co. (1983)
139 Cal.App.3d 627 ..... 38, 39

Perkins v. Benguet Consol. Mining Co. (1942)
55 Cal.App.2d 720 40

San Diego Deputy Sheriffs Assn. v. San Diego Cnty. Civil Serv. Comm. (1998)
68 Cal.App.4th 1084 ..... 5, 28, 29

San Marcos Water Dist. v. San Marcos Unified Sch. Dist. (1986)
42 Cal.3d 154 41

Sanders v. City of Los Angeles (1970)
3 Cal.3d 252 25

Schachter v. Citigroup, Inc. (2009)
47 Cal.4th 610 20

Stein v. S. Cal. Edison Co. (1992)
7 Cal.App.4th 565 35

Tripp v. Swoap (1976)
17 Cal.3d 671 ..... 18, 24

Tyre v. Aetna Life Ins. Co. (1960)
54 Cal.2d 399 38

Weber v. Bd. of Ret. (1998)
62 Cal.App.4th 1440 ..... *passim*

Wisper Corp. v. Cal. Commerce Bank (1996)
49 Cal.App.4th 948 ..... 5, 35

Statutes

Civil Code Section 3287(a) ..... *passim*

County Employees' Retirement Law ("CERL") 6, 7, 14, 16, 22, 31, 33, 40

Government Code
Sections 31450, *et seq.* 6
Section 31533 12
Section 31534 42
Sections 31662-31664.65 24
Sections 31670-31682 24
Section 31720 37
Section 31720(a) 10
Section 31722 37
Section 31723 40
Section 31724 ..... 11, 16, 37, 40, 41

ISSUE PRESENTED

May prejudgment interest be awarded against a public retirement system such as Defendant/Appellant San Bernardino County Employees' Retirement Association ("SBCERA") on a disability retirement allowance as to which the governing statutes authorizing the benefit do not provide for the payment of interest, and the allowance is paid to cover a period (1) before the retirement system member filed an application seeking a disability retirement allowance from the retirement system, (2) before the member presented evidence to the adjudicating Board of Retirement establishing entitlement to the allowance, and (3) before the Board of Retirement considered and administratively determined whether to grant the application?

I. INTRODUCTION.

In 2008, Respondent in this case first applied for a disability retirement allowance from SBCERA. He proved his eligibility for that benefit to the SBCERA Board of Retirement ("Board"), which granted his application in full in August of 2010. SBCERA paid that allowance immediately after the Board granted it, including a lump sum retroactive payment reflecting the allowance due from the date the application was first filed in 2008 until the date the benefit was first paid. As provided by statute, that payment reflected the total of the underlying stream of retirement benefits then due to the now newly-retired member. It did not

include interest as the Legislature has not provided for interest to be paid on disability retirement allowances.

Respondent had, at that point, timely received everything for which he had then applied from SBCERA. He then pursued a multi-step administrative reconsideration and appeal process, in which he sought, for the first time, benefits covering the time *before* he filed his disability retirement application – that is, from his 2000 separation from county service through his 2008 application. Such a request required an additional showing from Respondent, specifically that he had been "unable to ascertain the permanency" of his disability at the time he left county service in 2000. After Respondent's attempted showing on this issue, the Board determined, based on the findings and recommendations of an administrative hearing officer, that Respondent had not met his burden of establishing entitlement to the earlier effective date for the retirement allowance. Thus, the Board denied that aspect of Respondent's application, its final decision on this limited question coming in October of 2012.

Respondent then sought judicial relief. The trial court disagreed with SBCERA on the question of pre-application retroactive benefits, and in 2013, by writ of mandamus, ordered SBCERA to pay them. SBCERA did so immediately. The trial court also ordered SBCERA to pay prejudgment interest on this amount, running all the way back to 2000, rather than merely back to the date the SBCERA Board rendered its

decision on pre-application retroactivity in October of 2012. To this aspect of the order, SBCERA objected and appealed.

It is the period from 2000-2012, occurring almost entirely *before* the Board was first presented with evidence to support Respondent's request for pre-application benefits, and indeed most of which occurred before Respondent made any request to retire from SBCERA at all, as to which Respondent claims SBCERA through the Board, the adjudicator as to his disability retirement application, "damaged" him and should pay prejudgment interest to him.

Neither SBCERA nor the Board, however, caused Respondent "damage" while they adjudicated the question of entitlement to benefits he sought. Certainly they did not cause any damage before Respondent had even filed an application for benefits with SBCERA or provided evidence of his entitlement to them. Rather, during that time, the Board simply carried out its fiduciary responsibilities, as an adjudicator, to rule on benefits as they were applied for, as it is required by law to do.

The law provides that prejudgment interest may run only from the date when Respondent became legally entitled to actually receive payment of the claimed benefits, and SBCERA was found to have wrongfully withheld them. In the case of disability retirement allowances, that date does not simply identify itself. Rather, it varies, case by case, contingent upon the filing of a request for the allowance, proof of the factual

predicates to receiving the allowance (*i.e.*, permanent incapacity, service-connection if claimed, and inability to ascertain permanency if also claimed), and the adjudicating body's determination of entitlement.

The case law regarding prejudgment interest is relatively clear, with one exception to be noted below. This case is controlled by section 3287(a) of the Civil Code (herein, "section 3287(a)"). That statute provides, in relevant part:

> A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt.

(Civ. Code, § 3287, subd (a).)

Thus, for prejudgment interest to run, four things must be true. First, there must be "damages" caused by a party who has an obligation to pay them, but wrongfully delayed or refused to do so. Second, any such "damages" must be "certain, or capable of being made certain by calculation." Third, the right to recover those damages must have "vested in the" claimant "on a particular day." And fourth, the debtor must not have been "prevented by law, or by act of the creditor from paying the debt." The purpose of this statute is to make the aggrieved party "whole for the accrual of wealth which could have been produced during the period of

loss" (*Wisper Corp. v. Cal. Commerce Bank* (1996) 49 Cal.App.4th 948, 960), during a time when money has been "wrongfully withheld." (*San Diego Deputy Sheriffs Assn. v. San Diego County Civil Serv. Comm.* (1998) 68 Cal.App.4th 1084, 1094 ("*San Diego Sheriffs*").) This is necessary where a wrongful withholding has occurred, because, as this court explained in *Mass v. Bd. of Educ.* (1964) 61 Cal.2d 612, 625 ("*Mass*"), in such a case the plaintiff "would have obtained the benefit of the moneys paid as of those dates [when wrongful withholding occurred];" due to the wrongful withholding the plaintiff "has lost the natural growth and productivity of the withheld [funds][1] in the form of interest."

It follows, then, that during a period where the creditor would not have "obtained the benefit of the moneys" because they could not have been paid, prejudgment interest will not serve section 3287(a)'s basic purpose. Indeed, it strains credulity to understand how this purpose would

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[1] The word actually used in the quoted passage of *Mass* here is "salary." As will be discussed further below, contrary to Respondent's contention, this case is unlike *Mass* in a key respect related to when withholding becomes wrongful. In *Mass*, salary payments were withheld wrongfully, *ab initio*, in that they should have been paid on the various paydays at issue. The creditor had no valid justification for its failure to pay. A key holding of *Mass* was that there was no need for an administrative proceeding to make the withholding wrongful. (*Mass*, *supra,* 61 Cal.2d at p. 625.) In the instant case, Respondent could not have had any entitlement to disability retirement payments unless and until he applied for them and made the required evidentiary showing, and the SBCERA Board rendered a decision thereon in October of 2012.

be served by awarding prejudgment interest during a period when the debtor has done nothing to deprive the creditor of the funds, and could not have paid the creditor. In order for pre-judgment to run as "damages" under section 3287(a), the delay must result from a "wrongful withholding" of payment by the debtor. (*Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1037 (herein "*AFL*").)

When a member of a county retirement association formed under the County Employees' Retirement Law (CERL), Government Code section 31450, *et seq.*, wishes to receive disability retirement benefits, the CERL requires that person file an application for those benefits and prove eligibility for them. Prior to that time, the county board of retirement has no way of knowing what benefits might be due, if any, or in what amounts. Moreover, the individual is not *eligible* to retire for disability until having made such a showing to the county board of retirement, which then — and only then — must grant or deny the requested benefits as provided by law. "Until that time, the member is not retired, and [the CERL system] has no monetary obligation to that member." (*Weber v. Bd. of Ret.* (1998) 62 Cal.App.4th 1440, 1448 ("*Weber*").)

Thus, turning to the various requirements of section 3287(a), it becomes clear that Respondent's claims are without merit. Until the application is made and supported, the benefits owed are not "certain, or capable of being made certain by calculation," because both the entitlement

to benefits and the exact amount thereof are contingent upon the proof. Until the required showing has been presented to the county retirement board, the amount of the benefits to which the applicant may be entitled cannot be made certain. The entitlement to those benefits is not "vested" until the county retirement board to which the application is submitted has finally acted upon that application and supporting evidence, or at least had an opportunity to do so. Finally, the CERL prohibits a retirement board from paying benefits before the entitlement thereto has been established by sufficient evidence, and specifically prohibits pre-application retroactive benefits until it has been "demonstrated to the satisfaction of the board" that such benefits are owed. Thus, the retirement board is "prevented by law" from paying those benefits before the entitlement has been proven.

Under each component of section 3287(a), then, SBCERA owed Respondent nothing (beyond what it had already paid him in 2010, as a disability retirement effective as of the date of application), and therefore could not owe him prejudgment interest until his entitlement vested in an amount certain, which SBCERA was no longer prevented by law from paying. These contingencies occurred when he made his request for, and presented evidence to prove a basis for awarding pre-application retroactive benefits, and SBCERA had the opportunity to consider and act upon that application and the supporting evidence. The last of these events occurred

on October 4, 2012, the date of the SBCERA Board's final decision in this case.

As is explained in greater detail below, Respondent had left county employment approximately eight years prior to contacting SBCERA in 2008 about applying for disability retirement benefits. During these eight years, SBCERA had no way of knowing that Respondent might be entitled to benefits. He did not submit a complete application for benefits until over a year later, on July 16, 2009. That application did not request pre-application retroactive benefits, and it did not include any evidence to support an award of pre-application retroactive benefits. One year after that, on August 5, 2010, the Board granted him all of the benefits requested in the application and paid him immediately thereafter, including payment retroactive to June 12, 2008, the date of his application. On September 30, 2010, for the first time, Respondent submitted a request for retroactive benefits for the period from July 15, 2000 to June 12, 2008. That request did not include any evidence to overcome the statutory presumption permitting payment of retirement benefits no earlier than the application date.

Respondent finally presented evidence concerning his request for retroactive benefits at a hearing on December 15, 2011. The hearing officer found this evidence inadequate to overcome the statutory presumption, and recommended denying the request for pre-application benefits. The Board

considered the hearing officer's decision on October 4, 2012 and agreed that Respondent had not met his burden of proving a basis for pre-application benefits. The superior court thereafter granted Respondent's request for a writ of mandamus, finding that Respondent had indeed carried his burden of proving that he could not have ascertained the permanency of his disability on July 14, 2000, and accordingly ordered SBCERA to pay benefits retroactive to that date. The superior court also ordered SBCERA to pay prejudgment interest back to that same date, without further analysis.

SBCERA does not dispute that some section 3287(a) prejudgment interest is owed. But it is only owed from the date of the SBCERA Board's final decision denying the request for pre-application retroactive benefits, which was rendered on October 4, 2012 - that being the first date upon which any evidence on pre-application retroactivity was placed before the Board itself. No interest may be assessed under section 3287(a) before that final Board decision on the pre-application retroactivity issue.

To hold otherwise would provide Respondent with a windfall that the statutes and the cases thereunder clearly do not authorize. It would reward him, and penalize the adjudicator, the Board (and the trust fund out of which the benefits would be paid, and from which SBCERA pays benefits to all of its members and beneficiaries), by awarding "damages" in the form of prejudgment interest on benefits that were not paid during a period of approximately a decade when SBCERA could not know that

Respondent was entitled to or would seek those benefits, and could not lawfully have paid them due to the lack of proof in support thereof. This would turn both the law and any reasonable concept of justice on its headby awarding "damages" in the form of prejudgment interest against the *adjudicator* for a delay that the adjudicator did not cause.

II. DETAILED STATEMENT OF FACTS AND PROCEDURAL HISTORY.

Respondent was an employee of the County of San Bernardino, and thus an active member of SBCERA, for nine years concluding on July 14, 2000. (1 AR 59.) Nearly eight years later, on June 12, 2008, he filed an application for disability retirement benefits, but at that time refused to sign an authorization for the release of relevant medical records. (1 AR 11; 3 AR 1663.) On July 16, 2009, he signed the required authorization, rendering his application complete. (1 AR 20.) The parties agreed to deem the application to have been filed on the earlier date, June 12, 2008, for the purpose of the starting date for disability retirement benefits if the SBCERA Board granted them. (1 AR 11; 3 AR 1663.) The application alleged that Respondent had been injured on the job on two occasions, in 1993 and 1998, and that as a result he was permanently incapacitated for the performance of his county duties, entitling him to service-connected disability benefits under Government Code section 31720, subdivision (a). (1 AR 24.)

SBCERA's staff had Respondent's medical records reviewed by its medical advisor, upon whose recommendation the staff proposed that the Board find that Respondent was permanently incapacitated for the performance of his duties, and that his incapacity was service-connected. (1 AR 46.)

By statute, the presumptive date from which a disability retirement allowance commences is the date the application is filed. (Gov. Code, § 31724, "His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation.") If Respondent could prove to the satisfaction of the Board that he was unable, when he left county service in 2000, to ascertain that his disability was permanent, the second paragraph of Government Code section 31724 would entitle him to benefits retroactive to his July 14, 2000 separation date. Otherwise, his benefits would be retroactive only to the default starting date, which was his June 12, 2008 application date. The 2008 and 2009 applications did not address whether Respondent had been able to ascertain that his disability was permanent at the time he left county service in 2000, and did not request pre-application retirement benefits. The staff recommended that Respondent's benefits be effective on June 12, 2008, the date of his original application. (3 AR 1585.) On August 5, 2010, the Board approved the staff recommendation in its entirety. (3 AR 1588.)

On September 30, 2010, Respondent asked the Board to award benefits retroactive to July 15, 2000, the day after his last day receiving compensation from the county. Although Respondent submitted his request on a form called a request for "review and reconsideration," in fact this was the first time Respondent had raised any issue about the starting date of benefits. Respondent failed to submit any evidence in support of this contention either with the request or within the six months allotted by SBCERA Board policy. As a result, the Board on April 7, 2011, denied the request for pre-application benefits. (3 AR 1591.)

On April 14, 2011, Respondent requested a formal hearing on the sole issue of the retroactive starting date for benefits. (1 AR 23.) A hearing officer was appointed. (1 AR 6.) In prehearing filings to the hearing officer, Respondent submitted and cited no evidence in support of the contention that he could not have ascertained the permanence of his disability as of July 14, 2000, but stated his intention to submit his own testimony on the question. (3 AR 1594.) He did so at the formal hearing on December 15, 2011. (3 AR 1599.) He submitted no additional evidence or exhibits to support his request for pre-application retroactivity. (3 AR 1603, 1605, 1615-1640.)

The hearing officer completed an initial recommendation to the Board on May 25, 2012, pursuant to Government Code section 31533. (3 AR 1989.) After both sides submitted objections thereto, the hearing

officer prepared a final report and recommendation on July 16, 2012. (3 AR 1722.) The hearing officer's final report opined that Respondent had not carried his burden of proof to establish his inability to ascertain the permanence of his disability as of July 14, 2000, and therefore recommended that the Board maintain its original decision that the starting date for benefits should be June 12, 2008, the original application date.

On October 4, 2012, after a delay requested by the Respondent, the Board adopted the hearing officer's recommendation, rejecting Respondent's claim of entitlement to additional benefits for the eight years before he applied to SBCERA for disability retirement, all the way back to 2000. (3 AR 1739.)

Respondent reacted to the Board's final decision by filing a petition for writ of mandate. (AA 1.) The trial court awarded pre-application disability retirement benefits (RT 1-8) and attorney fees (RT 9-13). Both of these amounts have been paid and are not at issue in this appeal. (AA 61.) The trial court also awarded prejudgment interest at 7% per annum dating back to 2000, which amounted to $132,865.37, representing interest on all of the benefits that would have been paid if Respondent had filed his disability retirement application on the date following the day for which he last received regular compensation, and SBCERA had granted his application on that same day. (RT 23; AA 127.)

SBCERA appealed, limited to the issue of when section 3287(a) interest should begin to run. The Court of Appeal reversed on April 22, 2015, in a then-published opinion originally at 236 Cal.App.4th 65, relying primarily on *Weber* and *AFL* in holding that interest should not run until Respondent's right to pre-application retroactive benefits vested, which could not have occurred until Respondent had submitted an application and proven his entitlement to these benefits. The Court of Appeal remanded to the trial court to determine that date. This Court granted review on July 15, 2015, vacating the Court of Appeals' opinion.

III. STANDARD OF REVIEW.

SBCERA agrees with Respondent's statement that the standard of review in this appeal is *de novo*.

IV. ARGUMENT.

A. Summary of the Argument.

Respondent's argument for prejudgment interest running from the time prior to SBCERA's opportunity to act on his claim for a disability retirement allowance at the administrative level fails every necessary element of the statutory test for such a claim under section 3287(a).

First, a CERL applicant's right to a disability retirement allowance and a right to pre-application retroactive benefits are both contingent upon the submission of proof of entitlement thereto, and the Retirement Board's consideration of that proof. Because the right cannot mature until those

contingencies are removed, Respondent's right to the benefits in question therefore did not and could not vest in him until he submitted an application and provided proof of his entitlement to SBCERA, and the Board considered that proof. Prior to that time, any right to retire for disability, and any further right to pre-application retroactive benefits, was not vested but merely inchoate. And because vesting is a requirement before prejudgment interest can run, no prejudgment interest could be owed before Respondent submitted an application and the required proof and the Board acted upon it on October 4, 2012.

Second, the "damages" that Respondent now seeks could not, prior to their presentation to SBCERA and the submission of evidence thereon, have been "certain, or capable of being made certain by calculation." Rather, Respondent's failure even to notify SBCERA that he would seek such benefits, let alone present a basis upon which SBCERA could have calculated the exact amount of those benefits, defeats any claim to section 3287(a) interest before he did so. Extensive case law under section 3287(a) addresses periods when a creditor neglects to provide a debtor with the information that would permit the debtor to determine the amount of the debt owed. The rule is well established that prejudgment interest will not run on the debt during such a period, because the debtor could not have known what, if anything, to pay the creditor, so the "certain, or capable of being made certain by calculation" requirement is not met.

Third, Respondent's failure to apply for and submit evidence in support of his claim left SBCERA, until he did so, in a position where it was "prevented by law" from awarding him the subsequently claimed benefits. The CERL requires a board of retirement, prior to awarding disability benefits, to evaluate and find sufficient the medical and other evidence submitted in support thereof. Moreover, case law establishes that SBCERA has an affirmative duty to evaluate the evidence in support of any disability claim, and to take care to pay benefits only to a claimant entitled thereto, and to no others. Section 31724 mandates a presumption that benefits are paid for a period on and after "the date such application is filed with the board, but not earlier than the day following the last year for which he [or she] received regular compensation." (Gov. Code, § 31724.) Pre-application retroactive benefits can be paid only if the applicant demonstrates, with evidence, a valid basis for overcoming that statutory presumption. To pay such benefits without proof of entitlement is unlawful. Because there was a time when SBCERA was "prevented by law" from paying the disputed benefits, section 3287(a)'s explicit instruction is that any award of interest against SBCERA shall exclude that time.

Whether the question was one of vesting, or of determining when a benefit was "certain or capable of being made certain," or of whether the debtor was prevented by law from paying the debt, the authors of section

3287(a) drew the same distinction: interest will run only on and after the day when the debt should actually have been paid. Whether there was no duty to pay because the debt was still subject to a contingency (*i.e.*, it was not vested), or because the debtor could not know with certainty what or whether to pay, or because the law required a delay in payment, the result is the same. Interest will not run before payment was actually due.

All of these factors counsel against any assessment of interest against SBCERA in the instant case until Respondent had demonstrated his entitlement to the pre-application retroactive benefits in question, and the Board adjudicated that claim. Interest is owed under section 3287(a) from the day that the entitlement was, or should have been, established by the adjudicator (here, the Board), and not before.

B. The Explicit Requirements of Section 3287(a) are Not Met.

1) Respondent's Right to a Disability Retirement Allowance with an Effective Date Prior to His Filing an Application With SBCERA Was Not Vested Until the Condition that He Prove His Entitlement to All Aspects of It Had Been Fulfilled.

The first reason that Respondent cannot be entitled to the prejudgment interest at issue here is that his right to a disability retirement allowance for any period of time did not, and could not, vest until the Board

was presented with, and considered and rendered a decision on, his claim for those benefits.

a) The Right to Payments Vests on the Date the Claimant Becomes Entitled to Receive Them.

This Court has succinctly answered the question of vesting in a section 3287(a) case. A right to the payment of money "vests on the date the claimant was entitled to receive payment." (*AFL*, *supra*, 13 Cal.4th at p. 1034.) The Court there was applying and explaining its earlier statement of the same rule in *Tripp v. Swoap* (1976) 17 Cal.3d 671, 683, that for the purpose of awarding section 3287(a) interest, "each payment of benefits similarly should be viewed as vesting on the date it becomes due."

(1) Respondent's Misleading Citations to *Mass* Cannot Save His Case.

Respondent goes to great lengths, throughout his submissions but most explicitly at page 13 of his Opening Brief, to obscure the key distinctions between the concepts of benefits becoming "vested," becoming "due," and being "accrued." Thus, Respondent claims at page 13 that it is a legal rule that "section 3287(a) 'authorizes prejudgment interest on...payments from the date of accrual to the entry of judgment.'" For this proposition, Respondent cites *Mass v. Bd. of Educ.*, *supra,* 61 Cal.2d at p. 624. Respondent then claims that "the question then becomes when does an obligation accrue." That is the wrong question, though. Because the

issue is the "vested" requirement of section 3287(a), the question is when the right to a payment vests. If a right happens to vest on the accrual date, then the answers to the two questions will be the same, but that does not make them the same question.

To see this clearly, it helps to examine the various meanings of the word "accrue." Webster's Encyclopedic Unabridged Dictionary of the English Language offers three definitions of the word: "1. to happen or result as a natural growth, addition, etc. 2. to be added as a matter of periodic gain or advantage, as interest on money. 3. *Law*. to become a present and enforceable right or demand." It is not difficult to see how these three meanings can produce very different results, and how a failure to distinguish among the various meanings can lead to confusion in the law.

Consider the hypothetical example of an employee with a performance-based incentive payment in her contract. The right to payment may be triggered solely by the meeting of a certain performance goal (*e.g.*, a certain return on investments) over the course of a fiscal year. Yet the contract might also be written to say that the payment is not actually due until the payday for the first pay period after a year-end report showing the returns is submitted to and accepted by the governing body of the organization. This might take some weeks after the fiscal year's end. The contract might further say that the employee must remain employed on the report's acceptance date in order to actually receive the payment. In such a

case, the right to the payment would accrue (under either of the first two meanings above) on the completion of the fiscal year, because it would "happen as a natural growth" from, or "be added" due to, events that occurred during that fiscal year. But it would be merely inchoate at that time. (See *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 621-22.) The right would vest only upon the occurrence of the further contingency that the employee remained employed on the date that the report was accepted. And payment of it would become due on the payday for the first pay period commencing thereafter. Thus, it is possible on the right facts for accrual, vesting, and becoming due all to occur at different times. Respondent's attempts to conflate the terms, as if they must always coincide exactly, does not bear scrutiny. Understanding the terms properly, then, one sees that Respondent's right to a disability retirement might be said, in some sense, to have "accrued" with each passing month as he remained permanently incapacitated beginning in July of 2000, in that his entitlement is attributable to conditions in existence during those times. But, it did not and could not vest until the occurrence of further contingencies - namely that he applied for the benefit and presented evidence in support thereof, and the Board rendered a final decision on his application. And it could not become *due* until it vested, at the earliest.

Viewed in this light, it becomes clear that the *Mass* Court's statement that section 3287 (a) "authorizes prejudgment interest on . . .

payments from the date of accrual to the entry of judgment" was not a general statement of the law. Rather, it was a much more specific ruling based on the legal framework and facts of that case, and applicable only in that context. Respondent's strategic use of an ellipsis at page 13 of his opening brief actually reveals the fallacy in Respondent's contention. That ellipsis represents the deletion of exactly one word: "salary." The unaltered quote from *Mass* is that section 3287(a) "authorizes prejudgment interest on *salary* payments from the date of accrual to the entry of judgment." (*Mass*, *supra,* 61 Cal.2d at p. 624, emphasis supplied.) Respondent makes similarly misleading use of multiple ellipses in another "quote" from *Mass* later in the same paragraph on page 13: "Each...payment...accrued on a date certain....[T]he...payments became vested on the dates they accrued." The full quote, with omitted words emphasized, is "Each *salary* payment *in the instant case* accrued on a date certain. *Unless the suspension itself can be sustained and the board relieved of any obligation whatsoever,* the *salary* payments became vested as of the dates they accrued." (*Mass, supra*, 61 Cal.2d at p. 625 (not page 624 as cited).) Thus, the *Mass* Court made clear that it was only stating a conclusion based on application of the law to the specific facts "in the instant case," which related only to "salary" payments. The right to salary payments does indeed vest when they accrue, since no further contingency is normally necessary for them to be paid. But, if the payment at issue is

not a salary payment that would otherwise would have been made but for a wrongful suspension or termination, these passages from *Mass* state no applicable rule at all. On different facts, vesting may occur at a different time, and that normally[2] will be the date from which section 3287(a) interest will run.

(2) The Rules for Vesting In Disability Cases Are Clear.

When the facts involve a grant of disability retirement under the CERL, we need not wonder when vesting occurs, as this question has been answered in *Weber, supra,* 62 Cal.App.4th at p. 1448. Noting *AFL*'s rule that vesting occurs "on the date the claimant was entitled to receive the payment," the *Weber* Court applied that rule to a CERL disability setting: "The event which triggers retirement and allowance payments is the disability determination by the Board. Until that time, the member is not retired, and [the retirement system] has no monetary obligation to that member." (*Weber*, *supra*, 62 Cal.App.4th at p. 1448.)

Respondent, seeking to explain away *Weber*'s ruling on vesting, places great reliance on the *Weber* Court's statement that, upon the determination by the Board, the "right to receive the benefits vests

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[2] As discussed below, interest may not run in cases where the amount owed is not certain or capable of being made certain, or where the debtor is prevented from paying by law or by act of the creditor.

retroactively to the date the application was filed." (Opening Brief, p. 20, citing *Weber*, *supra*, 62 Cal.App.4th at p. 1449.) Respondent would take this to mean that the vesting itself is deemed to have occurred on a date potentially far in the past. Indeed, in the instant case, Respondent seeks to combine this novel notion that vesting can itself be retroactive with the further concept of a disability application being "deemed" to have been filed long before it actually was filed, attempting to produce the result that his right to benefits should be "deemed" to have vested in 2000, when he ceased working but long before he ever could have received payments. This claim is asserted even though Respondent made no claim to any disability retirement benefits from SBCERA, and necessarily therefore made no showing in support thereof, for approximately a decade. The Board thus could not have rendered a decision thereon, and of course SBCERA therefore could have not provided disability retirement benefits to Respondent. But, as the courts have clearly established, an application and decision based upon evidence sufficient to support the benefit sought are a *sine qua non* of vesting in a disability retirement case. By way of contrast, a member's right to a service retirement benefit is vested merely upon his or her application after sufficient years of service and having reached retirement age as defined by statute. As the facts establishing sufficient service and age are not ordinarily subject to doubt, the statutes place no additional evidentiary pre-condition on the member. (See

generally CERL provisions in Gov. Code sections 31670-31682 (applicable to service retirement for general members) and Gov. Code sections 31662-31664.65 (applicable to service retirement for safety members).)

Vesting, in retirement cases, has long been properly understood to be the removal of all contingencies to the right to receive a benefit. (See *Brophy v. Employees Ret. System* (1945) 71 Cal.App.2d 455, 459 ("[T]he right to a pension does not become vested until the happening of the contingency upon which the pension becomes payable.").) Even in 1945, this idea was "too well-settled to require extended discussion." (*Ibid.*) Bizarrely, Respondent claims at page 17 of his opening brief that "[v]esting in this context means only that the obligation must be subject to ascertainment either on its face or by calculation." No authority is cited to support this statement, which seeks to merge the entirely distinct "vesting" and "certainty" requirements of section 3287(a). This would violate the well-known rule that a statute should not be construed in a manner that "renders related provisions nugatory." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The cases thereafter quoted by Respondent say that a right to payment, on the facts of those cases, vests either "on the first day of [the creditor's] entitlement" (*Tripp, supra*, 17 Cal.3d at p. 683), or state that interest runs on each payment "from the date it fell due." (*Olson v. Cory* (1983) 35 Cal.3d 390, 402 ("*Olson*").) No case is cited that actually says, or even suggests, that the right to pension payments can vest, for any

purpose, when they become "subject to ascertainment," because there is no such case.

Respondent at pages 22-25 of his Opening Brief tries to make several cases into what they are not. But each of the cases cited - *Mass, Olson, Currie v. Workers' Comp. Appeals Bd.* (2001) 24 Cal.4th 1109 ("*Currie*"), and *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252 ("*Sanders*"), involved payments to which the plaintiffs were entitled, and to which they had a vested right as of a particular date, without the need for any administrative and/or adjudicative process. Respondent's citation to *Sanders* is especially curious here. At page 24, Respondent claims that *Sanders* stands for the idea that "wrongful withholding of past due pension payments . . . represents an obligation on which interest will run." *Sanders*, however, was a case about salary being improperly underpaid, and was not about pensions. The cited passage from *Sanders*, *supra*, 3 Cal.3d at p. 262-63, actually quoted *Benson v. City of Los Angeles* (1963) 60 Cal.2d 355, 365-66 ("*Benson*").

Benson, in fact, provides a useful illustration of when pension rights vest, and when they do not. August Benson was a city pensioner who died having been married twice. The pension scheme in effect at the time of his death provided that there should be a "widow's pension" paid to his widow, if she was married to him at the time of his death and for one year before. August's first wife, Teresa, claimed that she was entitled to this benefit as a

function of community property law. (*Benson, supra*, 60 Cal.2d at p. 357.) But this court held that Teresa's being married to August not only for at least a year prior to his death (which she was), but also at the time of his death (which she was not), was a condition upon which any right to the "widow's pension" depended. Although she might have had an inchoate right to a widow's pension at one time, the contingency that they be married at his death never occurred, so her right never vested. (*Id.* at p. 361, explaining the rule that "a widow's pension may never vest in her in the absence of the happening of the contingency upon which payment of the widow's pension depends.")

In contrast, August Benson's second wife, Olive, was married to him when he died and for more than a year before. The city had resisted paying her widow's pension, on the basis that prior to its becoming due, the city had changed the conditions upon which it would be paid, rendering Olive ineligible. However, that change had been invalidated. Thus, the court found, Olive had a fully matured and vested right to receive the widow's pension when the last contingency - her being married to August at the time of his death - occurred. Olive was therefore entitled to prejudgment interest owing to the city's wrongful refusal to pay the benefit. (*Benson, supra*, 60 Cal.2d at pp. 366-67.) Thus, *Benson* (indirectly quoted, but not cited, by the Respondent) stands for the rule that, where a fully vested benefit is wrongfully withheld when it should be paid, interest will run. It assuredly

does not suggest that interest could ever run during a time when the benefit is not vested and could not be paid.

When the idea of vesting is thus properly understood as the occurring of the last contingency to the right to receive payment, it becomes apparent that the idea of a right to a disability retirement vesting "retroactively" makes no sense, even in the abstract. The right might be deemed retroactive in the sense that payments will be made that are attributable to past periods, but the vesting of the right to receive those payments cannot be retroactive. A contingency is removed when it is removed, and cannot be said to have been removed at some earlier date. Thus, directly contradicting Respondent's attempt to strategically misinterpret its statement about retroactivity, the *Weber* Court explained that "once the eligibility determination is made, the right vests immediately, *effective* retroactively." (*Weber*, *supra*, 62 Cal.App.4th at p. 1451, emphasis supplied.) Lest there be any lingering doubt, the Court finally stated, "[u]ntil the member makes the necessary showing of eligibility, his or her right is merely inchoate." (*Ibid.*) While the benefit that has vested may then be paid on a retroactive basis, as it was in *Weber*, the vesting itself cannot be understood to be retroactive, but can only occur on the actual date of the removal of the contingency. In a disability retirement case, that contingency is the board's decision, vesting thus occurs on the date when the board makes its decision and prejudgment interest will run

from that date, if the decision was incorrect, and not before. As *Weber* explained with specific reference to the interplay of section 3287(a) and Government Code section 31724, "[t]here is no mandated interest implied in the requirement that payment of benefits be retroactive to an earlier 'effective' date." (*Weber*, *supra*, 62 Cal.App.4th at p. 1449.)

A distinction must be drawn between a benefit that becomes vested as a result of a claimant's showing in an administrative proceeding, on the one hand, and a benefit that is found, in such a proceeding, to have become vested at some earlier time. If the right was vested earlier but wrongfully denied, then interest will run from the date that the payments should have been made, because the denial of those payments will always have been wrongful. The purpose of the administrative proceeding, on such facts, is not to create the entitlement in the first place, but to decide whether a prior entitlement was correctly taken away. But if the vesting was, on the facts of a given case, a function of the agency rendering its decision - that decision being a contingency to the right's full maturity - then vesting did not occur until that date, and interest will not run until after that date.

And indeed, the courts have drawn exactly this distinction. In *San Diego Sheriffs, supra*, 68 Cal.App.4th at p.1095, the court explained that there must be special consideration in a case in which there has been an agency determination of "an initial disciplinary action [that] deprived the employee of a fully vested right to his job and paycheck." In such a case,

the court reasoned, the administrative determination "is not a decision giving rise to entitlement to benefits in the first instance but instead is a decision that salary was wrongfully withheld." (*Ibid.*) The key is that the right was "fully vested" prior to the deprivation, and independent of any administrative action, the purpose of which was merely to determine the nature of the right, and not to bring about its vesting. The *San Diego Sheriffs* Court thus drew a direct contrast with *AFL* noting that in some cases like *AFL*, "the claimant is not entitled to benefits until the *administrative* process has been completed." (*Ibid.*)

Similarly, in *Currie*, this Court distinguished the right to obtain prejudgment interest on awards of backpay for Labor Code violations from claims based upon administrative determinations of eligibility for benefits as discussed in *AFL* and *Weber*. (*Currie*, *supra*, 24 Cal.4th at p. 1118.) As the *Currie* Court observed, understanding the purpose of the administrative proceeding was key: "Here we are concerned not with an inherent administrative delay in providing government benefits, but with wages withheld from an employee in violation of Labor Code section 132a." (*Ibid.*)

Applying this same distinction, in an earlier case, in support of an administrative interest award in a context where vesting had occurred prior to any administrative proceedings being initiated, the Court of Appeal explained "[w]e see no reason, however, why appellant should be denied

interest on his back pay simply because he was vindicated in an administrative proceeding and did not have to contest his demotion in court." (*Goldfarb v. Civil Serv. Comm.* (1990) 225 Cal.App.3d 633, 636.)[3] The same logic counsels for a similar uniformity of results in cases where vesting does not occur until later. A claimant whose right to benefits could never have vested until the administrative process was complete, and who ultimately received them in a writ proceeding, should not be entitled to interest that a similar claimant vindicated at the administrative level would not receive.

To avoid such an unjust result, all one need do is follow the statute. Interest does not run under section 3287(a) until the right to the benefits actually vests.

b) *Austin*, to the Extent That it Deviated From the General Rule, Should Be Disapproved.

Against this backdrop of clarity that interest does not run until the right to payments vests, and that vesting occurs when the claimant was actually entitled to receive payment and not before, there stands in opposition only *Austin v. Bd. of Ret.* (1989) 209 Cal.App.3d 1528

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[3] The facts of *Goldfarb* were, significantly, functionally identical to those of *Mass* and *Currie*, each involving a wrongful employee discipline action that deprived the plaintiff of salary payments to which he was entitled, and would have received if not for the wrongful discipline. In *Mass*, the wrongful action was a suspension; in *Currie*, it was a refusal to reinstate, and in *Goldfarb*, it was a demotion.

("*Austin*"). There, a CERL board of retirement had denied an applicant disability benefits throughout a completed administrative process. A writ was issued ordering benefits, and also awarding section 3287(a) interest on "the amount of the pension that was retroactive." (*Id.* at p. 1531.) As in the instant case, the board in *Austin* challenged only the interest award on appeal. As Respondent has emphasized, the *Austin* Court found the interest award proper.

Austin relied heavily, and inappropriately, on the factually dissimilar *Mass*. In particular, *Austin* placed great reliance on *Mass'* observation that, in *Mass*, if the "plaintiff had not been wrongfully suspended, he would have obtained the benefits of the moneys paid as of those dates [the paychecks not received]; he has thus lost the natural growth and productivity of the withheld salary in the form of interest." (*Id.* at p. 1534, quoting *Mass*, *supra*, 61 Cal.2d at p. 625.) From this, the *Austin* Court extended the *Mass* Court's reasoning thus: "If Austin had not been wrongfully denied disability retirement benefits, he would have obtained the benefits of the moneys paid as of the date of the accrual of each payment." (*Austin*, *supra*, 209 Cal.App.3d at p. 1534.) But, to the extent it refers to a time prior to the CERL board's final decision, this statement in *Austin* was just factually wrong. The plaintiff there, Jason Austin, could never, in fact, have "obtained the benefits of the moneys" at issue there, prior to his disability application and the retirement board's decision thereon.

If by "accrual," the *Austin* Court meant to refer to the dates as to which the payments were attributable - *i.e.*, the dates during which Austin was actually disabled while his application was pending and prior thereto - then the court's belief that he "would have obtained the benefit of the moneys" was clearly incorrect. Austin could not have received those payments unless and until he filed an application and was found to be disabled, the significance of which the *Weber* Court later made clear. (*Weber*, *supra*, 62 Cal.App.4th at p. 1448.)

On the other hand, if by "date of accrual" the *Austin* Court meant to refer to the dates upon which the payments might actually have been made, absent the Board's erroneous denial of *Austin's* application, then *Austin* could only have had "the benefit of the moneys paid" from and after the date of the board's final decision, as the retirement system in that case had no statutory or other authority to pay a disability retirement benefit to a member until its board of retirement determined the member satisfied eligibility requirements. This statement by the Court therefore seems a wholly inappropriate justification for an award of interest running from a time prior to that decision, when those payments could never have been made.

Either way, *Austin* is unquestionably at odds with the central reasoning in the later holding of this Court in *AFL* and of the Third District Court of Appeal in *Weber*. This is why the Court of Appeal below in the

instant case declined to follow *Austin*, to the extent that it held that prejudgment interest should be awarded "on retroactive disability benefit payments attributable to the period before he [*i.e.* Flethez] filed his application for, and proved his entitlement to, the disability benefits." (Slip opinion, pp. 16-17.)

The decision not to follow *Austin* below was well justified, and should be adopted by this Court, on three independent rationales. First, the law has developed considerably in the last twenty-six years. *Austin* was decided before this Court's 1996 ruling in *AFL*, and the court in *Austin* therefore did not have the benefit of that case's clear statements that, where the very existence of the right to receive payment is dependent upon an administrative decision, there is "no underlying monetary obligation to the claimant until [the adjudicating body] determines the claimant is eligible for the benefits," and "[o]nce eligibility has been determined, the right to receive benefits vests on the first day of the claimant's entitlement," and "delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits." (*AFL*, *supra*, 13 Cal.4th at p.1023.) *Austin* was also decided prior to *Weber*'s application of that rule from *AFL* to the specific context of CERL disability applications, which clarified that the right to disability payments vests upon "the disability determination by the Board." (*Weber*, *supra*, 62 Cal.App.4th at p.1448.)

Second, the *Austin* Court's reasoning, when examined, reveals scant attention to the question of vesting. Indeed, no form of the word "vest" appears in the original text authored by the *Austin* Court; the word's only appearances in that opinion occur in quotations either from section 3287(a) or from *Mass*.

Third, to the significant extent that *Austin* relied on *Mass*, it failed to recognize what later cases would show is a crucial distinction regarding vesting - that a right to payments vests only when those payments should actually have been made. In *Mass*, the payments should have been made, and thus became vested, on each successive pay date as it passed, because there was never a valid justification for the suspension at issue there. But, in failing to actually examine the vesting question with reference to the facts in *Austin*, the court failed to address the significance of the fact that the payments there remained subject to a contingency, and thus could not have become vested rights, unless and until Austin had proven his entitlement to a disability retirement allowance to the adjudicating Board of Retirement with which he filed his application.

Thus, the court below was right to decline to follow *Austin*. And this Court would be right to make clear that *Austin* is no longer good law on this point.

Once *Austin* is properly understood, on the question of vesting, as anomalous and inconsistent with the later elucidated controlling law, the

rule becomes clear. The right to a retroactive disability retirement benefit does not vest until the payment of that benefit becomes a present obligation of the retirement system. That obligation does not mature into a present one until the system makes a decision on the claimant's application and the proof in support thereof. Prior to that time, the right to the disability retirement benefit is not vested but merely inchoate because it is still subject to legal preconditions that must occur before payment can be made, and interest will therefore not run.

2) Respondent's Claim was Not "Certain or Capable of Being Made Certain by Calculation" Prior to His Presentation to the Board of that Claim.

Section 3287(a) is also quite explicit in stating that prejudgment interest will not run until a right to payment, even if vested, is "certain, or capable of being made certain by calculation." This statutory rule, to be sure, will not excuse payment merely due to the defendant's denial of liability. (*Wisper Corp., supra,* 49 Cal.App.4th at p. 958, citing *Stein v. S.Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 572).) But it does limit prejudgment interest to "situations where the defendant could have timely paid that amount and has thus deprived the plaintiff of the economic benefit of those funds." (*Wisper Corp., supra,* 49 Cal.App.4th at p. 962.) Any apparent similarity to the rule described above regarding questions of vesting is assuredly not coincidental. Again, the principle is that the

defendant will not be charged prejudgment interest unless and until it actually should have paid the defendant the disputed amount. Thus, in *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 150-51, the court ruled that section 3287(a) interest will be owed only "from the date that the right to recover arose," and that where the question is whether the damages were certain or capable of being made certain, they will be deemed sufficiently certain and thus subject to payment "if the defendant actually knows the amount of the damages or could calculate the amount from information reasonably available to the defendant." In section 3287(a) cases, "if the defendant does not know or cannot readily ascertain damages, it is incumbent on the plaintiff to provide the defendant with some statement and supporting data from which defendant can make the necessary determination." (*Levy-Zentner Co. v. S. Pac. Trans. Co.* (1977) 74 Cal.App.3d 762, 798.) If the plaintiff fails to do so, "where the defendant does not know what amount he owes and cannot ascertain it except by accord or judicial process, he cannot be in default for not paying it." (*Id.* at p. 799.)

In the instant case, SBCERA was entirely unaware of Respondent's claim until he first presented it - albeit without support - in 2008. Moreover, even to the extent that SBCERA then became aware that Respondent was making a claim, it could not have ascertained whether it was a valid claim, and if so, the proper amount of that claim, until it

received medical evidence in support thereof and evaluated it. Specifically, SBCERA first needed to determine whether Respondent was "permanently incapacitated for the performance of duty." (Gov. Code, § 31720.) If he was, SBCERA next needed to determine whether he had been "continuously" incapacitated since his separation from employment; if not, his application would be untimely under Government Code section 31722. If both of these burdens were met, SBCERA would then need to determine whether Respondent's incapacity arose out of his employment and was therefore "service-connected," as a service-connected disability retirement is more generous than a non-service-connected disability retirement. Once established, these facts entitled Respondent to a disability retirement allowance retroactive to his actual application date. The Board so found on August 5, 2010 and immediately paid him all of the benefits he had requested up to that time, and continued to pay his monthly disability retirement allowance thereafter.

Once Respondent made a belated request for additional benefits retroactive to his last date of regular compensation, SBCERA needed to make a separate determination whether Respondent had in fact been "unable to ascertain the permanency" of his incapacity at the time of his separation from employment, thus entitling him to additional retroactive benefits dating back to 2000, rather than merely to his first application in 2008. (Gov. Code, § 31724.) Until Respondent requested additional

retroactive benefits and SBCERA had information enabling it to make each of the necessary determinations, Respondent's claim was not "certain, or capable of being made certain by calculation." Thus, interest could not run until Respondent provided this information.

In a more general way, the cases apply this principle to require that where a debtor has no way of ascertaining either the validity or the amount of the claim, the creditor will need to make a well-supported demand in order for section 3287(a) prejudgment interest to begin running. (See, *e.g.*, *Tyre v. Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 406-07 ("The record does not disclose the date upon which plaintiff first demanded payment of her community property interest in cash. That date properly marks the commencement of interest."); *Leatherby Ins. Co. v. City of Tustin* (1977) 76 Cal.App.3d 678, 689 ("The last stop notice claim was released on June 6, 1975. However, knowledge of this was not communicated to Tustin until it received the demand of June 23, 1975. It was on the latter date that it came under a duty to pay over the funds, and so the interest should be reckoned from that date.").) "The theory is that it is unreasonable or unfair to expect a defendant to pay a debt before he is aware of or able to compute its amount," so, when applied to the question of the commencement of section 3287(a) interest, such interest will run only from "the date upon which the [creditor] provided the [debtor] with the required accounting and supporting data." (*People v. S. Pac. Co.*

(1983) 139 Cal.App.3d 627, 641 *cf. Ball v. City of Los Angeles* (1978) 82 Cal.App.3d 312 (a city is not required to pay interest on a tax refund claim prior to the date the request for a refund is submitted).)

The cases thus place beyond doubt or dispute the concept that, where the defendant could not know what is owed absent a well-supported demand from the plaintiff, prejudgment interest will not run against the defendant until such time as the plaintiff has made that demand and supported it with sufficient evidence to establish entitlement. Applying that rule to the facts here, it is beyond dispute that Respondent did not even contact SBCERA about a desire to retire based on a claimed disability until he filed his first claim in 2008, and did not provide evidence to support his later claim, to receive such benefits retroactive to his 2000 separation date, until December 15, 2011. (3 AR 1599.) Because SBCERA could not have known what, if anything, it might owe Respondent as a lifetime disability retirement allowance prior to his providing evidence sufficient to support his demand, the claim was not "certain, or capable of being made certain by calculation" by SBCERA.

3) SBCERA was Prevented by Law from Paying Respondent's Claim Until He Proved His Entitlement Thereto.

Section 3287(a) provides that interest does not run "during such time as the debtor is prevented by law, or by the act of the creditor from paying

the debt." The law has long been clear that, during any time where a debt, although owed, cannot be paid by operation of law, the debtor will not be liable for prejudgment interest thereon. "It is well settled that where the defendant has been prevented from making payment by reason of a judgment, order, statute, or judicial process directing it to hold the amount due, there is no liability for interest." (*Perkins v. Benguet Consol. Mining Co.* (1942) 55 Cal.App.2d 720, 769.)

In the present case, SBCERA was prohibited by statute from paying Respondent any disability retirement benefits prior to his initial application and submission of proof. The CERL places upon the applicant the burden of proof of an entitlement to a disability retirement, and each element thereof, including permanent incapacity, service connection, and entitlement to a pre-application effective date if such an additional retroactive benefit is sought. The member must submit such proof as the board may require, and cannot be retired for disability unless and until such proof is submitted and decided upon by the board. (Gov. Code, § 31723; *Weber*, *supra*, 62 Cal.App.4th at p. 1448.) The member may be retired only when the evidence submitted "shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties." (Gov. Code, § 31724.) Where the member seeks a pre-application effective date, the member's inability to have determined the permanence of his disability as of his separation from

employment must also be "demonstrated to the satisfaction of the board." (Gov. Code, § 31724.)

In considering disability retirement applications, CERL retirement boards make quasi-judicial decisions. (*Masters v. San Bernardino Cnty. Employees Ret. Assn.* (1995) 32 Cal.App.4th 30, 45.) Because the Board is subject to a fiduciary duty to safeguard its trust fund for all of its members, it must refrain from paying benefits to which any particular member is not entitled. It would have been an unconstitutional gift of public funds to have paid Respondent retroactive benefits prior to the time he met his burden of proof. (See *San Marcos Water Dist. v. San Marcos Unified Sch. Dist.* (1986) 42 Cal.3d 154, 167 (paying an invalid assessment would be a gift of public funds).) Thus, it cannot pay benefits "unless it investigates applications and pays benefits only to those members who are entitled to them."[4] (*McIntyre v. Santa Barbara Cnty. Employees Ret. Sys.* (2001) 91 Cal.App.4th 730, 734.) Respondent first presented evidence to support his

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[4] Respondent suggests at page 3 of his opening brief that SBCERA should be "embarrassed" for "forcing him to resort to the Superior Court" in order to receive pre-application retroactive benefits. But, given SBCERA's duty to refrain from paying benefits to those who are not entitled, it is inevitable that on occasion SBCERA will deny a claim only to later be reversed on writ. When this type of error inevitably occurs, prejudgment interest is, indeed, owed for that portion of the harm to the applicant caused by the retirement board's error – *i.e.*, running from the time of the final, erroneous decision. The question is not whether SBCERA should be embarrassed, but whether the statute requires SBCERA – that is, SBCERA's other members and employers – to go much, much farther and pay prejudgment interest for a time prior to its final decision.

claim for retroactive benefits to a hearing officer on December 15, 2011. (3 AR 1599.) The hearing officer prepares a recommendation, but only the Board can decide whether to grant a request for retroactive benefits. (Gov. Code, § 31534.) The "wrongful" withholding of retroactive benefits thus did not occur until the Board hearing on October 4, 2012. (3 AR 1739.)

Seen in this light, the obvious becomes cognizable as a matter of statutory law as interpreted by the courts: SBCERA could not, by law, have paid Respondent his requested benefits until he applied for those benefits and submitted proof thereon, and until SBCERA had investigated his claim and made a considered determination as to Respondent's eligibility. Because it was prevented by law from paying any benefits until that time, it cannot owe prejudgment interest until that time. And this would remain true even if this Court were to accept Respondent's implausible suggestion that vesting can somehow be "deemed" to have occurred in 2000.

4) The Application of These Rules to this Case.

As discussed, several cases summarize these rules and hold that interest does not run until benefits or other money due to the plaintiff is withheld "wrongfully." (*AFL, supra*, 13 Cal.4th at p. 1026 ("a 'wrongful withholding' of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to

the benefits. . . The delays inherent in this system are not, however, tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest once the Board rules in favor of the claimant."); *Weber*, *supra*, 62 Cal.App.4th at p. 1452 ("the procedural delay does not constitute a wrongful denial of benefits").)

Until Respondent applied for benefits and proved a basis for them, and the Board had an opportunity to consider that evidence, any delay in paying the disability benefits was not wrongful. Similarly, until Respondent requested retroactive benefits, submitted evidence in support, and the Board had an opportunity to consider that evidence, there was no wrongful denial of retroactive benefits.

The correct starting date for interest is therefore October 4, 2012, the date of the Board decision after Respondent presented evidence to support his claim for retroactive benefits. Prior to that date, the rules addressed above prevented the Board from paying the request for pre-application retroactive benefits.

September 30, 2010 was the first time Respondent made any request for payment of pre-application benefits. Prior to that date, there was no vested right to pre-application benefits, and the amounts were uncertain and could not have been determined without evidence of Respondent's inability to determine the permanency of his incapacity. Therefore, SBCERA was

prevented by law from paying, and there was no wrongful withholding of benefits.

There followed an extensive but normal administrative process, including a six-month period following his September 30, 2010 request during which Respondent submitted no evidence to support it, and then a formal hearing, post-hearing briefing, and submission of the hearing officer's recommendation to the Board of Retirement. The matter of pre-application benefits was first considered at the Board's meeting on October 4, 2012. Only then was Respondent's request for pre-application benefits denied. (3 AR 1726, 1731.)

The time required by this administrative process is not a wrongful withholding of benefits and is not a basis for interest. (*AFL*, *supra*, 13 Cal.4th at p.1026 ("The statutory scheme thus accounts for the fact that delays are inherent in the entitlement claim review process and are necessary to ensure only those claimants who have established eligibility will receive benefits.... The delays inherent in this system are not, however, tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest.").)

The correct starting date for interest is October 4, 2012, the date the Board first had an opportunity to consider Respondent's supporting evidence and make a decision on his later request for pre-application benefits.

V. CONCLUSION.

For the foregoing reasons, the Court should find that the trial court erred in awarding Respondent prejudgment interest running prior to October 4, 2012, and make clear that in a disability retirement case where a denial of benefits is eventually reversed by writ of mandamus, section 3287(a) prejudgment interest will run from the time of the final, erroneous retirement board decision denying benefits, and not before.

DATED: October 13, 2015

Respectfully submitted,

Christopher D. Lockwood, SBN 110853
Arias & Lockwood
225 W. Hospitality Lane, Suite 314
San Bernardino, CA 92408
Telephone: (909) 890-0125
Facsimile: (909) 890-0185
Email: Christopher.Lockwood@ariasLockwood.com

Michael P. Calabrese, SBN 237682
Chief Counsel
San Bernardino County Employees' Retirement Association
348 West Hospitality Lane
San Bernardino, CA 92414
Telephone: (909) 915-2039
Facsimile: (909) 885-7446
Email: mcalabrese@sbcera.org

By */s/ Michael P. Calabrese*
Michael P. Calabrese
Attorneys for Defendant and Appellant
San Bernardino County Employees' Retirement Association

CERTIFICATE OF COMPLIANCE

California Rules of Court, Rule 14(c)(1)

Pursuant to California Rules of Court, Rule 14(c)(1), the foregoing ANSWER BRIEF ON THER MERITS is double-spaced and was printed in proportionately spaced 13-pt. Times New Roman type. It is 45 pages long (inclusive of footers but exclusive of the cover page, tables, signature block, the Certificate of Compliance, and the Certificate of Service). According to Microsoft Word, it contains 10,897 words.

Executed this 13th day of October, 2015, at San Bernardino, California.

/s/ Michael P. Calabrese
Michael P. Calabrese

CERTIFICATE OF SERVICE

I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action. My business address is 225 W. Hospitality Lane, Suite 314, San Bernardino, CA 92408.

On October 13, 2015, I served the following document described as **ANSWER BRIEF ON THE MERITS** on all interested parties in this action by placing a true copy of the original thereof enclosed in sealed envelopes addressed as follows:

Mark Ellis Singer
Faunce, Singer & Oatman
12501 Chandler Boulevard, Suite 200
North Hollywood, CA 91607-1966
(Attorneys for Frank Flethez)

Civil Division
San Bernardino County Superior Court
303 West Third Street
San Bernardino, CA 92415-0210
(Case No.: CIVDS 1212542)

California Court of Appeal,
Fourth District Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101
(Case No. D066959)

I caused said document to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight delivery pursuant to C.C.P. §1013(c) on that same date at San Bernardino, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 13, 2015 at San Bernardino, CA.

/s/ Sharvonne Sulzle
Sharvonne Sulzle