

1 JONATHAN V. HOLTZMAN (SBN 99795)
RANDY E. RIDDLE (SBN 121788)
2 DAVID E. KAHN (SBN 98128)
ALBERT S. YANG (SBN 281265)
3 RENNE SLOAN HOLTZMAN SAKAI LLP
350 Sansome Street, Suite 300
4 San Francisco, CA 94104
Telephone: (415) 678-3800
5 Facsimile: (415) 678-3838

6 Attorneys for Respondent
7 CITY OF SAN JOSE

8 BEFORE THE ATTORNEY GENERAL
9 OF THE STATE OF CALIFORNIA

10 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

11 Plaintiff-Relator,

12 v.

13 CITY OF SAN JOSE, and CITY OF SAN
14 JOSE CITY COUNCIL,

15 Defendants.
16

Case No.:

EXEMPT FROM FEES (GOV. CODE §6103)

**DECLARATION OF JONATHAN V.
HOLTZMAN IN OPPOSITION TO SAN
JOSE POLICE OFFICERS'
ASSOCIATION'S APPLICATION FOR
LEAVE TO SUE IN *QUO WARRANTO***

17 I, Jonathan V. Holtzman, declare as follows:

18 1. I am a partner in the law firm Renne Sloan Holtzman Sakai LLP, which is counsel for
19 Defendant City of San Jose (City) in relation to the San Jose Police Officers' Association's (SJPOA)
20 Application for Leave to Sue in *Quo Warranto*. I am authorized to practice law in the State of
21 California. I have personal knowledge of the facts set forth in this declaration and, if called upon as a
22 witness, I could and would testify competently as to these facts.

23 2. SJPOA seeks leave to sue in *quo warranto* in order to challenge the validity of a
24 recently adopted charter amendment known as Measure B.

25 3. Measure B is the subject of numerous pending proceedings in state court and before the
26 Public Employment Relations Board (PERB), each of which is potentially dispositive of the issue
27 presented in SJPOA's present Application for Leave to Sue in *Quo Warranto*.
28

1 4. On March 16, 2012, SJPOA filed a Verified Petition for Writ of Mandate and
2 Complaint for Declaratory and Injunctive Relief, Case No. 1-12-CV-220795, in the Santa Clara
3 County Superior Court. On March 26, 2012, SJPOA filed an Amended Verified Petition for Writ of
4 Mandate and Complaint for Declaratory and Injunctive Relief. The basis for this amended petition
5 and complaint was the City's alleged failure to meet and confer in good faith under the MMBA. A
6 true and correct copy of SJPOA's Amended Verified Petition for Writ of Mandate and Complaint in
7 this matter is attached hereto as **Exhibit A**.

8 5. On June 6, 2012, SJPOA filed a Complaint for Declaratory and Injunctive Relief, Case
9 No. 1-12-CV-225926, in the Santa Clara County Superior Court. This complaint alleges, *inter alia*,
10 violation of various constitutional rights and violation of the MMBA. A true and correct copy of
11 SJPOA's Complaint in this matter is attached hereto as **Exhibit B**.

12 6. On June 6, 2012, various members of the San Jose Police and Fire Department
13 Retirement Plan filed a Complaint for Declaratory and Injunctive Relief and Petition for Writ of
14 Mandate/Prohibition, Case No. 1-12-CV-225928, in the Santa Clara County Superior Court. This
15 complaint alleges that Measure B violates various constitutional rights of the plan members. A true
16 and correct copy of the Complaint in this matter is attached hereto as **Exhibit C**.

17 7. On November 23, 2011, OE Local 3 filed an Unfair Practice Charge, UPC No. SF-CE-
18 900-M, with PERB. This Charge alleges, *inter alia*, that the City failed to meet and confer in good
19 faith with regard to Measure B. A true and correct copy of OE Local 3's Charge in this matter is
20 attached hereto as **Exhibit D**.

21 8. On February 1, 2012, AFSCME Local 101 filed an Unfair Practice Charge, UPC No.
22 SF-CE-924-M, with PERB. This Charge alleges, *inter alia*, that the City failed to meet and confer in
23 good faith with regard to Measure B. A true and correct copy of AFSCME Local 101's Statement of
24 Charge in this matter is attached hereto as **Exhibit E**.

25 9. On June 4, 2012, IAFF Local 230 filed an Unfair Practice Charge, UPC No. SF-CE-
26 969-M, with PERB. This Charge alleges that the City failed to meet and confer in good faith with
27 regard to Measure B. A true and correct copy of IAFF Local 230's Charge in this matter is attached
28 hereto as **Exhibit F**.

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct. Executed on July 6, 2012, at San Francisco, California.

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7 JONATHAN V. HOLTZMAN
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RENNE SLOAN HOLTZMAN SAKAI LLP
Attorneys at Law

EXHIBIT A

1 Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
2 Jennifer S. Stoughton, No. 238309
3 **CARROLL, BURDICK & McDONOUGH LLP**
Attorneys at Law
4 44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415.989.5900
5 Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
6 jyank@cbmlaw.com
jstoughton@cbmlaw.com

7 Attorneys for Petitioner/Plaintiff
8 San Jose Police Officers' Association

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11
12 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

13 Petitioner/Plaintiff,

14 v.

15 CITY OF SAN JOSE, and BARRY
16 GARNER, in his official capacity as
Registrar of Voters of the County of
17 Santa Clara,

18 Respondents/Defendants.

No. 1-12-CV-220795

AMENDED VERIFIED PETITION FOR WRIT
OF MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF
FOR FAILURE TO MEET-AND-CONFER IN
GOOD FAITH IN VIOLATION OF THE
MEYERS-MILLAS-BROWN ACT,
GOVERNMENT CODE SECTION 3500 *et seq.*

BY FAX

19
20
21 Petitioner/Plaintiff SAN JOSE POLICE OFFICERS' ASSOCIATION
22 ("SJPOA" or "Petitioner") alleges as follows:

23 1. In the spring and early summer of 2011, during collective bargaining
24 negotiations, SJPOA and Respondent/Defendant the CITY OF SAN JOSE ("the City")
25 had lengthy negotiations over retirement benefits. The parties agreed to create a program
26 through which current employees could voluntarily choose to opt out of the current level
27 of pension benefits into a lower level of benefits ("the SJPOA opt-in").
28

CBM-SFASF545279.2

ENDORSED
FILED

MAR 26 2012

David H. [unclear] of the Superior Court
County of Santa Clara, California
By: C.A. [unclear] District Clerk

COURT SERVICES

1 2. The parties also agreed that either side could continue to “meet and
2 confer” (the technical term for collective bargaining and used herein interchangeably with
3 the term “bargaining”) on pension and retiree health care benefits for current and future
4 employees, notwithstanding that they had reached an agreement on other terms and
5 conditions of employment.

6 3. Notwithstanding this agreement, and almost before the ink on it was dry,
7 the City’s Mayor, Chuck Reed, began a campaign to have the City Council declare a fiscal
8 emergency. Concurrently, the Mayor and other City Council members proposed a ballot
9 measure that would unilaterally reduce retirement benefits of all city employees, including
10 those represented by SJPOA.

11 4. The Mayor began a frenzied political and media campaign warning of
12 impending fiscal disaster for the City as a result of projections for escalating pension
13 costs. The Mayor and his staff repeatedly asserted, including in official city documents
14 put forward as part of the City’s bargaining position, that by Fiscal Year 2015-16, the
15 City’s retirement contribution could reach \$650 million per year, from a 2010-11 level of
16 \$245 million in Fiscal Year 2010-2011. This figure was used approximately 38 times,
17 including in press releases and interviews in the New York Times and Vanity Fair
18 magazine.

19 5. As recently as February 24, 2012, the Mayor asserted that the City’s
20 pension liability could still reach \$650 million by 2015-16.

21 6. In response to the City’s ballot measure, SJPOA and other San Jose labor
22 unions invoked their statutory and City Charter rights to meet and confer about the ballot
23 measure. Concurrently, SJPOA, in coalition with IAFF, Local 230 (“Local 230”),
24 representing firefighters employed by the City of San Jose, bargained over retirement
25 benefits and the SJPOA opt-in.

26 7. Throughout the meet and confer process, the City’s position was that it
27 would vote on sending the ballot measure to the public at a Special Election, planned for
28 March 2012.

1 8. The original ground rules contemplated that the parties would complete
2 bargaining on the July 5, 2011 ballot measure by October 31, 2011. Thereafter, if no
3 agreement had been reached, the parties would enter mediation.

4 9. The parties were unable to reach agreement and went to mediation, which
5 was ultimately unsuccessful.

6 10. Following mediation, in the run up to the Council's planned vote, the
7 City significantly changed its ballot proposal on November 22, 2011. In an email to all
8 employees, the City Manager Debra Figone described the revised ballot measure as "far
9 different than the earlier versions."

10 11. Additionally, on November 11, November 18 and December 1, 2011,
11 SJPOA and Local 230 (described herein collectively as "the Unions") put forward new
12 proposals significantly amending their prior proposal. The Unions asked to resume
13 bargaining over the revised ballot measure and the revised Union proposals. But the City
14 refused to bargain, or deviate from its original plan to vote on its proposed ballot measure
15 on December 6.

16 12. No bargaining has taken place at any time over the City's revised
17 November 22, 2011 ballot measure or the Union proposals of November 11, November 18
18 and December 1, 2011.

19 13. On December 1, 2011, the independent actuary for the Retirement Plan
20 issued an updated report with projections for prospective City retirement contributions.
21 The report showed that the City's retirement contributions would be far less than
22 previously estimated and far less than the City had been relying on as justification for both
23 its proposed Declaration of a Fiscal Emergency and its ballot measure. The report showed
24 that—just for the Police and Fire Retirement Plan—the City's contributions for Fiscal
25 Year 2012-13 would be approximately \$55 million *less than* previously expected.

26 14. On approximately December 5, 2011, the Mayor withdrew his proposal
27 to have the City Council declare a Fiscal State of Emergency.
28

1 15. But notwithstanding the new Union proposals or the greatly reduced
2 pension contribution projections, the City Council voted to place the November 22, 2012
3 ballot measure before the voters.

4 16. The City took the unusual step, however, of seeking to put the ballot
5 measure before the voters in June of 2012, not March 2012, as previously planned. The
6 City Council then essentially directed City staff to engage in after-the-fact mediation—but
7 not bargaining—with the SJPOA and other City unions.

8 17. SJPOA subsequently met with the City on two occasions in late
9 December, 2011 and early January 2012, but the City refused to agree to bargain, taking
10 the position that the parties remained at impasse.

11 18. Further mediation efforts followed, but were unsuccessful.

12 19. On February 21, 2012, the City issued a revised ballot measure. The
13 Unions again requested to meet and confer about the changes, but the City refused.

14 20. On March 2, 2012, SJPOA and Local 230 presented a new proposal—
15 designed to meet the City's concern about the unguaranteed nature of prior union
16 proposals—which guaranteed tens of millions of dollars in savings to the City annually.

17 21. The City rejected the proposal on March 5, 2012—i.e., within 72 hours—
18 without any meeting or bargaining about the proposal.

19 22. On March 6, 2011, the San Jose City Council voted to place the February
20 21 version of the pension reform ballot measure on the June 2012 election ballot.

21 23. This unfair labor practice charge contends that the City violated its
22 statutory obligation to bargain in three ways.

23 24. First, it was illegal for the City to refuse to resume bargaining before it
24 voted on December 6, 2011 to put a ballot measure before the voters. The revisions
25 reflected in the November 22, 2011 ballot measure, the Unions' proposals on November
26 11, 18 and December 1, and the greatly more favorable pension fund performance and
27 City cost projections produced in the December 1, 2011 Cheiron actuarial report
28

1 individually and collectively required the City to agree to the Unions' request to resume
2 bargaining, as these changed the bargaining-related circumstances.

3 25. Second, further favorable actuarial projections, further revisions to the
4 City's ballot measure, and a revised proposal by the Unions in January, February and
5 early March 2012 required the City to agree to the Unions' request to return to the
6 bargaining table.

7 26. Third, the City deliberately overstated the extent of its pension
8 liabilities—by in excess of \$250 million dollars—to create enormous public and media
9 pressure on the Unions to make concessions. The deliberate overstatement of pension
10 liabilities—by maximizing the difference between the parties' positions in terms of
11 necessary cost savings—was designed to inhibit the parties' ability to reach agreement
12 and is a per se unfair labor practice pursuant to Government Code section 3506.5.

13 **The Parties and Their Collective Bargaining**
14 **Relationship Under the Meyers-Milias-Brown Act,**
15 **Government Code Section 3500 *et seq.***

16 27. Labor-management relations between the SJPOA and the City are
17 governed by the Meyers-Milias-Brown Act ("the MMBA" or "the Act"), Government
18 Code section 3500, *et seq.*

19 28. The SJPOA is, and was at all relevant times, a non-profit corporation
20 organized and existing under the laws of the State of California, with its principal place of
21 business in the County of Santa Clara. The SJPOA is the "recognized employee
22 organization" for all police officer classifications in Bargaining Units 11, 12, 13 and 14
23 (collectively "Police Officers") employed by the City of San Jose to work in the San Jose
24 Police Department, pursuant to the Meyers-Milias-Brown Act, Government Code section
25 3500 *et seq.* ("MMBA"). Petitioner's approximately 1100 members perform all law
26 enforcement functions for the nearly 1 million residents of the City of San Jose.

27 29. By reason of the facts stated in the prior paragraph, the SJPOA is
28 beneficially interested in the City's faithful performance of its obligations under the
MMBA. The SJPOA brings this action on behalf of itself and its members, having

1 standing to do so under the doctrine articulated by the California Supreme Court in
2 *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of*
3 *Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

4 30. At all times relevant, the City is and has been the employer of the
5 SJPOA's members and a "public agency" within the meaning of the MMBA. As a charter
6 city, in addition to being bound by the MMBA in regard to its labor-relations with the
7 SJPOA, the City is governed by the San Jose City Charter.

8 31. The MMBA requires that the City meet and confer in good faith with the
9 SJPOA over the wages, hours, and other terms and conditions of employment for Police
10 Officers, including retirement benefits. (Gov. Code §§ 3504, 3505.) When negotiations
11 result in agreement between the parties, the MMBA requires that the agreement be
12 reduced to a mutually-signed writing known as a "memorandum of agreement" ("MOA").
13 (Gov. Code § 3505.1.)

14 32. The MMBA further states that "knowingly providing a recognized
15 employee organization with inaccurate information regarding the financial resources of
16 the public employer, whether or not in response to a request for information, constitutes a
17 refusal or failure to meet and negotiate in good faith." (Gov. Code § 3506.5(c).)

18 33. The MMBA also prohibits the City from taking unilateral action on
19 matters impacting wages, hours, and other terms and conditions of employment for Police
20 Officers without first providing the SJPOA with reasonable notice and an opportunity to
21 bargain, resolve any differences, and reach agreement prior to implementation. (Gov.
22 Code § 3504.5.) "The duty to bargain requires the public agency to refrain from making
23 unilateral changes in employees' wages and working conditions until the employer and
24 employee association have bargained to impasse." (*Santa Clara County Counsel*
25 *Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537.) Thus, for example, it is well-
26 established that an MMBA-covered city is "required to meet and confer with [a union
27 representing impacted employees] before it propose[s] charter amendments which affect
28

1 matters within their scope of representation.” (*People ex rel. Seal Beach Police Officers*
2 *Assn. v. City of Seal Beach* (“*Seal Beach*”) (1984) 36 Cal.3d 591, 602.)

3 34. Where there is no imminent need to act prior to a deadline to place a
4 proposed measure on an election ballot, doing so without first satisfying the bargaining
5 obligation violates Government Code section 3504. (*Santa Clara County Registered*
6 *Nurses Assoc.* (2010) PERB Decision No. 2120-M, pp. 15-16.)¹ In order to demonstrate
7 that financial difficulties create a compelling operational necessity permitting unilateral
8 action prior to satisfying the bargaining obligation, the employer must demonstrate “an
9 actual financial emergency which leaves no real alternative to the action taken and allows
10 no time for meaningful negotiations before taking action.” (*Id.* at p.16.) “The mere fact
11 that [a public employer] thought the inclusion of the measure on the ... ballot was
12 desirable does not constitute a compelling operational necessity sufficient to set aside its
13 bargaining obligation.” (*Id.* at 17.)

14 35. Even after bargaining has reached a state of impasse, the bargaining
15 obligation does not end permanently. Rather, “impasse is always viewed as a temporary
16 circumstance and the impasse doctrine ... therefore, is not a device to allow any party to
17 continue to act unilaterally or to engage in the disparagement of the collective bargaining
18 process.” (*McClatchy Newspaper* (1996) 321 NLRB 1386, 1398-1390.) “An impasse
19 does not constitute a license to avoid the statutory obligation to bargain collectively where
20 the circumstances which led to the impasse no longer remain in status quo.” (*Kit*
21 *Manufacturing Co., Inc. and Sheet Metal Workers Int’l Assoc., Local 213, AFL-CIO*
22 (1962) 138 NLRB 1290, 1294.) Thus, “[a]nything that creates a new possibility of fruitful
23 discussion (even if it does not create a likelihood of agreement) breaks an impasse.” (*Gulf*
24

25
26 ¹ The Public Employment Relations Board (“PERB”) is the California administrative
27 agency generally charged with construing and administering the MMBA. (Gov. Code §§
28 3501 and 3509.) While PERB does not have jurisdiction over cases involving labor
associations representing police officers (Gov. Code § 3511), Courts give great deference
to its construction of the MMBA. (*Banning Teachers Assn. v. Public Employment*
Relations Bd. (1988) 44 Cal.3d 799, 804–805.)

1 *States Mfg. Inc. v. N.L.R.B.* (5th Cir. 1983) 704 F.2d 1390, 1399 [citations omitted].²

2 Thus, when a party has made a significant bargaining concession, impasse will be broken.
3 Likewise, when an employer's financial condition has improved substantially, impasse
4 will be broken. (See, e.g., *Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l*
5 *Assoc., Local 213, AFL-CIO* (1962) 138 NLRB 1290, 1294-1295.)

6 36. Respondent BARRY GARNER is the Registrar of Voters of the County
7 of Santa Clara ("Registrar of Voters") and is sued in his official capacity only. Under the
8 State Elections Code, the Registrar of Voters is charged with placing local measures on
9 the County election ballots. If the Registrar of Voters is not restrained from doing so, he
10 will place the City's pension reform ballot measure on the June 2012 election ballot.
11 Petitioner is informed and believes that the Registrar of Voters will finalize the content of
12 the June 2012 election ballot on April 4, 2012, and that, therefore, this Court must act on
13 or before that date in order to prevent inclusion of the City's pension reform ballot
14 measure.

15
16 **The City Misrepresented Its Projected Pension Costs and Pushed
17 Toward Declaring a So-Called "Fiscal State of Emergency"**

18 37. On April 13, 2011, San Jose Mayor Chuck Reed and Vice Mayor Nguyen
19 issued a press release announcing that "San José's retirement director has projected that
20 [pension] costs could rise to \$650 million per year by fiscal year 2015-2016" This
21 statement knowingly and recklessly misrepresented the City's potential pension liability.

22 38. On May 13, 2011, the City published a Memorandum re: Fiscal Concerns
23 wherein Mayor Chuck Reed asserted that the City's pension costs were projected to grow
24 to \$650 million annually by 2016. Again, there was no basis for this assertion.

25
26 _____
27 ² Decisions by the federal courts and the National Labor Relations Board ("NLRB")
28 construing the Labor Management Relations Act are persuasive in construing similar
California labor relations statutes. (See, e.g., *Modesto City*, 136 Cal.App.3d at 895-896; *J.
R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874, 908.) Decisions interpreting similar
provisions of other California labor statutes are also persuasive. *County Sanitation Dist.
No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 572-573.

1 39. The \$650 million figure was communicated by the Mayor and the City
2 again and again in press releases, reports, and official City documents until approximately
3 mid-November 2011.

4 40. The communications referenced in the preceding paragraphs were made
5 even though the City's retirement director—the only source for the \$650 estimation
6 according to the Mayor—had expressly disavowed any \$650 million projection and had
7 told the Mayor and the City that it should NOT be relied upon. The City had no other
8 actuarially sound basis for projecting a \$650 million pension projection for 2015-16.

9 41. The intent of the City in continuing to communicate the false \$650
10 million projection was to whip-up public, media and political sentiment to support the
11 City's plan to declare a fiscal emergency (discussed *infra*) and slash retirement and other
12 benefits for Police Officers and other City civil servants. At all times that these
13 representations were made, the City was aware that they were false and without any
14 reasonable actuarial basis, such that the City “knowingly providing [the SJPOA] with
15 inaccurate information regarding the financial resources of the public employer ...
16 constitute[d] a refusal or failure to meet and negotiate in good faith.” (Gov. Code
17 § 3506.5(c).)

18 42. In fact, on approximately February 21, 2012, the City own retirement
19 system's actuaries estimated that the actual future projection figure for Fiscal Year 2015-
20 16 is approximately \$310 million, less than half the level the City has consistently and
21 knowingly misrepresented.

22 43. Undeterred, as recently as February 24, 2012, Mayor Reed was still
23 publicly estimating that the City's pension liability could reach \$650 million.

24 44. On March 7, 2012, the State of California's Joint Legislative Audit
25 Committee ordered a state audit to determine, *inter alia*, whether the Mayor, City Council,
26 or other officials engaged in any wrongdoing or legal violations in referencing the false
27 \$650 million projection.

28

1
2 **The City Adopted a Plan to Place a Measure on the Ballot to Dramatically**
3 **Curtail Existing Retirement Benefits and Limit Future Benefits**

4 45. Returning to the origins of the ballot measure itself, in the May 13, 2011
5 Memorandum re: Fiscal Concerns mentioned *supra*, the City's Mayor recommended that
6 the City Council approve a ballot measure to amend the San Jose City Charter to
7 dramatically decrease retirement benefits for current retirees and current/future employees,
8 as well as to require voter approval of future increases in retirement benefits for these
9 same employees. The Mayor recommended setting a maximum level of retirement
10 benefits (that, in some cases, were less than current employees and retirees earn currently)
11 that could not be exceeded without voter approval.

12 46. At a meeting on May 24, 2011, the City Council approved the Mayor's
13 recommendation and directed City Council staff to draft a proposed ballot measure that, if
14 approved by the voters of the City of San Jose, would implement the Mayor's
15 recommendations.

16 47. In mid-July, the SJPOA and the City began bargaining over retirement
17 benefits. The negotiations concerned retirement benefits, the ballot measure and SJPOA's
18 opt-in.

19 48. Over the following four (4) months, the parties met and conferred at least
20 13 times, including on July 13, August 2, 25, 30, and 21, September 13, 15, and 27, and
21 October 5, 12, 14, 17, and 20. During the Retirement Negotiations, the parties bargained
22 over various proposals put forth by the SJPOA and the City regarding retirement
23 generally, along with bargaining about the specific language of the proposed ballot
24 measure. In the course of the negotiations, the City passed proposals on the following
25 subjects unrelated to the ballot measure: Retirement benefits for New Employees; Retiree
26 Healthcare Benefits For New Employees; Supplemental Retiree Benefit Reserve
27 ("SRBR"); Healthcare Cost Sharing; and Workers' Compensation Offset. For example,
28 the City proposed to change the retirement benefits for new employees, such that the
pension benefits formula for employees hired after April 1, 2012 would be 1.5% per year

1 of service, subject to a maximum of 60% of final compensation, and raising the retirement
2 year to 60 years old. The City also proposed to cap any cost of living adjustments to 1%
3 per fiscal year and to limit the City's maximum contribution to 9% of pensionable
4 compensation.

5 49. The Unions also made various proposals in the course of bargaining
6 unrelated to the ballot measure. For example, on September 26, 2011, they proposed a
7 three-tier retirement model that maintained the *status quo* for active employees but created
8 a second tier for new hires and opt-ins with reduced retirement benefits.

9 50. Throughout these discussions, the City continued to represent that its
10 pension costs were projected to increase annually to approximately \$650 million by 2016.
11 As detailed above, these representations were knowingly false and without basis.

12 51. The negotiations were made more difficult by the City's own
13 acknowledgement that the changes to retirement benefits being proposed by the ballot
14 measure were of questionable legal validity.

15 52. The parties met and conferred until approximately October 31, 2011, but
16 unfortunately were unable to reach an agreement. On November 15-16, 2011, the parties
17 participated in mediation in an effort to resolve their differences. The mediation was not
18 successful.

19
20 **Without Providing the SJPOA With Notice and an Opportunity to Bargain,
the City Adopted Language for its Retirement Ballot Measure**

21 53. On December 6, 2011, the City Council adopted Resolution 76087 and
22 approved a ballot measure for the June 2012 election ballot, which, *inter alia*, would
23 implement dramatic reductions in Police Officers' retirement benefits beginning June 24,
24 2012. The draft ballot measure language approved by the City Council was prepared on
25 December 5, 2011, though largely based on the November 22 version, and was approved
26 by the Council the following day, without providing the SJPOA with notice and an
27 opportunity to bargain, as required by the MMBA. (Gov. Code § 3504.5 [requiring notice
28 and opportunity to bargain before adoption of "ordinance, rule, resolution, or regulation

1 directly relating to matters within the scope of representation proposed to be adopted by
2 the governing body”]; *Seal Beach, supra*, 36 Cal.3d at 602.)

3 54. The ballot measure language approved by the City Council on December
4 6, 2011, would dramatically reduce the pension benefits of SJPOA-represented Police
5 Officers by forcing current employees into a new retirement plan that, *inter alia*, severely
6 reduces accrual rates, dramatically increases minimum retirement age and service
7 requirements, cuts the maximum cost-of-living adjustment in half (from 3% to 1.5%), and
8 slashes survivorship and disability retirement benefits. Police Officers who elect not to go
9 into the misnomered “Voluntary Election Program,” would be punished by slashing their
10 salaries and requiring that they pay 50% of existing unfunded liabilities.

11 55. The City agreed to meet with the SJPOA once in late December 2011 and
12 once in early January 2012. However, during those meeting, the City stated its belief that
13 the parties were at impasse and that it was not obligated to further bargain about the ballot
14 measure.

15 56. On February 8, 2012, NBC Channel 11, a San Jose area television station
16 produced an investigative report alleging that the City had deliberately overstated its
17 potential pension liability for political reasons. The report suggested that the City’s
18 overstatements were deliberate, and designed to support both the Mayor’s budget proposal
19 and his proposal for the Declaration of Fiscal Emergency. To wit, in an interview with
20 NBC, when asked the basis for the \$650 million city pension liability projection, Mayor
21 Reed acknowledged that the sole source for the \$650 million figure was the City’s
22 Retirement Services Director, Russell Crosby. In the same interview, Mr. Crosby stated
23 about the \$650 million estimation: “That was a number off the top of my head.” He also
24 stated that: “The Mayor was told not to use that number ... that the number was 400
25 [million dollars].”

1 **As a Result of Improvements in the City's Financial Condition**
2 **and Pension Fund Performance, the Bargaining-Related Circumstances**
3 **Have Changed and Any Asserted Impasse is Necessarily Broken**

4 57. In light of the developments regarding the City's improved financial
5 condition and the dramatically-reduced projections of retirement related costs over the
6 next few years, an ostensible bargaining impasse was broken. (See *Kit Manufacturing*
7 *Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO* (1962) 138 NLRB
8 1290, 1294-1295 [improvement in employer's financial condition breaks impasse].) In
9 recent weeks, for example, the City actually reported a surplus of \$10 million in its budget

10 **Without Providing the SJPOA With Notice and an Opportunity to Bargain,**
11 **the City Adopted Revised Language for its Retirement Ballot Measure**

12 58. On February 21, 2012, the City, through its Director of Labor Relations,
13 provided the SJPOA with a copy of a revised version of its ballot measure and informed
14 the SJPOA that the City Council intended to take a final vote on language for a June 2012
15 ballot measure at its regularly-calendared session on March 6, 2012. *Inter alia*, the
16 measure language was amended to move its effective date to June 23, 2013.

17 59. On February 24, 2012, the SJPOA made a request to bargain about the
18 February 21, 2012 ballot measure. The letter noted that the February 21, 2012 revised
19 measure contained significant changes from the December 6, 2011 version and
20 specifically referenced a concession by the City Manager that it contained "many
21 significant changes and movement from earlier drafts." The SJPOA noted that it "had no
22 opportunity to bargain about this new ballot language."

23 60. On February 27, 2012, the City's Labor Relations Director, Alex Gurza
24 responded to the SJPOA's February 24 communication by conditioning any resumption of
25 bargaining on the Association (1) making a concession that the City deemed in its
26 subjective opinion to be "sufficient" and (2) that such concession be capable of being
27 "ratified prior to March 6."

28 61. On February 28, 2012, five California State Assembly members and two
State Senators requested that the California Legislature's Joint Legislative Audit

1 Committee conduct an audit into the City's general finances and current and future
2 pension obligations ("the State audit request"). They asked that: "The audit should focus
3 on all projections used by the City and/or its elected officials that include, but may not be
4 limited to, \$400 million, \$431 million, \$570 million, and \$650 million."

5 62. On March 6, 2012, the San Jose City Council adopted a resolution to
6 place the February 21, 2012 version of the pension ballot measure on the June 2012
7 election ballot.

8 63. The ballot measure language approved by the City Council on March 6,
9 2012, if enacted by the voters, will dramatically reduce the pension benefits of SJPOA-
10 represented Police Officers in the same ways as the prior version approved by the City
11 Council on December 6, 2011. The February 21, 2012 version of the pension reduction
12 ballot measure adopted by the City Council on March 6, 2012 also including new
13 language dictating that, if adopted, the City would file as lawsuit seeking a declaration as
14 to the legality of the various pension reduction provisions delineated in the measure.

15 64. On March 7, 2012, the California State Legislature's Joint Legislative
16 Audit Committee voted to audit the City's finances in response to the February 28, 2010
17 letter referenced *supra*. The committee directed the state auditor to give the audit priority
18 status.

19 65. These actions and plans were made by the City unilaterally and without
20 providing the SJPOA with notice and an opportunity to "meet and confer ... before [the
21 City] proposed charter amendments which affect matters within their scope of
22 representation." (*Seal Beach, supra*, 36 Cal.3d at 602.)

23 Jurisdiction and Venue

24 66. It is well-established that a labor association not subject to the
25 jurisdiction of the Public Employment Relations Board ("the PERB") may file suit in the
26 Superior Court to seek enforcement of rights and redress for wrongs arising under the
27 MMBA. (*Santa Clara County Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th
28 525, 538-540.) Pursuant to Government Code section 3511, the SJPOA and the Police

1 Officers it represents are not subject to the jurisdiction of the PERB. Therefore, this Court
2 has jurisdiction to adjudicate this action.

3 67. All parties exist and reside within the County of Santa Clara, and all
4 relevant actions and omissions took place within the County of Santa Clara, making this
5 Court the appropriate venue for this action.

6
7 **FIRST CAUSE OF ACTION**

8 **Declaratory Relief (C.C.P. § 1060 *et seq.*) for a Declaration of Rights and
9 Duties Under the Meyers-Milias-Brown Act, Gov. Code § 3500 *et seq.***

10 68. Petitioner hereby incorporates by reference all of the foregoing
11 paragraphs as though fully set forth herein.

12 69. The City was responsible for the acts or omissions complained of herein.

13 70. An actual controversy has arisen and now exists between Petitioner and
14 the City concerning their respective rights, duties, and obligations under the MMBA.
15 Petitioner contends that by the foregoing acts and omissions, the City has committed
16 unfair labor practices in violation of the MMBA by: (1) proposing and adopting a
17 resolution to put on the June 2012 election ballot a measure that would dramatically
18 curtail retirement and other benefits for Police Officers without first providing notice and
19 an opportunity to bargain to the SJPOA; (2) after the fact, engaging in bad-faith
20 bargaining by, *inter alia*, insisting that the SJPOA was required to convince the City to
21 undo its *fait accompli* and asserting that the City was under no obligation to bargain with
22 the SJPOA in any event; (3) knowingly providing the SJPOA with inaccurate information
23 regarding the City's projected pension costs; and (4) failing and refusing to return to
24 bargaining on the asserted basis that the parties were at impasse even after significantly
25 changed circumstances required a resumption of bargaining, including an improved
26 financial outlook for the City, greatly improved pension fund performance, and significant
27 monetary concessions by the SJPOA.

28 71. The SJPOA is informed and believes that the City disputes the allegations
regarding its obligations under the MMBA and its ostensible violations of the Act.

1 significantly changed circumstances required a resumption of bargaining , including
2 vastly improved financial outlook for the City, greatly improved pension fund
3 performance, and significant monetary concessions by the SJPOA.

4 77. No adequate remedy exists at law for the injuries suffered by the SJPOA
5 as alleged herein, insofar as the violation of statutory rights has been made, and may
6 continue to be made, and cannot be protected against absent injunctive relief. If this Court
7 does not grant injunctive relief of the type and for the purpose specified below, the SJPOA
8 and its members will suffer further irreparable injury. Indeed, “failure to bargain in good
9 faith has long been understood as likely causing irreparable injury to union
10 representation.” (*Small v. Avanti Health Systems, LLC* (9th Cir. 2011) 661 F.3d 1180,
11 1193; see also *id.* at 1194 [failure to bargain is likely to cause irreparable harm “absent
12 some unusual circumstance indicating that union support is not being affected or that
13 bargaining could resume without detriment as easily later as now”].)

14 78. Conversely, the City will suffer no harm by being required to withdraw
15 its current ballot proposal and bargain with the SJPOA, as significant parts of its revised
16 measure would not go into effect until June 23, 2013, until a declaratory relief action has
17 been determined, post-election, and until IRS approval has been secured on the proposed
18 opt-in plan.

19 79. As a result, Petitioner requests that this court preliminarily and
20 permanently enjoin Respondents from placing the City’s retirement measure on the June
21 2012 ballot and restrain the City from engaging in the unfair labor practices delineated
22 *supra*. Petitioner is informed that ballots will be printed on or about April 16, 2012.

23 WHEREFORE, Petitioner pray for the relief set forth below.

24
25 **THIRD CAUSE OF ACTION**

26 **Writ of Mandate (C.C.P. § 1085 *et seq.*) Requiring Compliance with the Duty to
Meet-and-Confer Under the Meyers-Miliias-Brown Act, Gov. Code § 3500 *et seq.***

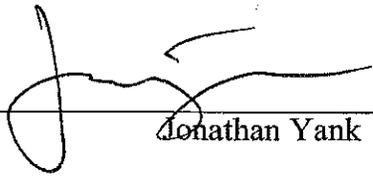
27 80. Petitioner hereby incorporates by reference all of the foregoing
28 paragraphs as though fully set forth herein.

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VERIFICATION

I, Jonathan Yank, am one of the attorneys for Petitioner herein and am authorized to execute this on its behalf. I have read the Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and am informed and believe, and thereon allege, that the matters stated therein are true and correct. I sign this verification on behalf of Petitioner, pursuant to Code of Civil Procedure section 446, since an extenuating circumstance exists in that Petitioner is absent from the county in which my office is located.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on March 26, 2011 at San Francisco, California.



Jonathan Yank

EXHIBIT B

1 Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
2 Gonzalo C. Martinez, No. 231724
Jennifer S. Stoughton, No. 238309
3 **CARROLL, BURDICK & McDONOUGH LLP**
Attorneys at Law
4 44 Montgomery Street, Suite 400
San Francisco, CA 94104
5 Telephone: 415.989.5900
Facsimile: 415.989.0932
6 Email: gadam@cbmlaw.com

7 Attorneys for Plaintiff
San Jose Police Officers' Association

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

11 **SAN JOSE POLICE OFFICERS'**
12 **ASSOCIATION,**
13 **Plaintiff,**
14 **v.**
15 **CITY OF SAN JOSE, BOARD OF**
16 **ADMINISTRATION FOR POLICE**
17 **AND FIRE DEPARTMENT**
18 **RETIREMENT PLAN OF CITY OF**
19 **SAN JOSE, and DOES 1-10,**
20 **inclusive,**
21 **Defendants.**

No.
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF FOR:
(1) VIOLATION OF CALIFORNIA
CONSTITUTIONAL CONTRACTS CLAUSE;
(2) VIOLATION OF CALIFORNIA
CONSTITUTIONAL TAKINGS CLAUSE;
(3) VIOLATION OF CALIFORNIA DUE
PROCESS;
(4) VIOLATION OF CALIFORNIA FREEDOM
OF SPEECH—RIGHT TO PETITION;
(5) VIOLATION OF SEPARATION OF
POWERS DOCTRINE;
(6) BREACH OF CONTRACT;
(7) VIOLATION OF MMBA;
(8) VIOLATION OF CAL. PENSION
PROTECTION ACT.

1 Plaintiff SAN JOSE POLICE OFFICERS' ASSOCIATION ("SJPOA" or
2 "Plaintiff") on behalf of its members brings this action for declaratory, injunctive and
3 other relief asking the Court to declare unconstitutional and temporarily and permanently
4 enjoin implementation of proposed changes to the San Jose Police and Fire Department
5 Retirement Plan:

6 1. Plaintiff challenges provisions of "The Sustainable Retirement Benefits
7 and Compensation Act," which was passed by the San Jose electorate as Measure B at the
8 June 5, 2012 election ("Measure B"), and which will amend provisions of the San Jose
9 City Charter in ways detrimental to the SJPOA and its members. Unless restrained,
10 Measure B will become effective immediately and directs the City Council with the goal
11 that implementing ordinances "shall become effective no later than September 30, 2012."

12 2. Numerous provisions of Measure B violate the California Constitution on
13 their face and as applied to Police Officers who were participants in the 1961 Police and
14 Fire Department Retirement Plan ("Retirement Plan") on or prior to June 5, 2012, in that
15 Measure B:

16 a. substantially impairs these employees' contracts with the City of
17 San Jose for the Retirement Plan and benefits in place when they began working for the
18 police department, and as improved during their employment;

19 b. constitutes a taking of private property rights without just
20 compensation or due process;

21 c. violates their right to free speech and to petition the courts through a
22 "poison pill" that punishes employees if they successfully challenge portions of Measure
23 B;

24 d. violates the separation of powers doctrine by giving the City
25 ultimate authority over whether an unlawful ordinance implementing Measure B should
26 be amended or severed;

27
28

1 e. impairs SJPOA members' rights under their Memorandum of
2 Understanding ("MOA") with the City by unilaterally increasing contributions for future
3 retiree medical benefits above what is contractually agreed;

4 f. violates the Meyers-Milias-Brown Act ("MMBA"), Gov. Code
5 section 3500, *et seq.*, by unilaterally reducing employee salaries—a mandatory subject of
6 bargaining—if Section 1506-A of Measure B is declared invalid; and

7 g. violates the California Pension Protection Act by abrogating the
8 fiduciary duties of the Board of Administration for Police and Fire Department Retirement
9 Plan ("Retirement Board") to current and future retirees.

10 3. Hundreds of current Police Officers on whose behalf Plaintiff brings this
11 action will suffer severe and irreparable harm upon implementation of Measure B and
12 amendment of the Charter. Among other things, Measure B forces employees to make the
13 Hobson's choice between standing on their existing pension rights and having their
14 existing salaries reduced by as much as 16%, or "voluntarily" opting into a second tier
15 Retirement Plan with lesser benefits so they can keep their current salaries. Measure B
16 also has numerous other consequences for Police Officers as further described herein,
17 including detrimentally changing the definition of disability retirement, authorizing
18 suspension of cost-of-living adjustments, eliminating the Supplemental Retirement
19 Benefits Reserve program, and dramatically increasing salary deductions for future retiree
20 healthcare.

21 4. Measure B also discourages employees from exercising their freedom of
22 speech rights, including their right to petition the courts for redress. For example, it
23 specifically provides that if its lesser "voluntary" retirement program is "illegal, invalid or
24 unenforceable as to Current Employees . . . then . . . an equivalent amount of savings
25 shall be obtained through pay reductions." It also gives the City ultimate authority to
26 decide whether any implementing ordinance determined to be unlawful should be
27 "amend[ed] ... or ... sever[ed]," regardless of any court order obtained by employees
28 enforcing their rights.

1 16. The SJPOA and the City agreed to continue negotiations on pension and
2 retiree health care benefits for current and future employees, even though they had
3 reached agreement on the other terms and conditions of employment.

4 17. The City subsequently began a campaign to reduce all City employees'
5 pension benefits, including those of Police Officers, through a City-sponsored voter ballot
6 initiative and a threatened declaration of fiscal emergency. If implemented, Measure B
7 will amend the San Jose City Charter.

8 18. To support the City's efforts to declare a fiscal emergency and the ballot
9 measure, the City's mayor asserted repeatedly in public statements and press releases that,
10 by Fiscal Year ("FY") 2015-16, the City's retirement contribution costs would reach \$650
11 million per year.

12 19. On July 5, 2011, certain City Council members formally proposed a
13 ballot initiative that would unilaterally reduce retirement benefits of all City employees,
14 including those represented by SJPOA. The ballot measure was purportedly directed at
15 reducing the City's retirement costs to FY 2010-2011 levels by FY 2015-16.

16 20. The City's projected retirement contribution increases were partly rooted
17 in the City's reduced contributions during times when the Retirement Plan had an
18 actuarial surplus.¹ For example, in fiscal years 1993 through 2004 the City reduced its
19 contributions into the Retirement Plan by approximately \$80 million. The Retirement
20 Board later concluded in 2011 that, had the City not reduced its contributions during that
21 time period, the \$80 million would have grown to \$120 million. That increased the
22 Retirement Plan's Unfunded Actuarial Liability by approximately 44%.

23 21. On December 1, 2011, the independent actuary for the Retirement Plan
24 issued a report with updated projections for the City's prospective retirement costs which
25 showed that the City's retirement contributions would be far less than previously
26 estimated and far less than the City had been relying on as justification for the proposed

27
28 ¹ An actuarial surplus is defined as a situation where the actuarial value of the assets in the
retirement fund is more than the value of the plan's actuarial liability.

1 declaration of fiscal emergency and ballot measure. Specifically, the report showed that
2 the City's contributions for Fiscal Year 2012-13 for the Police and Fire Retirement Plan
3 would be approximately \$55 million less than previously expected.

4 22. At a City Council meeting on December 6, 2011, the Mayor withdrew his
5 proposal to have the City Council declare a fiscal emergency. Even though there was no
6 fiscal emergency, the City Council nonetheless proceeded with placing the ballot measure
7 before the voters.

8 23. On February 21, 2012, the City issued a revised ballot measure. On
9 March 6, 2012, the City Council voted to place that revised ballot measure ("Measure B")
10 on the June 5, 2012 election ballot. On April 10, 2012, the Sixth Appellate District Court
11 of Appeal found the ballot statement of issue was "impermissibly partisan," and ordered
12 the City to revise it, which it did.

13 24. Measure B was passed by the San Jose electorate on June 5, 2012. If
14 allowed to go into effect, Measure B will change SJPOA members' retirement benefits
15 and the Retirement Plan as further described below.

16 **POLICE OFFICERS' RIGHTS UNDER THE RETIREMENT PLAN AND MOA**

17 25. The Retirement Plan established by the pre-Measure B City Charter and
18 the San Jose Municipal Code gives Police Officers constitutionally-protected and vested
19 contractual and property rights to certain pension benefits and the right to proceed under
20 the Retirement Plan in place when they began working for the City, as well as any
21 improvements to those benefits made during their employment with the City.

22 26. SJPOA members' benefits and rights became vested when they accepted
23 their positions with the City or, with respect to any improvements to those benefits, when
24 they continued laboring for the City. In exchange for these benefits and rights, SJPOA
25 members accepted their positions with the City and will continue to as they have in the
26 past dutifully labor for the City of San Jose.

27 27. The City Charter prescribes certain minimum benefits for Police Officers.
28 The Charter expressly states that the City "may grant greater or additional benefits."

1 There is no provision for reducing employee benefits or for reducing benefits below the
2 minimum in the Charter. As further described herein, Police Officers' pension rights arise
3 from the Charter, the Municipal Code, and the MOA.

4 **28. Service Retirement and Pension Calculation.** The Charter (Section
5 1504) establishes Police Officers' right to service retirement. The Municipal Code
6 provides that Police Officers are eligible to begin receiving service retirement benefits at
7 age 50 with 25 years of service, at age 55 with 20 years of service, or at any age following
8 30 years of service. Upon retirement, they are entitled to a pension calculated according
9 to the following formula contained in Municipal Code section 3.36.809: 2.5% of final
10 compensation for each year of service up to 20 years, plus 4% of final compensation for
11 each year of service between 21-30 years up to a cap of 90% of final compensation.

12 **29. Disability Retirement and Pension Calculation.** The Charter (Section
13 1504) establishes Police Officers' right to disability retirement and defines "disabled" as
14 "the incurrance of a disability . . . which renders the officer or employee incapable of
15 continuing to satisfactorily assume the responsibilities and perform the duties and
16 functions of his or her office or position and of any other office or position *in the same*
17 *classification of offices or positions* to which the City may offer to transfer him or her . . ."
18 (emphasis added). Upon disability retirement, Police Officers are entitled to a pension
19 calculated according to the following formula in Municipal Code section 3.36.1020: 50%
20 of final compensation, plus 4% of final compensation for each full year of service
21 exceeding 20 years, to a cap of 90% of final compensation.

22 **30. Splitting of Normal Retirement Costs According to 3:8 Ratio.** The
23 Charter (Section 1504) and Municipal Code (Section 3.36.410) establish that Police
24 Officers contribute 3/11ths of the normal costs of maintaining the Retirement Plan, and
25 the City pays 8/11ths.

26 **31. City Pays All Unfunded Actuarial Liability ("UAL") for Pensions.**
27 The Municipal Code (Sections 3.36.1520 and 3.36.1550) establishes that the City pays
28

1 any UAL generated by the Retirement Plan.² Under the Retirement Plan, the City is
2 required to pay UAL and Police Officers did not pay UAL for pensions.

3 32. When the Retirement Plan generated an actuarial surplus, the City reaped
4 all of the benefits and used those excess earnings to reduce its contribution rates during
5 FYs 1993-2004 by approximately \$80 million. According to the Retirement Board, that
6 \$80 million would have grown to \$120 million and increased the existing UAL by 44%.

7 33. **Yearly Cost of Living Adjustments ("COLA").** The Municipal Code
8 (Section 3.44.150) establishes Police Officers' right to an annual 3% COLA to pension
9 benefits upon retirement. The normal cost of the COLA is funded by contributions from
10 Police Officers and the City on a 3-8 basis (Section 3.44.090) to fund the normal cost.

11 34. **Supplemental Retiree Benefit Reserve ("SRBR") Payments.** The
12 Municipal Code (section 3.36.580) also establishes a supplemental retirement benefit
13 reserve, funded from employee and City contributions and administered solely for the
14 benefit of Retirement Plan members, from which the Retirement Board has the discretion
15 to make a variable annual payment to retirees based on investment performance.

16 35. **Contribution Rates for Retiree Healthcare.** Employee contribution
17 rates for retiree healthcare are established through the collective bargaining process.
18 Thus, the MOA sets Police Officers' contribution rates for retiree healthcare.
19 Specifically, contributions for retiree medical benefits are made by the City and Police
20 Officers on a 1:1 ratio. The MOA caps any increase in these contribution rates for Police
21 Officers at 1.25% per year. The MOA further provides that employees shall not pay more
22 than 10% of their pensionable salary to fund retiree healthcare. Currently, SJPOA
23 members pay 7.01% of their pensionable pay toward retiree healthcare costs, which will
24 increase to 8.26% on July 1, 2012 under the MOA.

25
26
27 ² UAL is "the difference between actuarial accrued liability and the valuation assets in a
28 fund. [Citation] Most retirement systems have [UAL]. . . . [UAL] does not represent a
debt that is payable [in full] today." (*County of Orange v. Association of Orange County
Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 34.)

1 normal costs. By contrast, Police Officers who elect to remain in the current Retirement
2 Plan for future service credits will be forced to pay up to 50% of the pension UAL
3 through a reduction in their current salaries up to 16%. This Hobson's choice is contained
4 in Sections 1506-A and 1507-A of Measure B.

5 41. Section 1506-A mandates that employees not entering the VEP will have
6 their salary reduced by as much as 16% in order to pay for up to half of the pension UAL.
7 Although Measure B styles this reduction as an "adjust[ment] through additional
8 retirement contributions," Measure B would effectively require Police Officers (who have
9 never paid UAL contributions for their pensions) to offset the City's UAL costs through
10 salary deductions resulting in reductions to take-home pay without giving them any
11 comparable advantage.

12 42. Section 1507-A sets out the VEP which caps employees' pension benefits
13 and prospectively changes the pension formula for those employees "voluntarily"
14 "opting" into this system. Section 1507-A mandates that such employees "will be
15 required to sign an irrevocable election waiver (as well as their spouse or domestic
16 partner, former spouse or former domestic partner, if legally required) acknowledging that
17 the employee irrevocably relinquishes his or her existing level of retirement benefits and
18 has voluntarily chosen reduced benefits."

19 43. The VEP imposes a reduced retirement benefits formula as follows: 2%
20 of final compensation for each year of prospective service, up to a cap of 90% of final
21 compensation. It re-defines "final compensation" as "the average annual pensionable pay
22 of the highest three consecutive years of service." Section 1507-A also increases the
23 retirement age to 57 for Police Officers, including the eligibility to retire after 30 years of
24 service, and disallows retirement before age 50. It caps COLA increases at 1.5% per
25 fiscal year. Finally, it imposes a new requirement that an employee is eligible for a full
26 year of service credit only upon reaching 2080 hours of regular time worked, excluding
27 overtime.

1 44. In exchange for giving up their rights, Police Officers entering the VEP
2 keep their current salaries, do not pay UAL and retain the 3:8 cost-sharing ratio—rights
3 which Police Officers already have. Police officers forced into VEP would thus receive
4 no comparable advantage for the waiver of their rights.

5 45. The VEP presents a Hobson's choice that is unconscionable and unlawful
6 because current employees have no meaningful choice. The City is obligated by the
7 MOA to maintain contractual salaries and retiree healthcare contributions at the agreed
8 rate, and is also obligated by the Charter and Retirement Plan to pay Police Officers the
9 benefits under the retirement system in place when they began working for the City, as
10 well as any enhancements made during their service with the City. The City may not
11 lawfully renege on either of its obligations, let alone penalize current employees for
12 standing on their rights.

13 46. An employee's election under the VEP is not "voluntary" at all and fails
14 for lack of consideration in the form of a comparable advantage because, regardless of
15 what decision an employee makes, he or she is forced to give up valuable rights protected
16 under the law. Further, any such choice is made under economic duress because
17 employees not electing the VEP have their salaries reduced by as much as 16%.

18 47. Although the VEP would require IRS approval, Measure B mandates that
19 the "compensation adjustments" shall be effective regardless of whether IRS approval has
20 been given and regardless of whether the City Council has implemented the VEP.

21 48. The City has known since at least January of 2012 that the VEP will not
22 receive IRS approval in 2012 and is likely never to receive such approval. Nonetheless,
23 the City Council voted to put Measure B, including the VEP, on the June 5, 2012 ballot.

24 **Section 1509-A: Evisceration of Disability Retirement Availability**

25 49. Section 1509-A of Measure B immediately and radically alters Police
26 Officers' rights to disability retirement by unilaterally imposing numerous burdensome
27 requirements, including that "City employees must be incapable of engaging in *any*
28 gainful employment for the City." (Emphasis added.) Specifically, Measure B re-defines

1 disability retirement for Police Officers by now requiring a determination that an
2 employee be unable to “perform *any other jobs* described in the City’s classification plan
3 *in the employee’s department* because of his or her medical condition.” (Emphasis
4 added.) The practical effect for a Police Officer is that if he or she is able to perform *any*
5 function within the police department—including non-peace officer functions—he or she
6 is now ineligible for disability retirement. Under the current Retirement Plan, such an
7 employee would have been eligible for disability retirement if he or she could not perform
8 work within his or her own classification.

9 50. Measure B further requires that a disability retirement assessment be
10 made even if there are *no* positions for which an otherwise-disabled Police Officer may be
11 eligible—i.e., even if there are no vacancies for such jobs. That means that if an
12 otherwise-disabled employee is found to be able to perform non-peace officer functions in
13 his or her department but there is no available vacancy, that employee will be ineligible
14 for disability retirement. Even if there is an available vacancy, Measure B would not
15 require that the officer be placed in the vacancy. Under Measure B such an employee
16 would get *nothing* even though he or she was incapacitated in the line of duty. Measure B
17 does not provide employees with any comparable advantage for taking away this right.

18 **Section 1510-A: Unfettered Right to Deny COLA Increases**

19 51. Section 1510-A gives the City the right to deny COLA increases to non-
20 VEP and VEP employees alike. Upon a unilateral declaration of “fiscal and service level
21 emergency” by the City Council, it allows the City to suspend COLA increases to
22 applicable retirees (defined as “current and future retirees employed as of the effective
23 date of this Act”) for up to five years. Measure B does not require that the time period for
24 which COLAs are suspended have any nexus to the declared emergency. Nor does
25 Measure B contain any definition of a “fiscal and service level emergency” or even
26 require that the City Council’s suspension of COLAs be “reasonable” under the
27 circumstances or reasonably related to the declared emergency. Measure B does not
28 provide employees with any comparable advantage for taking away this right.

1 the other salary deductions under Measure B, which will have a detrimental impact on
2 SJPOA members.

3 57. Additionally, Measure B detrimentally re-defines “low cost plan” to
4 mean “the medical plan which has the lowest monthly premium available to any active
5 employee in either the Police and Fire Department Retirement Plan or Federated City
6 Employees’ Retirement Plan.” That effectively makes it impossible for the SJPOA to
7 bargain over retiree medical benefits, as it will fix employees’ benefits to the lowest cost
8 plan City-wide, regardless of whether such plan was bargained for by another bargaining
9 unit or unilaterally imposed on another bargaining unit by the City.

10
11 **Section 1513-A: Compromising Board’s Fiduciary Duties to
Current and Future Beneficiaries**

12 58. Section 1513-A compromises the Retirement Board’s constitutionally-
13 based fiduciary duties to current and future beneficiaries, including SJPOA members, by
14 forcing the Retirement Board to take into account “*any* risk to the City and its residents”
15 in its actuarial analyses, by compelling the Retirement Board to equally “ensure fair and
16 equitable treatment for current and future plan members *and taxpayers* with respect to the
17 costs of the plans [,]” and requiring the Retirement Board to act with the objective “to
18 minimize ... the volatility of contributions required to be made by the City” These
19 changes violate Article XVI, section 17 of the California State Constitution, which
20 mandates that the Retirement Board’s fiduciary duties are owed only to participants and
21 their beneficiaries.

22 **Sections 1514-A and 1515-A: Poison Pill and Usurping Judicial Function**

23 59. Measure B would punish employees for exercising their constitutional
24 rights to challenge its provisions in the courts in at least two different ways. It also usurps
25 the power of the judiciary.

26 60. Section 1514-A contains a wholly punitive “poison pill” that mandates
27 that if Section 1506-A(b)—which requires that the salaries of non-VEP, current
28 employees be reduced by as much as 16% to cover half of the UAL under the Retirement

1 Plan—is “illegal, invalid or unenforceable as to Current Employees,” then “an equivalent
2 amount of savings *shall* be obtained through *pay reductions*.” Measure B does not require
3 that such pay reductions be used to pay UAL. It does not even provide any guidance as to
4 what those reductions should be used for and appear to be reductions for the sake of
5 reductions.

6 61. The absence of any such guidance makes plain that the reduction in
7 employee salaries is merely punitive, *i.e.*, to discourage employees from challenging
8 Measure B in court and to punish them if they are successful.

9 62. Section 1515-A contains another provision that provides that “[i]f any
10 ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise
11 unenforceable by a final judgment, the matter shall be referred to the City Council” to
12 have it decide “whether to amend the ordinance consistent with the judgment, or whether
13 to determine the section severable and ineffective.”

14 63. The City Council is not a court and may not decide the legality of a
15 measure it unilaterally put before the voters. Under our system of government, the
16 decisions described above are not up to the City Council but are the province of the
17 courts. Measure B usurps the power of the judiciary to fashion an appropriate remedy and
18 to decide the severability of unlawful ordinances promulgated thereunder.

19 64. Section 1515-A has the additional effect of discouraging employees from
20 challenging Measure B in court, because even if they were successful, the City could take
21 the position that it has the sole and ultimate authority to decide their suit.

22 **RIGHT TO INJUNCTIVE AND DECLARATORY RELIEF**

23 65. No adequate remedy exists at law for the injuries suffered by SJPOA
24 members because the constitutional violations cannot be protected against and SJPOA
25 members’ rights cannot be preserved absent injunctive relief. If this Court does not grant
26 injunctive relief of the type and for the purpose specified below, SJPOA and its members
27 will suffer further irreparable injury.

28

1 authority and fiduciary responsibility for investment of moneys and administration of the
2 system” The City, in violation of Cal. Civ. Code section 52.1, has violated and
3 continues to violate the rights of plaintiff’s members herein alleged.

4 109. Measure B violates the California Constitution because it compromises
5 the Retirement Board’s constitutionally-based fiduciary duties to SJPOA members, who
6 participate in the plan as future retirees, by compelling the Board to consider “any risk to
7 the City and its residents” in its actuarial analyses and by compelling the Retirement
8 Board to equally “ensure fair and equitable treatment for current and future plan members
9 and taxpayers with respect to the costs of the plans”

10 **PRAYER**

11 WHEREFORE, Plaintiff SJPOA prays for the following relief:

12 1. A declaration that:

13 a. Measure B cannot be applied to SJPOA members working for the
14 City on or before June 5, 2012;

15 b. the City was and is required to provide SJPOA members with the
16 retirement benefits and Retirement Plan in place when they began working for the City, as
17 well as any enhancements made during their service with the City;

18 c. the City is required to provide the retirement benefits delineated in
19 the MOA;

20 d. and, by the above-described actions and omissions, the City violated
21 its obligations.

22 2. A preliminary and permanent injunction prohibiting the City from
23 applying or otherwise enforcing any part of Measure B to SJPOA members working for
24 the City before June 5, 2012;

25 3. For any and all actual, consequential, and incidental damages as against
26 the City according to proof, including but not limited to damages that have been or may
27 be suffered by members of SJPOA and all costs incurred by SJPOA in attempting to
28 enforce the constitutional and statutory rights of the association and its members;

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- 4. For attorneys' fees as against the City pursuant to California Code of Civil Procedure section 1021.5, Government Code section 800, or otherwise;
- 5. For costs of suit herein incurred; and,
- 6. For such costs and further relief as the Court deems just and proper.

Dated: June 6, 2012

CARROLL, BURDICK & McDONOUGH LLP

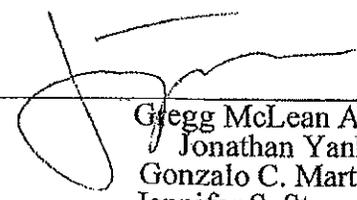
By 
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Jennifer S. Stoughton
Attorneys for Plaintiff
San Jose Police Officers' Association

EXHIBIT C

1 JOHN McBRIDE, ESQ., SBN 36458
2 CHRISTOPHER E. PLATTEN, ESQ., SBN 111971
3 MARK S. RENNER, ESQ., SBN 121008
4 Wylie, McBride, Platten & Renner
5 2125 Canoas Garden Avenue Suite 120
6 San Jose, CA 95125
7 Telephone: 408.979.2920
8 Facsimile: 408.979.2934
9 cplatten@wmpirlaw.com

10 Attorney for Plaintiffs and Petitioners
11 ROBERT SAPIEN, MARY KATHLEEN McCARTHY,
12 THANH HO, RANDY SEKANY and KEN HEREDIA

ENDORSED
FILED

JUN 06 2012

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

M. Rawson

13 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SANTA CLARA**

15 ROBERT SAPIEN, MARY KATHLEEN
16 McCARTHY, THANH HO, RANDY
17 SEKANY and KEN HEREDIA

18 Plaintiffs and Petitioners,
19 vs.

20 CITY OF SAN JOSE, DEBRA FIGONE, in
21 her official capacity as City Manager of
22 the CITY OF SAN JOSE, and Does 1
23 through 15,

24 Defendants and Respondents.

25 THE BOARD OF ADMINISTRATION FOR
26 THE 1961 SAN JOSE POLICE AND FIRE
27 DEPARTMENT RETIREMENT PLAN,

28 Necessary Party in Interest

Case No. **112CV225928**

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND PETITION FOR
WRIT OF MANDATE/PROHIBITION OR
OTHER APPROPRIATE WRIT RELIEF**

By this action, plaintiffs and petitioners, active and retired members of the 1961 San Jose Police and Fire Department Retirement Plan (Plan), seek injunctive, declaratory and writ relief to invalidate certain amendments to the San Jose City Charter as violations of their vested contract rights.

\\

1 Plaintiffs and petitioners allege:

2 **PUBLIC EMPLOYEE PENSION RIGHTS ARE PROTECTED UNDER CALIFORNIA LAW**

3
4 1. Under California law, when a public entity creates a pension system, the
5 right to that pension immediately vests when an employee accepts employment. A
6 pension system may be modified prior to employee retirement for the limited purpose
7 of keeping the system flexible and to maintain the integrity of the system. Before
8 employee pension rights can be detrimentally affected, commensurate benefits must
9 be given the employee to prevent an unconstitutional impairment of pension
10 entitlements. When governmental action impairs vested pension rights, the courts are
11 required to enjoin such conduct.
12

13
14 2. Firefighters employed by the City since 1961 have participated in the
15 Plan provided under San Jose Municipal Code (SJMC), Chapter 3.36, §§ 3.36.010 et
16 seq., a true and correct copy of the Plan is attached as Exhibit A. On June 5, 2012, San
17 Jose voters enacted Local Measure B, a true and correct copy of which is attached as
18 Exhibit B. It amends the City Charter to impose various changes and limitations to
19 Plan benefits for active and retired firefighters. These changes and limitations
20 unconstitutionally impair Plaintiffs' and Petitioners' vested contract rights. These
21 impairments include, but are not limited to: (a) eliminating disability retirement
22 benefits by redefining eligibility to require that a firefighter be unable to perform as a
23 firefighter *and* "any other jobs described in the City's classification plan" in the Fire
24 Department because of the firefighter's medical condition, even if no such jobs are
25 available which the disabled firefighter can perform; (b) permitting the City Council
26 upon a declaration of a "fiscal and service level emergency" to suspend and forfeit
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1 annual cost of living adjustments (COLAs) to retirees; (c) forcing employees to make
2 additional contributions for up to 50% of the pension plan's unfunded actuarially
3 accrued liability (UAAL); (d) forcing employees to make additional contributions for up
4 to 50% of the retiree medical plan's unfunded UAAL; and, (e) eliminating the
5 Supplemental Retiree Benefit Reserve (SRBR) which funds supplemental benefits to
6 annuitants and survivors.
7

8 PARTIES

9
10 3. Plaintiff and petitioner Robert Sapien is a resident, taxpayer, and
11 registered voter of the County of Santa Clara, California. Plaintiff and Petitioner
12 Sapien is a San Jose firefighter and an active participant in the Plan.

13 4. Plaintiff and petitioner Mary Kathleen McCarthy is a San Jose firefighter
14 and an active participant in the Plan.

15 5. Plaintiff and petitioner Thanh Ho is a San Jose firefighter and an active
16 participant in the Plan.

17 6. Plaintiff and petitioner Randy Sekany worked as a San Jose firefighter for
18 the San Jose Fire Department (SJFD) for more than 28 years before retiring in 2008.
19 Plaintiff and Petitioner Sekany is a retired annuitant of the Plan.
20

21 7. Plaintiff and petitioner Ken Heredia worked as a San Jose firefighter for
22 the SJFD for more than 29 years before retiring in 1999. Plaintiff and Petitioner
23 Heredia is a retired annuitant of the Plan.
24

25 8. Defendant and respondent City of San Jose (City) is a municipal
26 corporation in the State of California that operates under the authority of the California
27 Constitution and the City Charter.
28

1 9. Defendant and respondent Debra Figone is the San Jose City Manager.
2 She is sued in her official capacity. Under the City Charter, Figone is the chief
3 administrative officer of the City responsible to the Council for the administration of
4 City affairs placed under her charge including but not limited to responsibility for the
5 faithful execution of all laws, provisions of the charter and acts of the Council which
6 are subject to enforcement by her or by officers who are under her direction and
7 supervision.
8

9 10. Defendants and respondents Does 1 through 15, inclusive, are sued
10 under fictitious names. Their true name and capacities are unknown to plaintiffs and
11 petitioners. When their true names and capacities are ascertained, plaintiffs and
12 petitioners will amend this complaint by inserting their true names and capacities.
13 Plaintiffs and petitioners are informed and believe, and thereon allege, that each of the
14 fictitiously named defendant and respondent is responsible in some manner for the
15 occurrences alleged in this action, and that plaintiffs' and petitioners' damages as
16 alleged in this action are proximately caused by those defendants and respondents.
17

18 11. Necessary Party in Interest the Board of Administration of the 1961
19 Police and Fire Department Retirement Plan (Board) is the body appointed by the City
20 Council responsible for managing, administering and controlling all funds in the Plan
21 established under the SJMC and the California Constitution, art. XVI, §17. The Board
22 administers the retirement system and performs various functions related to the Plan,
23 including determining eligibility for receipt of retirement benefits, the calculation of
24 employer and employee contributions, the management and investment of the Plan's
25 funds and the distribution of pension benefits to retired firefighters.
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28 \\ \\

JURISDICTION AND VENUE

1
2 12. Plaintiffs and petitioners bring this action for declaratory relief pursuant to
3 Code of Civil Procedure §1060 to determine the constitutionality and validity of
4 Measure B. Plaintiffs and Petitioners bring this action for injunctive relief pursuant to
5 Code of Civil Procedure §§526 and 527 and Civil Code §52.1 to enjoin the
6 implementation of Measure B because it violates plaintiffs' and petitioners'
7 constitutional and contract rights. Plaintiffs and petitioners also bring this action as a
8 petition for appropriate writ relief under Code of Civil Procedure §1085 to block
9 implementation of Measure B as an unconstitutional impairment of contract under art.
10 I, §9, an unconstitutional violation of substantive due process under art. I, §7 and an
11 unconstitutional taking of property without just compensation under art. I, §19,
12 respectively, of the California Constitution and the existing terms of the Plan. This
13 action is properly filed in the County of Santa Clara pursuant to Code of Civil
14 Procedures §§394 and 395 and Civil Code §52.1.
15
16

FACTS COMMON TO ALL CAUSES OF ACTION

17
18
19 13. Membership in the Plan is compulsory and a condition of employment for
20 SJFFs. Retirement benefits under the Plan are funded by contributions from both the
21 pension Plan's members and the City, which contributions are in turn invested for the
22 benefit of the Plan members. Employee contributions for normal service cost and for
23 COLAs are credited to member participation accounts. Employees make no
24 contributions towards prior service cost, except for that portion of the contributions
25 provided by SJMC. §§3.36.1555. This Plan provision requires member contributions
26 because of the increased benefits provided by SJMC §§3.36.805 and
27
28

1 §3.36.1020.B.3 The contributions under these Plan provisions cover the member
2 cost for benefits improvements retroactively provided by an interest arbitration award
3 under Charter §11111; the contributions represent the amount of normal service
4 contributions members would have made from the effective date of the benefit
5 increase (i.e., February 4, 1996) to the date of the interest arbitration award,
6 amortized like prior service costs. In contrast, the City's contributions are credited to
7 the Plan as a whole. When investments exceed the actuarially assumed investment
8 growth rate, the City's unfunded actuarially accrued liability (UAAL) for prior service
9 costs is reduced. Moreover, when the funding ratio with the Plan's assets to liabilities
10 exceeds 100%, the positive UAAL (or over-funding of the Plan) serves as a credit in
11 favor of the City by reducing its normal cost contributions.
12
13

14 14. As adopted, Measure B amends the City Charter to alter provisions of the
15 Pension Plan as it affects contribution rates and benefits for participants and
16 annuitants. Measure B reduces, changes or eliminates existing retirement benefits
17 enjoyed by current employees and retirees and reduces retirement benefits for San
18 Jose firefighters in pertinent part, as follows:
19

20 a. Disability Retirement. Under SJMC §3.36.900 et seq., active
21 firefighters are entitled to a disability pension benefit if they can no longer work as
22 firefighters. The Board determines entitlement for a disability retirement upon proof of
23 "incapacity for the performance of duty," whether service-connected or nonservice-
24 connected if under SJMC §3.36.970 the firefighter is "incapable of assuming the
25 responsibilities and performing the duties of the position then held by him [sic] or of
26 any other person in the same classification of positions [i.e., firefighter classifications]
27 to which the city may offer to transfer him" (SJMC §3.36.900). Among other things,
28

1 Measure B, §1509-A subd. (a) and (b) limits disability retirements for current and
2 future firefighters to instances where the SJFF is unable to perform any other job
3 within the SJFD, whether such job is available and whether or not the City offers
4 such a job to the firefighter. Thus, under Measure B, if a disabled firefighter is
5 capable of performing secretarial duties in the SJFD, but no such positions are
6 available, or such position is not offered, the firefighter is ineligible for disability
7 retirement benefits. Measure B, §1509-A subd. (c) displaces the responsibility for
8 determining eligibility for disability retirement benefits from the Board, and instead
9 vests that responsibility in "an independent panel of medical experts" subject to "a
10 right of appeal to an administrative judge." Measure B does not define a "medical
11 expert" nor does it define "an administrative judge". Measure B does not afford any
12 offsetting or comparable benefit or advantage to the Plan participants for §1509-A.
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15 b. Cost-of-Living Adjustments. Under SJMC §3.44.150 San Jose
16 firefighter annuitants receive an annual COLA of 3% to their monthly allowance,
17 effective each February 1st. Measure B, §1510-A authorizes the Council to suspend
18 costs of living adjustment paid to current and future retirees for up to five years, if the
19 Council adopts a resolution declaring a fiscal and service level emergency based on
20 unidentified criteria. There is no requirement under Measure B to repay annuitants for
21 the suspension or forfeiture of the COLAs. Measure B does not afford any offsetting
22 or comparable benefit or advantage to Plan participants for §1510-A.
23
24

25 c. Contributions. Under SJMC §3.36.1500 et seq., the Plan requires
26 the City and SJFFs to make contributions towards the normal cost of the Plan in a
27 ratio of eight (City) to three (SJFF). Absent specific exceptions resulting from
28 collective bargaining, under SJMC §3.36.1550, the City is required to make 100% of

1 the contributions toward the UAAL that results from insufficient Plan assets to pay
2 projected retirement costs. Under Measure B, §1506-A subd. (b), beginning July 23,
3 2013, employees will be required to make additional contributions to pay the Plan's
4 UAAL. San Jose firefighters will contribute from 4% of pay, up to a maximum of
5 16% of pay per year, but no more than half the yearly cost to pay the UAAL. There is
6 no provision for a reduction in firefighter contributions in the event that the UAAL
7 declines to less than current amounts. Moreover, under Measure B, §1514-A, if a
8 court determines that the provisions of §1506-A subd. (b) are unenforceable,
9 equivalent monetary "savings" will be imposed on employees by "pay reductions".
10 Measure B does not afford any offsetting or comparable benefit or advantage to Plan
11 participants for §1506-A.
12
13

14 d. Retiree Health Benefits. Under SJMC §3.36.575, the Plan
15 establishes medical benefit accounts within the retirement fund to provide retiree
16 medical benefits, including benefits for sickness, accident, hospitalization, dental or
17 medical expenses. Contributions for the normal cost of these benefits are made by
18 the City and the firefighters for dental benefits in the ratio of three (City) to one
19 (firefighter) and for medical benefits in the ratio of one (City) to one (firefighter).
20 SJMC 3.36.1900 et seq. sets out eligibility criteria for medical benefits annuitants and
21 allocates the costs of premiums for medical benefits. Under Measure B, §1512-A, the
22 cost burden for unfunded liabilities for these benefits is shifted from the City to the
23 firefighters since they "must contribute a minimum of 50% of the cost of retiree
24 healthcare, including both normal cost and unfunded liabilities." Measure B does not
25 afford any offsetting or comparable benefit or advantage to Plan participants for
26 §1512-A.
27
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1 e. Supplemental Retirement Benefits. Under SJMC §3.36.580 a
2 "gain sharing" segregated fund called the Supplemental Retiree Benefits Reserve
3 (SRBR) is established which requires the allocation of a portion of excess Plan
4 investment income to fund supplemental benefits to annuitants. Measure B, §1511-A
5 discontinues the SRBR, and returns the SRBR segregated funds to the Plan's general
6 fund and prohibits the payment of supplemental benefits out of the SRBR or other Plan
7 assets. Measure B does not afford any offsetting or comparable benefit or advantage
8 to Plan participants for §1511-A.

10 15. Plaintiffs and petitioners have no plain, speedy and adequate remedy in
11 the ordinary course of law, other than the relief sought in this complaint and petition,
12 because the constitutional violations at issue cannot be protected against and
13 plaintiffs' and petitioners' rights cannot be preserved absent injunctive or writ relief.

15 16. Defendants and respondents implementation of the foregoing provisions
16 of Measure B is wrongful conduct, and unless and until enjoined and restrained by
17 order of this court, will cause great and irreparable injury to plaintiffs and petitioners
18 by impairing provision of vested pension rights.

20 17. Plaintiffs and petitioners have no adequate remedy at law for the
21 wrongful implementation of the foregoing provisions of Measure B because it will be
22 impossible to determine the precise measure of damages that will be suffered if
23 defendants' and respondents' conduct is not restrained, and plaintiffs and petitioners
24 will be forced to institute a multiplicity of suits to obtain adequate compensation for
25 each individual's injuries.

27 18. Defendants and respondents have a non-discretionary legal, constitutional
28 and contractual duty to continue in effect all vested Plan provisions, rights and

1 benefits to plaintiffs and petitioners. At all times herein mentioned, defendants and
2 respondents have been able to provide all provisions, rights and benefits under the
3 Plan in effect as of June 4, 2012 to plaintiffs and petitioners.

4
5 **FIRST CAUSE OF ACTION**
6 **REQUEST FOR DECLARATORY RELIEF**

7 19. Plaintiffs and petitioners hereby incorporate by reference the preceding
8 paragraphs.

9 20. Article I, §7 of the California Constitution prohibits the taking of property
10 without due process.

11 21. Article I, §9 of the California Constitution prohibits laws that impair
12 contracts.

13 22. Article I, §19 of the California Constitution prohibits the taking of private
14 property for public use in the absence of just compensation.

15 23. An actual controversy has arisen and now exists between plaintiffs and
16 petitioners and defendants and respondents relative to their respective rights and
17 duties in that plaintiffs and petitioners contend that Measure B is unconstitutional,
18 invalid and unenforceable, both on its face and as construed by defendants and
19 respondents, because it impermissibly impairs vested contract rights to pension
20 benefits under the Plan. The impairment is neither reasonable nor material to the
21 theory of the pension system and its successful operation. It changes pension plan
22 benefits in a manner which results in a disadvantage to employees and annuitants
23 without comparable new advantages.
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1 24. Plaintiffs' and petitioners require a declaration as to the validity of
2 Measure B, both on its face and as applied to plaintiffs' and petitioners' status as
3 plan members. A judicial declaration is necessary and appropriate at this time so that
4 plaintiffs and petitioners may ascertain their rights and duties.

5 25. The City Council prepared and authorized Measure B, and based thereon,
6 plaintiffs and petitioners are informed and believe, and upon such information and
7 belief allege that the defendants and respondents dispute the allegations regarding
8 the invalidity of Measure B, their obligations under law, and the alleged violations of
9 the law.
10

11 **SECOND CAUSE OF ACTION**
12 **IMPAIRMENT OF CONTRACT**
13 **[CALIFORNIA CONSTITUTION ARTICLE I, §9]**
14

15 26. Plaintiffs and petitioners hereby incorporate by reference the preceding
16 paragraphs.
17

18 27. As set forth in the SJMC, the Plan gives rise to vested contractual rights
19 for employees both active participants and annuitants, prior to June 5, 2012.

20 28. Measure B impairs the contractual rights of plaintiffs and petitioners.

21 29. By impairing these contractual rights without giving plaintiffs and
22 petitioners any comparable advantage, commensurate benefit or compensation,
23 Measure B as applied to existing plan participants, both current San Jose firefighters
24 and annuitants, is unconstitutional and violates Article I, §9 of the California
25 Constitution.
26
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**THIRD CAUSE OF ACTION
SUBSTANTIVE DUE PROCESS**

[CALIFORNIA CONSTITUTION ARTICLE I, §7]

30. Plaintiffs and petitioners hereby incorporate by reference the preceding paragraphs.

31. Article I, §7 of the California Constitution prohibits the taking of property for a public purpose without due process of law.

32. Plaintiffs and petitioners have vested property right in the benefits provided by the Plan, and in the Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City.

33. By taking these protected benefits without giving plaintiffs and petitioners any comparable advantage, commensurate benefit or compensation, Measure B violates Article I, §7 of the California Constitution.

FOURTH CAUSE OF ACTION

TAKING

[CALIFORNIA CONSTITUTION ARTICLE I, §19]

34. Plaintiffs and petitioners hereby incorporate by reference the preceding paragraphs.

35. Article I, §19 of the California Constitution prohibits the taking of private property for public use in the absence of just compensation.

36. Plaintiffs and petitioners have vested property right in the benefits provided by the Plan, and in the Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City. In

1 addition, the retirement benefits are a form of promise for compensation.

2 37. By taking these protected benefits without giving plaintiffs and
3 petitioners any comparable advantage, commensurate benefit or compensation, the
4 provisions of Measure B violates Article I, §19 of the California Constitution as to the
5 taking of property for a public purpose without just compensation.
6

7 **FIFTH CAUSE OF ACTION**

8 **PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT
RELIEF**

9 1. Plaintiffs and petitioners hereby incorporate by reference the preceding
10 paragraphs.

11 2. Plaintiffs and petitioners are informed and believe, and upon such
12 information and belief allege that upon the effective date of Measure B, if not before,
13 defendants and respondents will implement the provisions Measure B and will not
14 abide by all Plan provisions, rights and benefits in effect as of June 4, 2012.
15

16 **PRAYER FOR RELIEF**

17 WHEREFORE, plaintiffs and petitioners pray for the following relief:

18 1. A declaration that:

19 a. The provisions of Measure B cannot be applied to plaintiffs and
20 petitioners because it violates their constitutional and contractual rights; and,
21

22 b. The defendants and respondents were and are required to provide
23 plaintiffs and petitioners with the Plan provisions, rights and benefits in place when
24 they began working for the City, as well as any enhancements made during their
25 service with the City.

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28 \ \ \

1 2. A preliminary and permanent injunction prohibiting the defendants and
2 respondents and the Board from applying or otherwise enforcing any part of Measure
3 B to plaintiffs and petitioners, inclusive of the admonition required under Civil Code,
4 §52.1;

5 3. A preemptory writ mandating defendants and respondents and the Board
6 apply all Plan provisions, rights and benefits in effect as of June 4, 2012 to plaintiffs
7 and petitioners and prohibiting the defendants and respondents from applying or
8 otherwise implementing Measure B to plaintiffs and petitioners;

9 4. Any and all actual, consequential and incidental damages according to
10 proof, including but not limited to damages that have been or made be suffered by
11 plaintiffs and petitioners and all costs incurred by plaintiffs and petitioners in an
12 attempt to enforce the constitutional, statutory and contractual rights and described
13 herein;

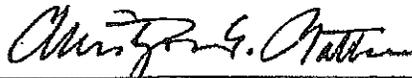
14 5. For attorneys' fees pursuant to California Civil Code §52.1, Code of Civil
15 Procedure §1021.5, Government Code §800 or otherwise;

16 6. For costs of suit herein incurred; and

17 7. For such costs and further relief as the Court deems just and proper.

18 Dated: June 5, 2012

19 WYLIE, McBRIDE,
20 PLATTEN & RENNER

21 

22 CHRISTOPHER E. PLATTEN

23 Attorneys for Plaintiffs and Petitioners
24 ROBERT SAPIEN, MARY KATHLEEN McCARTHY,
25 THANH HO, RANDY SEKANY and KEN HEREDIA

26
27
28 I:\0230\72256\pnd\complaint #2.doc x

respect to the board's policies of investing and reinvesting of moneys in the retirement fund. Such contracts shall be entered into in the name of the board of administration for the police and fire department retirement plan.

B. Any person or association who provides services to the board with regard to financial securities:

1. Shall be a person or association whose principal business consists of investment counseling services; and
2. Shall be registered as an investment adviser under such laws as may require such registration.

C. With respect to real estate advisors, the board shall enter into contractual arrangements only with persons or associations whose principal officers are engaged in the business of advising and evaluating commercial, industrial or residential real estate investments, mortgage banking, or property management, and which are licensed as real estate brokers by the State of California.

(Ords. 21607, 25084, 25553.)

Chapter 3.36
1961 POLICE AND FIRE DEPARTMENT RETIREMENT PLAN.

Parts:

- 1 General Provisions and Definitions
- 2 Membership
- 3 Retirement Board and Other Officers
- 4 Retirement Fund
- 5 Service
- 5.5 Benefits Generally
- 6 Retirement for Service
- 7 Retirement for Disability
- 8 Survivorship and Death Benefits
- 9 Surviving Child's School Allowance
- 9.5 Optional Settlements
- 10 Contributions
- 11 Suspension or Termination
- 12 Increased Benefits for Certain Persons

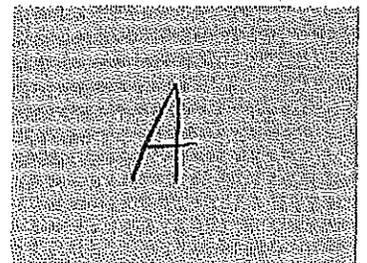


EXHIBIT D



OPERATING ENGINEERS LOCAL UNION No. 3

1620 SOUTH LOOP ROAD, ALAMEDA, CA 94502-7089 • (510) 748-7400 • FAX (510) 748-7436

Jurisdiction: Northern California, Northern Nevada, Utah, Hawaii, and the Mid-Pacific Islands

Via US Mail

November 23, 2011



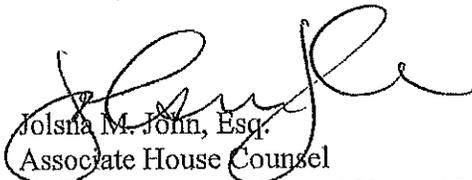
Public Employment Relations Board
Oakland Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514

Re: OE3 UPC against City of San Jose

To Whom It May Concern:

I write to you on behalf of Operating Engineers Local Union No. 3 to submit the enclosed unfair practice charge against the City of San Jose that was electronically filed today. If you have any questions, please contact me at 510.748.7400.

Sincerely,



Jolsna M. John, Esq.
Associate House Counsel

Operating Engineers Local Union No. 3

Enclosure

CC: Robert E. Jesinger, Esq., House Counsel
Carl Carey, Public Employees Division Director
Bill Pope, Business Representative
Giña Donnelly, City of San Jose (Office of Employee Relations; 200 E. Santa Clara Street; San Jose, CA 95113)



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
UNFAIR PRACTICE CHARGE

DO NOT WRITE IN THIS SPACE: Case No.: Tracking No.: 4632K892W966 Date Filed: 11/23/2011 12:33:47

INSTRUCTIONS: File the original and one copy of this charge form with proof of service attached to each copy in the appropriate PERB regional office (see PERB regulation 32075). Proper filing includes concurrent service and proof of service of the charge as required by PERB regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE? YES NO If yes, Case Number:

1. CHARGING PARTY: EMPLOYEE EMPLOYEE ORGANIZATION EMPLOYER

a. Full name:
OPERATING ENGINEERS LOCAL UNION NO. 3
b. Mailing Address:
1620 SOUTH LOOP ROAD
ALAMEDA, CA 94502
c. Telephone number:
(510)-748-7400 x3610
d. Name, title, and telephone number of person filing charge:
JOLSNA M. JOHN, ESQ., ASSOCIATE HOUSE COUNSEL, (510)-748-7400
e. Bargaining unit(s) involved:
UNIT 61 - CITY OF SAN JOSE PUBLIC WORKS

2. CHARGE FILED AGAINST: (mark only one) EMPLOYEE ORGANIZATION EMPLOYER

a. Full name:
CITY OF SAN JOSE
b. Mailing Address:
200 E. SANTA CLARA STREET
SAN JOSE, CA 95110
c. Telephone number:
(408)-535-3500
d. Name, title, and telephone number of agent to contact:
GINA DONNELLY, EMPLOYEE RELATIONS MANAGER, (408)-535-8150

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization.)

a. Full name:
b. Mailing Address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Government Code section 18524.)

a. Full name:
b. Mailing Address:
c. Agent:

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

Yes No

6. STATEMENT OF CHARGE

- Educational Employment Relations Act (BERA) (Gov. Code sec. 3540 et seq.)
- Ralph C. Dills Act (Gov. Code sec. 3512 et seq.)
- Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code sec. 3560 et seq.)
- Meyers-Millas-Brown Act (MMBA) (Gov. Code sec. 3500 et seq.)
- Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEBRA) (Pub. Utilities Code sec. 99560 et seq.)
- Trial Court Employment Protection and Governance Act (Trial Court Act) (Article 3; Gov. Code sec. 71630 -- 71639.5)
- Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code sec. 71800 et seq.)

b. The specific Government or Public Utilities Code section(s), or PERB regulation section(s) alleged to have been violated is/are: Gov. Code 3503, 3505, 3506 et seq.

c. For MMBA, Trial Court Act and Court Interpreter Act cases, if applicable, the specific local rule(s) alleged to have been violated is/are (a copy of the applicable local rule(s) MUST be attached to the charge):

d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and not conclusions of law. A statement of the remedy sought must also be provided. (Use and attach additional sheets of paper if necessary.)

SEE ATTACHED

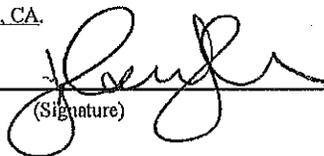
DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge

and belief and that this declaration was executed on NOVEMBER 23, 2011 at ALAMEDA, CA.

JOSNA M. JOHN, ESQ.

(Type or Print Name)



(Signature)

Title, if any: **ASSOCIATE HOUSE COUNSEL**

Mailing address:
**1620 SOUTH LOOP ROAD
ALAMEDA, CA 94502**

Telephone Number: **(510)-748-7400**



OPERATING ENGINEERS LOCAL UNION No. 3

1620 SOUTH LOOP ROAD, ALAMEDA, CA 94502-7089 • (510) 748-7400 • FAX (510) 748-7436
Jurisdiction: Northern California, Northern Nevada, Utah, Hawaii, and the Mid-Pacific Islands

Via Online Submission and US Mail

November 23, 2011

Public Employment Relations Board

**Re: OE3 UPC against City of San Jose
Section 6 Statement of Charge (d)**

To Whom It May Concern:

1. The Charging Party, Operating Engineers Local Union Number 3 represents employees in Unit 61 at the City of San Jose, an employer covered by the Meyers-Milias-Brown Act (MMBA).
2. The Respondent, City of San Jose, is an employer under PERB jurisdiction. Pursuant to the MMBA, the City is a public employer.
3. Both the Charging Party and the Respondent, pursuant to the MMBA, Government Code section 3505, entered into the Memorandum of Agreement effective July 1, 2010 through June 30, 2011. *See Exhibit 1 (MOA).*

Factual Summary

1. Charging Party and Respondent conducted all bargaining sessions at City Hall in San Jose, CA. Charging Party's negotiation team comprised of Business Representative Bill Pope, Public Employee Division Director Carl Carey, Bargaining Unit Member Cynthia Perez, and Bargaining Unit Member Jon Max Reger with Business Representative Pope serving as the Union's lead negotiator. Respondent's negotiation team comprised of Employee Relations Manager Gina Donnelly, Marcus Hermanson, Kevin O'Connor, and Jennifer Schembri with Employee Relations Manager Donnelly serving as the City's lead negotiator.
2. On or about February 17, 2011, Employee Relations Manager Donnelly sent via email to Business Representative Pope the City's initial list of negotiation interests and issues to Charging Party. *See Exhibit 2 (02/17/11 City's Initial List of Negotiation Interests and Issues).* Exhibit 2 specifies the items listed.

3. On or about February 22, 2011, negotiation teams for Charging Party and Respondent met to start negotiations on a successor contract. Employee Relations Manager Donnelly presented the City's initial list of negotiation interests and issues to Charging Party. *See Exhibit 3 (02/17/11 City's Revised Initial List of Negotiation Interests and Issues)*. Respondent in its revision added, "Change/modify language in Safety section" to its initial list of negotiation interests and issues.
4. On or about February 24, 2011, Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's proposals for the following subjects: arbitrator lists, release time, sick leave payout, holiday pay, and standby pay. *See Exhibit 4 (2/24/11 OE3 Proposal)*. Exhibit 4 specifies the terms of the Union's proposal.
5. On or about February 28, 2011, Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's proposal on pension reform for new hires. *See Exhibit 5 (2/25/11 OE3 Proposal – Pension Reform for New Hires)*. Exhibit 5 specifies the terms of the Union's proposal.
6. On or about March 3, 2011, Employee Relations Manager Donnelly on behalf of Respondent submitted to Business Representative Pope the City's proposals for Wages, Healthcare Cost Sharing, Healthcare Co-Pays, Healthcare Dual Coverage, Health and Dental in Lieu, and Safety. *See Exhibit 6 (3/2/11 City Proposals)*. Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's revised contract term and compensation, salary step structure, and release time proposals. *See Exhibit 7 (3/3/11 OE3 Proposals)*.
7. On or about March 7, 2011, negotiations teams identified above discussed ideas on the retirement issue. Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's holiday pay proposal. *See Exhibit 8 (3/4/11 OE3 Proposal for Holiday Pay)*.
8. On or about March 11, 2011, Employee Relations Manager Donnelly on behalf of Respondent presented the City's package proposal "A". *See Exhibit 9 (03/11/11 City Package Proposal "A")*. Exhibit 9 specifies the terms of the City's Proposal A. The Proposal included side letters on retirement reform, layoff, Supplemental Retiree Benefit Reserve, and public transit subsidy.
9. On or about March 14, 2011, Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's Proposals regarding documented oral counseling, safety, and certificate pay. *See Exhibit 10 (3/7/11 OE3 Proposal for Documented Oral Counseling, 3/8/11 OE3 Proposal for Safety, and 3/8/11 OE3 Proposal for Certificates)*.
10. On or about March 24, 2011, Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's Package Proposal #1. *See Exhibit 11 (03/24/11 Union Package Proposal #1)*.

11. On or about March 28, 2011, Employee Relations Manager Donnelly on behalf of Respondent presented the City's Package Proposal "B". *See Exhibit 12 (03/28/11 City Package Proposal "B")*. The Proposal included a new side letter requiring the Union to withdraw its additional retirement contribution grievance and forego any remedy.
12. On or about April 6, 2011, Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's Package Proposal #2. *See Exhibit 13 (4/6/11 OE3 Package Proposal #2)*. Business Representative Pope on behalf of Charging Party advised Respondent's Negotiation Team that the Union refuses to agree to the City's proposed side letters. Donnelly stated that the parties are far apart and requests mediation. Pope asked Donnelly got as counterproposal to the Union's Package Proposal #2. Donnelly stated that the City might be able to counter-propose in mediation. Later that day, Business Representative Pope on behalf of Charging Party submitted to Employee Relations Manager Donnelly the Union's Corrected Package Proposal #2. *See Exhibit 14 (4/6/11 OE3 Package Proposal #2 - Corrected)*.
13. On or about May 4, 2011, the parties met for a first of two mediation sessions. At the conclusion of the mediation session, Business Representative Pope requested a second mediation session.
14. On or about May 11, 2011, Business Representative Pope, Employee Relations Manager Donnelly and Senior Executive Analyst Jennifer Schembri met without the mediator present.
15. On or about May 12, 2011, Senior Executive Analyst Jennifer Schembri sent a letter to Business Representative Bill Pope advising Charging Party of the City's Last, Best, and Final Offer Proposals. *See Exhibit 15 (05/12/11 Letter from Schembri to Pope)*. Exhibit 9 contains the two (2) Last, Best, and Final Offers including their specific terms that the City presented to the Union.
16. On or about May 13, 2011, Mayor Chuck Reed, Vice Mayor Madison Nguyen, Councilmember Rose Herrera, and Councilmember Sam Liccardo approved a Fiscal Reforms Memoranda. *See Exhibit 16 (05/13/11 Memorandum from Mayor Chuck Reed, Vice Mayor Madison Nguyen, Councilmember Rose Herrera, and Councilmember Sam Liccardo to City Council)*. Respondent placed this Memorandum on the City Council's May 24, 2011 Agenda and the City Council approved this memoranda on May 24, 2011.
17. On or about May 18, 2011, the parties reached a mediated tentative agreement. *See Exhibit 17 (05/18/11 Mediated Tentative Agreement)*.
18. On May 24, 2011, Business Representative Pope notified Ms. Donnelley that the Union's membership voted down the Mediated Tentative Agreement.
19. On or about May 31, 2011, the City Council approved the implementation of the terms contained in the City's Last, Best, and Final Offer – Alternative A ("final offer"). *See Exhibit 18 (05/31/11 City Council Approved Agenda Item 3.4)*.

20. On or about June 3, 2011, Gina Donnelly on behalf of the City sent a letter to Business Representative Pope advising that on May 24, 2011 the City Council approved a memo concerning a proposed ballot measure. *See Exhibit 19 (06/03/11 Donnelly letter to Pope re: Proposed Ballot Measure).*
21. On or about June 8, 2011, Ms. Donnelly on behalf of the City sent a letter to Business Representative Pope and other Union leaders concerning the City's Retirement Reform and Proposed Ballot Measures. *See Exhibit 20 (06/08/11 Donnelly letter to Pope et al re: Retirement Reform and Proposed Ballot Measure).*
22. On or about June 22, 2011, Ms. Donnelly on behalf of the City sent a letter to Business Representative Pope rejecting the coalition union's proposed framework. *See Exhibit 21 (06/22/11 Donnelly letter to Pope re: Proposed Ballot Measure).*
23. On or about June 23, 2011, Teague Paterson responded to Ms Donnelly's June 22nd letter for the coalition of unions requesting meaningful meet-and-confer. *See Exhibit 22 (06/23/11 Paterson letter to Donnelly re: City of San Jose – Framework for Bargaining).*
24. On or about June 30, 2011, the City implemented the terms of the "final offer" on the Union upon the expiration of the Union's MOA.
25. On or about July 6, 2011, Ms. Donnelly on behalf of the City sent a letter to Business Representative Pope to provide the Union with a copy of the draft proposed ballot measure. *See Exhibit 23 (07/06/11 Donnelly letter to Pope re: Draft Proposed Ballot Measure).*
26. On or about July 29, 2011, the coalition of unions (including Business Representative Bill Pope for the Union) and the City met. The City for all coalition meetings was represented by Ms. Donnelly (lead negotiator) and Ms. Aracely Rodriguez. The Coalition consisting of AFSME-MEF, AFSME-CEO, OE3, IBEW, and ABMEI. Mr. Charles Allen from AFSME served as the lead negotiator for the Coalition. Mr. Dan Doonan of AFSME International served as the subject matter expert for the Coalition's New Hire Proposal. The coalition of unions proposed language pertaining to new hire tier 2. *See Exhibit 24 (0729/11 Union Proposal New Hire Tier 2).* After the Coalition's presentation, Ms. Donnelly asked questions and Mr. Doonan answered her questions. The City never provided a counterproposal to the Union's proposal. The parties also discussed retiree pension and medical benefits.
27. On or about August 31, 2011, Business Representative Pope along with other representatives from the coalition of unions sent a letter to Mayor Reed and the City Council regarding the City's lack of authority to declare a Fiscal and Public Safety Emergency due to ongoing budget shortfalls. *See Exhibit 25 (08/31/11 Coalition Union's letter to Mayor Reed and City Council).* On this date, Mr. Pope on behalf of OE3 also met with Ms. Donnelly's bargaining team regarding the ballot measure. The parties did not reach resolution at this time.

28. On or about September 9, 2011, Ms. Donnelly on behalf of the City sent a letter to Business Representative Pope with the revised draft proposed ballot measure. *See Exhibit 26 (09/09/11 Donnelly letter to Pope re: Revised Draft Proposed Ballot Measure).*
29. On or about September 20, 2011, Deputy City Manager Alex Gurza sent via email a letter to Business Representative Pope and other coalition union representatives to provide the City's response to the Coalition's August 31st letter. *See Exhibit 27 (09/20/11 Gurza letter to Pope and other Coalition Union Representatives).*
30. On or about September 27, 2011, the Coalition of Unions and the City met. All were represented by the same individuals identified earlier for Coalition meetings.
31. On or about October 22, 2011, Yolanda Cruz on behalf of the Union Coalition sent Ms. Donnelly a letter with the Coalition's Proposal. *See Exhibit 28 (10/22/11 Cruz letter to Donnelly re: Non-Management Retirement Coalition Proposal for Opt-In Plan).*
32. On or about October 24, 2011, Councilmember Donald Rocha sent the Mayor and City Council a memorandum regarding retirement/pension reform. *See Exhibit 29 (10/24/11 Rocha memorandum to Mayor and City Council re: Retirement/Pension Reform).*
33. On or about October 31, 2011, Ms. Donnelly on behalf of the City sent Business Representative Pope a letter regarding the draft proposed ballot measure. In this writing, Ms. Donnelly states that OE3 has waived its right to meet and confer over the proposed ballot measure or the parties have declared impasse. She also advised that she would schedule mediation and if the Union failed to respond by November 3rd, she would assume that the Union waived mediation. *See Exhibit 30 (10/31/11 Donnelly letter to Pope re: Draft Proposed Ballot Measure).*
34. On or about November 2, 2011, Business Representative Pope sent a letter in response to Ms. Donnelly's October 31st letter specifying no waiver by the Union and specified that the City continued to not meet and confer in good faith and instead continue with their "take it or leave it" approach. Mr. Pope requested a timeline of when the Union would receive a counter proposal to its last offer. *See Exhibit 31 (11/02/11 Pope letter to Donnelly re: Draft Proposed Ballot Measure).*
35. On or about November 15, 2011, LaVerne Washington on behalf of the coalition of Unions sent to Ms. Donnelly the Coalition's Proposal which was the counter to the City's proposal. *See Exhibit 32 (Union Proposal).*
36. On or about November 22, 2011, the Coalition and the City participated in mediation. At the conclusion, Ms. Donnelly declared impasse. The Coalition members and the City's negotiation team met with the mediator. Ms. Carol Koenig served as the Coalitions spokesperson. The mediator advised the Coalition that the City did not have any additional authority than it had from the previous week but the City could move on items not within the ballot measure. The City at no time provided a counterproposal to the Coalition's proposal. The parties did not reach agreement.

Argument

37. Respondent failed to meet and confer in good faith prior to declaring impasse, failed to participate in the mediation process in good faith, and adopted a "final offer" without first exhausting the good faith meet-and-confer process for the following reasons:
38. Respondent's bargaining position on key proposals from the start of negotiations was "take it or leave it." Respondent's initial and final offers contained the exact same language for side letters addressing retirement benefits, layoffs and the Supplemental Retiree Benefit Reserve ("SRBR"). Respondent's proposals on a 10% pay decrease, a 2% rollback, salary step freezes and disability leave supplement never changed throughout negotiations. Respondent announced at the start of negotiations that they desired to achieve these specific items and made subsequent proposals to achieve its predetermined objective and never waived from their initial proposals. Respondent failed to respond to the Union's proposals. Respondent's conduct is bad faith, surface bargaining under the Act. See NLRB v General Electric, (2nd Cir. 1959) 418 F.2d 736, *cert. denied* (1970) 397 U.S. 965. See also, Muroc Unified School Dist. (1978) PERB Dec. No. 80; Jefferson School Dist., (1980) PERB Dec. No. 133; Fremont Unified School Dist., (1980) PERB Dec. No. 136; and Regents of the University of California, (1985) PERB Dec. No. 520-H. Similarly with regarding to the pension reform and ballot measure, Respondent adopted a "take it or leave it" approach throughout negotiations.
39. Respondent engaged in a per se violation of its duty to meet and confer in good faith when it insisted to impasse on the proposals contained in its "last, best and final" because Respondent insisted to impasse on non-mandatory subjects of bargaining that waive the union's rights. South Bay Union School Dist. V. Public Employment Relations Bd. (1991) 228 Cal.App.3d 502, 507, 279 Cal.Rpt. 135. Specifically, Respondent insisted to impasse on its proposed side letters addressing retirement benefits, layoffs, and the SRBR. Employer cannot insist on "permissive subjects of bargaining" to the point of impasse. Chula Vista City School District (1990) PERB Dec. No. 834, 14 PERC Para. 21162, p. 586. Respondent's intent is clear through the proposed side letters that it had the right to demand unilaterally that the Union engage in negotiations to modify established benefits (retirement and SRBR) or layoff procedures and upon impasse it could act unilaterally to change the established benefits or layoff procedure in any way the City desires when it so desired. Essentially, the side letters demanded that during the term of the MOA that the Union give up any rights to maintain negotiated terms and conditions during the terms of a negotiated MOA. This insistence effectively strips the Union of its bargaining authority and not lawful to implement upon impasse. See McClatchy Newspapers, Inc. v NLRB (1997, D.C. Cir.) 131 F.3d 1026.
40. Respondent engaged in conditional bargaining by conditioning the acceptance of an MOA on the Union's withdrawal of a grievance via the grievance side letter. See California State Employees' Assn. v Public Employment Relations Board (1996) 51 Cal.App.4th 923, 934-935, 59 Cal.Rptr.2d 488; Vernon Fire Fighters v City of Vernon (1980) 107 Cal.App.3d 802, 823, 165 Cal.Rptr. 908.

41. Respondent engaged in surface bargaining when it failed to act on Charging Party's proposals and offer counter proposals. *See* Jefferson School District (1980) PERB Dec. No. 133, 4 PERC Para. 11117.
42. Respondent engaged in surface bargaining when it insisted on extraneous conditions, such as the unions' withdrawal of its grievance via the grievance side letter. *See* Stockton Unified School District (1980) PERB Dec. NO. 133, 4 PERC Para. 11189, p. 773.
43. Respondent violated the Act when it prematurely declared impasse based on its arbitrary deadlines despite the coalition advising it that the Unions wanted to continue to meet and confer in good faith to find a resolution.

Remedies Sought

44. As remedies, Charging Party seeks for PERB to issue an order enjoining Respondent from implementing the "final offer" that its City Council approved on May 31, 2011, enjoining Respondent from putting the ballot measure on the ballot in March 2012, directing Respondent to make whole all employees adversely affected by the City's unilateral implementation of its "final offer", direct Respondent to return to the bargaining table to bargain in good faith with Charging Party, direct Respondent to post notices, and pay Charging Party's attorneys' fees and costs.

Sincerely,



Jolanta M. John, Esq.
Associate House Counsel
Operating Engineers Local Union No. 3

Enclosure

CC: Robert E. Jesinger, Esq., House Counsel
Carl Carey, Public Employees Division Director
Bill Pope, Business Representative
Gina Donnelly, City of San Jose (Office of Employee Relations; 200 E. Santa Clara Street; San Jose, CA 95113)

EXHIBIT E

Exhibit to Unfair Practice Charge
AFSCME Local 101, MEF & CEO v. City of San Jose

Item 6(d) – Statement of Charge

I. INTRODUCTION

This charge arises from changes the City of San Jose (“City” or “employer”) is seeking to make to its federated pension retirement system in which members of MEF and CEO, Local 101, AFSCME (collectively, the “Union”) participate. The changes sought by the City are mandatory subjects of bargaining. Since June 2011, the Union has attempted to negotiate with the City – and provide concessions – with respect to City’s retiree health and pension benefits. While the Union made substantial concessions during the bargaining sessions, the City was unwilling to reciprocate, engaging in only surface bargaining while refusing to move from its otherwise immutable and drastic position. Additionally, the city insisted on proposals that would make impermissible changes to vested benefits. Although the parties had agreed to bargain substantively over pension and retirement benefits concessions, the City simultaneously adopted, and will place for referendum on its June 5, 2012 ballot, a measure to amend the city charter to reduce employee pension and retirement health benefits. The ballot measure was not bargained with the Union. Attendant to the City’s unilateral adoption of its ballot measure, it terminated negotiations with the Union over pension and retirement benefits and prematurely declared an impasse.

The City has incorrectly asserted that it has negotiated its ballot measure and the proposed changes and has also improperly asserted that an impasse was reached. As set forth below, the City’s statements are belied by the fact that the proposed ballot measures neither tracked nor were responsive to the Union’s attempt to bargain substantively over retirement benefits. Indeed, the City has taken this action despite the fact that it had previously agreed to ‘table’ negotiations over the ballot measure pending substantive bargaining over retirement pension and health benefits.

In short, the City has failed to meet and confer in good faith, failed to engage in substantive bargaining, and prematurely declared impasse. It also plans to forward an unbargained ballot measure that seeks to put into place pension changes outside of the bargaining process. Indeed, subsequent unbargained changes made by the City to its ballot measure are further indicative of the City’s bad faith bargaining, as is the City’s failure to respond to the Union’s numerous information requests seeking information related to the status and funding of the City’s federated retirement system.

This unfair practice charge addresses the City's failure to meet and confer in good faith, its premature declaration of impasse, and its placement of a ballot measure affecting mandatory terms and conditions of employment without properly bargaining such terms and conditions with the Union.

II. STATEMENT OF FACTS

Before engaging in retirement-related negotiations, the Union and the City had been negotiating a successor Memorandum of Understanding ("MOU"). The successor MOU negotiations commenced prior to the expiration of the then-current MOU. Before the parties truly reached impasse on a successor agreement, the City prematurely declared impasse and imposed a last, best, and final offer ("LBFO"). The City voted to impose the terms of its LBFO on MEF on May 31, 2011, and imposed them prior to the expiration of the MEF contract on July 1, 2011. Even though its contract with CEO did not expire until September 18, 2011, the City declared impasse towards the end of April 2011. The City's imposition of terms is currently the subject to a separate Unfair Practice Charge (PERB Case No. SF-CE-837-ME; an amended charge was filed on August 19, 2011).

Notably, the City's LBFOs did not include language addressing retirement benefits. Instead, the City "imposed" a side letter proposing to defer negotiations over retirement benefits to a later date, a copy of which is attached hereto as Exhibit 1.

During these negotiations with the City, the Union stressed that the parties were not at impasse, refused to accept both the City's prematurely imposed LBFO and its side letter, and demanded to continue bargaining over substantive retirement issues as well as a successor MOU. It also informed the City that it would entertain a legitimate proposal on the issue. That the City can "impose" partial terms, while continuing to request bargaining over retirement issues is, of course, inimical to its duty to bargain in good faith.

Meanwhile, in a memorandum dated May 13, 2011, Mayor Chuck Reed, the Vice Mayor, and two Council members¹ proposed a plan for fiscal reform to the City Council, the employer's governing body. (Exhibit 2.) Specifically, they recommended declaring a fiscal and public safety emergency, proposing that the City Council pass a measure to amend the city charter via a ballot measure to limit retirement benefits and to further require voter approval of any increases in retirement benefits.

¹ For the sake of brevity, any further memoranda from Mayor Chuck Reed, the Vice Mayor, and any number of Council members will be referred to as memoranda from Mayor Reed.

Notwithstanding its imposition of terms on the Union, by letter date June 3, 2011, the City informed the Union that it was proposing to the City Council a ballot measure regarding retirement and pension benefit reform for city workers. (Exhibit 3.) This announcement was made under the guise of a simultaneous declaration of fiscal emergency under which the City contended it had no duty to bargain the proposed ballot measure.

In a letter dated June 12, 2011, the Union demanded that the City bargain over the City's contemplated changes to the workers' retirement and pension benefits, providing authority setting forth the City's duty to bargain. (Exhibit 4.)

On June 16, 2011, the City proposed a framework for negotiating with a coalition of city employee unions consisting of MEF, CEO, ABMEI, IBEW, and Local 3 of the Operating Engineers (the "Coalition"). The proposed topic was "retirement reform" and the proposed ballot measure.² (Exhibit 5.) The proposal was made notwithstanding the Union's earlier demand to continue to bargain over substantive retiree health and pension terms prior to the City's declaration of impasse.

The City proposed a bargaining framework or ground rules, in which it demanded that the parties agree to complete negotiations by October 31, 2011, and if the parties failed to reach an agreement by that time, the City and Coalition would proceed to impasse and move for the City Council's approval of the proposed ballot measure. The framework proposal further provided that in the event that impasse procedures were unsuccessful, the City would have the authority to unilaterally implement substantive pension changes and propose charter amendments in the form of ballot measures. The Union did not agree to the framework and, in response, the City determined that the Union has declined to participate in bargaining, as described below.

Meanwhile, in a letter dated June 20, 2011, Michael A. Troncoso, senior counsel to California Attorney General Kamala Harris, responded to California State Assembly Member Paul Fong about the prospects of the City of San Jose declaring a fiscal emergency over its budget shortfall. (Exhibit 6.) Troncoso opined that based on "even a cursory review, ... declaring a 'state of emergency' based on a financial crisis in order to justify the unilateral alteration of public contracts would be an extraordinary maneuver." Troncoso also pointed out that the Attorney General's Office had previously concluded that "the inability or difficulty in carrying out voluntarily undertaken normal government operations, because of financial straits, does not constitute an emergency" pursuant to article XIII B, section 3(c) of the California Constitution. (citing 65 Ops.Cal.Atty.Gen 151, 160 (1982).)

² The Union made it clear that while it would bargain with the City as a part of the Coalition, it also reserved the right to bargain individually.

Because the Union did not have an opportunity to bargain substantively over retirement benefits (as opposed to bargaining over a ballot measure), the proposed framework did not meet the requirements necessary to allow full and free bargaining over the terms and conditions of retirement benefits. Thus, after considering the City's proposed framework, the Coalition submitted a counter-proposal as to a bargaining framework, on June 20, 2011. The counter proposal retained most of the language from the City's June 16, 2011 framework. (Exhibit 7.) Further, the email to which the counter-proposal was attached indicated that the Coalition's primary goals for modifying the framework were twofold:

1. To provide a "mutual understanding of the costs and saving that [would] be achieved for retirement security" in order to "expedit[e] the negotiation process and reduce or eliminate the uncertainty of the cost implications of alternative[]" plans; and
2. To open the negotiations to the public in order to "remove the secrecy, misunderstandings, misinterpreted conversations or progress of the negotiation process...."

In letters to the Union's Presidents dated June 22, 2011, the City responded by rejecting the Union's counter-proposal in its entirety (Exhibits 8 & 9). Importantly, the City did not provide a counter-proposal of its own or demonstrate a willingness to continue negotiating over a framework. Instead, it announced that the Unions would be excluded from the bargaining process. This response demonstrated an unwillingness to negotiate over even the most basic pre-bargaining framework and constituted retaliation for engaging in activity protected by the Meyers-Milias-Brown Act. To that end, the Union responded to the City's declaration, through counsel by letter dated June 23, 2011, and informed the City that bargaining over "ground rules" was mandatory and that the City's declination to further discuss the issue constituted an unfair labor practice. (Exhibit 10.) The Union further requested that the City reevaluate its position and meet and confer in good faith over a framework or proceed directly to substantive negotiations over retirement benefits.

In response, on June 28, 2011, the City shifted its position and indicated that even though bargaining over a framework for negotiations was a non-mandatory subject of bargaining, it was not refusing to continue negotiations with the Union.³ (Exhibit 11.) Despite this admission, the City nevertheless reiterated its unilaterally-adopted requirement that all negotiations must be completed by October 31, 2011 and expressly reserved the right to unilaterally propose charter amendments in the form of ballot measures on that date if the Union did agree to its demands. Without accepting these

³ The Union's response is also included in this exhibit.

“take it or leave it” terms, the Union proceeded to commence negotiations over retirement benefits with the City.

The Coalition began bargaining with the City over the pension reform measures on July 6, 2011, their first bargaining session. However, that same day, by letter dated July 6, 2011, the City unveiled a proposed ballot measure predicated on the City Council’s approval of the Mayor’s May 13 ballot measure proposal, and had directed staff to draft a ballot measure based on the proposal. (Exhibit 12.) In response to this announcement, the Union requested a meet and confer with the City by letter dated July 14, 2011. (Exhibit 13.)

Negotiations continued between the Coalition and the City on July 13, 2011. The Union then negotiated with the City on July 21, 2011. At that meeting, the City insisted on negotiating over the language of a ballot measure even though the parties were continuing to negotiate over substantive changes to pension and retiree health benefits and other retirement issues.

A week later in a July 28, 2011 letter addressed to Carl Mitchell of the Association of Legal Professionals, the City insisted that retirement reform negotiations “must remain separate from any meet and confer obligations that may exist regarding ballot measures proposed by the City...” pursuant to *Seal Beach Police Officer Assoc. v. City of Seal Beach* (1984) 36 Cal.3d 591. (Exhibit 14.) On July 29, 2011, the Coalition and the City resumed negotiations.

In response to this announcement, at the bargaining table the Union reminded the City (see Exhibit 4) that it was improper for the City to insist that the parties bargain over the language of a ballot measure before first meeting and conferring over the terms and conditions of any such retirement benefits reform plan, a mandatory subject of bargaining.

At the July 29, 2011 session the Coalition submitted to the City its first pension-related proposal. The Union’s proposal accepted the City’s position of establishing a new tier of pension benefits that would be applicable to newly hired employees. The second tier included a provision under which the pension system’s cost of living adjustment (“COLA”) would be forfeited during years in which the system’s funding levels were not met, with a maximum of five COLA forfeitures. The proposal did not change employee contribution requirements – currently set at 3/11’s of normal cost – but did provide that in the event the system’s funding ratio fell, employee contributions increase to ½ of normal cost. In addition, the proposal placed a compensation cap for purposes of determining pension benefits, which was pegged to the social security taxable wage base, which was \$106,800 in 2011. The City gave no indication of its consideration of the proposal.

Following this round of bargaining, the Union sent the City a letter on August 2, 2011, in which it indicated that it was encouraged by the negotiations over substantive retirement issues and

requested tabling ballot measure negotiations until after the parties could fully bargain over substantive retirement issues. (Exhibit 15.) At the next bargaining session, on August 3, 2011, the City agreed to table ballot measure discussions pending substantive bargaining.

The City continued to maintain its position that if it declared a fiscal emergency it could – and would – cut off bargaining and take unilateral action. However, on August 10, 2011, the Legislative Counsel Bureau issued an opinion in response to inquiries submitted by Assembly Member Fong. (Exhibit 16.) The Bureau concluded that under the facts Fong presented:

The City of San Jose may not validly declare a local emergency under the California Emergency Services Act (Ch. 7 (commencing with Sec. 8550), Div. 1, Title 2, Gov. C.) [“CSEA”] based upon a chronic budget deficit caused by rising employee retirement costs. Nor may the city amend its charter to validly limit the retirement benefits to which current city employees and retirees are contractually entitled. The proposed limitations would substantially impair the contractual rights of current city employees and retirees, and this impairment would violate the California and United States Constitutions.... (Exhibit 16, p. 11.)

On August 23, 2011, the Coalition and City again negotiated over substantive retirement issues, at which the City provided a proposal. The City’s proposal eliminated the Supplemental Retiree Benefit Reserve (SRBR) and folded the funds into the pension system trust fund. The proposal also amended provisions relating to Retirement Service Credit, among other things.⁴ During the August 23 negotiation session, the parties reached a tentative agreement with respect to elimination of the SRBR. However, at this meeting the City refused the Union’s request to provide the figures and analysis necessary to calculate the impact of the retirement reform plan on its members. As is discussed in the next section, the Coalition had submitted an information request to the City on July 29, 2011 (Exhibit 17), and the City failed to provide the Coalition with adequate requested information by letter sent on August 9, 2011 (Exhibit 18).

Following the August 23 session, the City took steps to implement its plan to declare a fiscal emergency, and no bargaining sessions were scheduled. In a letter to the City dated August 31, 2011, the Coalition reiterated its demand to bargain, citing the positions of both the Legislative Counsel Bureau and Attorney General’s Office to contest the legality of San Jose’s plans to call a fiscal emergency and amend the city charter to limit retirement benefits to current employees and retirees. (Exhibit 19.) In its demand, the Coalition recognized the City’s budget challenges and reemphasized its commitment to “addressing these issues in a

⁴ The City also made several proposals related to employee healthcare.

constructive, fair, open and legal manner.” In doing so, the Coalition requested the City to withdraw its plan to “enact a State of Emergency and pension measure as proposed” because of “the overwhelming evidence that the City ... lack[ed] the legal authority to” do so.

As a result, the Coalition and the City scheduled a session for September 7, 2011 and on September 9, 2011, the City provided to the Union a revised draft of its proposed ballot measure. (Exhibit 20.) Although, the accompanying letter indicated that the City Council’s revisions to the measure were in part attributable to feedback received from the bargaining units, the revisions did not reflect any statements, accords or progress achieved through substantive retirement bargaining. Indeed, the Coalition had not bargained ballot measure language as that issue had been tabled by the parties in order to bargain over substantive matters. Inexplicably, the City provided additional draft proposal ballot measures on October 5, October 20, and October 27, 2011. These measures contained few substantive revisions and were not reflective of proposals or concessions taken at the bargaining table.

In a letter dated September 15, 2011, the City criticized the Legislative Counsel Bureau’s analysis in its August 10th letter for “consider[ing] assumption and facts which were presented ... by parties outside the City” and for not “dicuss[ing] any aspect of the issues addressed in the response with anyone in the City.” (Exhibit 21.) Rather, the City contended that its authority to “consider the declaration of a fiscal emergency and suspend and/or modify existing contractual obligations” came “from the City’s inherent police powers granted under the State Constitution and recognized by the courts.” The City continued to posit that it would move forward with a declaration of fiscal emergency and unilaterally implement its pension ballot measure.

In a series of letters dated September 20, 2011, the City responded to the Coalition’s August 31st letter by simply referring it to its September 15th response to the Legislative Counsel Bureau in which it rejected the Bureau’s position. It also disputed the Coalition’s characterization of its proposal as a shared sacrifice because the proposal did not affect current employees. (Exhibit 22.) The Coalition and the City resumed retirement negotiations on September 28, 2011, October 12, 2011, and October 26, 2011. During this period the Coalition’s proposals began to incorporate changes applicable to current workers on a voluntary, incentivized basis (as the Unions did not believe that pension reductions to current, vested employees could constitutionally be imposed).

The Coalition presented the City a proposal on or about October 22, 2011, that incorporated an opt-in for current employees into the second tier benefits otherwise applicable to new hires. Those opting-in would be entitled to COLA based on the consumer price index (“CPI”) with a cap of 3%. Future benefit accrual rates would be reduced from 2.5% to 2% of final pay for each year worked.

The retirement age would be increased from age 55 to age 60 years of age, a five year increase in the retirement age that would also have a substantial impact in reducing liability for retiree health benefits. Under the Coalition's proposal, the pension benefits would revert back to the prior policy of being based upon final average pay of 3-years, as opposed to the current policy of being based on pay for one year. The City rejected this proposal but stated that the parties were not too far apart on the Union-proposed new-hire tier. However, the city never subsequently explained which aspects of the proposal it did not accept, despite the fact that the unions provided figures estimated the proposals would save the City \$160 Million over four years.

At the bargaining table, the Union raised concerns about the City's "opt-in" proposal for current employees. In essence, the City's plan set a penalty for employees who failed to opt-into a plan. The Union was also concerned that if no current employee chose to opt-into the new retirement plan, the City's fiscal issues would remain unchanged. Again, the Union stressed that substantive discussion should be at the Coalition retirement negotiations table. The City did not respond to the Union's concerns or questions.

The Union presented the City with its opt-in proposal on October 22, 2011. (Exhibit 23.) The Union's proposal projected savings to the City of approximately \$160 million from fiscal years 2013 through 2016. The parties met on October 26, 2011, and the City rejected the Union's proposal.

Rather than respond to the Union's proposal, on October 27, 2011, the City submitted a revised draft proposal ballot measure that was accompanied by a letter addressed to the Union indicating that the City reaffirmed its belief that it was within its power to increase retirement contributions for current employees. (Exhibit 24.) The October 27 iteration of the ballot measure also changed Section 15 of the measure to state "that in the event that any increase in the employee's share of the cost to amortize the unfunded liabilities for pension benefits cannot be implemented, the equivalent cost savings will be achieved through compensation reductions." In other words, although the parties had limited their bargaining to retirement matters, the City injected, unilaterally and without bargaining, terms with respect to employee compensation. Further, such terms, which backtracked from prior unbargained ballot measure proposals and illegally shifted the City's unfunded liabilities directly onto worker's via a direct wage reduction trigger, were evidently made and communicated in order to retaliate for the Union's continued demand to bargain over retirement benefits.

In response, the Union contended—and still contends—that such a maneuver would be illegal under California law. The October 27 letter also reiterated the City's intention to submit its ballot proposal to the voters in a March 2012 plebiscite. The City also demanded that all meet and confer

obligations must be exhausted by the end of October 2011, in order for the parties to utilize impasse procedures. Of course, the parties had not reached impasse, and indeed the City had previously refused to bargain over a framework at the outset of negotiations, a framework it now sought to impose.

Further, in its letter, the City contended that “there [wa]s a lack of any meeting of the minds regarding any aspect of the ballot measure[.]” and “[a]ssuming that no agreement [was] reached prior to the end of October,” the Union should indicate whether it was interested in participating in impasse mediation.

The City’s communication was problematic for a number of reasons. First, it had agreed to table ballot measure bargaining until after substantive bargaining had been completed. Second it imposed an artificial and unnecessary deadline on bargaining after refusing to bargain over a framework at the outset of negotiations. Third, it pre-determined that an impasse would take place and imposed deadlines for such impasse procedures while the parties continued to make progress on substantive issues.

The City concluded its letter by stating that it intended to schedule mediation sessions for November 1 through 14, 2011, and asked the Union to communicate its desire to participate by November 3, 2011. The request for mediation was, of course, premature, as there had been no impasse in bargaining. Rather, the Union continued to refine its proposals, even where the City maintained an immutable bargaining position.

Soon thereafter, in an email letter addressed to the Union and dated October 31, 2011, the City improperly and incorrectly contended that it had been available to meet and confer with the Union since June 2011 and that the Union had failed to engage the City in negotiations except on two occasions. (Exhibit 25.) The City then inexplicably proclaimed that the Union had either “waived its right to meet and confer over the ballot measure or the parties [had] reached impasse.”

Notwithstanding this exchange of letters, the parties resumed negotiations on November 2, 2011, and later that day the Union sent correspondence in response to the City’s letter. (Exhibit 26.) The Union emphasized that it had not waived its right to meet and confer over the ballot measure or to participate in mediation. It also reminded the City that the parties had agreed to table discussions regarding the ballot measure “as [they] were making significant progress dealing with the retirement issue[.]” The Union further reminded the City that it had been bargaining “regularly over the retirement issues during the last couple of months and as recently as October 22, 2011, when [it] provided [the City] with a proposal that, when combined with [its] earlier proposal for new hires, would save the City roughly \$160 million.” The Union also pointed out that the City’s insistence in

concluding negotiations and declaring impasse by set deadlines illustrated its “unwillingness to participate in good faith bargaining on this issue.”

In a response letter dated November 3, 2011, to the Union’s November 2 letter, the City incorrectly refuted the Union’s contention that it had agreed to table ballot measure negotiations until a later time and reiterated its unilaterally imposed “immutable deadline[s]” for conclusion of negotiations and impasse procedures. (Exhibit 27.) The letter belied the City’s determination not to bargain, illustrating it intended merely to declare impasse and implement its predetermined terms without regard to what occurred at the bargaining table. The City’s letter further concluded that the Union had *either* waived its right to negotiate over the ballot measure proposition *or* was at impasse with the City. Neither contention is correct.

In an email response on November 3, 2011, the Union again informed the City that it had not waived its right to negotiate and asked the City to set up a meeting between the parties. (Exhibit 28.) The City failed to respond to that communication. (See Exhibit 29.) On November 8, 2011, the City sent the Union a letter stating that the meet and confer process regarding the proposed ballot measure was complete because it had failed to accept the City’s invitation to participate in mediation by November 3, 2011. (Exhibit 30.) Of course, such a statement could not be correct because the City had previously agreed to table ballot measure negotiations pending the parties’ negotiation over substantive retirement benefit changes.

The Union responded to the City’s November 8 letter by a letter dated November 15, 2011, pointing out that the City had previously indicated at the bargaining table that its unilaterally imposed November 3, 2011, deadline was not “firm” and had further agreed to table ballot measure negotiations until the resolution of substantive retirement benefits bargaining. (Exhibit 29.) The Union further indicated that while the City asserted in its November 3, 2011 letter that the Union either waived its right to meet and confer or the parties were at impasse, the City had recognized that the parties were “close” in regards to their negotiations over new employees at their November 2, 2011 bargaining session. As such, the Union contended and still contends that there was no basis to conclude that the parties had reached an impasse, as bargaining continued to prove fruitful. For those reasons, the union indicated that the City was incorrect in its contention that they were “at impasse for the ballot measure meet and confer” and further questioned why the City rescinded its agreement to table ballot-measure bargaining.

The Union further expressed frustration over the City’s lack of good-faith bargaining in the face of a proposal put forward by the Union under which City workers would make concessions resulting in savings of over \$160 million over the next four years. Further, the Union had already

offered a retirement solution that would have saved nearly \$500 million. For these reasons, the Union contended that the City could not be considered to be acting in good-faith should it move forward with its ballot measure while the parties were continuing to make progress as to the substantive issues covered by the proposed ballot measure. The Coalition further iterated that it would be making a comprehensive retirement proposal, referred to as a "Grand Bargain," to the City that would require due consideration and evaluation.

At their next negotiation on November 15, 2011, the Coalition explained its Grand Bargain proposal. In addition to the concessions made in the prior proposals, the Unions proposed that retiree health care benefits would be cut by 15 percent, which would affect everyone (new hires, retirees and current workers). Then, the restoration of this cut could be used as an incentive to get current workers to agree to the less expensive opt-in pension tier for future service. The union believed this would allow an opt-in program to function in a manner consistent with the law. It also proposed supporting political reform that would eliminate past-service increases in pension costs in the future, modifying retiree health care to make sure retirees sign up for Medicare at age 65, and financing of additional retiree health care unfunded liabilities through the issuance of bonds (to help facilitate the conversion from pay-go financing to prefunding of retiree health care costs).

After the Coalition presented the Grand Bargain, the City left the room for fifteen minutes. It came back with a couple of minor questions, then adjourned the meeting. Two days later, on November 17, 2011, the City rejected the Coalition's Grand Bargain, communicated its unwillingness to engage in further substantive bargaining sessions, and declared impasse. (Exhibit 31.) Throughout this process, the City had not provided any substantive proposals of its own. Indeed, although the Union had made significant and continued compromises, the City had not made any responsive proposals to the Union's concessions.⁵ While many of the Union's concessions directly responded to the City's concerns and City Council's cost-saving parameters, the City did not offer comprehensive pension benefit proposals—for new hires, for instance—beyond the ballot negotiations, in which the Union did not participate because the City had agreed to table them. Further, the City did not have either the capability or the inclination to value the Union's proposals, and made no attempt to understand the Union's proposals or analyze the cost savings contained therein. Instead, it simply declared impasse and requested that the parties mediate.

By letter dated November 21, 2011, the Coalition pointed out that the Grand Bargain was designed to save the City millions of dollars and that the City's "apparent substantial

⁵ Notably, the City made offers to: 1) cut retiree health care by 20%, 2) make changes to ensure retirees join Medicare, and 3) eliminate SRBR. The City's second proposal basically mirrored its first proposal with effective dates changed.

misunderstanding of [the Union's] proposal" suggests that "the parties are nowhere near impasse and further bilateral discussions are appropriate." The Union concluded that it had not waived its right to meet and confer or its right to participate in mediation and reminded the City that it had prematurely and improperly declared impasse. (Exhibit 32.)

After just a few hours of mediation on November 22nd, the mediator ended the session because she did not believe the City was willing to make any concessions whatsoever. Directly thereafter, the City sent a letter, dated November 22, 2011, indicating that it would submit a revised ballot measure to the City Council during its meeting on December 6, 2011, for a March 2012 election. (Exhibit 33.) The proposal, also dated November 22, 2011, was attached to the letter. The proposal contained several substantive changes. For instance, the new ballot measure increased the accrual rate of retirement benefits under the Voluntary Election Program ("VEP") from 1.5% to 2% and decreased the retirement age from 65 to 62 for employees represented by the Coalition. It also backtracked from certain other language. The City's continued submission of changes to its ballot measure, after declaration of impasse, indicated the parties could not have been at impasse.

In a memorandum dated December 1, 2011, Mayor Reed submitted to the City Council a series of recommendations. In relevant part, he recommended deferring consideration of the declaration of a "Fiscal and Service Level Emergency"; adopting a resolution calling for a municipal election on June 5, 2011; adopting a "resolution authorizing the Mayor to prepare and submit an argument in favor of the City on the June 5, 2012 Voter's Sample Ballot"; and declining to "permit rebuttal arguments in the June 5, 2012 Voter's Sample Ballot." (Exhibit 34.) Inexplicably, and despite the City's self-described "immutable deadlines," the City now departed from its unilaterally imposed deadlines and its continuously stated intention to declare a fiscal emergency. Yet it still contended that the parties had and continued to be at impasse.

In addition, Mayor Reed indicated that his initial recommendation to declare the emergency was based upon a projection by the Police and Fire Department Retirement Board actuary that the City's contribution for Police and Fire would increase to \$160 million for 2012-2013. However, a new projection estimated the 2012-2013 contribution to be approximately \$105 million, pending final approval of the City Council. (Exhibits 34, 35.) At the very least such changed circumstances warranted continued negotiation and a lifting of the City's prematurely declared impasse.

Thereafter on December 5, 2011, Mayor Reed sent another supplemental memorandum to the City Council in which he requested that the Council approve language for a revised ballot measure draft and direct staff to delay transmitting the ballot measure resolution and related documents to the registrar to allow time for continued "mediation." (Exhibit 36.) He further directed staff to request

that all city employee bargaining units waive all impasse procedures in order to engage in mediation over the ballot measure and "related" retirement issues. In the Unions' view, the request to waive statutory rights as a condition to bargain constitutes a *per se* unfair practice.

Also, the Ballot Measure put forward by the Mayor was substantially different from the ballot measure the City contended it would unilaterally implement upon exhaustion of impasse procedures. Pursuant to the new projection, the ballot measure acknowledged that while retirement costs to the City were expected to increase, they would not increase dramatically. The City stated that it would have to make additional cuts to Essential City services in order to adequately fund the rising costs of post employment health benefits. However, the City acknowledged those cuts would not be dramatic. The new measure erased all references to the prospects of a fiscal emergency and no longer called upon voters to declare a fiscal emergency. Furthermore, the measure gave the City discretion to temporarily suspend COLAs for all retirees for five years in the event that the Council adopts a resolution declaring a fiscal emergency while finding it necessary to suspend increases in cost of living payments to retirees.

The City Council approved the aforementioned ballot measure for a June 2012 election. In a letter dated December 7, 2011, the City addressed all unions representing public employees excepting police and firefighters. The City invited the unions to reengage in mediation over the issue of retirement reform and the ballot measure collectively, but further insisted that they waive their right to exhaust other impasse procedures as a precondition. (Exhibit 37.)

On December 9, 2011, the Union responded to the City's December 7 correspondence. (Exhibit 38.) It reiterated that the parties never reached impasse and that it was unwilling to waive impasse procedures as a condition to continuing mediation with the City. The Union stated: "the request to 'waive impasse procedures' is contrary to the City's duty to bargain in good faith, as is any precondition tied to waiving statutory rights." However, without making any such concessions, the Union was willing to reengage in mediation as a continuation of the bargaining process.

The City provided a response, dated December 12, 2011, in which it reasserted its belief that the City and Union completed impasse procedures, and then proceeded to mischaracterize the parties' bargaining history, and invited the Union to participate in mediation "with the understanding that further discussions do not constitute reopening of negotiations over the ballot measure or in any way prejudice [the City's] position that the parties have already completed any required impasse resolution procedures." (Exhibit 39.) Such a statement is further indicative of a refusal to bargain because, even after impasse an employer still has a duty to bargain.

On December 13, 2011, the Coalition responded to the City's December 12 letter. (Exhibit 40.) It reiterated its position in regards to the City's failure to bargain to impasse and highlighted the City's misrepresentation of the bargaining history between the parties. It then reasserted its willingness to reengage in mediation as a continuation of the pre-impasse meet and confer process.

City's Refusal to Respond to Information Requests

In addition to the foregoing, the City's bad faith bargaining is illustrated by its failure to meaningfully respond to the Union's information requests regarding its pension and retiree health proposals. The Union submitted several information requests regarding the cost to the City for retirement benefits owed to Union members. Most of these requests went unanswered and the responses received were inadequate or did not contain substantive or meaningful responses.

On February 8, 2011, during its contract negotiations with the City, the Union submitted a letter requesting, amongst other things, "the cost to the City of all pension and retirement contributions, including any portion paid by the City of what is the council members', appointees', or Unit 99 employees' share of pension contribution, and any payments to any other deferred compensation or retirement plan." (Exhibit 41.) On February 28, 2011, the Union submitted another information request to the City requesting, among other items, costs to the City from its retirement benefit obligations. (Exhibit 42.) In addition, on July 29, 2011, the Coalition submitted the information request attached hereto as Exhibit 17. In a letter dated August 9, 2011, the City responded but failed to provide virtually any of the information that was requested. (Exhibit 18.) Further, in response to several of the Union's requests, the City indicated that its actuary would perform an actuarial valuation in the following months. Nevertheless, the City continued to precondition bargaining according to its unilaterally-imposed timelines and failed to provide the updated actuarial information.

ARGUMENT

California law requires that cities "meet and confer in good faith" over matters within the scope of representation of the "representatives of ... recognized employee organizations". (Gov. Code Sect. 3505.) "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment..." (Gov. Code Sect. 3504.) A city must meet and confer in good faith with a recognized employee organization over retirement benefits since such benefits fall within the purview of Gov. Code Sect. 3504. Furthermore, it is axiomatic that retirement income security and retiree health affecting current employees or future retirees are mandatory subjects of

bargaining. (*Temple City Unified School District* (1989) PERB Dec. No. 782; *Compton Community College District* (1989) PERB Dec. No. 720.)

Here, the parties sought to negotiate changes to retirement benefits for current employees and retirees as well as new hires. As such, the negotiations involved a mandatory subject of bargaining and required a good faith meet and confer.

Unlawful Insistence on Negotiating Ballot Measure Language Before Terms and Conditions Bargaining Completed

Pursuant to Gov. Code Sect. 3505, the City was required to meet and confer to impasse over the terms and conditions of any such plan before bargaining over the language of the ballot measure. When the Union initially demanded a meet and confer over the City's proposed retirement benefits plan, it first expected to negotiate over substantive changes to the employees' retirement systems. That is because it was necessary to reach agreement over the substantive terms of the retirement plan before considering language that would articulate the substantive changes in an acceptable fashion.

However, from the very start, the City insisted on meeting and conferring over ballot measure language before the parties had agreed to any substantive terms and despite the Union's assertion that such discussions were premature. Later, the City agreed to table ballot measure discussions pending substantive issues bargaining at the negotiation session on August 3, 2011. However, the City then declared "impasse" on the ballot measure or, alternatively, claimed the union had declined to bargain ballot measure language. In fact, the City insisted on negotiating on ballot measure language and resisted the Union's efforts to engage in substantive negotiations, that is, bargaining over the substantive terms and conditions that may have required a charter amendment necessitating a ballot measure proposal.

The City's refusal to bargain over substantive terms equates to a violation of its duty to meet and confer over terms and conditions of employment.

Refusal to Continue Bargaining Over Ground Rules and Unilaterally Implementing a Deadline

Refusing to bargain, unilaterally imposing, or renegeing on ground rules is a failure to bargain in good faith. (*California Department of Personnel Administration* (1993) PERB Dec. No. 995-S.)

As discussed above, the Coalition submitted a counter-proposal to the City's proposed ground rules in June 2011. The Coalition's counter-proposal retained most of the language from the City's proposed framework and aimed to bring more transparency to the negotiations. However, the City rejected the Coalition's counter-proposal in its entirety without sufficiently explaining its opposition

and indicated it would proceed to bargain only with unions who accepted its ground rules.⁶ Seeking to exclude such unions from bargaining, especially where the bargaining is the result of a unilaterally imposed “retirement reopener” is *per se* bad faith. Although the City later stated that it was not refusing to bargain over the framework with the Union, the City failed to meet and confer with the Union and unilaterally adopted a requirement that all negotiations must be completed by October 31, 2011. The City’s refusal to continue bargaining over a framework and instead unilaterally impose a deadline to complete bargaining constitutes an unfair labor practice.

Imposition of bargaining timetable defeats “good faith” in bargaining and did not result in impasse while progress was being made

Government Code section 3505 specifically defines a *good faith* “meet and confer” as a public agency’s and union’s mutual obligation:

personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

The meet and confer continues up until the point of impasse. The point of impasse is reached when “the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.” (*Modesto City Schools* (1983) PERB Dec. No 291.) An unfounded declaration of impasse constitutes bad faith bargaining. (*Rio School District* (2008) PERB Dec. No. 178.)

As discussed above, from the very beginning of negotiations, the City demanded that the parties complete negotiations by the end of October 2011; it insisted on this deadline before it even knew how much progress would result from the negotiations by that point. The parties had not agreed on a bargaining framework that may have legitimately limited the meet and confer to a specific timeframe. Therefore, the City was without the authority to insist on reaching impasse by a particular date. The City then prematurely declared impasse while there was still positive movement at the bargaining table.

Prior to the City’s premature declaration of impasse, the parties had only negotiated several times over the course of four to five months but were coming closer to agreement with each subsequent Coalition proposal, mainly due to the continued concessions the Coalition was making. When the City declared impasse, the parties truly had not reached a stalemate—as is characteristic of an impasse—and further discussions would *not* have been fruitless. Therefore, the City was required to continue negotiating to a true stalemate.

⁶ The City’s response indicated that an acceptable proposal by the Coalition would have to provide that the meet and confer would be completed in time to place the retirement measures on the ballot. However, the Coalition, in its counter-proposal proposed to aim to complete negotiations by October 31, 2011.

The City's insistence on adhering to a strict bargaining deadline demonstrates that it considered the meet and confer process a hollow formality. Its premature declaration of impasse amidst continued progress at the bargaining table showed that it would only organically come to terms with the Coalition if the Coalition agreed to its exact method of cost-savings, despite other proposals that would achieve the same cost-savings.⁷ The City's premature declaration of impasse demonstrates its lack of good faith in its dealings with the Coalition and the Union and is grounds for sustaining this UPC.⁸

No Impasse where City Continues to change its proposals

It is also well settled that the duty to bargain is a continuing one, not only through the life of a labor agreement, but continues after the expiration of the MOU and until all mandatory impasse procedures are exhausted. (*California Department of Forestry and Fire Prevention* (1993) PERB Dec. No. 595.) Even where an impasse is reached, the obligation to bargain is suspended only until changed circumstances break the impasse, including concessions made by one of the parties that indicate agreement may be possible. (*Modesto City Schools* (1983) PERB Dec. No 291.) Even where a bona fide impasse is reached, once it is broken the duty to bargain is revived. (*PERB v. Modesto City School District* (1982) 136 Cal.App.3d 881, 899.)

Starting in late October, the City insisted that the parties had either reached impasse or the Union had waived its right to meet and confer. However, while the parties engaged in mediation, the City submitted several revised ballot measures to its Council for its consideration and approval. As stated above, the language of the proposals differed from that which the City had presented the Union prior to its premature declaration of impasse. Assuming *arguendo* that the parties were at impasse, the City's additional proposals would have broken the purported impasse and reignited the City's obligation to meet and confer in good faith. The City's failure to do so is grounds for upholding this UPC.

The City Engaged in Surface Bargaining by "Going Through the Motions" Without Seriously Considering Compromise with the Coalition

Central to the duty to bargaining good faith is the obligation to "endeavor to reach an agreement" (Gov. Code §§ 3505, 3517, 3519. It is well settled that entering negotiations with a "take

⁷ Although the parties negotiated twice in November, the City showed bad faith by rejecting the Coalition's substantially cost-saving Grand Bargain without giving it any real consideration. The City then declared impasse without even forwarding a counter-proposal.

⁸ Furthermore, the City's first premature declaration of impasse occurred during the successor MOU negotiations. Even though the parties had not reached impasse on the subject of retirement and pension benefits, the City declared impasse on MEF and CEO. The City ignored the Union's demand to continue bargaining and imposed its LBFOs on the Union. This was the City's first demonstration of bad faith.

it or leave it" attitude evidences a failure of the duty to bargain because it amounts to merely "going through the motions" of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194). "A flat refusal to reconcile differences by failing to offer counterproposals, could be construed to be in bad faith if no explanation or rationale" is provided to support the employer's position. (*Oakland Unified School District* (1981) PERB Dec. No. 178). Implicit in the obligation to bargain in good faith is the obligation to explain bargaining positions with sufficient detail to "permit the negotiation process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Dec. No. 136.) Moreover, total inflexibility in bargaining positions, especially when coupled with other indicia of bad faith, may be a further basis for finding bad faith bargaining. (*Fremont Unified School District* (1980) PERB Dec. No. 178).

As the facts above demonstrate, the Union made substantial concessions to the City throughout the course of their negotiations. However, from the very start of the negotiations, the City failed to seriously consider, respond to, or provide an explanation for its continued rejections of the Coalition and Union's counterproposals. The City appeared determined to achieve budget cuts according to its own plan, and its proposals failed to incorporate proposals advanced by the Coalition even when they amounted to substantial cost-savings. For instance, on October 22, 2011, the Coalition submitted the City a proposal that was estimated to save it \$160 Million over four years. Although the City rejected this proposal without adequately explaining its opposition, it conceded that the parties were not too far apart on the new-hire tier. The City then rejected the Coalition's "Grand Bargain," a proposal designed to realize additional cost-savings. In doing so, the City caucused outside of the presence of the Coalition for fifteen minutes and only asked a few minor questions about it. In rejecting the Coalition's December 21st proposal, the City again failed to provide feedback on what was not agreeable about the plan.

The City did not provide any substantive proposals of its own. The ballot language proposals it submitted failed to significantly incorporate any proposals or concessions taken at the bargaining table with the Coalition.⁹ Furthermore, while the City proposed that the parties engage in mediation, it failed to take such sessions seriously; this was an observation a mediator even made. This is all evidence that the City merely went through the motions with regards to the meet and confer process.

⁹ This, in itself, is further evidence that the ballot language negotiations did not involve a meet and confer over the substance of the retirement issues.

Effect of Imposition of Pension Re-opener

It is well settled that while a public agency may implement a last, best and final offer, it may not implement a memorandum of understanding. (Gov. Code § 3505.4.) It is also well settled that an employer cannot impose a "partial" offer or reach a "partial" impasse.

Here, the City purportedly "bargained to impasse" with MEF and CEO over successor Memorandums of Understanding but "imposed" an additional duty to bargain over pension benefits. It did this by imposing its LBFOs, which included side letters deferring negotiations over retirement benefits to a later date. As a result, the parties engaged in separate negotiations over retirement benefits after the City's imposition of its LBFOs. By imposing partial terms but also imposing a pension reopener and then commanding additional bargaining of retirement issues directly after imposition, the City has failed to bargain in good faith.

Contingent Bargaining

Conditioning agreement at the bargaining table on a waiver of rights is a *per se* violation of the duty to bargain and further supports an inference that an employer has engaged in bad-faith. (*Modesto City Schools* (1983) PERB Dec. No. 291; *South Bay Unified School District v. PERB* (1991) 228 Cal.App.3d 502, 507.) As demonstrated above, the City invited various unions to reengage in mediation through a letter dated December 7, 2011. However, it preconditioned participation for each union on it waiving its right to exhaust other impasse procedures. (Exhibit 37.) Such an action serves as a basis to uphold this UPC.

Failure to Provide Requested Information

Employers have an obligation to provide employee organizations with requested information necessary and relevant to bargaining, and a failure to provide such information constitutes a refusal to bargain in good faith. (*Stockton Unified School District* (1980) PERB Dec. No. 143.) Information pertaining to mandatory subjects of bargaining, such as up-to-date funding status and assumptions contained in such assumptions with respect to retirement benefits clearly falls within the category of information that must be provided. (*Id.*) Provision of inaccurate information in response to a request further constitutes a failure or refusal to bargain in good faith. (*Id.*) Information requested must be provided in a timely fashion, unreasonable delay is further evidence of bad faith. (*Chula Vista School District* (1990) PERB Dec. No. 834.) Finally, the "mechanics" of providing information is itself a subject of bargaining and unilateral determinations as to the provision of requested information supports a separate basis for a charge. (*Bakersfield City School District* (1998) PERB Dec. No. 834.)

As demonstrated above, on multiple occasions, the Union and Coalition requested from the City information directly related to the parties' subject of bargaining. In order for the Union to have

intelligently bargained over retirement and pension issues and to have truly understood the impact of the City's proposals on public employees and the City's budget, the Union required such information.

Approximately six months after the Union first requested the information relevant to the City's pension and retirement system, the City provided incomplete information of its choosing. To this date, the City has not provided the requested information. As a result, the Union and Coalition proceeded through negotiations with incomplete information. For instance, the Coalition agreed to the City's proposed elimination of the SRBR despite the City's refusal to provide the figures and analysis necessary to calculate the impact of retirement "reform" plan on its members.

The City's failure to provide the Union and Coalition in a timely fashion with information necessary to intelligently bargaining is further evidence of its lack of good faith in bargaining.

Proposing Illegal Terms

The City's substantive proposals included terms that would be illegal under California law, specifically, the curtailment of vested benefits and the shifting of the City's unfunded liability onto employees. The City has consistently put forward and insisted on acceptance of such proposals by the Union despite their illegality under state law. For example:

- An "opt-in" to a second tier under which if an employee does not elect the "opt-in" s/he will be subject to liability for the unfunded liabilities associated with vested benefits for current and retired employees, to be deducted from his/her pay. Such a change to shift the basis of funding to employees is illegal under California law. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438 ("where city employees were employed while there was in effect a pension system providing for fluctuating pension payments and subsequently by amendment to city charter a fixed payment pension system was established without any corresponding advantages to offset such detriment, amendments were unreasonable and invalid as applied to such employees who were employed before passage of amendments.").)
- Elimination and reduction of COLA benefits for retirees and vested employees. (See *Association of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780; see also *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095.)
- Increase in employee contributions with no concomitant benefit improvement. (*United Firefighters*, 210 Cal.App.3d at 1102-1103.)
- Restricting of the eligibility requirement for disability retirement benefit to be applies to current and vested employees. (Cf. *Newman v. City of Oakland Retirement Board*, 80 Cal.App.3d 450 (1978); and Cf. *Central Laborers' Pension Fund V. Heinz* (2004) 541 U.S. 739.)

Thus, the City's insistence to impasse on these proposals constitutes, *per se*, bargaining in bad faith.

III. CONCLUSION

For the foregoing reasons the Board should issue a complaint against the City.

EXHIBIT F

**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD
UNFAIR PRACTICE CHARGE**

DO NOT WRITE IN THIS SPACE: Case No. _____

Date Filed: _____

INSTRUCTIONS: File the original and two copies of this charge form with proof of service attached to each copy in the appropriate PERB regional office (see PERB regulation 32075). Proper filing includes concurrent service and proof of service of the charge as required by PERB regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE?

YES

No

1. CHARGING PARTY: EMPLOYEE EMPLOYEE ORGANIZATION EMPLOYER

a. Full name: INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230

b. Mailing address: 425 East Santa Clara Street, San Jose, CA 95113

c. Telephone number: (408) 283-0910

d. Name, title and telephone number
of person filing charge: Christopher E. Platten, Counsel to Charging Party
Wylie, McBride, Platten & Renner
(408) 979-2920

Received
JUN 07 2012
City Manager's
Office of Employee Relations

e. Bargaining unit(s) involved: INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230

2. CHARGE FILED AGAINST: (mark one only) EMPLOYEE ORGANIZATION EMPLOYER

a. Full name: CITY OF SAN JOSE

b. Mailing address: 200 East Santa Clara Street, San Jose, CA 95113

c. Telephone number: (408) 535-1900

d. Name, title and telephone number
of agent to contact: Alex Gurza, Deputy City Manager
City of San Jose
(408) 535-8155

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization)

a. Full name:

b. Mailing address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Government Code section 18524)

a. Full name:

b. Mailing address:

c. Agent

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?
YES NO

6. STATEMENT OF CHARGE

- a. The charging party hereby alleges that the above named respondent is under the jurisdiction of (check one)
- Educational Employment Relations Act (Gov. Code sec. 3540 et. seq.)
 - Ralph C. Dills Act (Gov. Code sec. 3512 et. seq.)
 - Higher Education Employer-Employee Relations Act (Gov. Code sec. 3560 et seq.)
 - Meyers-Milias Brown Act (Gov. Code sec. 3500 et. seq.)
- b. The specific Government Code section(s) alleged to have been violated is/are: Gov. Code §3504.5, 3505, 3506.5(c), 3507(e)(5).
- c. The specific PERB regulation(s) and/or, for MMBA, the specific applicable local rule(s) alleged to have been violated is/are (*a copy of the applicable rule(s) MUST be attached to the charge*) PERB Regs 32603(b), (c), (e), and (f); City of San Jose Resolution 39637
- d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and *not a conclusion of law*. A statement of the remedy sought must also be provided. (*Use and attach additional sheets of paper if necessary.*)

**SEE DECLARATION OF CHRISTOPHER E. PLATTEN IN SUPPORT OF
UNFAIR PRACTICE CHARGE AND REQUEST FOR EXPEDITED HEARING**

DECLARATION

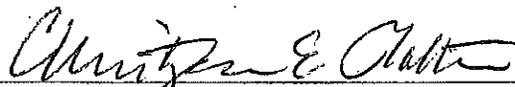
I declare under penalty of perjury that I have read the above charge and that the statements herein are true and

complete to the best of my knowledge and belief and that this declaration was executed on June 4, 2012
(Date)

at San Jose, California
(City and State)

CHRISTOPHER E. PLATTEN, ESQ.

(Type or Print Name)


(Signature)

Title, if any Attorney
Mailing address: Wylie, McBride, Platten & Renner
2125 Canoas Garden Ave #120
San Jose, CA 95125

Telephone Number (408) 979-2920

Declaration of Christopher E. Platten In Support of Unfair Practice Charge and Request for Expedited Hearing

I, Christopher E. Platten, declare:

1. I am an attorney licensed to practice in the state of California and a shareholder in the firm of Wylie, McBride, Platten and Renner, counsel to Charging Party International Association of Fire Fighters, Local 230 (Union). As counsel, I represent the Union's negotiating team and I participated in the bargaining process at issue. This declaration is made on behalf of the Union in compliance with the requirements of PERB Regulations 32615.

Introduction

2. Under the decision in *The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, a charter city must bargain in good faith before submitting to voters charter amendments relating to items within the scope of representation under Sections 3504.5 and 3505 of the Meyers-Milias-Brown Act (MMBA). As a charter city, Respondent City of San Jose (City) is therefore required to either bargain in good faith to agreement or impasse before placing on the ballot a measure affecting retirement benefits for employees. (*Santa Clara County Correctional Peace Officers' Association* (2010) PERB Decision No. 2114-M; and *Santa Clara County Registered Nurses Professional Association* (2010) PERB Decision No. 2120-M). When a charter city fails to fulfill its obligations to permit bargaining over a proposed charter amendment impacting matters within the scope and representation, it is guilty of bad faith bargaining, and if enacted, the charter amendment is invalid. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra.*)

3. On March 6, 2012, the City Council adopted Resolution No. 76158 and authorized a proposed charter amendment measure to be placed on the ballot for the June 5, 2012

primary election to reduce and eliminate vested pension benefits of current employees.¹ The City refused to bargain over the measure prior to Council adoption on March 6th. This is per se bad faith bargaining. Because the City failed to bargain in good faith with the Union over the terms of the proposed charter amendment, its placement of Measure B² on the ballot is an unfair practice in violation of the MMBA, and applicable PERB regulations.

Sections of the Government Code and PERB Regulations Violated

4. By submitting Measure B to the voters without meeting and conferring in good faith, the City violated its duty to bargain under the following provisions of the MMBA and PERB regulations:

A. Government Code, sections 3504.5, 3505, 3506.5(c) and 3507(e)(5)

B. PERB Regulation: 32603(b), (c), (e) and (f) and City of San Jose

Employer-Employee Resolution 39367.

The Union Seeks An Expedited Hearing for the Purpose of Expediting the Filing by PERB of a Petition for Writ Quo Warranto.

5. An action in quo warranto is a proper remedy by which to challenge the procedural regularity of a city charter amendment. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra; International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694.) Accordingly, the Union requests either (1) that the Board instruct its agent to submit the record of the case to the Board itself for decision, and to expedite its decision

¹A true and correct copy of City of San Jose Resolution No. 76158 adopted March 6, 2012 and authorizing the submission to the electors of its proposal to amend the charter as it pertains to pensions and benefits provided to current and future employees "and to place other limitations on pensions and benefits" is attached hereto as Exhibit I.

² The Registrar of Voters for the County of Santa Clara has denominated the City's proposed charter amendment as Local Measure B on the June 5, 2012 ballot. All future references to Measure B thus refer to the proposed charter amendment adopted by the City of San Jose Resolution No. 76158.

in accordance with PERB Regulation 32147, or (2) that the Chief Administrative Law Judge or General Counsel expedite the scheduling of an administrative hearing and decision pursuant to PERB Regulations 32147 and 32215. The Union asks PERB to expedite its ruling in order to establish the predicate determination enabling PERB to seek leave from the Office of the Attorney General to sue in quo warranto to set aside the Measure B if adopted by the voters.

6. Directing expedited processing of this matter is warranted for several reasons. First, under the facts presented, the establishment of an unfair practice is likely to succeed since the provisions of Measure B were never bargained over by the parties prior to adoption by the City (*see, Santa Clara County Registered Nurses Professional Association, supra*; and pages 17-24 *infra*). Second, the City Council, aware that the provisions of Measure B are “untested,”³ potentially unconstitutional and thus an ongoing controversy of great importance, has already directed its legal counsel to initiate proceedings establishing the validity of the pension changes immediately upon certification of the election results.⁴ Third, the position of whether a California municipal employer may lawfully reduce current employee pension benefits as proposed in Measure B is a matter of statewide importance for collective bargaining parties. Lastly, obtaining leave to sue in quo warranto may be a time-consuming process. And a petition for a writ quo warranto may be permissive cross claim to the City contemplates action for declaratory relief upon passage of Measure B. Thus judicial economy and administrative efficiency requires

³ See p. 6 of March 5, 2012 Memorandum to Richard Doyle, City Attorney from Arthur A. Hartinger, et al, regarding “Proposed Charter Amendment – Sustainable Retirement Benefits and Compensation Act,” a true and correct copy of which is attached as Exhibit 2.

⁴ See Memorandum to Mayor and City Council from Councilmember Sam Liccardo dated March 6, 2012, a true and correct copy of which is attached as Exhibit 3. At the March 6th Council session, a majority of the Council adopted Councilmember Liccardo’s recommendation to “direct the City Attorney to file an action for declaratory relief in the trial court of competent jurisdiction . . . seeking a judicial determination of whether the City may adjust the compensation of current employees through additional retirement contributions or pay reductions [required under Measure B].”

the exercise of discretion by PERB to expedite processing of this charge. (Cf., *Riverside Unified School District* (1985) PERB Order No. Ad-152.) If the Board determines that it will benefit both parties and the Board itself to first receive a proposed decision of a PERB administrative law judge, then the Board should at least expedite the scheduling and presentation of the matter before the ALJ.

Pertinent Facts Underlying the Unfair Practice and the Request for An Expedited Hearing

7. The Union is an employee organization within the meaning of MMBA section 3501(a), a recognized employee organization within the meaning of MMBA section 3501(b), and an exclusive representative within the meaning of PERB Regulation 32016 (b) for a bargaining unit of fire fighters. The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).

8. The Union and the City are parties to a Memorandum of Agreement (MOA) for the term of July 1, 2009 through June 30, 2013. This Agreement is evidenced by the preexisting provisions of the predecessor MOA in effect for the term of March 1, 2004 through June 30, 2009 combined with the executed agreements on discrete matters within the scope of representation.⁵

The Contractual Agreement to Bargain Retirement Benefits Reform

9. Under the terms of the MOA, and as a result of the exceptional circumstances provided by the recent national economic recession, the parties agreed to bargain in 2011 over pension and retiree health care benefits for current and future employees. That agreement is set forth in a "Side Letter Agreement" dated March 3, 2011 in Exhibit 4 and provides, in pertinent

⁵ These documents constituting the MOA are collectively attached hereto as Exhibit 4.

part that “[I]f the parties are at impasse and no agreement is reached, the parties shall submit the issues for determination in accordance with the applicable provisions under the Employer-Employee Relations Resolution No. 39367 and/or City Charter Section 1111.”⁶

Section 23 of Resolution No. 39367 provides for mediation in the event of an impasse in bargaining, when interest arbitration does not apply. San Jose City Charter Section 1111 provides for binding interest arbitration of bargaining impasses between the Union and the City.

The City’s Police and Fire Retirement Plan and the Changes to Benefits Under Proposed Measure B

10. Pursuant to the San Jose City Charter, the City Council is empowered to set benefits and establish a retirement plan for its employees. The City has established two pension plans, one for police officers and fire fighters, and another for all other City employees. (See San Jose Municipal Code §§3.16-3.52.) The City Charter also sets forth minimum benefits for certain members of the police and fire fighter pension plan.⁷ The plans are both defined benefit pension plans.⁸ The Charter does not reserve to the City the right to impair the pension plan benefits once established, nor does it provide that plan benefits are not vested contractual rights.

11. The Council further created Boards of Administration for each plan, with the power to determine eligibility for receipt of retirement benefits under the plans. In that role, the Board of Administration for the Police and Fire Plan (“Board”) administers the retirement system and performs various functions related to the plan, including the calculation of annual

⁶ A true and correct copy of City of San Jose Employer-Employee Relations Resolution No. 39367 is attached hereto as Exhibit 5.

⁷ See City of San Jose City Charter section 1504 at http://www.sanjoseca.gov/clerk/Charter/Charter_article15.pdf.

⁸ See .g., San Jose Municipal Code §§3.36 et seq., the 1961 Police and Fire Retirement Plan at [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=template\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=template$fn=default.htm$3.0$vid=amlegal:sanjose_ca).

employer and employee contributions, the management and investment of the plan's funds and the distribution of pension benefits to retired police officers and fire fighters. Membership in the plan is compulsory and a condition of employment for City fire fighters. Retirement benefits under the plan are funded by contributions from both the pension plan's members and City, which contributions are in turn invested for the benefit of the plan members.⁹ Employee contributions are credited to a member's participation account for normal service costs.¹⁰ Employees contribute nothing towards prior service costs. In contrast, the City's contributions are credited to the Plan as a whole. When investments exceed the actuarially assumed investment growth rate, the City's unfunded actuarially accrued liability ("UAAL") for prior service costs is reduced. Moreover, when the funding ratio of the Plan's assets to liabilities exceeds 100%, the positive UAAL (or "over-funding of the Plan") serves as a credit in favor of the City by reducing its normal cost contributions.

12. As a result of declining national economy and consequential investment losses to the Plan in the period of 2007-2008, the Plan's funded ratio dropped, and the City's payment for prior service UAAL increased. This experience is consistent with every other public pension plan in California. But unlike other public sector plans, the San Jose Plan has an unusually short amortization period – only 16 years – as contrasted with most California public pension plans. This shorter amortization period guarantees greater increases in the annual UAAL contributions assigned to the City, thus increasing its pension contribution costs, since there is a shorter period of time within which the Board's actuary calculates contribution rates needed to achieve 100%

⁹ See, San Jose Municipal Code §§3.36.1500 et. seq.

¹⁰ The Board, through its actuary's valuation determines the annual amount of employee and City contributions that will be necessary to pay for the costs of current benefits (the normal cost) split on a 3/11ths to 8/11ths basis, as well as the annual costs of any unfunded liability (i.e., benefits that have already accrued, but for which the plan does not have sufficient assets to pay).

funding of liabilities. The exceptional rise in pension contribution costs, fomented by economic declines beyond the Board's control, created the background against which the parties agreed in March, 2011 to continue to bargain over retirement reform for employees.

13. If adopted, Measure B¹¹ would shift up to 50% of the costs of unfunded liabilities from the City to employees and it would radically reduce, change or eliminate existing retirement benefits enjoyed by current employees and would dramatically reduce retirement benefits for future employees in pertinent part, as follows:

A. Contributions. The Plan requires the City and employees to make contributions towards the normal cost of the retirement plan in a ratio of 8 (City) to 3 (employee). The City also makes contributions towards the unfunded liabilities that result from insufficient plan assets to pay projected retirement costs. Under Measure B, Section 1506-A(b), beginning July 23, 2013, employees would be required to make additional contributions to pay the City's unfunded liabilities. Employees would contribute from 4% of pay, up to a maximum of 16% per year, but no more than half the yearly cost to pay unfunded liabilities. There is no provision for a reduction in employee contributions in the event that unfunded liabilities decline to less than current amounts. If a court determines that this provision of Measure B¹² is unenforceable, equivalent monetary "savings" would be imposed on employees by "pay reductions".

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¹¹ The text of Measure B amending the City Charter to add Article XV-A, is set forth in Exhibit A to Exhibit 1 attached hereto.

¹² See Proposed Charter Section 1514-A, set forth in Exhibit A, page 16 to Exhibit 1.

B. Alternative Plan. Measure B requires the City Council to adopt a Voluntary Election Program (“VEP”), subject to IRS approval.¹³ Under the VEP, employees who “opt in” would not be required to make the additional contributions to pay the City’s unfunded liabilities. But of course, the VEP provides vastly inferior benefits to those provided to current fire fighters. If the VEP has not been implemented, or employees do not elect to participate, employees will be required to contribute up to a maximum of 16% of pay per year to pay the City’s unfunded liabilities.

C. New Employees. Measure B requires the City to adopt a retirement plan for new fire fighters that could include social security, a defined benefit plan and/or a defined contribution plan, provided that the City’s contribution is capped at 9% of some unidentified figure.

D. Disability Retirement. Measure B limits disability retirements for current and future employees to instances where the fire fighter is unable to perform any other job within the Fire Department, whether such job is available or not. Thus, if a disabled fire fighter is capable of performing secretarial duties in the Fire Department, but no such positions are available, the fire fighter is ineligible for disability retirement benefits.

E. Measure B authorizes the Council to suspend cost of living adjustments paid to current and future retirees for up to five years if the Council adopts a resolution declaring a fiscal and service level emergency based on unidentified criteria.

¹³ The “implementation of the VEP is contingent on IRS approval” but that approval, as the City concedes is uncertain at best. In a memorandum dated June 23, 2011, from Deputy City Manager Alex Gurza to Mayor and City Council, (http://www.sanjoseca.gov/clerk/Agenda/20110624/20110624_0301att3.pdf) the City acknowledged that “the IRS has not approved any opt in plans since at least 2005 and that there are currently 22 such requests pending with the IRS. Orange County has had their retirement opt in program for current employees on hold waiting on IRS approval.” Accordingly, Measure B is revealed for what it is: a means to shift the cost of unfunded liabilities from the City to the employees.

F. Supplemental Retirement Benefits. Measure B discontinues the Supplemental Retiree Benefit Reserve in the current pension plan, which requires the allocation of a portion of excess plan investment income to fund supplemental benefits for retirees.

G. Retiree Health Care Benefits. Measure B requires fire fighters to assume 50% of the cost of unfunded liabilities for all retiree health care benefits.

The City's Campaign to Misrepresent the Future Cost of Pension Contributions

14. Notwithstanding the 2011 agreement to bargain over retirement benefits for current and future employees, San Jose City Mayor Chuck Reed in February 2011 began a campaign to have the City Council declare a fiscal emergency to justify making unilateral changes to pension benefits for current employees and retirees. Concurrently, the Mayor and other Councilmembers proposed consideration of a charter amendment in the form of a ballot measure that would unilaterally reduce retirement benefits of all City employees, including those represented by the Union. The Mayor commenced a frenzied political and media campaign warning of an impending fiscal disaster for the City as a result of projections for escalating pension costs. The Mayor and his staff repeatedly asserted, including in official City documents put forward as part of the City's bargaining position with the Union, that by fiscal year 2015-2016, the City's total retirement contribution costs could reach \$650 million per year, up from a fiscal year 2010-2011 level of \$245 million. This figure was used more than three dozen times, including in press releases and in interviews in the New York Times and Vanity Fair magazine. For example, on April 13, 2011, San Jose Mayor Chuck Reed and Vice Mayor Madison Nguyen issued a press release announcing that "San Jose's Retirement Director has projected that

[pension] costs could rise to \$650 million per year by fiscal year 2015-2016 . . .”¹⁴ This statement was knowingly misleading.¹⁵ On May 13, 2011, the City published the Mayor’s Memorandum Re: Fiscal Reforms wherein Reed asserted the City’s pension costs were projected to grow to \$650 million annually by 2016.¹⁶ Again, there was no basis for this assertion.

15. On October 17, 2011, the City Council convened a “study session,” for the purpose of discussing the Union’s view that the \$650 million projection of future pension contribution costs was wildly unfounded. The Union presented actuary Tom Lowman to the Council. Mr. Lowman advised the Council that in his expert opinion, future City pension contribution costs would not rise to \$650 million or even \$431.5 million by Fiscal Year 2015-2016. His opinion was based, among other things, upon (1) the actual growth in assets above the assumed annual rate in Fiscal Year 2010-2011 and (2) the 10% salary reductions negotiated with the Union¹⁷ and other labor groups, at variance with an assumed payroll growth rate of 4.25% annually. He advised that based on his preliminary review, at present, City pension contribution costs for Fiscal Year 2015-2016 would rise to a figure closer to \$300 million. In fact, in November and December, 2011, the independent actuary to the Board determined that total City pension contribution costs would be closer to \$330 million. Because the City customarily pays its full year’s contribution in one payment on July 1st, at the beginning of the fiscal year, this figure may drop by \$15-20 million. Moreover, the overall UAAL may decline, and with it the City’s pension contribution costs, if the economic recovery now underway increases assets more than the assumed growth rate, or if the assumed increases in wage growth does not occur.

¹⁴ See Press Release: Mayor Reed and Vice Mayor Nguyen to Discuss Impacts of Pension Costs on San Jose Budget (4/13/12): <http://www.sanjoseca.gov/mayor/news/releases/11April/ReedNguyenDiscussPensionCosts.pdf>.

¹⁵ See discussion in ¶16, *infra*.

¹⁶ See Memo:Fiscal Reforms (5/13/12, see page 5):

http://www.sanjosecagov/mayor/news/memos/11May/FiscalReforms_05132011.pdf.

¹⁷ See 2011 “Wages” agreement executed March 3, 2011 attached as part of Exhibit 4 hereto.

16. The extensive use by the Mayor and his staff of the \$650 million figure during the bargaining over retirement benefits between the parties is set forth in detail in an ethics complaint¹⁸ brought against the Mayor on or about February 9, 2012 and in a complaint filed with the Securities and Exchange Commission¹⁹ on or about February 27, 2012.

17. In 2011 and 2012, various City management representatives repeatedly issued dire warnings about projected pension contribution costs. They pushed the Council for a declaration of towards declaring a so-called fiscal state of emergency. They lobbied publicly for a ballot measure to reduce and eliminate pension benefits, even though the \$650 million dollar figure projected cost figure was inaccurate by more than \$330 million. The City's Director of Retirement Services, Russell Crosby, the only source for the \$650 million projection of costs, expressly disavowed the \$650 million figure and told the Mayor and the City that it should not be relied upon. Director Crosby's disavowal was made public on a February 8, 2012 broadcast of an investigative report on Bay Area NBC-TV Channel 11, a San Jose television station. The Channel 11 broadcast established that the City's overstatements and inaccurate pension contribution cost projections were deliberate and designed to support both the Mayor's declaration for fiscal emergency and his drive towards achieving a ballot measure to reduce and eliminate pension benefits. In the February 8th broadcast, Mayor Reed acknowledged that the source for the \$650 million figure was Crosby. In a same broadcast, however, Crosby stated that the \$650 million estimation: "Was a number off the top of my head." He also stated that: "The Mayor was told not to use that number . . . that the number was \$400 [million dollars]." The City never had an actuarially sound basis for representing a \$650 million pension contribution cost projection by fiscal year 2015-2016. In a March 22, 2012 memorandum to the City Council,

¹⁸ A true and correct copy of the ethics complaint is attached hereto as Exhibit 6.

¹⁹ A true and correct copy of the SEC complaint is attached hereto as Exhibit 7.

City Manager Debra Figone confirmed that the \$650 million cost figure was not based on a competent expert actuarial analysis – rather, it was an unsupported estimate from Crosby.

18. By continuing to communicate the false \$650 million projection, the City's intent was to organize public media and political sentiment to support the City's plan to declare a fiscal emergency and place before the voters a ballot measure radically changing retirement and other post-employment benefits for Union represented firefighters, among other City employees. At all times that the \$650 million representation was made, however, the City knew that it was false and without any reasonable actuarial basis such that the City "knowingly provided [the Union] with inaccurate information regarding the financial resources of the public employer . . ." within the meaning of MMBA Section 3506.5(c) in violation of MMBA 3505 and PERB Regulation 322603(c).

19. On or about December 1, 2011, the independent actuary for the City's two retirement plans issued an updated report regarding projections for prospective City retirement contribution costs. The report disclosed that the City's retirement contribution costs would be far less than previously estimated and approximately \$320 million less than the Mayor had been broadcasting as justification for both a proposed declaration of fiscal emergency and a ballot proposition unilaterally reducing pension benefits. The independent actuary's report showed that, just for the Police and Fire Retirement Plan, the City's cost and contributions for fiscal year 2012-2013 would be approximately \$55 million less than previously budgeted.²⁰

²⁰ More importantly, in reports dated February 8 and 21, 2012, the independent plan actuaries issued 5-year budget projections for the Federated and the Police and Fire Retirement plans. Combined the projected cost of City contributions for pension and retiree health benefits for Fiscal Year 2015-2016 totaled \$322.0 million dollars. Subtracting the projected retiree health care contributions reduced the Fiscal Year 2015-2016 City pension contribution cost projection to \$251.6 million – almost \$400 million below Reed's public estimate.

20. Ever intent on misrepresenting the future costs of current benefits, however, as recently as February 24, 2012 the Mayor asserted that the City's pension liability could reach \$650 million by fiscal year 2015-2016.²¹

21. On February 28, 2012, five California State Assembly members and two State Senators requested that California's legislature's Joint Legislative Audit Committee conduct an audit into the City's general finances and current and future pension obligations. In a statement released to the press, these legislators asked that: "The audit should focus on all projections used by the City and/or its elected officials that include, but may not be limited to, \$400 million, \$431 million, \$570 million, and \$650 million [in projected contribution costs]." On March 7, 2012, the Joint Legislative Audit Committee ordered a State audit to determine, inter alia, whether the Mayor, City Council, or other City officials engaged in any wrongdoing or illegal violations in referencing the false \$650 million pension costs contribution projection for fiscal year 2015-2016. The Committee directed a State order to give the audit priority status.

The City's Bad Faith Bargaining over the Ballot Measure Amending the Charter to Alter Retirement Benefits for Current Employees

22. In coordination with the San Jose Police Officers Association (SJPOA), the exclusive bargaining representative within the meaning of MMBA section 3501(b) for a bargaining unit of police officers, the Union and the City commenced joint bargaining over retirement benefits for current and future fire fighters and police officers in June 2011. At that first meeting, the parties executed a "Pledge of Cooperation and Agreement upon a Framework

²¹ KCBS 740 AM Radio News Report CHUCK REED: "It could get into the ballpark of \$650 million which would be a disaster for the City of San Jose and that's something I think that the public has a right to know." See page 8 of attachment to SEC complaint, attached hereto as Exhibit 7.

for Retirement and Related Ballot Measure Negotiations”.²² The pertinent provisions of that “Pledge” are:

[¶]2. The parties agree to negotiate concurrently on the issues of retirement reform and related ballot measure(s). Negotiation of retirement reform shall include pension and retiree healthcare benefits for current and future employees, including but not limited to healthcare benefits; the Supplemental Retiree Benefit Reserve (SRBR); an opt-in program in which current employees could voluntarily choose to opt-out of the current level of pension benefits into a lower level of benefits; and other terms as identified through the negotiations.

* * *

[¶]7. The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to the procedures outlined in the Employer-Employee Relations Resolution No. 39367. In the event of impasse, the POA and IAFF, Local 230 will participate in the impasse procedures collectively. If the parties proceed to binding interest arbitration, in accordance with the applicable provisions under Charter Section 1111, it is understood that the POA and Local 230 will participate in these proceedings separately. Charter Section 1111 shall not apply to bargaining over ballot measures.

[¶]8. The parties agree that the Council may, pursuant to its constitutional authority, place charter amendments on the ballot regarding retirement at the conclusion of these negotiations and mediation.

[¶]9. It is understood that, by participating in these negotiations, neither party waives any legal rights, including the Unions’ or an employee’s rights to assert that certain benefits are vested.

23. At the first bargaining session between the three parties on June 20, 2011, the City bargaining team, led by Deputy City Manager Alex Gurza gave the Union a copy of the Mayor’s

²² A true and correct copy of this document is attached hereto as Exhibit 8.

June 14, 2011 Budget Message.²³ Gurza confirmed in writing on June 21st, that the Mayor's Budget Message was "*the City's only actual proposal for a ballot measure*" (emphasis in the original).²⁴ Of course, the Mayor's Budget message represented that the City's pension costs could increase annually to approximately \$650 million by 2016²⁵ – a baseless assertion that the City never retracted during bargaining.

24. On July 5, 2011, the City presented its first proposal²⁶ setting forth language for consideration as an amendment to the Charter, although the proposal did not identify what portions of the Charter were proposed to be amended. The City subsequently modified this proposal on September 9, October 5, 20 and 27, 2011.

25. During the period between July and October 2011, the parties met and conferred. The Union and the SJPOA put forth various proposals. Each proposal was consistent with paragraph 9 in the "Pledge of Cooperation"²⁷ and the Union's position that any pension benefit reforms had to conform to the legal strictures under the vested rights doctrine²⁸ such that any reductions or modifications to current benefit provisions could only be achieved by either accompanying offsetting benefit improvements²⁹ or through individual voluntary non-punitive waivers of current pension plan benefits, e.g., truly voluntary "opt-ins" to a 2nd tier benefit plan.

²³ A true and correct copy of the Mayor's June 14, 2011 Budget Message is attached hereto as Exhibit 9.

²⁴ A true and correct copy of Gurza's June 21, 2011 letter to Union President Robert Sapien confirming the City's opening ballot measure proposal is attached hereto as Exhibit 10.

²⁵ See Exhibit 9 at page 5 under section entitled, "BACKGROUND".

²⁶ A true and correct copy of the City's July 5, 2011 proposal is attached as Exhibit 11.

²⁷ See Exhibit 8 attached hereto.

²⁸ The state Constitution protects the vested retirement rights of public employees by prohibiting laws that impair the obligation of contracts or deprive employees of their property rights without due process of law. (Cal. Const., art. I, §§ 7, 9; see also, *Legislature v. Eu* (1991) 54 Cal.3d 492, 528; *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-864; *Miller v. State of California* (1977) 18 Cal.3d 8089,814-817; *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; and *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853.)

²⁹ See *Betts v. Board of Administration*, supra, 21 Cal.3d at p.864: "alterations of employees' pension rights must bear some material relation to the theory of a pension system, and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages,*" quoting *Allen v. City of Long Beach*, supra, 45 Cal.2d at p. 131, italics added.

For example, on September 27, 2011, the Union and the SJPOA proposed, in writing, a three-tier retirement model that maintained the status quo for active employees but created a second tier for new hires and opt-ins with reduced retirement benefits under the California Public Employees Retirement System (CalPERS).

26. The parties failed to reach agreement on either pension benefits or a potential proposed charter amendment by October 31, 2011. In compliance with paragraph 7 of the "Pledge of Cooperation," the parties entered into mediation, with the assistance of the California State Mediation Conciliation Service. The Union and the SJPOA put forward new proposals on November 11 and 18, 2011 significantly amending their prior proposals.

27. On November 22, 2011, the City revised its ballot measure proposal. It was subject to a new condition: if rejected by the Union, the City Council would determine on December 6, 2011 whether to authorize the November 22nd proposal as a charter amendment to be placed on the ballot in a March 2012 special election. The City's November 22nd proposal was transmitted as an enclosure to a letter of that date from Gurza to Union President Sapien and SJPOA President George Beattie.³⁰ Like all prior charter amendment proposals from the City, the November 22nd proposal does not set forth what provisions of the charter it would amend by deletion or addition.

28. On December 6, 2011, the City Council adopted Resolution No. 76087³¹ calling a special municipal election for March 6, 2012 as communicated by Gurza's November 22nd letter to Union President Sapien. Resolution No. 76087 authorizes the submission to the electorate of a

³⁰ A true and correct copy of Gurza's November 22, 2011 letter is attached hereto as Exhibit 12.

³¹ A true and correct copy of the Synopsis of the December 6, 2011 Council meeting adopting Resolution No. 76087 is attached hereto as Exhibit 13. Resolution No. 76067 was appended to a December 5, 2011 Memorandum from Mayor Chuck Reed to the Council, a true and correct copy of which is attached hereto as Exhibit 14.

different measure than the November 22nd City proposal. At this same council meeting, the Mayor deferred his proposal to have the City Council declare a fiscal state of emergency.

29. Concurrent with its action on December 6, 2011 to adopt Resolution No. 76087, the City Council directed City staff to engage in after-the-fact or fait accompli mediation with the Union and other labor organizations, if requested.

30. The Union and the SJPOA subsequently met with the City on December 22, 2011 and on January 9 and 12, 2012, but the City refused to agree to bargain, adopting the position that the parties were at impasse and therefore not obligated to further bargain about the ballot measure.

31. Renewed mediation efforts followed on January 17, 18 and February 6 and 10, 2012 with the assistance of an outside third party mediator, but were unsuccessful.

32. At the end of the mediation session on February 10, 2012, Gurza presented the Union and the SJPOA with a new revised City proposed ballot measure.³² It contained different terms and provisions from those in the proposed measure adopted by the Council on December 6, 2011 in Resolution No. 76087. Gurza presented the February 10, 2012 proposed measure under the following condition: The Union could accept the new February 10th ballot measure, but if the Union rejected it, the City would go forward on the June 5, 2012 ballot *with the ballot measure adopted by Resolution No. 76067 of the City Council on December 6, 2011*. On its face, the City's February 10th proposed charter amendment bears that date of February 8, 2012. It contains a significant revision from all earlier City proposals because it changes the effective

³² A true and correct copy of the City's February 10, 2012 proposal is attached hereto as Exhibit 15.

date employees will be required to make additional contributions to pay the City's unfunded liabilities from June 24, 2012 to June 23, 2013.³³

33. The need for a measure on the June 2012 election ballot was obviated by the new February 10, 2012 proposal because the effective date for cost-shifting of UAAL pension contributions from the City to employees was delayed one year from 2012 to 2013. Yet, on February 21, 2012, Gurza wrote Union President Sapien and told him that the City's revised proposed charter measure of February 10th "would be considered by the City Council at the March 6, 2012, Council Meeting for a June 2012 ballot."³⁴ This was a major change to the offer as communicated in mediation on February 10th, when Gurza stated that if rejected by the Union, the Council would submit to the voters the measure authorized by the adoption of Resolution No 76087 on December 6, 2011.

34. On February 28, 2012 I wrote to Gurza requesting the City to meet and confer over its newly framed offers of February 10th and 21st, especially since it was now unclear what *possible* ballot measure would be adopted by the Council and since the Union had not been afforded the opportunity to bargain over the provisions of the measure proposed on February 10th and 21st.³⁵ My letter notes that the City's February 10, 2012 revised proposal for a ballot measure sets forth significant changes from the ballot measure approved for placement on the ballot by the City Council on December 6, 2011. For example, the February 10th proposal reduces the annual increase in employee contributions for the City's unfunded pension liability from 5% per year, to 4% per year. Moreover, my letter notes that the City Manager conceded that the City's February 21st proposal contained "many significant changes and movements from

³³ Compare Exhibit 15, Section 6(c) with Exhibit 14, Section 6(c).

³⁴ A true and correct copy of Gurza's February 21, 2012 letter is attached hereto as Exhibit 16.

³⁵ A true and correct copy of my February 28, 2012 letter to Gurza is attached hereto as Exhibit 17.

earlier drafts.” Hence, I wrote that the Union “had no opportunity to bargain about this new ballot language.”

35. On March 2³⁶ and 3,³⁷ 2012 Union President Robert Sapien sent Gurza a new joint Union/SJPOA proposal to the City, inclusive of alternative ballot language, which would guarantee additional tens of millions of dollars in savings to the City annually. The March 3rd letter proposed continued bargaining “from 10:00 a.m. March 3, 2012 through 11:59 p.m. on March 9, 2012.”

36. On March 5, 2012, by letter from City Counsel Jonathan V. Holtzman, the City rejected the joint Union/SJPOA proposal, without meeting or bargaining.³⁸

37. On March 6, 2012, the City Council adopted Resolution No. 76158, placing its new February 21, 2012 proposed pension reform charter reform ballot measure on the June 5, 2012 election ballot.³⁹ The adopted measure, like the proposal distributed by the City to the Union at the final mediation session of February 10th, reflects a date of February 8, 2012, not February 21, 2012. Because the document is dated February 8, it is clear that the City had this proposal before it presented the proposal to the Union at the last moment in mediation on February 10, 2012 with the strict admonition and condition that rejection of the proposal meant the Council would proceed with the charter amendment previously adopted by Resolution No. 76087 on December 6, 2011.

38. The action taken by the City Council on March 6, 2012 adopting Resolution No. 76158 was taken unilaterally and without providing the Union with notice and opportunity to

³⁶ A true and correct copy of the March 2, 2012 letter is attached hereto as Exhibit 18

³⁷ A true and correct copy of the March 3, 2012 letter is attached hereto as Exhibit 19.

³⁸ A true and correct copy of the March 5th letter is attached hereto as Exhibit 20.

³⁹ See Exhibit 8 attached hereto.

“meet and confer” . . . before [the City] proposed charter amendments which affect matters within their scope of representation.” (*People ex rel Seal Beach Police Officers’ Assn. v. City of Seal Beach, supra*, 36 Cal.3d at 602.)

The Law

39. MMBA section 3505 requires public agencies to meet and confer in good faith with employee organizations regarding matters within the scope of representation. In determining whether a party has violated MMBA sections 3504.5 and 3505 and PERB Regulation 35603 (b), (c) or (e), PERB utilizes either the “per se” or “totality of the conduct” test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)⁴⁰

40. Unilateral changes are considered “per se” violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties’ written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members’ terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

41. The rule is applicable when a party seeks to change a matter within the scope of representation through the initiative process. Prior to placing the matter before the voters, the

⁴⁰ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (See, *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

City must first satisfy its obligation to bargain. (*The People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, supra.*) The City's ballot measure changing the terms of promised retirement benefits to current employees and future employees is a matter within the scope of representation. (*County of Sacramento I; County of Sacramento II; County of Sacramento III, Madera Unified School District* (2007) PERB Decision No 1907.) Accordingly, the City had a duty to meet and confer over the terms of Measure B prior to submitting the measure for the June 2012 ballot.

Conclusion

42. The changes to firefighter pension contributions and benefits contained in Measure B go beyond mere clarification and constitute substantive changes to pension rights and benefits enjoyed currently by employees, as well as radically reducing benefits for future firefighters. Accordingly, and as is recognized on the face of Resolution No. 76158, Measure B seeks to change the pension plan benefits now in place under the San Jose Municipal Code.

43. The Council's placement of Measure B on the June 5, 2012 election ballot was done without giving the Union an opportunity to bargain over the provisions of the proposed charter amendment. The Board has held that the obligation to meet and negotiate in good faith is one that must be fulfilled before implementing a change to matters within the scope of representation. (*Calexico Unified Schl. Dist.* (1983) PERB Decision No. 357.) Indeed, MMBA Section 3505 provides, in relevant part:

'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to

reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses for specific procedures for such resolution that are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent. [Emphasis added.]

Thus, absent a waiver by the exclusive representative, an employer violates its duty to meet and confer in good faith when it makes a unilateral change to a matter within the scope prior to the completion of bargaining. (*Omnitrans* (2009) PERB Decision No. 2001-M.) This duty is satisfied if the parties either reach agreement or bargain to impasse or participate in any applicable impasse procedures.

44. The City met with the Union on several occasions to bargain over both contractual provisions for retirement benefits and the charter amendment measure *but never bargained over the provisions of Measure B*. There is no evidence that these sessions suffered from a lack of interest by the Union. But the City refused to bargain over the provisions of Measure B (1) after it told the Union on February 10th that rejection of the February 10th proposal, would lead to implementation of the City Resolution No. 76087 adopted December 6, 2011 and again (2) after it later declared on February 21st that the charter amendment measure adopted by Resolution No. 76087 would be displaced by adoption of Resolution No. 76158 — i.e., placing the language of its February 10th proposed measure on the June ballot. The City's refusal to bargain or further mediate pursuant to City Resolution No. 39367 before adopting Resolution No. 76158 is bad faith bargaining.

45. Measure B is not a mere isolated or de minimus breach of terms and conditions of employment, but a change in policy of immense overall effect and continued impact on bargaining unit terms and conditions of employment. Measure B will change the level of

benefits and cost paid by firefighters for those benefits. Such a change will have an ongoing and generalized effect on the terms and conditions of employment.

46. Because all four elements of the "per se" violations criteria are met, the City breached its duty to meet and confer in good faith when it failed to bargain over its proposal of February 21, 2012 to agreement or impasse, inclusive of exhaustion of the mediation procedures under City Resolution No. 39367, prior to placing Measure B on the ballot. Moreover, the change in effective application of the cost shifting provisions in Measure B from June 24, 2012 to June 23, 2013 compared with previously adopted Resolution No. 76087, means the City Council had no imminent need to adopt Resolution No. 76158 on March 9, 2012 and proceed to a June 5, 2012 election. Thus, the City is not relieved of its duty to bargain to agreement or impasse, inclusive of impasse resolution procedures, in the absence of an imminent need to act. (*Cf., Compton Community College Dist. (1989) PERB Decision No. 720.*) This city was not faced with an imminent need to act prior to March 9, 2012 and thus it was not privileged under *Compton* to place Measure B on the ballot prior to the completion of bargaining.

47. The foregoing facts establish that Respondent City committed unfair labor practices as follows:

A. By knowingly providing the Union with inaccurate information regarding the projected pension contribution costs of the City and by bargaining from a false premise that the City's pension contribution costs would escalate to \$650 million by fiscal year 2015-2016 when the City knew that such a projection was inaccurate and not factually based.

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B. By adopting Resolution No. 76158 on March 6, 2012, and placing before the voters on June 5, 2012 a ballot measure amending the City Charter per the City's offer of February 21, 2012 without bargaining or engaging in mediation with the Union under the City's Employer-Employee Resolution No. 39367 or other impasse procedures with the Union.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed on this 4th day of June 2012 at San Jose, California.



Christopher E. Platten

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PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am a resident of or employed in the County of Santa Clara, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Wylie, McBride, Platten & Renner, 2125 Canoas Garden Ave, Suite 120, San Jose, CA 95125.

I am readily familiar with the ordinary practice of the business of collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

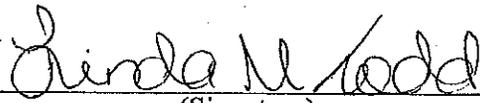
On June 4, 2012, I served the **UNFAIR PRACTICE CHARGE (with accompanying exhibits) and DECLARATION OF CHRISTOPHER E. PLATTEN IN SUPPORT OF UNFAIR PRACTICE CHARGE AND REQUEST FOR EXPEDITED HEARING** on the parties listed below by placing a true copy thereof enclosed in a sealed envelope for collection and mailing in the United States Postal Service following ordinary business practices at San Jose, California addressed as follows:

**Alex Gurza, Deputy City Manager
City of San Jose
200 East Santa Clara Street
San Jose, CA 95113**

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on **June 4, 2012** at San Jose, California.

LINDA M. TODD

(Type or print name)



(Signature)

CERTIFICATE OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104.

On July 6, 2012, I served the following document(s) by the method indicated below:

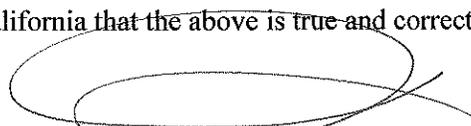
DECLARATION OF JONATHAN V. HOLTZMAN IN OPPOSITION TO SAN JOSE POLICE OFFICERS' ASSOCIATION'S APPLICATION FOR LEAVE TO SUE IN *QUO WARRANTO*

- by placing the document(s) listed above in the sealed envelope(s) and by causing messenger delivery of the envelope(s) to the person(s) at the address(es) set forth below. I am readily familiar with the business practice of my place of employment with respect to the collection and processing of correspondence, pleadings and notices for hand delivery.
- by placing ALL document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.
- by placing the document(s) listed above in a sealed envelope(s) with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited in the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- by electronic transmission via e-mail attachment (agreed by the parties served in this matter)

Gregg McLean Adam, SBN 203436
Jonathan Yank, SBN 215495
Jennifer S. Stoughton, SBN 238309
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery St, Suite 400
San Francisco, CA 94104
Telephone: (415) 989.5900
Facsimile: (415) 989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
jstoughton@cbmlaw.com

Attorneys for Petitioner SAN JOSE POLICE
OFFICERS' ASSOCIATION

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Executed on July 6, 2012, at San Francisco, California.



Rochelle Redmayne