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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SANTA CLARA

12 SAN JOSE RETIRED EMPLOYEES
ASSOCIATION, HOWARD E. FLEMING,
13 DONALD S. MACRAE, FRANCES J.
OLSON, GARY J. RICHERT and
14 ROSALINDA NAVARRO,
15 Plaintiffs/Petitioners,
16 v.
17 CITY OF SAN JOSE; DOES 1 through 50,
inclusive,
18 Defendants/Respondents,
19 BOARD OF ADMINISTRATION FOR THE
20 FEDERATED CITY EMPLOYEES
RETIREMENT SYSTEM,
21 Real Party in Interest.
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Case No. 112CV233660
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER AND IN THE
ALTERNATIVE MOTION TO STRIKE
BY THE CITY OF SAN JOSE
Date: January 17, 2012
Time: 9:00 a.m.
Dept: 2
BY FAX
Action Filed: October 5, 2012
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs and Petitioners, the San Jose Retired Employees Association and retired
3 members of the Federated City Employees Retirement System (“Plaintiffs”) seek injunctive,
4 declaratory, and writ relief to invalidate provisions of Measure B, a recent amendment to the San
5 Jose City Charter. Measure B is entitled “The Sustainable Retirement Benefits and Compensation
6 Act.” The Act amends the Charter to reform retirement benefits for City employees in an effort to
7 lower costs and preserve essential city services such as police and fire protection. Plaintiffs
8 complain that various sections of Measure B violate their vested contractual and property rights,
9 and other sections of the California Constitution.

10 The City files this demurrer to the Complaint based on lack of ripeness and in the
11 alternative moves to strike the specific allegations in Plaintiffs’ complaint that are not ripe for
12 adjudication.

13 Plaintiffs bring three causes of action – for injunctive, declaratory, and writ relief – each
14 including multiple legal and factual allegations. Under these three causes of action, Plaintiffs
15 claim that the following provisions of Measure B violate the state Constitution:

- 16 • Section 1504-A – Reservation of voter authority to change pension and other post-
17 employment benefits;
- 18 • Section 1510-A – Authorization for the City Council to suspend cost of living
adjustments in the event of an emergency;
- 19 • Section 1511-A – Discontinuation of the Supplemental Retiree Benefit Reserve
20 (“SRBR”);
- 21 • Section 1512-A – Reservation of the City’s right to amend, change, or terminate
any provision of a retiree healthcare plan or benefit;
- 22 • Section 1513-A – Requirement for retirement plans to be actuarially sound and
23 various factors to be considered in setting actuarial assumptions; and
- 24 • Section 1515-A – Provision stating that portions of the Act are severable in the
event of a judicial determination that any portion is illegal.

25 Plaintiffs’ Complaint does not describe any concrete action to be taken by the City under
26 these Measure B provisions that would have any immediate effect on Plaintiffs. Rather, over and
27 over, Plaintiffs ask for relief “to the extent” or “in the event” or “insofar as” the City takes action
28 in the future that violates their rights. The lack of ripeness is glaring. The ripeness requirement

1 prevents courts from issuing purely advisory opinions. *Pacific Legal Foundation v. California*
2 *Coastal Commission*, 33 Cal.3d 158, 170 (1982). Courts evaluate ripeness based on two factors.
3 First, the “controversy must be definite and concrete, touching the legal relations of parties having
4 adverse legal interests.” *Id.* at p. 170-171. “It must be a real and substantial controversy admitting
5 of specific relief through a decree of a conclusive character, as distinguished from an opinion
6 advising what the law would be upon a hypothetical state of facts.” *Id.* Second, a party seeking a
7 judicial opinion must show hardship if the Court does not rule. *Id.*

8 Plaintiffs do not present any “definite and concrete” controversy, but only the fear that the
9 City may in the future take some unspecified action that will violate their rights. Nor do they
10 plead facts showing any imminent harm that would constitute hardship.

11 For example, Plaintiffs contend that Section 1504-A, which requires increases in
12 retirement benefits to be approved by the voters, violates their vested rights. But Plaintiffs base
13 this claim only on unspecified actions that they fear the City may take in the future. The same is
14 true for Section 1512-A which reserves the City’s rights to change retiree healthcare plans or
15 benefits. Plaintiffs complain only that they fear some future unspecified harm.

16 Plaintiffs complain that Section 1510-A, which authorizes suspension of COLAs during an
17 emergency, violates their rights. But Plaintiffs do not claim that the City has declared an
18 emergency. And whether an emergency justifies impairment of vested rights depends on the facts
19 and circumstances at the time the emergency is declared.

20 Plaintiffs complain that Section 1511-A, which discontinues the SRBR, violates their
21 rights. But Plaintiffs admit that SRBR distributions were always discretionary, and Plaintiffs
22 claim only that they fear the City will not exercise its discretion at some unspecified time in the
23 future.

24 Plaintiffs claim that Section 1513-A, which requires the City’s retirement boards to
25 consider various factors in making actuarial decisions, violates the California Pension Protection
26 Act. But the City and the pension boards have not applied Section 1513-A, making any
27 determination of inconsistency with state law premature.

28 Finally, Plaintiffs claim that Section 1515-A, which constitutes a standard severability

1 clause, violates the principal of separation of powers. But no court has ruled on Measure B, and
2 the City has taken no action to sever any portion of Measure B. Like the other allegations, this
3 allegations is not ripe for adjudication.

4 All three causes of action, for injunctive, declaratory, and writ relief, suffer from these
5 defects. Accordingly, this Court should grant the City's demurrer or in the alternative should
6 strike the allegations in the Complaint that relate to claims that are not ripe for adjudication.

7 **II. STATEMENT OF FACTS**

8 **A. City of San Jose Retirement Plans**

9 Under City Charter section 1500, the City provides a retirement plan or plans for all City
10 officers and employees. (Complaint at ¶¶ 9-10, Exh. A.) There are two plans, one for police
11 officers and fire fighters, the other for all other "federated" employees. Plaintiffs are retirees
12 under the Federated Retirement System. (*Id.* at ¶ 3.) The benefits provided under the City's
13 Federated Retirement System are set forth in Chapters 3.16, 3.20, 3.24, and 3.28 of the San Jose
14 Municipal Code. (*Id.* at ¶ 11, Exh. B.) Although retirement benefits are established in the City's
15 Municipal Code, the Federated Retirement System is administered by a separate Board of
16 Administration for the Federated Employees Retirement System. (*Id.* at ¶ 2.)

17 **B. Measure B**

18 On June 5, 2012, San Jose city voters enacted Measure B, an amendment to the San Jose
19 City Charter entitled: "The Sustainable Retirement Benefits and Compensation Act." (Complaint,
20 Exh. D.) The "Findings" for the Act state that the City's ability to provide its citizens with
21 "Essential City Services" – such as police and fire protection, street maintenance and libraries
22 – is threatened by the rising costs of retirement benefits for City employees. (Section 1501-
23 A.) The stated "Intent" of the Act is to "ensure the City can provide reasonable and
24 sustainable post-employment benefits while at the same time delivering Essential City
25 Services." (Section 1502-A.)¹

26 _____

27 ¹ Measure B includes provisions that: require employees to pay increased pension contributions
28 towards system unfunded liabilities; authorize an alternative lower cost pension plan; provide a
(footnote continued)

1 **C. Measure B Provisions Contested By Plaintiffs**

2 Plaintiffs seek invalidation of the following provisions of Measure B:

3 **1504-A. Reservation of Voter Authority.**

4 “The voters expressly reserve the right to consider any change in matters related to
5 pension and other post-employment benefits. Neither the City Council, nor any
6 arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree
7 to or provide any increase in pension and/or retiree healthcare benefits without
8 voter approval, except that the Council shall have the authority to adopt Tier 2
9 pension benefit plans within the limits set forth herein.” (Complaint, Exh. D at p.
10 289.)

11 **1510-A. Emergency Measures to Contain Cost of Living Adjustments.**

12 “If the City Council adopts a resolution declaring a fiscal and service level
13 emergency, with a finding that it is necessary to suspend increases in cost of living
14 payments to retirees the City may adopt the following emergency measures,
15 applicable to retirees (current and future retirees employed as of the effective date
16 of this Act):

17 (a) Cost of living adjustments (“COLAs”) shall be temporarily suspended
18 for all retirees in whole or in part for up to five years. The City Council shall
19 restore COLAs prospectively (in whole or in part), if it determines that the fiscal
20 emergency has eased sufficiently to permit the City to provide essential services
21 protecting the health and well-being of City residents while paying the cost of such
22 COLAs.

23 (b) In the event the City Council restores all or part of the COLA, it shall
24 not exceed 3% for Current Retirees and Current Employees who did not opt into
25 the VEP and 1.5% for Current Employees who opted into the VEP [the One Time
26 Voluntary Election Program set forth in Section 1507-A of Measure B] and 1.5%
27 for employees in Tier 2.” (Complaint, Exh. D, at p. 298.)

28 **1511-A. Supplemental Payments To Retirees.**

 “The Supplemental Retiree Benefit Reserve (“SRBR”) shall be discontinued, and
 the assets returned to the appropriate trust fund. Any supplemental payments to
 retirees in addition to the benefits authorized herein shall not be funded from plan
 assets.” (Complaint, Exh. D at p. 298.)

1512-A. Retiree Healthcare.

 “(b) Reservation of Rights. No retiree healthcare plan or benefit shall grant any
 vested right, as the City retains its power to amend, change or terminate any plan

 “Tier 2” pension plan for new employees; confirm the obligation of employees to pay increased
 contributions towards retiree healthcare unfunded liabilities; modify the basis for disability
 retirements; grant the City Council authority to suspend COLA payments in the event of an
 emergency; discontinue the supplemental retiree benefit reserve, and require retirement plans to be
 actuarially sound, among other provisions. (Complaint, Exh. D.)

1 provision.” (Complaint, Exh. D, at p. 299.)

2 **1513-A. Actuarial Soundness.**

3 “(c) In setting the actuarial assumptions for the plans, valuing the liability of the
4 plans, and determining the contributions required to fund the plans, the objectives
5 of the City’s retirement boards shall be to:

6 (i) achieve and maintain full funding of the plans using at least a median
7 economic planning scenario. The likelihood of favorable plan experience should be
8 greater than the likelihood of unfavorable plan experience; and

9 (ii) ensure fair and equitable treatment for current and future plan members
10 and taxpayers with respect to the costs of the plans, and minimize any
11 intergenerational transfer of assets.” (Complaint, Exh. D at p. 299.)

12 **1515-A. Severability.**

13 “(b) If any ordinance adopted pursuant to the Act is held to be invalid,
14 unconstitutional or otherwise unenforceable by a final judgment, the matter shall be
15 referred to the City Council for determination as to whether to amend the ordinance
16 consistent with the judgment, or whether to determine the section severable and
17 ineffective.” (Complaint, Exh. D at p. 301.)

18 **D. Plaintiffs’ Causes of Action**

19 Plaintiffs bring three causes of action. Within each cause of action, they allege that
20 provisions of Measure B violate various sections of the California Constitution.

21 **First Cause of Action.** Plaintiffs’ First Cause of Action for Injunctive Relief is divided
22 into five “counts” brought under the California Constitution, including claims for violation of the
23 contracts, takings, and due process clauses, along with violation of separation of powers and the
24 California Pension Protection Act.²

25 **Second Cause of Action.** Plaintiffs’ Second Cause of Action for Declaratory Relief does
26 not list separate “counts” but claims violation of the same constitutional provisions as their First
27 Cause of Action.

28 **Third Cause of Action.** Plaintiffs’ Third Cause of Action is a Petition for Writ Of

25 2 Count I, “Violation of the Contract Clause of the California Constitution (Article I, Section 9”;
26 Count II, “Taking Without Just Compensation In Violation Of the California Constitution (Article
27 I, Section 19”); Count III, “Deprivation of Property Without Due Process of Law In Violation of
28 the California Constitution (Article I, Section 19”); Count IV, “Violation of Separation of Powers
Under The California Constitution (Article III, Section 3”); and Count V, “Violation of California
Pension Protection Act (Article XVI, Section 17).”

1 Mandate, under which they ask the Court to return transferred out of the SRBR.

2 **III. LEGAL ARGUMENT**

3 **A. A Defendant May Bring a Demurrer Or In The Alternative A Motion to**
4 **Strike Allegations that Do Not State a Claim for Relief**

5 Plaintiffs seek injunctive, declaratory, and writ relief, alleging that various sections of
6 Measure B violate the California Constitution. Plaintiffs bring numerous factual and legal claims
7 under each of their causes of action. Therefore, under Code of Civil Procedure section 430.10 (e),
8 the City brings this demurrer and in the alternative, under sections 435 and 436, the City brings
9 this motion to strike specific allegations in the Complaint that are not ripe for adjudication. These
10 unripe allegations may be stricken as “irrelevant . . . or improper” under Section 436(a). See
11 *County of Los Angeles v. State Water Resources Control Bd.*, 143 Cal.App.4th 985, 1001 (2006)
12 (“Code of Civil Procedure section 436 allows a court to strike portions of a cause of action”);
13 *Caliber Bodyworks v. Superior Court*, 134 Cal.App.4th 365, 385 (2005) (“The appropriate
14 procedural device for challenging a portion of a cause of action seeking an improper remedy is a
15 motion to strike.”); *PH II, Inc. v. Superior Court*, 33 Cal.App.4th 1680, 1682-1683 (1995) (“when
16 a substantive defect is clear from the face of a complaint, such as a violation of the applicable
17 statute of limitations or a purported claim of right which is legally invalid, a defendant may attack
18 that portion of the cause of action by filing a motion to strike”).³

19 **B. Allegations That Are Not Ripe Are Subject To Dismissal.**

20 **1. The Ripeness Doctrine Prohibits Courts From Issuing Advisory**
21 **Opinions.**

22 The ripeness requirement prevents courts from issuing purely advisory opinions. The
23 doctrine “is rooted in the fundamental concept that the proper role of the judiciary does not extend
24 to the resolution of abstract differences of legal opinion.” *Pacific Legal Foundation, supra*, 33
25 Cal.3d at 170. “[T]he ripeness doctrine is primarily bottomed on the recognition that judicial

26 ³ For purposes of a demurrer or a motion to strike, the allegations in the complaint are assumed to
27 be true. *Aubry v. Tri-City Hosp. Dist.*, 2 Cal.4th 962, 966-967 (1992); *Clauson v. Sup. Ct. (Pedus*
28 *Services, Inc.)*, 67 Cal.App.4th 1253, 1255 (1998).

1 decision-making is best conducted in the context of an actual set of facts so that the issues will be
2 framed with sufficient definiteness to enable the court to make a decree finally disposing of the
3 controversy.” *Id.* “The controversy must be definite and concrete, touching the legal relations of
4 parties having adverse legal interests. It must be a real and substantial controversy admitting of
5 specific relief through a decree of a conclusive character, as distinguished from an opinion
6 advising what the law would be upon a hypothetical state of facts.” *Id.*

7 In *Pacific Legal Foundation*, the Court held that a general challenge on statutory and
8 constitutional grounds to the California Coastal Commission’s access guidelines was not ripe.
9 According to the Court, because the plaintiffs did not apply their challenge to any specific
10 circumstances, their claim lacked urgency and definiteness and therefore was not appropriate for
11 immediate judicial resolution. *Id.* at p. 172. As commented in *Lee v. Bank of America*, 27
12 Cal.App.4th 197 (1994): “Suffice to say that any rule of procedural law that allows one to be sued
13 for conduct in which one has not engaged because one is ‘expected’ to do the wrong thing in the
14 future is Kafkaesque.” *Id.* at 206.

15 **2. To Be Ripe For Adjudication, A Controversy Must Be Sufficiently**
16 **Concrete And Threaten Plaintiff With Imminent And Significant**
17 **Hardship.**

18 To determine if a controversy is ripe, courts employ a two-prong test. They evaluate: 1)
19 whether the dispute is sufficiently concrete so that any ruling from the court would not be an
20 advisory opinion; and 2) whether withholding judicial consideration will result in hardship to the
21 parties. *Pacific Legal*, 33 Cal.3d at 171-173.

22 Under the first prong, courts will decline to adjudicate disputes that ask them to speculate
23 on the resolution of hypothetical situations. For example, in *Selby Realty Co. v. City of*
24 *Buenaventura*, 10 Cal.3d 110, 118 (1973), the California Supreme Court upheld a demurrer to a
25 claim of declaratory relief because the petitioner had not yet been affected by the City’s proposed
26 general plan which was tentative and subject to change. In *Wilson & Wilson v. City Council of*
27 *Redwood City*, 191 Cal.App.4th 1559 (2011), the Court held petitioner’s claim was not ripe for
28 declaratory relief because resolution would require that the court speculate on whether the City
would take steps in the future to condemn its property. *Id.* at 1583-1584. In *Del Cerro Mobile*

1 *Estates v. City of Placentia*, 197 Cal.App.4th 173 (2011), the court sustained a demurrer on claims
2 for declaratory and injunctive relief, holding that “merely contemplating action and marshaling
3 legal arguments to support *potential* action does not constitute an actual controversy” and that a
4 claim about “plans that might *or might not* occur” were not ripe. *Id.* at 186 (emphasis in original).

5 Under the second prong set forth in *Pacific Legal*, Plaintiffs must show that there is “an
6 imminent and significant hardship inherent in further delay.” *Farm Sanctuary, Inc. v. Dept. of*
7 *Food and Agriculture*, 63 Cal.App.4th 495, 502 (1998) (plaintiffs’ claim for declaratory relief
8 regarding the Humane Slaughter Act was ripe where delay may have caused the “needless
9 suffering of animals”).

10 C. **Plaintiffs’ First Cause Of Action For Injunctive Relief Fails To State A**
11 **Cause Of Action Because Plaintiffs’ Claims That Measure B Violates Their**
Rights Are Not Ripe For Adjudication.

12 Plaintiffs’ First Cause of Action for Injunctive Relief challenges the legality of Measure B
13 Sections 1504-A, 1510-A, 1511-A, 1512-A, 1513-A and 1515-A.

14 I. **Section 1504-A: “Reservation of Voter Authority”**

15 Plaintiffs’ challenge to Section 1504-A is not ripe for adjudication because Plaintiffs base
16 their claim on unspecified acts the City may take in the future.

17 Plaintiffs allege that Section 1504-A violates the contract, takings, and due process
18 provisions of the California Constitution. (Complaint at ¶¶ 28-30, 35-36, 41-42, 61-62.) Section
19 1504-A provides that any increase in pension or retiree healthcare benefits must be approved by
20 the voters. Plaintiffs allege that “[i]n the event that Section 1504-A of Measure B is interpreted by
21 the City to apply to and is applied to the Affected Retirees’ and Affected Beneficiaries’ vested
22 contractual right to receive additional Council-approved benefits” the City will impair those vested
23 contractual rights. (Complaint at ¶ 29.)

24 These allegations are not ripe. They are based on unspecified actions Plaintiffs believe the
25 City may take in the future with regard to pensions or retiree healthcare benefits. As Plaintiffs
26 have not identified any pending action by the City, their requests for injunctive and declaratory
27 relief regarding section 1504-A are speculative and cannot satisfy the first prong of the ripeness
28 test. See, e.g. *Selby Realty*, 10 Cal.3d at 110 (upholding a demurrer to a claim of declaratory relief

1 because the petitioner had not yet been affected by the City's proposed general plan). As
2 explained in *Selby*: "If the plan is implemented by the county in the future in such a manner as
3 actually to affect plaintiff's free use of his property, the validity of the county's action may be
4 challenged at that time." *Id.* at p. 118. Similarly, if the City takes action in the future under
5 Section 1504-A to impair Plaintiffs rights, they may challenge the City's action at that time.

6 Neither can these allegations satisfy the second prong of the ripeness test. Plaintiffs have
7 not shown an imminent and significant hardship inherent in further delay. Compare *Farm*
8 *Sanctuary*, 63 Cal.App.4th at 502 (where the treatment of animals at slaughter depended on the
9 court's ruling).

10 Plaintiffs cannot identify any pending action by the City to implement section 1504-A, nor
11 any imminent and significant hardship. Accordingly, their allegations regarding section 1504-A
12 are not ripe for adjudication.

13 **2. Section 1510-A of Measure B: "Emergency Measures to Contain Retiree**
14 **Cost of Living Adjustments"**

15 Plaintiffs' challenge to Section 1510-A is not ripe for adjudication because Plaintiffs based
16 their claim on a hypothetical declaration of emergency that would require the Court to speculate
17 about future conditions and City actions.

18 Plaintiffs allege that section 1510-A: "Emergency Measures to Contain Retiree Cost of
19 Living Adjustments" violates the contract, takings, and due process clauses of the California
20 Constitution. (Complaint at ¶¶ 22-23, 30, 35-36, 41-42, 61-62.) Section 1510-A provides that the
21 City may temporarily suspend the cost of living adjustment (COLA) for retirees "[i]f the City
22 Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is
23 necessary to suspend increases in cost of living payments to retirees."

24 These allegations are not ripe. Plaintiffs do not and cannot allege that the City has
25 adopted, or imminently plans to adopt, a resolution declaring a fiscal and service level emergency,
26 which would allow the City, under Section 1510-A, to suspend the COLA for retirees. Plaintiffs
27 instead ask the Court to assume that the City someday will take these measures, and ask the Court
28 to declare that these actions would violate their rights under the California Constitution. This

1 argument, however, is exactly the kind of speculative claim courts deem unripe. See, e.g., *Pacific*
2 *Legal*, 33 Cal.3d at 172 (“Plaintiffs are in essence inviting us to speculate as to the type of
3 developments for which access conditions might be imposed and then to express an opinion on the
4 validity and proper scope of such hypothetical exactions.”)

5 If the Court were to address Plaintiffs allegations now, it would have to assess not only
6 whether Plaintiffs have a vested right to the COLA, but whether a state of emergency would
7 permit an impairment of that right. See *Valdes v. Cory*, 139 Cal.App.3d 773, 790 (1983) (“a
8 substantial impairment may be constitutional if it is ‘reasonable and necessary to service an
9 important public purpose’”). To make this determination, the Court would be evaluating whether
10 a theoretical suspension of the COLA, based on a theoretical declaration of emergency: (1) served
11 to protect the basic interests of society, (2) had an emergency justification, (3) was appropriate for
12 the emergency, and (4) was designed as a temporary measure, during which contract rights are
13 only deferred. See *Olson v. Cory*, 27 Cal.3d 532, 539 (1980); *Sonoma County Organization of*
14 *Public Employees v. County of Sonoma*, 23 Cal.3d 296, 305-06 (1979); *Valdes v. Cory*, 139
15 Cal.App.3d at p. 791 (listing factors to be evaluated in determining whether substantial
16 impairment of vested contract rights is justified).

17 These are not assessments that the Court can make at this time. As stated in *BKHN, Inc. v.*
18 *Department of Health Services*, 3 Cal.App.4th 301, 309-310 (1992): “In order to determine this
19 proposition, the court would have to imagine a myriad of hypotheticals, speculate on the
20 application of [the law] to those hypotheticals In the words of *Pacific Legal Foundation*,
21 ‘[w]e decline [to compel a court] to enter into such a contrived inquiry.’”

22 Plaintiffs allegations regarding section 1510-A cannot meet either prong of the ripeness
23 test: they neither identify any pending action by the City pursuant to section 1510-A, nor do they
24 claim any imminent hardship resulting from this section. These allegations regarding section
25 1504-A are therefore not ripe for adjudication.

26 3. Section 1511-A: “Supplemental Payments to Retirees”

27 Plaintiffs’ challenge to Section 1511-A is not ripe for adjudication because Plaintiffs do
28 not claim any right to supplemental payments. Plaintiffs base their claim only on the fear that the

1 City will not exercise its discretion at some future time to make payments.

2 Plaintiffs allege that section 1511-A: "Supplemental Payments To Retirees" violates the
3 contract, takings, and due process clauses of the California Constitution. (Complaint at ¶¶ 24-25,
4 30, 35-36, 41-42, 61-69.

5 Section 1511-A states: "The Supplemental Retiree Benefit Reserve ("SRBR") shall be
6 discontinued, and the assets returned to the appropriate retirement trust fund. Any Supplemental
7 payments to retirees in addition to the benefits authorized herein shall not be funded from plan
8 assets."

9 In paragraphs 17 and 18 of their Complaint, Plaintiffs claim a vested contractual right "to
10 have the City Council maintain its discretion" to make supplemental pension payments. (*Id.* at ¶¶
11 17-18.) They claim that "in the event" Section 1511-A is applied to their vested contractual rights
12 "to receive distributions from the SRBR as set forth in paragraphs 17 and 18" those rights "will
13 have been" impaired. (*Id.* at ¶ 25.)

14 This claim is not ripe because Plaintiffs do not claim any right to supplemental retirement
15 payments, admitting in their complaint that they are discretionary. Plaintiffs plead only their fear
16 that the City will not exercise its discretion in the future to decide whether to make supplemental
17 pension payments. Measure B does not prohibit any supplemental payments, it only changes the
18 potential source of those payments. Like Plaintiffs' other claims, this claim is based on future,
19 hypothetical facts and therefore lacks ripeness. See *Stonehouse Homes* 167 Cal.App.4th at 540
20 (court would have had to "speculate about hypothetical future actions by the City"). Moreover,
21 since Plaintiffs admit that supplemental payments are discretionary, they do not plead an imminent
22 and significant hardship inherent in further delay.

23 As pled, this contention is not ripe because it is based on allegations that the City will not
24 exercise future discretion. However, unlike Plaintiffs' other allegations concerning Measure B,
25 which do not involve any identifiable actions by the City, in this case the City is taking action – to
26 return SRBR funds to the general retirement funds. See RJN, Exh. A [proposed ordinance
27 including action to terminate the Federated SRBR program]. Nonetheless, because Plaintiffs
28 admit that supplemental payments are discretionary, and they do not describe any imminent harm

1 from the return of SRBR funds to the general retirement funds, their claims are not ripe.

2 Accordingly, their allegations regarding section 1511-A are not ripe for adjudication.

3 **4. Reservation of Rights Clause in Section 1512-A: "Retiree Healthcare"**

4 Plaintiffs' challenge to Section 1504-A is not ripe for adjudication because Plaintiffs based
5 their claim on unspecified acts the City may take in the future.

6 Plaintiffs allege that section 1512-A: "Retiree Healthcare" violates the contract, takings,
7 and due process clauses of the California Constitution. (Complaint at ¶¶ 26-27, 35-36, 41-42, 61-
8 62.) Section 1512-A states that "No retiree healthcare plan or benefit shall grant any vested right,
9 as the City retains its power to amend, change, or terminate any plan provision."

10 Plaintiffs allege that "[t]o the extent the City interprets and applies Section 1512-A
11 paragraph (b) of Measure B to alter the status of the Affected Retirees' and Affected
12 Beneficiaries' rights...Section 1512-A, paragraph (b) of Measure B abrogates and/or substantially
13 impairs the vested contractual rights...of the Affected Retirees and Affected Beneficiaries."
14 (Complaint at ¶ 27.)

15 These allegations are not ripe, because they are based on unspecified actions Plaintiffs
16 believe the City may take some time in the future. Plaintiffs have not cited to any actions the City
17 has taken or is soon to take in connection with this reservation of rights clause. Therefore,
18 Plaintiffs' allegations regarding section 1512-A are speculative and do not satisfy the first prong
19 of the ripeness test. See, e.g., *Selby Realty Co.*, 10 Cal.3d at 118 (1973) (Court found that a
20 plaintiff's general challenge to the constitutionality of a City's general plan was unripe because
21 there was no "present concrete indication that the county either intend[ed] to use plaintiff's
22 property".) Neither can these allegations satisfy the second prong of the ripeness test, as Plaintiffs
23 have not shown an imminent and significant hardship inherent in further delay. Accordingly, their
24 allegations regarding section 1504-A are not ripe for adjudication.

25 **5. Section 1513-A: "Actuarial Soundness"**

26 Plaintiffs claim that Section 1513-A, which requires the City's retirement boards to
27 consider various factors in making actuarial decisions, violates the California Pension Protection
28 Act. But the City and the pension boards have not applied Section 1513-A, making any

1 determination of inconsistency with state law premature.

2 Plaintiffs allege that section 1513-A: “Actuarial Soundness (for both pension and retiree
3 healthcare plans)” violates the California Pension Protection Act, Cal. Const., Art. XI, section 17.
4 (Complaint at ¶¶ 53-59, 61-62.) Section 1513-A provides objectives for the City’s retirement
5 boards in setting the actuarial assumptions to “achieve and maintain full funding of the plans” and
6 “ensure fair and equitable treatment for current and future plan members and taxpayers.”
7 Plaintiffs claim that section 1513-A violates the California Pension Protection Act “because it
8 compromises the Board’s fiduciary duties to Affected Retirees and Affected Beneficiaries by
9 compelling the Board to consider equally the City’s residents and taxpayers in making
10 determinations affecting the Plan.” (Complaint at ¶ 55.)

11 These allegations are not ripe. The Board has yet to take any action that is inconsistent
12 with the Pension Protection Act. In fact, the City recently introduced legislation that confirms the
13 duty of the Federated retirement board to act in conformity with the Pension Protection Act.
14 (City’s RJN, Exh. A at p.10.) Moreover, in the City’s view, Section 1513-A’s direction to
15 consider taxpayer interest may be harmonized with the Pension Protection Act. Under the Pension
16 Protection Act, a retirement board’s duty to its beneficiaries takes precedence, but the Act also
17 requires a retirement board to consider the interests of the public employer and, accordingly, *the*
18 *taxpayers*. The Act requires members of a public retirement board to “discharge their duties with
19 respect to the system solely in the interest of, and for the exclusive purposes of providing benefits
20 to participants and their beneficiaries, *minimizing employer contributions thereto*, and defraying
21 reasonable expenses of the system.” (Cal. Const., Art. XVI, section 17(b) [emphasis added].)

22 Because the City is requiring that Section 1513-A be applied consistently with the Pension
23 Protection Act, this Court cannot assume that the City or its retirement boards will take any action
24 contrary to the Act. In interpreting legislation, courts must “adopt an interpretation that, consistent
25 with the statutory language and purpose, eliminates doubts as to the provision’s constitutionality.”
26 *In re Kay*, 1 Cal.3d 930, 942 (1970); see also *Clare v. State Bd. of Accountancy*, 10 Cal.App.4th
27 294, 303 (1992) (“In determining a statute’s constitutionality, we start from the premise that it is
28 valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear

1 and unquestionable conflict with the state or federal Constitutions.”) The same principles apply to
2 interpretation of city charters. *Building Material & Construction Teamsters’ Union v. Farrell*, 41
3 Cal.3d 651, 665 (1986) (“It is also settled that when the terms of a statute or charter may
4 reasonably be interpreted to avoid conflict with a constitutional interpretation, they will be so
5 read.)

6 Thus, until the City or Board takes an action that is inconsistent with the Pension
7 Protection Act, there is no concrete issue to be litigated and Plaintiffs’ cannot meet the first prong
8 of the ripeness test. See *PG&E Corp. v. Public Utilities Com.*, 118 Cal. App.4th 1174, 1217
9 (2009) (“Because the PUC has yet to apply its interpretation of the first priority condition to a
10 concrete set of facts, the dispute petitioners would like this court to resolve is abstract.”) Neither
11 can their allegations satisfy the second prong of the ripeness test, as Plaintiffs have not shown an
12 imminent and significant hardship inherent in further delay. Accordingly, Plaintiffs’ allegations
13 regarding section 1513-A are not ripe for adjudication.

14 **6. Section 1515-A: “Severability”**

15 Plaintiffs allege that section 1515-A of Measure B is a violation of the separation of
16 powers provision of the California Constitution, claiming that: “Insofar as Section 1515-A of
17 Measure B is interpreted in essence to give the City Council judicial power to decide the
18 appropriate manner of relief to be provided upon a judgment that any portion of Measure B is
19 invalid, unconstitutional or otherwise unenforceable, it constitutes a violation of the separation of
20 powers between the legislative, executive and judicial branches under Article III, Section 3 of the
21 California Constitution.” (Complaint at ¶¶ 47-48, 61-62.)

22 These allegations misread section 1515-A. Section 1515-A does not purport to grant the
23 City Council judicial power. It simply provides that in the event that any part of Measure B is
24 found to be unenforceable by a court, the City will refer the matter to the City Council to decide,
25 in accordance with any judgment, whether to amend, sever, or declare a provision ineffective.

26 Given that there is no judgment at issue and no specific action for the Court to evaluate,
27 Plaintiffs’ allegations regarding section 1515-A are not ripe.

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D. Plaintiffs' Second Cause Of Action For Declaratory Relief Fails To State Facts Constituting A Cause Of Action Because Plaintiffs' Claims That Measure B Violates Their Rights Are Not Ripe For Adjudication.

Plaintiffs' Second Cause of Action For Declaratory Relief is based on the same legal and factual claims made under their First Cause of Action. For the reasons set forth above, these claims are not ripe and therefore Plaintiffs' Second Cause Of Action fails to state a claim.

E. Plaintiffs' Third Cause Of Action For Writ Of Mandate Fails To State Facts Constituting A Cause Of Action Because Plaintiffs' Claim That Section 1511-A Violates Their Rights Is Not Ripe For Adjudication.

Plaintiffs' Third Cause of Action is based on Plaintiffs' claim that Section 1511-A, which returns the SRBR funds to the general retirement funds, violates their rights. For the reasons set forth above, this claim is not ripe and therefore Plaintiffs Third Cause of Action does not state a claim.

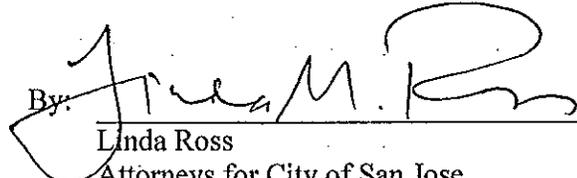
IV. CONCLUSION

For the foregoing reasons, this Court should grant the City's demurrer or in the alternative strike the allegations in Measure B that lack ripeness. Plaintiffs claim only fear of unspecified future harm and do not allege any concrete imminent action by the City or harm to themselves. Because Plaintiffs cannot correct this lack of ripeness, the City requests that the demurrer or the motion to strike be granted without leave to replead. The City has provided a proposed order which grants the demurrer and in the alternative identifies and strikes the paragraphs in Plaintiffs' Complaint that are not ripe for adjudication.

DATED: November 21, 2012

Respectfully submitted.

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 
Linda Ross
Attorneys for City of San Jose

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 633 W. 5th Street, Suite 1700, Los Angeles, CA 90071.

On November 21, 2012, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND IN THE ALTERNATIVE MOTION TO STRIKE BY THE CITY OF SAN JOSE** on the interested parties in this action as follows:

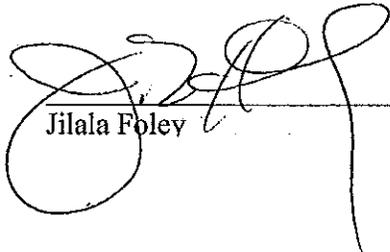
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BY HAND DELIVERY: I caused such envelope(s) to be delivered by hand to the office of the addressee(s)

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

Executed on November 21, 2012, at Oakland, California.



Jilala Foley