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

11 SAN JOSE RETIRED EMPLOYEES
ASSOCIATION HOWARD E. FLEMING,
12 OLSON, GARY J. RICHERT and
13 ROSALINDA NAVARRO,
14 Plaintiff/Petitioners,
15 v.
16 CITY OF SAN JOSE; DOES 1 through 50,
inclusive,
17 Defendants/Respondents.
18 BOARD OF ADMINISTRATION FOR THE
FEDERATED CITY EMPLOYEES
19 RETIREMENT SYSTEM,
20 Real Party in Interest.

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ENDORSED
FILED
EXEMPT FROM FILING FEES
GOV'T CODE § 6103
OCT 21 PM 4:08

David H. ...
By: M. Rawson
10/21/12

COURT SERVICES

CASE NO. 1-12-CV-233660
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEMURRER AND
MOTION TO STRIKE BY THE CITY OF
SAN JOSE; EXHIBIT A IN SUPPORT
THEREOF

Date: January 17, 2013
Time: 9:00 a.m.
Dept.: 2

BY FAX

Action Filed: October 5, 2012
Trial Date: None Set

1 Defendant City of San Jose hereby requests the Court to take judicial notice pursuant to
2 California Evidence Code Sections 450 *et seq.* and in accordance with California Rules of Court
3 3.1113, subdivision (l) and 3.1306, subdivision (c), of the following material, true and correct
4 copies of which are attached hereto:

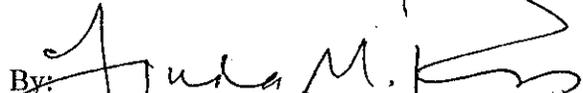
5 Exh. A: [Proposed] An Ordinance of the City of San Jose Amending Various
6 Sections of Chapter 3.28 of Title 3 of the San Jose Municipal Code to
7 Clarify the City Charter Supersedes the Federated City Employees
8 Retirement Plan in Event of Conflict, Clarify the Definition of Tier 2
9 Member, Discontinue the Supplemental Retiree Benefit Reserve, Clarify
10 Actuarial Soundness is Determined Consistent With the California
11 Constitution, and Make Additional Requirements for Mandatory Medicare
12 Enrollment, To Be Effective January 1, 2013 [City Council Agenda Item
13 No. 3.5 discussed on November 6, 2012]

14 Exhibit A is properly subject to judicial notice pursuant to California Evidence Code
15 Sections 453 and 452, subdivision (b) (providing that courts may take judicial notice of legislative
16 enactments issued by or under any public entity in the United States) and (h) (providing that courts
17 may take judicial notice of facts and propositions that are not reasonably subject to dispute and are
18 capable of immediate and accurate determination by resort to sources of reasonably indisputable
19 accuracy). *See also Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4th 1014, 1027 (“The
20 Evidence Code also expressly provides for judicial notice of a public entity’s legislative
21 enactments and official acts. Thus, we may take notice of local ordinances and the official
22 resolutions, reports, and other official acts of a city.”).

23 For these reasons, the City respectfully requests that the Court take judicial notice of the
24 above-listed documents.

25 DATED: November 21, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

26 By: 

27 Arthur A. Hartinger
28 Linda M. Ross
Attorneys for Defendant
City of San Jose

EXHIBIT A

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING VARIOUS SECTIONS OF CHAPTER 3.28 OF TITLE 3 OF THE SAN JOSE MUNICIPAL CODE TO CLARIFY THE CITY CHARTER SUPERSEDES THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN IN EVENT OF CONFLICT, CLARIFY THE DEFINITION OF TIER 2 MEMBER, DISCONTINUE THE SUPPLEMENTAL RETIREE BENEFIT RESERVE, CLARIFY ACTUARIAL SOUNDNESS IS DETERMINED CONSISTENT WITH THE CALIFORNIA CONSTITUTION, AND MAKE ADDITIONAL REQUIREMENTS FOR MANDATORY MEDICARE ENROLLMENT, TO BE EFFECTIVE JANUARY 1, 2013

WHEREAS, the City of San José ("City") wishes to further implement the provisions of Article XV-A of the City's Charter and clarify that in the event of conflict between the provisions of Article XV-A of the City's Charter and the Federated City Employees Retirement Plan, the City's Charter controls; and

WHEREAS, the City wishes to clarify that certain employees who participate in a City sponsored defined contribution plan will be excluded from participation in the Federated City Employees Retirement Plan; and

WHEREAS, the City wishes to discontinue use of the Supplemental Retiree Benefit Reserve; and

WHEREAS, the City wishes to clarify that the actuarial soundness of the Federated City Employees Retirement Plan is determined in a manner consistent with Article XVI, Section 17 of the California Constitution (the "1992 California Pension Protection Act"); and

WHEREAS, the City wishes to make additional requirements relating to mandatory enrollment of Federated City Employees Retirement Plan members into Medicare;

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NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 3.28.010 of Chapter 3.28 of Title 3 of the San José Municipal Code is amended to read as follows:

3.28.010 Plan Established - Name - Scope

- A. There is hereby established a retirement plan for all persons, hereinafter in this chapter specified, who may become members thereof pursuant to the provisions of this chapter. This plan shall be known as the "1975 Federated City Employees Retirement Plan," and includes all provisions of this Chapter 3.28.
- B. Notwithstanding any provision of the code to the contrary, the elements of the retirement plan as set out in Chapters 3.16, 3.20, 3.24 and 3.28 are components of a single retirement system known as the Federated City Employees Retirement Plan.
- C. Contributions made by the City and the members of the plan to the retirement fund described in Part 3 of this Chapter shall be made for the purpose of distributing to such members or their beneficiaries the corpus and income of the fund in accordance with the terms of this plan.
- D. The Federated City Employees Retirement Plan is established as a qualified governmental defined benefit plan pursuant to Sections 401(a) and 414(d) of the Internal Revenue Code or such other provision of the Internal Revenue Code as applicable and applicable treasury regulations and other guidance of the internal

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revenue service. The board shall be authorized to adopt rules and regulations which are appropriate or necessary to maintain the qualified status of the plan.

E. Effective September 30, 2012, the Federated City Employees Retirement Plan has been amended to provide for different retirement benefits for individuals hired or rehired by the City on and after that date. Members subject to these new benefit provisions are referred to in this chapter as Tier 2 members.

F. The provisions of Article XV-A of the City Charter are hereby implemented into the San José Municipal Code. To the extent there is any conflict between Article XV-A of the City of San José's Charter and the provisions of the Federated City Employees' Retirement System, Article XV-A will supersede any conflicting provision in the Federated City Employees' Retirement System.

SECTION 2. Section 3.28.030.28 of Chapter 3.28 of Title 3 of the San José Municipal Code is amended to read as follows:

3.28.030.28 Tier 2 Member

"Tier 2 member" means any person who is hired, rehired or reinstated by the City on or after September 30, 2012 except for any person who is eligible and elects to participate in a defined contribution plan established under the San José Municipal Code.

SECTION 3. Section 3.28.070 of Chapter 3.28 of Title 3 of the San José Municipal Code is amended to read as follows:

3.28.070 Termination of Plan

- A. Upon the termination of this plan or upon the complete discontinuance of contributions under the plan, the rights of each member, former member and beneficiary to benefits accrued to the date of such termination or discontinuance, to the extent then funded, shall be Nonforfeitable.
- B. Upon the termination of this plan, the board shall perform all of the following:
1. Liquidate the assets of the retirement fund.
 2. Pay all of the accrued administrative expenses of the plan, including the expenses of liquidation.
 3. Determine the rights of each member, former member and beneficiary to benefits accrued to the date of termination, and ensure that all such benefits have been or are paid to the respective persons.
 4. ~~Allocate any assets in the supplemental retiree benefit reserve established pursuant to Section 3.28.340 to the then existing retired members, survivors of members, and survivors of retired members using the distribution methodology most recently approved by the city council.~~
- C. Upon the termination of this plan and the satisfaction of all liabilities described in Subsection B. above, the board shall allocate any remaining assets of the retirement fund to the members of the plan on the basis of years of service and final compensation credited to the member at the time of termination of the plan.

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SECTION 4. Section 3.28.340 of Chapter 3.28 of Title 3 of the San José Municipal Code is amended to read as follows:

3.28.340 Disposition of Earnings

A. Definitions. For the purpose of this Section 3.28.340, the terms listed herein shall have the following meanings:

1. "Income account" means the account established in the general reserve pursuant to subsection B. below.
2. "Interest crediting rate" means the interest rate determined by the board for crediting the employee contribution reserve.

B. Retirement fund reserves. There shall be established in the retirement fund the following reserves:

1. The employee contribution reserve.
 - a. The board shall credit to the employee contribution reserve all contributions made by members of the retirement system and all interest payable pursuant to subsection C. below.
 - b. Moneys in the employee contribution reserve shall be available for the payment of benefits and for the return of contributions pursuant to Section 3.28.780.

2. ~~The supplemental retiree benefit reserve.~~

- a. ~~The board shall credit to the supplemental retiree benefit reserve all interest payable pursuant to subsection C. below and that portion of the excess earnings determined pursuant to subsection D. below.~~
- b. ~~Distributions from the supplemental retiree benefit reserve shall be made in accordance with subsection E. below.~~

32. The general reserve.

- a. The board shall establish an income account and shall credit the income account with all rents, interest, dividends, realized gains and losses, unrealized gains and losses, and all other income other than employer contributions, received during the fiscal year. The board shall pay from the income account all expenses and administrative costs as they are incurred.
- b. The board shall credit to the general reserve all contributions made by the City, all interest payable pursuant to subsection C. below, and that portion of the excess earnings determined pursuant to subsection D. below.
- c. Moneys in the general reserve shall be available for the payment of benefits and for the payment of the expenses and administrative costs of the retirement system.

43. Such other reserves as the board may determine from time to time.

- C. Credit to contributions and reserves. All interest credited pursuant to this subsection C. shall be deducted from the income account.

1. Interest shall be credited to the employee contribution reserve on a semi-annual basis, or more frequently if authorized by the board, at the interest crediting rate.

~~2. Interest shall be credited to the supplemental retiree benefit reserve at the actuarially assumed annual rate of return adopted by the board pursuant to Section 3.28.200 or at the actual rate of return earned by the retirement fund during the applicable fiscal year, whichever is lower. Interest credited to the supplemental retiree benefit reserve shall be calculated as though the transfer of excess earnings required by subsection D. had been made on July 1 of the calendar year, regardless of the actual date such transfer is made.~~

32. Interest shall be credited to the general reserve as follows:

- a. Interest at the actuarially assumed annual rate of return adopted by the board pursuant to Section 3.28.200 or at the actual rate of return earned by the retirement fund during the applicable fiscal year, whichever is lower; plus
- b. Interest calculated as the difference between (i) the interest that would have been credited to the employee contribution reserve had the employee contribution reserve been credited at the actuarially assumed annual rate of return adopted by the board pursuant to Section 3.28.200 or at the actual rate of return earned by the retirement fund during the applicable fiscal year, whichever is lower, and (ii) the interest actually credited to the employee contribution reserve pursuant to subsection C.1. above; provided,

however, that there shall be no offset to the general reserve in any case where this difference is a negative number.

~~4. Interest shall be credited to any other reserves established by the board in the same manner as interest is credited to the supplemental retiree benefit reserve.~~

D. Excess earnings.

1. Within ninety (90) days from and after receipt of audit reports for each fiscal year, the board shall determine the balance remaining in the income account after crediting of interest as provided in subsection C. above, and after payment of administrative costs and expenses of the retirement system for the applicable fiscal year.
2. If the balance remaining in the income account is greater than zero, the board shall by written resolution declare that balance to be the excess earnings for the applicable fiscal year, shall transfer ten percent of the ~~excess earnings to the supplemental retiree benefit reserve, and shall transfer the remaining ninety percent of the excess earnings to the general reserve.~~ If the balance remaining in the income account is less than or equal to zero, the board by written resolution shall declare that there are no excess earnings and shall adjust the general reserve to reflect any negative balance in the income account so that the balance in the income account is zero as of the beginning of each fiscal year.

~~E. Distributions from the supplemental retiree benefit reserve.~~

1. ~~The supplemental retiree benefit reserve shall be used only for the benefit of retired members, survivors of members, and survivors of retired members.~~
2. ~~Upon the request of the city council or on its own motion, the board may make recommendations to the city council regarding the distribution, if any, of the supplemental retiree benefit reserve to retired members, survivors of members, and survivors of retired members. The city council, after consideration of the recommendation of the board, shall determine the distribution, if any, of the supplemental retiree benefit reserve to said persons.~~

SECTION 5. Section 3.28.350 of Chapter 3.28 of Title 3 of the San José Municipal Code is amended to read as follows:

3.28.350 Investment of Funds - Conditions and Limitations

The board shall invest and reinvest the moneys in the retirement fund in accordance with the following standards:

- A. The assets of the retirement plan are trust funds and shall be held for the exclusive purposes of providing benefits to members of the plan and their beneficiaries and defraying reasonable expenses of administering the plan. The assets of the retirement plan must not revert, and no contributions shall be permitted to be returned to the employers, except as permitted by Revenue Ruling 91-4.
- B. The board shall discharge its duties with respect to the plan solely in the interest of, and for the exclusive purposes of providing benefits to, members of the plan

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and their beneficiaries, maintaining the actuarial soundness of the plan in a manner consistent with Article XVI, Section 17 of the California Constitution (the "1992 California Pension Protection Act"), and defraying reasonable expenses of administering the plan. The board's duty to the members and their beneficiaries shall take precedence over any other duty.

- C. The board shall discharge its duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of like character and with like aims.
- D. The board shall diversify the investments of the plan so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances, it is clearly prudent not to do so.
- E. The retirement plan may participate under Section 401(a)(24) of the Internal Revenue Code in a qualified group trust that meets the requirements of Section 401(a) of the Internal Revenue Code in accordance with Revenue Ruling 81-100, as amended by Revenue Ruling 2004-67.

SECTION 6. Section 3.28.1970 of Chapter 3.28 of Title 3 of the San José Municipal Code is amended to read as follows:

3.28.1970 Requirements for Participation in Medical Insurance Plan

- A. A member, as specified in Section 3.28.1950, above, is eligible to participate in a medical insurance plan sponsored by the City provided that the member satisfies the following requirements:

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1. The member retires for service or disability pursuant to the provisions of this chapter; and
 2. The member applies for medical insurance coverage at the time of his or her retirement in accordance with the provisions of the medical insurance plan, and agrees to pay any applicable premiums.
- B. A survivor, as specified in Section 3.28.1960, above, is eligible to participate in a medical insurance plan sponsored by the City provided that the following conditions are satisfied:
1. The survivor is receiving a monthly survivorship allowance because of the death of a member who either died during his or her employment with the city or died after he or she terminated City employment and was retired pursuant to the provisions of this chapter; and
 2. At the time of the member's death, the member and the survivor were enrolled in one of the medical insurance plans sponsored by the City; and
 3. The survivor applies to continue medical insurance coverage at the time of the member's death, and agrees to pay any applicable premiums.
- C. A member may secure medical insurance coverage for a spouse only if the spouse and member were married at the time of said member's retirement for service or disability.
- D. A member may secure medical insurance coverage for a domestic partner only if the domestic partner and member had established a registered domestic partnership pursuant to Division 2.5 of the California Family Code or had formed

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a legal union other than a marriage that is recognized as a domestic partnership pursuant to California Family Code Section 299.2 at the time of said member's retirement for service or disability.

- E. A surviving spouse or surviving domestic partner shall be eligible for single coverage only, except as follows:
1. A surviving spouse or surviving domestic partner shall be eligible for family coverage if at least one surviving child as defined in Section 3.28.1460.D., or at least one child of the surviving spouse or surviving domestic partner who is unmarried, not a member of a registered domestic partnership and under the age of eighteen years, or an eligible surviving child for purposes of receiving a school allowance as defined in Section 3.28.1750, is surviving the death of a member; in such case, if such child was enrolled in a medical insurance plan sponsored by the City at the time of the member's death.
 2. A surviving spouse or surviving domestic partner shall be eligible for family coverage if the surviving spouse or surviving domestic partner is the court-appointed guardian of the person of a minor child or children and such minor child or children are eligible for coverage under the terms of the eligible medical plan. A surviving spouse or surviving domestic partner may continue family coverage after such child reaches the age of majority in any case where, if such child had been a surviving child of the member, such child would be an eligible surviving child for purposes of receiving a school allowance pursuant to Part 14 of this Chapter.
- F. As used in this section, "medical insurance plan sponsored by the city" means an eligible medical plan as described in Section 3.28.1990, below.

- G. Notwithstanding the provisions of Sections 3.28.1970.A.1., 2., and 3., and 3.28.1970.B.1., 2., and 3., members or their survivors who would otherwise qualify for participation in a medical insurance plan pursuant to the provisions of this part, but who, at the time of retirement or death, could not enroll because the benefits provided in this part were not available at the time of the member's retirement for service or disability or death of the member, may enroll in an eligible insurance plan as provided for in this part on or before October 31, 1984. If a member or survivor does not enroll on or before October 31, 1984, then said members or their survivors must otherwise comply with the coverage limitations provided in Section 3.28.1970 and with all other provisions of this part.
- H. A surviving spouse who would otherwise qualify for family coverage because the surviving spouse is the court-appointed guardian of the person of a minor child or children but who could not enroll because the family coverage provided in subsection E. above was not available to the surviving spouse at the time of the member's death, may enroll in family coverage in an eligible insurance plan as provided for in this part until December 30, 2002, only. Said surviving spouse must otherwise comply with the coverage limitations set forth in this Section 3.28.1970 and with all other provisions of this part.
- I. Effective September 30, 2012 for Tier 2 members and effective January 1, 2013 for non-Tier 2 members, a member and/or dependent and/or survivor who is eligible for retiree healthcare benefits in the Federated City Employees' Retirement System shall be required to enroll in Medicare Part A and B within 6-months of reaching the age of 65. However, if a member is already retired and age 65 or older on the date the requirements regarding enrollment in Medicare in this Section of the Ordinance becomes effective for such member then the member shall be required to enroll in Medicare Part A and B by July 1, 2013.

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Additionally, the plan member and/or dependent and/or survivor shall be required to enroll in a Medicare Plan provided by the Federated City Employees' Retirement System and assign Medicare Part A and B benefits to the Medicare Plan if required by the healthcare provider.

If a plan member was hired before March 1986 and is not eligible for Medicare Part A at no cost, the plan member shall be required to provide such verification from the U.S. Social Security Administration to the Department of Retirement Services within 6 months from the date the plan member becomes age 65, or if the member is already retired and age 65 or older on January 1, 2013 then by July 1, 2013~~the requirements to enroll in Medicare become effective under this Section, applicable for such member.~~ Plan members shall be required to enroll in a Medicare Plan provided by the Federated City Employees' Retirement System within 6 months from the date the plan member is age 65 or if the member is retired and age 65.

If a plan member fails to meet the requirements set forth above within 6 months from the date the member becomes age 65, or if the member is retired and age 65 or older on the effective date ~~this Section of the Ordinance becomes applicable to such member, within 6 months of the applicable effective date by July 1, 2013,~~ the plan shall cease to provide retiree healthcare benefits until the plan member completes such requirements. This means that the member and any qualifying dependents shall not receive retiree healthcare benefits. The Plan member and qualifying dependents shall be re-enrolled in retiree healthcare benefits beginning the first day of the following month after such requirements have been completed.

If the Plan member dies during the period which the plan member failed to complete the requirements set forth above, the eligible spouse or domestic

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partner and any qualifying child(ren) shall be re-enrolled in a health insurance plan. When the spouse or domestic partner shall be enrolled upon attaining is age 65, or if the spouse or domestic partner is age 65 or older on the effective date, becomes effective to such spouse or domestic partner, applicable by July 1, 2013. The requirements described above regarding enrollment in Medicare Parts A and B and enrollment in a Medicare Plan provided for city retirees and dependents, and assignment of Medicare Parts A and B benefits to the Medicare Plan must be fulfilled. If such requirements are not met, retiree healthcare coverage will cease until such requirements are completed, in the same manner set forth above with respect to members.

SECTION 7. The provisions of this Ordinance shall be effective on January 1, 2013.

PASSED FOR PUBLICATION of title this ____ day of _____, 2012, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED
Mayor

ATTEST:

DENNIS D. HAWKINS, CMC
City Clerk

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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 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER AND MOTION TO STRIKE BY THE CITY OF SAN JOSE; EXHIBIT A IN SUPPORT THEREOF** on the interested parties in this action as follows:

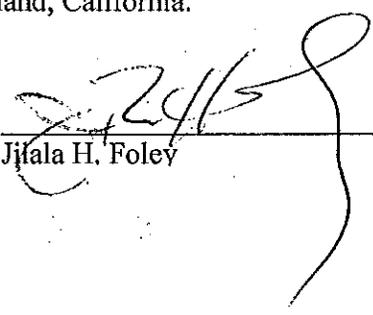
Stephen H. Silver, Esq.
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Attorneys for Plaintiffs/Petitioners
San Jose Retired Employees Association,
Howard E. Fleming, Donald S. Macrae, Frances
J. Olson, Gary J. Richert and Rosalinda Navarro

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.



Jifala H. Foley