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Electronically FILED by Superior Court of California, County of Los Angeles 1/13/2025 11:35 AM David W. Slayton, Executive Officer/Clerk of Court, By J. Gnade, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MARYANNE GILLIARD, individually and on behalf of a class of similarly situated persons,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Defendants.

Case No. 24STCP02837

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS STATE CONTROLLER AND CALPERS'S DEMURRER

Date: March 10, 2025
Time: 1:45 P.M.
Dept: 1
Judge: The Honorable Lawrence P. Riff
Action Filed: September 3, 2024

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INTRODUCTION

Plaintiff Maryanne G. Gilliard, a superior court judge in Sacramento County, filed this putative class action against defendants CalHR, CalHR Director Ortega, the Controller, and CalPERS.[1] (Compl., ¶¶ 1-2, 6.) Plaintiff argues that CalHR has misapplied Government Code section 68203, which provides that "the salary of each justice and judge . . . shall be increased by the amount that is produced by multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California state employees."[2] Specifically, Plaintiff alleges that since the 2006-07 fiscal year, CalHR has considered only one category of salary increase—the general salary increase ("GSI")—and wrongly omitted other categories, including so-called special salary adjustments ("SSAs"). (Compl., ¶¶ 19-20.) Plaintiff seeks a declaration against CalHR that all categories of salary increases, including SSAs, must be included in the calculation of the "average percentage salary increase" under section 68203, subdivision (a). (*Id.* ¶ 21.) In addition, plaintiff seeks a writ of mandate requiring the Controller and CalPERS to compensate plaintiff and the putative class based on properly calculated salaries and benefits from 2016-17 to present. (*Id.* ¶¶ 24-25.) Plaintiff's claims against the Controller and CalPERS fail for three independent reasons:

First, plaintiff does not—and cannot—allege any present duty owed to her by the Controller or CalPERS. The Controller and CalPERS do not calculate the "average percentage salary increase" or otherwise determine judicial salary increases and related pension benefits. Rather, section 68203 tasks CalHR with determining the average percentage salary increase and communicating that information to the Controller in a "pay letter." The Controller and CalPERS then have a ministerial duty to implement the increase. Because the Controller and CalPERS have fulfilled this duty, a writ of mandate may not issue against them.

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[1] In this demurrer, "judges" refers to state judicial officers, whether designated as "judges" or "justices," and defendants will be referred to as follows: Malia Cohen, in her official capacity as the Controller of the State of California ("Controller"), the California Public Employees' Retirement System ("CalPERS"), the Judges Retirement System ("JRS"), the Judges Retirement System II ("JRS II"), the Board of Administration of CalPERS in its official capacity as the administrator of JRS and JRS II ("CalPERS Board") (collectively, CalPERS, CalPERS Board, JRS, and JRS II will be referred to as "CalPERS"). CalHR and CalHR Director Ortega are represented separately from the Controller and CalPERS.

[2] Further statutory citations reference the Government Code unless otherwise indicated.

Second, plaintiff's claims against the Controller and CalPERS are barred under both claim preclusion and issue preclusion. Plaintiff's claims against them are merged into a favorable class action judgment obtained against the Controller and CalPERS nearly 10 years ago where a class of judges, including plaintiff, successfully argued that they were entitled to salary increases under section 68203 as calculated by CalHR. In that litigation, the class representative and class counsel, the same counsel representing plaintiff, urged adoption of CalHR's judicial salary calculations, which they knew were based on GSIs only, and the court so ordered. Plaintiff and other class members cannot return to court years later to relitigate the same issue against the same parties but relying on a new legal theory.

Third, the bulk of the relief sought is barred by the statute of limitations, and the discovery rule exception has not been adequately pleaded and would not apply in any case.

Accordingly, the court should sustain the demurrer without leave to amend.

STATEMENT OF FACTS

A. California Judges' Salaries

Government Code sections 68200, 68201, and 68202 set state judicial officers' salaries. And section 68203 provides that these salaries are increased every year by "multiplying the then current salary of each justice or judge by the average percentage salary increase for the current fiscal year for California state employees." (§ 68203, subd. (a).) The "average percentage salary increase[s]" referred to in section 68203 are "those increases as reported by the Department of Human Resources to the State Controller in a pay letter." (*Id.*, subd. (b)(1).)

B. The *Mallano* Litigation

In 2014, former Justice Robert M. Mallano, on behalf of a class of current and retired judges, brought a declaratory relief action against the Controller, JRS, and JRS II. (Declaration of Malcolm Brudigam ("Brudigam Decl.") Ex. A, ¶¶ 1-5.) He alleged that judges did not receive salary increases in each of the fiscal years 2008-09 through 2012-13 as required under section 68203, even though there was a small average percentage salary increase for California state employees during some of those years. (*Id.*, ¶¶ 29-33.) He sought declarations that section 68203 provides the salary for each judge, that section 68203 salary increases are mandatory and not

subject to discretion or authorization, and that JRS and JRS II pension benefits are based on judicial salaries as calculated under section 68203. (*Id.*, p. 8.) The plaintiff in this case was a member of the *Mallano* class. (Compl., ¶ 27; Brudigam Decl. Ex. B, ¶ 1.)

At trial, the parties disputed how CalHR should calculate the "average percentage salary increase" under section 68203. Justice Mallano argued that CalHR's calculation should consider only salary increases, not any salary decreases (e.g., due to furloughs). (Brudigam Decl. Ex. C, pp. 3-5.) The state defendants argued the opposite—that salary decreases should be considered in calculating the average. (Brudigam Decl. Ex. D, p. 21.) Justice Mallano prevailed on this issue. (Brudigam Decl. Ex. E, ¶¶ 25-29.)

Justice Mallano's position was consistent with CalHR's practice at the time. Thus, he argued that CalHR's reported calculation, which he knew considered only GSIs, was presumptively correct and sought a declaration that section 68203 required judicial salary increases consistent with CalHR's reported calculations for fiscal years 2008-09 through 2015-16. (Brudigam Decl. Ex. C, p. 3 ["CalHR's Contemporaneous Average State Employee Salary Increases Were Correct."]; *id.* p. 4 ["CalHR understood Section 68203 and read it correctly when it made its contemporaneous reports of average percentage salary increases for other State employees during the years in question."]; *id.* p. 5 [seeking relief as the "[s]alary increases for state employees as reported by CalHR"]; see Ex. D, p. 12 ["In calculating the projected average percentage salary increases during the disputed years, consistent with its prior practice, [CalHR] considered approved general salary increases, if any, for all of the State's bargaining units and related employee groups."]; Ex. F, 69:3-71:23, 91:18-94:24; Ex. G [notice of lodging].)

The trial court agreed and entered judgment in favor of the *Mallano* class, and ordered the state defendants to implement salary increases consistent with CalHR's calculation for fiscal years 2008-09 through 2015-16. (Brudigam Decl. Ex. B, ¶ 2; Ex. E, ¶¶ 39-46, 67-72.)

The court of appeal affirmed the judgment in an unpublished opinion. (Brudigam Decl. Ex. H, at p. 2 ("*Mallano I*").)[3] Like Justice Mallano and the trial court, the court of appeal

[3]The unpublished opinions cited herein are relevant to the claim and issue preclusion arguments contained in section III. (Cal. Rules of Court 8.1115, subd. (b)(1).)

accepted CalHR's calculations of the "average percentage salary increase" as presumptively correct. (*Id.* at pp. 5-7, 14.)

After *Mallano I*, class members received backpay and the concomitant benefits based on the corrected salaries resulting from CalHR's calculations for fiscal years 2008-09 through 2015-16. (Brudigam Decl. Ex. I, pp. 2-3; Ex. B, ¶¶ 2-3; Ex. E, ¶¶ 39-46.) The court also ordered that beginning on July 1, 2017, the defendants were required to pay future judicial salaries and judicial retirement benefits in amounts "in accord with the judgment in this case."[4] (Brudigam Decl. Ex. I, p. 5, ¶ 2.)

C. Section 68203's Amendments

Following the *Mallano* judgment, the Legislature amended section 68203 to clarify: (1) "average percentage salary increase" means "those increases as reported by the Department of Human Resources *to the State Controller in a pay letter*"; and (2) in CalHR's calculations, the "average percentage salary increase for the current fiscal year for California state employees shall be reduced by the average percentage salary decrease resulting from the furlough or enrollment in a personal leave program of California state employees." (Brudigam Decl. Ex. K at p. 19, § 22, emphasis added.) The Legislature did not otherwise disapprove or change CalHR's method of calculation, which considered only GSIs. Thus, since 2016, section 68203 has been clear: contrary to the *Mallano* judgment, the only relevant "average percentage salary increase" for determining judicial salary increases is what CalHR calculates and reports to the Controller via a pay letter, and that calculation must consider salary reductions.

D. The *Van Voorhis* Litigation

In 2019, former judge Bruce Van Voorhis sued the Controller and CalPERS alleging underpayment of his judicial salary and seeking "a comprehensive declaration of [his] rights regarding the payment of retirement benefit increases under California Government Code Section 68203." (Brudigam Decl. Ex. L, ¶ 5.) The complaint alleged that "the Controller had … not complied with section 68203 in calculating judicial salaries and 'retiree benefits,'" and "that the

[4] There was a second appeal by the Controller, JRS, and JRS II that raised a handful of challenges to the trial court's enforcement of the judgment, but all were rejected. (See Brudigam Decl. Ex. J.)

Controller and JRS have an independent duty to calculate, verify, or correct CalHR's calculation of the 'average percentage salary increase'" per section 68203. (Brudigam Decl. Ex. M, p. 6.)

The court granted summary judgment to defendants. The court dismissed Van Voorhis's pre-2016 causes of action based on both claim and issue preclusion from the *Mallano* litigation. (Brudigam Decl. Ex. N, pp. 1-2). Regarding Van Voorhis's allegation that the Controller had improperly calculated judicial salaries, the court explained that the Controller and CalPERS only implement salary increases issued by CalHR in pay letters, and "[t]he statute gives [the Controller and CalPERS] no discretion" regarding said increases. (Brudigam Decl. Ex. O, p. 12.) The court distinguished this outcome from *Mallano*, in which CalHR had not issued pay letters to the Controller or CalPERS. (*Ibid.*) The court reasoned that any argument that CalHR incorrectly calculated the increase of judicial salaries could have been raised in *Mallano*, making the argument claim-precluded. (*Id.* at p. 14.) Finally, concerning the allegation that the Controller and CalPERS insufficiently verified CalHR's calculation of the salary increase, the court explained that section 68203 gives the Controller, CalPERS, and CalHR "clear" "respective duties": "CalHR calculates, and [the Controller and CalPERS] implement." (*Id.* at p. 16.)

The Court of Appeal affirmed. (Brudigam Decl. Ex. M, p. 2.) The court noted CalHR's "pivotal[] role in fixing judicial salaries and retirement benefits." (*Id.* at p. 6 fn. 6.) For that reason, the court explained that declaratory relief against the Controller and CalPERS would represent an improper advisory opinion. (*Id.* at pp. 20-21.) And the court repeated that the Controller or CalPERS have no duty to either calculate an average percentage salary increase or ensure the correctness of CalHR's calculation. (*Id.* at pp. 22-23.)

ARGUMENT

A defendant "may object ... to the pleading" if "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) A court can address the defenses of claim preclusion and issue preclusion on demurrer when all the relevant facts are within the complaint or subject to judicial notice. (*Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 855.) Likewise, a court may consider on demurrer whether a plaintiff has properly invoked the delayed-discovery exception to the statute of limitations. (*E-Fab, Inc. v. Accountants, Inc.*

Services (2007) 153 Cal.App.4th 1308, 1319.)

I. The Controller and CalPERS Fulfilled Their Duties

"[A]n applicant for a writ of mandate must show a present duty for the performance of the act sought to be compelled." (*Cal. Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 709.) An applicant may not, by contrast, "compel the performance of future acts" on the theory that "defendants would refuse to perform when performance became due." (*Communist Party of U.S.A. v. Peek* (1942) 20 Cal.2d 536, 540.)

The Controller and CalPERS owe plaintiff no present duty. As discussed *supra*, section 68203 requires CalHR to report the statutory "average percentage salary increase" to the Controller in a pay letter. The Controller and CalPERS then have a duty to adjust salaries and benefits as specified in the pay letter. And they have done so here. Plaintiff can thus compel no present legal duty from the Controller and CalPERS to do something else. Indeed, plaintiff recognizes this issue, attempting to sequence the relief sought such that that CalHR first report "amended pay letters," and only then that the Controller and CalPERS "as a result of the amended pay letters" be ordered to perform various duties. (Compl., p. 13.) This concession confirms the Controller and CalPERS owe no present duty to plaintiff, and a writ of mandate may not issue.[5]

II. Plaintiff's Lawsuit Is Barred By Preclusion

Plaintiff's complaint fails to mention the extensive history of judicial salary litigation concerning section 68203. But that history is dispositive to her claims against Controller and CalPERS because *Mallano* precludes plaintiff from bringing this action against them.

"Preclusion comes in two main forms: claim preclusion and issue preclusion." (*Grande v. Eisenhower Medical Center* (2022) 13 Cal.5th 313, 323.) "As the names suggest, claim preclusion prevents relitigation of entire claims (or 'causes of action'), while issue preclusion prevents relitigation of specific issues." (*Ibid.*, citation omitted.) California courts have "previously used the terms 'res judicata' and 'collateral estoppel' when discussing claim and

[5]Even if the court found that the Controller and CalPERS owed plaintiff a present duty, her action would still fail to state a claim because she seeks an order requiring the Controller and CalHR to pay additional salaries and pension benefits, but has not alleged compliance with the Claims Act. (§§ 905.2, 945.4; *State of Cal. v. Super. Ct.* (2004) 32 Cal.4th 1234, 1242-1243.)

issue preclusion, respectively." (*Ibid.*) Here, plaintiff's claims against the Controller and CalPERS are barred under both claim preclusion and issue preclusion.

A. Under claim preclusion, plaintiff's claims merge into the *Mallano* judgment.

"*Claim preclusion* prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, quotations omitted.) In contrast to issue preclusion (see, *infra*, section II.B), "which applies only to issues that were actually litigated, claim preclusion applies not just to what was litigated, but more broadly to what could have been litigated." (*LaCour v. Marshalls of Cal., LLC* (2023) 94 Cal.App.5th 1172, 1189-1190.) When a winning plaintiff from a prior action returns to court on issues that could have been raised in the first proceeding, "all claims the plaintiff did raise or could have raised merge into the judgment in his favor." (*Id.* at p. 1190, quotations omitted.) If a winning plaintiff "attempts to litigate any of those claims again, the judgment itself serves as a defense." (*Ibid.*) "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.)

As discussed below, the first two elements are satisfied because this case and *Mallano* involve the same cause of action between the same parties. The third element of claim preclusion is also satisfied because *Mallano* was resolved by a final judgment on the merits that was affirmed on appeal. (Brudigam Decl. Ex. B; Ex. H; Ex. J.)

1. *Mallano* and this case involve the same cause of action.

The first element of claim preclusion is satisfied because plaintiff's cause of action here is the same as that asserted in *Mallano*. "To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have consistently applied the 'primary rights' theory." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, quotations omitted.) Under this theory, "[t]he cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (*Id.* at p. 798.) "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." (*Ibid.*,

quotations omitted.) "Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Ibid.*)

Here, the alleged harm suffered in *Mallano*—i.e., the primary right—was that judges did not receive salary increases equal to "the average percentage salary increase for the current fiscal year for California state employees . . . ." (§ 68203, subd. (a); Brudigam Decl. Ex. A, ¶¶ 1-5; see *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 580 ["[C]ourts have recognized a primary right to be employed, a primary right to be paid for services rendered, and a primary right to be paid under a contract," citations omitted].) Although the *Mallano* complaint sought only declaratory relief, which Justice Mallano obtained for himself and class members, Brudigam Decl. Ex. B, ¶¶ 2-4, he then enforced that judgment to obtain millions of dollars in damages for class members and other relief, including that beginning on July 1, 2017, all future payment of judicial salaries and benefits must be made in accordance with the *Mallano* judgment.[6] (Brudigam Decl. Ex. I, p. 5, ¶¶ 1-2; Ex. J, at pp. 5-6 [affirming trial court's authority to enforce declaratory judgment and order payment of back wages and benefits].)

As in *Mallano*, plaintiff here seeks a declaration regarding the right of judges to receive the "average percentage salary increase" under section 68203, along with the corresponding relief to enforce that declaration with back pay and benefits. (Compl., p. 13.) Thus, the harm Plaintiff seeks to remedy here is the same remedied in *Mallano*: underpayment of judicial salaries in contravention of the statutorily mandated amount owed under section 68203. (Compl., ¶¶ 1-2, 5-6, 10-11, 21-22, 24-25.) That plaintiff's legal theory underlying this claim—i.e., the alleged failure to include all categories of salary increases in the section 68203 calculation—differs from that in *Mallano* does not matter for purposes of claim preclusion. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682; *Shine v. Williams-Sonoma, Inc.* (2018) 23 Cal.App.5th 1070, 1077 ["The

[6] To the extent plaintiff argues that the *Mallano* judgment cannot be used for claim preclusion because the complaint only sought declaratory relief, Code Civ. Proc., § 1062, that does not apply here where the judgment also included "coercive relief (such as damages, specific performance, or an injunction)." (*Mycogen Corporation v. Monsanto Co.* (2002) 28 Cal.4th 888, 897-898 [finding that claim preclusion applied where a plaintiff sought and obtained both declaratory and coercive relief].)

fact that no claim for reporting-time pay was alleged in [the prior action] does not alter our determination that the same primary right, to seek payment of wages due, was involved in both [prior action] and this case."].) This is because plaintiff's theory closely relates to the subject matter in *Mallano* and could have been raised within the scope of that lawsuit. (*Villacres*, *supra*, 189 Cal.App.4th at pp. 583-584 ["[I]f the matter [raised in the subsequent suit] was within the *scope* of the [prior] action, related to the *subject matter* and *relevant* to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged."].)

Villacres is illustrative. In that case, the first suit was a class action for failure to pay overtime and other wages; the second suit, brought by a class member from the first suit, asserted PAGA claims predicated on Labor Code violations against the same employer. (*Villacres*, *supra*, 189 Cal.App.4th at p. 584.) The court found the PAGA claims barred by claim preclusion because they "were within the scope of the [prior] litigation and were related to the subject matter and issues in that action: the payment of wages and penalties by the same employer," even though plaintiff alleged different Labor Code violations. (*Ibid.* [finding that the plaintiff's "claims *could have been raised* in the prior action for purposes of res judicata"].)

Like in *Villacres*, the *Mallano* class—represented by the same lawyers as plaintiff in this action—could have asserted plaintiff's legal theory in the *Mallano* litigation because it closely relates to the subject matter and issue in *Mallano*: the payment of judicial salary and benefits as required by section 68203. In fact, the validity of CalHR's judicial salary calculations were disputed by the parties in *Mallano*, with Justice Mallano arguing that the calculations done by CalHR were correct and the defendants arguing for a different calculation. (Brudigam Decl. Ex. C, pp. 3-5; Ex. E, ¶ 26 & fn.8 ["Defendants contend that Section 68203(a) should be interpreted to include not only state employee salary increases, but decreases [fn. 8] as well."].) The trial court ruled in Justice Mallano's favor. (Brudigam Decl. Ex. E, ¶¶ 26-29.)

Not only did Justice Mallano argue in favor of CalHR's calculations at that time, but it was also known during that litigation that CalHR's calculations did not include all categories of salary increases. (Brudigam Decl. Ex. D, p. 12 ["In calculating the projected average percentage salary

increases during the disputed years, consistent with its prior practice, the [CalHR] costing unit considered approved general salary increases, if any, for all of the State's bargaining units and related employee groups."]; Ex. F, 69:3-71:23, 91:18-94:24 [testifying that judicial salaries calculated under section 68203 are based only on GSIs and omit other salary increases, including special salary adjustments].) This evidence leaves no doubt that plaintiff seeks to relitigate the same claim on a new legal theory that could have been raised in *Mallano*. And this court would not be the first to conclude that new legal theories challenging CalHR's judicial salary calculations are claim precluded by *Mallano*. In *Van Voorhis*, the trial court considered a claim that there was a "calculation error" based on use of a "wrong ratio" in CalHR's judicial salary formula. (Brudigam Decl. Ex. O, p. 14.) Not only did the court conclude CalHR has used the same methodology for calculating judicial salary increases under section 68203 since 2003; it also held "the class representative [in *Mallano*] could have raised the 'wrong ratio' theory in that action, but chose not to do so." (*Ibid.*)

Finally, there has been no change in circumstances justifying revisiting the cause of action because plaintiff alleges CalHR's judicial salary calculation has not changed since after fiscal year 2006-07. (Compl., ¶ 58; Brudigam Decl. Ex. M, p. 19 [recounting "undisputed evidence that CalHR . . . has used the same method to calculate the 'average percentage salary increase' since at least 2003"]; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 230-231 [finding that a failure "to make any showing that a material change in circumstances has occurred since [the prior action]" meant the city could not relitigate proper calculation of retirement benefits].)

Thus, because the same primary right was at issue in both cases, plaintiff's claims merge with the *Mallano* judgment.

2. *Mallano* and this case are between the same parties.

The second element of claim preclusion is satisfied because plaintiff was a member of the *Mallano* class, while the Controller and CalPERS, CalPERS Board, JRS, and JRS II were either named defendants in *Mallano* or in privity with those defendants.

"[T]he preclusive effect of judgments depends . . . on whether those sought to be bound by

a judgment are named parties, are in privity with named parties, or are members of a class certified under class action procedures." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 984, fn. 6.) Here, plaintiff is a member of the certified class of judges in *Mallano*, (Brudigam Decl. Ex. B, ¶ 1; Compl., ¶¶ 26-27), and the Controller, JRS, and JRS II were defendants in *Mallano* and this action. (Brudigam Decl. Ex. A, p. 1; Compl., p. 1.) Plaintiff's suit also names CalPERS and the CalPERS Board but merely due to their administrative relationship to JRS and JRS II. (Compl., ¶ 34; see also §§ 20120, 75005, 75505 [providing that CalPERS, through the CalPERS Board, administers JRS and JRS II].) Thus, the court should sustain Controller and CalPERS's demurrer because plaintiff asserts claims that were raised, or could have been raised, in *Mallano*.

B. Under issue preclusion, plaintiff cannot relitigate the validity of CalHR's judicial salary calculation under section 68203.

"*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) "[I]ssue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at p. 825)

For the same reasons discussed above, the first and fourth elements are satisfied. (See, *supra*, section II.A.) And as shown below, an identical issue raised in this case—CalHR's judicial salary calculation—was actually litigated and necessarily decided in *Mallano*. Thus, issue preclusion prohibits plaintiff's claims against Controller and CalPERS in this case.

1. CalHR's judicial salary calculations were at issue in *Mallano*.

CalHR's section 68203 calculation was at issue in *Mallano*, and that identical issue cannot be relitigated in this action. "The 'identical issue' requirement addresses whether identical factual allegations are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." (*Rodriguez v. Lawrence Equipment, Inc.* (2024) 327 Cal.Rptr.3d 188, 199, quotations omitted.) In applying this standard, "the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted."

(*Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1326-1327, quotations omitted.)

Here, the proper calculation of judicial salaries under section 68203 by CalHR was at issue in *Mallano*. In *Mallano*, the plaintiff sought a declaration that judicial salary increases, as calculated by CalHR, should be deemed correct and be implemented by the defendants. (Brudigam Decl. Ex. C, pp. 3-6.) The parties disagreed over how CalHR should calculate judicial salaries, including what state employee salaries should be considered. (*Id.*, pp. 3-5; Brudigam Decl. Ex. P, pp. 5-11; Ex. D, pp. 17-21.) CalHR's calculations were also a topic of discovery, with CalHR explaining in depth how judicial salaries were calculated, including their reliance solely on GSIs. (Brudigam Decl. Ex. F, 69:3-71:23, 91:18-94:24; see also Ex. C, pp. 1-2; Ex. P, pp. 5-6; Ex. D, pp. 10-14.) With full knowledge of what salary increases were included in CalHR's judicial salary calculation, Justice Mallano argued, successfully, that "CalHR's Contemporaneous Average State Employee Salary Increases Were Correct." (Brudigam Decl. Ex. C, p. 3.) Plaintiff cannot now argue those salary calculations were *incorrect*.

Plaintiff might argue that the "issue" of which California employee salary increases were to be included in CalHR's judicial salary calculations was not disputed in *Mallano*, and thus, that "issue" is not identical to one presented in this action. But which salary increases should be included in CalHR's calculation is merely a different legal theory as to why the same legal issue—calculation of judicial salaries under section 68203—should be re-decided in a manner that is even more favorable towards plaintiff. Were the court to entertain that new legal theory, it would require disturbing the *Mallano* judgment, which declared that judicial salaries as calculated by CalHR were consistent with section 68203 and must be implemented from July 1, 2017 going forward. (*Rodriguez*, *supra*, 327 Cal.Rptr.3d at p. 199 [finding that where an issue in the second action (PAGA standing) is based on allegations that are contrary to the judgment from the first action (no Labor Code violation) the issues are identical].) And Justice Mallano's choice not to press that legal theory in *Mallano* does not negate its preclusive effect on the issue of CalHR's judicial salary calculations. (*Ibid.*; *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1566 [failure to raise arguments in opposition brief in first case were issue precluded in second case].) Indeed, a court evaluating this exact argument—albeit in the context

of claim preclusion—in the *Van Voorhis* litigation found the argument precluded because it could have been raised in *Mallano*. (Brudigam Decl. Ex. O, p. 14.)

2. CalHR's salary calculations were actually litigated and necessarily decided in *Mallano*.

The correctness of CalHR's judicial salary calculations under section 68203 was actually litigated and necessarily decided in *Mallano*. "Issue preclusion because of a prior adjudication results from the resolution of a question in issue, not from the litigation of specific arguments directed to the issue." (*People v. Curiel* (2023) 15 Cal.5th 433, 453.) For an issue to be "actually litigated," "the dispositive question is a litigant's opportunity to litigate, not the litigant's actual conduct at trial." (*Id.* at p. 453, fn.3.) Similarly, for an issue to be "necessarily decided," courts "require[] only that the issue should not have been 'entirely unnecessary' to the judgment in the initial proceedings." (*Samara v. Matar* (2018) 5 Cal.5th 322, 327, quotations omitted.)

Here, each aspect of this requirement—"actually litigated" and "necessarily decided"—is satisfied based on a review of the *Mallano* proceedings. First, Justice Mallano had an opportunity to litigate which California state employee salary raises were considered in CalHR's judicial salary calculations because the parties disputed whether salary decreases should be included. Justice Mallano advocated that salary decreases from furloughs should not be counted, and defendants advocated that the CalHR's judicial salary formula should count salary decreases caused by furloughs. (Brudigam Decl. Ex. C, pp. 3-5; Ex. D, pp. 17-21.) Discovery made clear that CalHR only considered GSIs in calculating the average percentage salary increase under section 68203. (Brudigam Decl. Ex. F, 69:3-71:23, 91:18-94:24; Ex. D, p. 12 [citing Ex. F]; see also *id.* at pp. 10-14 [explaining in detail how CalHR calculated judicial salaries].) Thus, though Justice Mallano did not raise a specific argument regarding which salary increases should be included in CalHR's formula, he had the opportunity to litigate that specific argument.

Second, the correctness of CalHR's judicial salary calculations, including which California state employee salary increases are included in those calculations, was necessarily decided because Justice Mallano advocated for, and the trial court adopted, CalHR's calculations. This issue was integral to the *Mallano* judgment because it specified the exact percentage salary

increase for judges and the corresponding salary amounts. (Brudigam Decl. Ex. B.) Both were based on CalHR's judicial salary calculations. If this court revisited CalHR's judicial salary calculations, it would necessarily disturb the *Mallano* judgment. (Brudigam Decl. Ex. I, ¶ 2.) Thus, plaintiff's legal theory was necessarily decided when the *Mallano* judgment issued.

Accordingly, the court should sustain Controller's and CalPERS's demurrer on the grounds that plaintiff's claims are barred by issue preclusion.

III. PLAINTIFF HAS NOT SUFFICIENTLY PLEADED THE DISCOVERY RULE

Recognizing that the bulk of her claims are barred by the statute of limitations, plaintiff asserts she was unaware of her claimed harm for several years. (Compl., ¶¶ 59-68.) She thus alleges that she "should benefit from the delayed discovery rule and any relevant statute of limitations should be tolled." (*Id.*, ¶ 68.) The discovery rule, if certain conditions are met, delays a cause of action's accrual until the plaintiff knows of her injury and its cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.) It "protects those who are ignorant of their cause of action through no fault of their own," *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832, and have "used reasonable diligence to protect the[ir] rights," *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1249. The discovery rule is inapplicable here.

To invoke the discovery rule, a plaintiff must allege sufficient facts. "In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, [] she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809.) A plaintiff thus must allege "(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." (*Id.* at p. 808, quotation omitted.) A plaintiff can meet this threshold by alleging that "'it is particularly difficult for [her] to observe or understand the breach of duty, or [that] the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.'" (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 [quoting *Shively*, *supra*, 21 Cal.4th at p. 1248].) Conclusory allegations will not survive demurrer. (*Fox*, *supra*, 35 Cal.4th at p. 808.)

Plaintiff insufficiently pleads her supposed inability to have discovered the relevant facts before she allegedly did. Although she generally alleges that she "had no knowledge, and no means to discover" misconduct until August 2023, when she "first became aware" of said malfeasance (Compl., ¶¶ 66-68), she does not "specifically plead facts showing . . . the inability to have made earlier discovery despite reasonable diligence." (*Fox*, *supra*, 35 Cal.4th at p. 808, quotation omitted; cf. *Lauckhart v. El Macero Homeowners Assn.* (2023) 92 Cal.App.5th 889, 903 [discovery rule applies where plaintiffs allege that they recently gained access to previously undisclosed documents revealing basis for claim].) This omission is glaring given plaintiff's status as a member of the class of judges in *Mallano*, in which these very issues were litigated.

Even if plaintiff amended her complaint to plead the discovery rule with the required specificity, she still could not qualify for its protection. Plaintiff was a member of the *Mallano* class, which argued that CalHR's manner of calculation—which the *Mallano* class knew considered only GSIs—was correct. Accordingly, "reasonable minds can draw only one conclusion from the evidence"—plaintiff knew or could have known the relevant facts many years ago, and so the court on demurrer may find the discovery rule inapt. (*Medina v. St. George Auto Sales, Inc.* (2024) 103 Cal.App.5th 1194, 1204, quotations omitted.)

CONCLUSION

For the reasons above, the Court should sustain defendants' demurrer.

Dated: January 10, 2025

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