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9  
10 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
11 **IN AND FOR THE COUNTY OF SANTA CLARA**

12 **SAN JOSE POLICE OFFICERS' ASSOCIATION**

13 Plaintiff,

14 vs.

15 **CITY OF SAN JOSE AND BOARD OF**  
16 **ADMINISTRATION FOR THE POLICE AND FIRE**  
17 **DEPARTMENT RETIREMENT PLAN OF CITY OF**  
18 **SAN JOSE**

Defendants.

19 and Consolidated Actions

20 **CITY OF SAN JOSE**

21 Cross-Complainant,

22 vs.

23 **SAN JOSE POLICE OFFICERS' ASSOCIATION, et**  
24 **at.**

25 Cross-Defendants.

Case No. 1-12-CV-225926  
(and Consolidated Actions 1-12-CV-  
225928, 1-12-CV-226570, 1-12-CV-  
226574, and 1-12-CV-227864)

**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT OF**  
**PRELIMINARY INJUNCTION FOR**  
**PLAINTIFFS AND CROSS-DEFENDANTS**  
**ROBERT SAPIEN, MARY KATHLEEN**  
**MCCARTHY, THAN HO, RANDY**  
**SEKANY, KEN HEREDIA, TERESA**  
**HARRIS, JON REGER, MOSES**  
**SERRANO, JOHN MUKHAR, DALE**  
**DAPP, JAMES ATKINS, WILLIAMS**  
**BUFFINGTON, AND KIRK PENNINGTON**

Date: March 5, 2013  
Time: 9:00 a.m.  
Dept: 8  
Judge: Hon. Peter H. Kirwan

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1 Plaintiffs Robert Sapien, et al. (Case No. 112CV225928), Teresa Harris, et al. (Case  
2 No. 112CV226570) and John Mukhar, et al. (Case No. 112CV226574) submit these Points  
3 and Authorities in Support of their Motions for a Preliminary Injunction.

#### 4 INTRODUCTION

5 Under California law the right of public employees to earn retirement benefits, both  
6 pension and health, becomes a vested contractual right at the commencement of the public  
7 employment. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855; *Allen v. City of Long*  
8 *Beach* (1955) 45 Cal.2d 128, 131, 133; *Thorning v. Hollister School District* (1992) 11  
9 Cal.App.4th 1598, 1606-1607.

10 In 2012, defendant City of San Jose placed a measure on the ballot for the election  
11 held on June 5, 2012 (Measure B). This measure was approved by the voters.

12 Plaintiffs then filed these actions to challenge the constitutionality of certain  
13 provisions of Measure B. Plaintiffs seek injunctive and mandamus relief to prevent  
14 implementation of the unconstitutional provisions. A trial setting conference is scheduled on  
15 February 26, 2013 in these cases.

16 Measure B modifies San Jose's two public employee retirement systems<sup>1</sup>. If  
17 implemented, these modifications will impair the vested contract rights of plan participants,  
18 including existing employees and retirees. The City has begun implementing the provisions  
19 of Measure B and this motion is brought to enjoin implementation of those portions of  
20 Measure B which would impair the plaintiffs' vested rights until the lawsuits can be heard  
21 on the merits.

#### 22 ARGUMENT

##### 23 I Purpose and Standards for Preliminary Injunction

24 The purpose of a preliminary injunction is to preserve the status quo until resolution  
25 of the controversy on the merits. *Southern Christian Leadership Conference v. Al Malaikah*  
26 *Auditorium Company* (1991) 230 Cal.App.3d 207, 223. ("Plaintiffs are not required to wait

27 \_\_\_\_\_  
28 <sup>1</sup> The 1967 Police and Fire Department Retirement Plan and the 1975 Federated Employees Retirement  
Plan. (see San Jose Municipal Code [SJMC] Chapter 3.36 and Chapter 3.28 respectively).

1 until they suffer actual harm but may seek injunctive relief against threatened infringement  
2 of their rights.”)

3 A trial court must exercise its discretion and determine the likelihood that the moving  
4 party will prevail and the relative interim harm to the parties from the issuance or non-  
5 issuance of an injunction. *Butt v. State of California* (1992) 4 Cal.4th 668, 676-678. “The  
6 trial court’s determination must be guided by a ‘mix’ of the potential merit and interim harm  
7 factors: the greater the plaintiff’s showing on one, the less must be shown on the other.”  
8 *Butt, supra*, 4 Cal.4th at 678 citing *King v. Meese* (1987) 43 Cal.3d 1217.

9 Implementation of a number of provisions contained in Measure B will impair vested  
10 contractual rights of plaintiffs and other employees and retirees of the City in violation of  
11 Art. I, § 9 of the California Constitution prohibiting impairment of contract. Further the  
12 economic burden on plaintiffs and other employees and retirees far outweighs any harm to  
13 the City.

## 14 II Public Pension Rights Are Vested Contractual Rights

15 It is settled law that the rights to retirement benefits agreed to by a public agency are  
16 vested contractual rights protected against impairment by the California Constitution Art. 1,  
17 § 9. This legal proposition is long standing<sup>2</sup>. In *Kern, supra*, the California Supreme Court  
18 held that a right to earn a pension vested at the commencement of employment, even  
19 though the pension is not earned until the employee works the requisite number of years.  
20 As the court explained:

21 In so far as the time of vesting is concerned, there is little reason to  
22 make a distinction between the periods before and after the pension  
23 payments are due. It is true that an employee does not earn the right  
24 to full pension until he has completed the prescribed period of service,  
25 but he has actually earned some pension rights as soon as he has  
26 performed substantial services for his employer. (See *Dryden v. Board  
of Pension Commrs.*, 6 Cal.2d 575, 579 [59 P.2d 104];. *French v.  
French*, 17 Cal.2d 775, 777 [112 P.2d 235]) He is not fully  
compensated upon receiving his salary payments because, in addition,  
he has then earned certain pension benefits, the payment is to be  
made at a future date. While payment of these benefits is deferred,

27 <sup>2</sup> See also, *Miller v. State of California* (1977) 18 Cal.3d 808; *Betts v. Board of Administration* (1978) 21  
28 Cal.3d 859; *Olson v. Cory* (1980) 27 Cal.3d 532; *Pasadena Police Officers Assn. v. City of Pasadena* (1983)  
147 Cal.App.3d 695.

1 and is subject to the condition that the employee continue to serve for  
2 the period required by the statute, the mere fact that performance is in  
3 whole or in part dependent upon certain contingencies does not  
4 prevent a contract from arising, and the employing governmental body  
5 may not deny or impair the contingent liability any more than it can  
6 refuse to make the salary payments which are immediately due.  
Clearly, it cannot do so after all the contingencies have happened, and  
in our opinion it cannot do so at any time after a contractual duty to  
make salary payments has risen, since a part of the compensation  
which that employee has at that time earned consists of his pension  
rights.

7 29 Cal.2d at 855.

8 The principles set forth in the *Kern* decision have been reiterated numerous times.  
9 See *Legislature v. Eu* (1991) 54 Cal.3d 492, 528-530; *Allen, supra*, 45 Cal.2d 128, 130-  
10 133 (holding that an increase in employee contribution rate, a modification of the pension  
11 benefit and a requirement that additional contributions be made by military veterans for  
12 periods served in military service, each impaired vested contractual rights which, without  
13 justification, could not be done); *United Firefighters of Los Angeles v. City of Los Angeles*  
14 (1989) 210 Cal.App.3d 1095, 1103-04 (A reduction of cost of living adjustments in a  
15 pension plan impairs vested contract rights unless it bears a material relation to the theory  
16 of a pension and the disadvantage is balanced by a comparable advantage).

17 As the court in *California League of City Employee Associations v. Palos Verdes*  
18 *Library District* (1978) 87 Cal.App.3d 135, 139 explained:

19 The courts have recognized, for instance, that an employee begins  
20 earning pension rights from the day he starts employment. 'While  
21 payment of these benefits is deferred, and is subject to the condition  
22 that the employee continue to serve for the period required by the  
23 statute, the mere fact that performance is in whole or in part  
dependent upon certain contingencies does not prevent a contract  
from arising, and the employing governmental body may not deny or  
impair the contingent liability any more that it can refuse to make the  
salary payments which are immediately due.' (Citations omitted.)

24 Medical benefits for retirees are part of the pension benefits that are protected under  
25 the same principles. *Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598, 1606.  
26 "The principle that an employee begins earning pension rights from the day he starts  
27 working is not limited simply to pension cases but extends to other types of benefits." *Id.* at  
28 1606 citing *California League of City Employee Associations, supra*. The court held that the

1 medical benefits were important to the employees and were a form of compensation which  
2 had been earned by remaining in employment. *Thorning, supra*, 11 Cal.App.4th at 1606.  
3 The court concluded that the employees had satisfactorily alleged deprivation of a vested  
4 contractual right, protected by the constitution.

5 In *Retired Employees Association of Orange County v. County of Orange* (2011) 52  
6 Cal.4th 1171, the California Supreme Court determined as a matter of California Law that  
7 California public employers and their employees can form an implied contract that confers  
8 vested rights to health benefits on retired county employees. The court held that absent a  
9 statutory prohibition a contract may be implied from an ordinance or a resolution when the  
10 language or circumstances clearly evidence a legislative intent to create an enforceable  
11 contract. *Id.* at 1176-77.

12 Through its management employees and its counsel the City has on a number of  
13 occasions made public admissions that the City's pension plans create vested contractual  
14 rights. See Exh. 2, p. 2:12-15, attached to Declaration of Christopher E. Platten (hereinafter  
15 Platten Decl.) ("Once a retirement benefit has been installed in the retirement plan . . . it  
16 generally cannot be removed from the plan unless a benefit of equal or greater value is  
17 given."); Platten Decl. Exh. 1, p. 26:12-16. ("So once a benefit comes into the retirement  
18 plan it becomes a benefit, then it's there, or you're going to give something else in return  
19 later on that's comparable to that, so for all practical purposes, it's there forever"); Request  
20 for Judicial Notice, Exh. 8, p. 21. (City Attorney arguing that state legislation invading  
21 corpus of pension funds was unconstitutional; "It is a governmental taking of vested  
22 property rights – the very antithesis of what an employee benefit plan is supposed to be.");  
23 Declaration of Randy Sekany, Exh. 1. (Memorandum from City Manager Debra Figone:  
24 "Because San Jose's retiree healthcare benefits are part of the City's retirement plan, the  
25 retiree healthcare can be considered a 'vested' benefit similar to the pension benefit  
26 itself.").

27 Disability pension benefits and the standard for entitlement thereto are  
28 encompassed in these vested contractual rights. *Babbitt v. Wilson* (1970) 9 Cal.App.3d 288,

1 290 (Disability retirement benefits in place upon commencement of employment and before  
2 retirement are vested contractual rights); *Dickey v. Retirement Board* (1976) 16 Cal.3d 745,  
3 748-749 (Retirement benefit rights including disability are contractual rights which vest  
4 upon commencement of employment); *Newman v. City of Oakland Retirement Board*  
5 (1978) 80 Cal.App.3d 450, 458-459 and 463 (Impermissible modification of terms of  
6 eligibility for disability pension).

7 While the right to pension benefits vests upon commencement of employment,  
8 modifications can be made if they are reasonable. To be reasonable, however, any change  
9 causing a disadvantage must be accompanied by a comparable new advantage. *Babbit*,  
10 *supra*, at 290.

11 As the court in *Allen, supra*, held:

12 To be sustained as reasonable, alterations of employees' pension  
13 rights must bear some material relationship to the theory of a pension  
14 system and its successful operation, and changes in a pension plan  
which result in disadvantage to employees should be accompanied by  
comparable new advantages. 45 Cal.2d at 131

15 See also, *California League of City Employees Association, supra*, at 140 (any  
16 disadvantage must be offset by a comparable new advantage).

17 Measure B *does not provide any* comparable advantages to offset the significant  
18 disadvantages that would be imposed on employees and retirees.

### 19 **III Provisions Of Measure B That Impair Vested Contractual Rights**

#### 20 **A Measure B, § 1506-A Improperly Increases the Pension Contributions 21 Required of Employee Members**

22 Under the 1975 Federated City Employee Retirement Plan (Federated Plan) the City  
23 and employees contribute to the pension plan; the amount of the employees' contribution is  
24 set and adjusted by the Board of Administration pursuant to SJMC Sections 3.28.710 and  
25 3.28.720. There are two significant requirements in Section 3.28.710 which protect the  
26 employees' level of contribution. First the normal rate of contribution is to be in a ratio of 3  
27 by employees to 8 by the City. Second, any new or adjusted rate for employees may not  
28 include any contributions required "because of the system changing the time at which

1 members may retire, or changing the benefits members will receive, or as a result of  
2 experience under the system.” In short the employees may not be required to pay for any  
3 unfunded liability. Rather, any unfunded liability is the responsibility of the City. SJMC  
4 Sections 3.28.850 and 3.28.880 require the City to make contributions toward any  
5 deficiency caused by any changes in retirement system or the earnings experience.

6 Under the 1961 Police and Fire Department Retirement Plan (Police and Fire Plan)  
7 the current service contributions required of participants are set forth in SJMC Section  
8 3.36.1520 and includes limitations similar to those in the Federated System; the rates of  
9 contributions shall not include any amount required to make up any deficits caused by prior  
10 inadequate rates and that the contribution ratio is 3 for participants and 8 for the City.  
11 Section 3.36.1550 D requires that the City “contribute to the retirement fund, monthly all  
12 such amounts as the retirement board shall find must be contributed to the fund to make  
13 the plan actuarially sound to the extent that such amounts are not provided by member and  
14 City’s current service contributions as provided for in Section 3.36.1520.” This liability for  
15 unfunded liabilities has been admitted by the City Attorney in an interest arbitration held  
16 pursuant to San Jose City Charter § 1111. Platten Decl. Exh. 4, p. 1:23-2:4. (“City is solely  
17 responsible to pay any deficit.”)

18 Section 1506-A (b) of Measure B specifically removes the limitations and protections  
19 of the above sections and requires additional contributions from employees of 4% of  
20 pensionable compensation per year up to 16% to pay for “pension unfunded liabilities” not  
21 to exceed 50% of the unfunded liability. As a result the City would shift up to 50% of its  
22 liability to pay for unfunded liabilities to the employees and the employees’ ratio of  
23 contribution of 3/11ths provided in SJMC Sections 3.24.710 and 3.36.1520 would increase.  
24 Under Section 1506-A(c), these new, higher employee contributions will begin June 23,  
25 2013. The provision makes a significant change in the vested contractual rights for all  
26 employees first employed prior to the time Measure B was approved.

27 In apparent recognition that this shift in liability might be unenforceable or illegal, the  
28 City included Section 1514-A in Measure B to provide that if Section 1506-A(b) is

1 determined to be "illegal, invalid or unenforceable" the hoped for savings (to the City) are to  
2 be recouped by reducing employees' pay by 4% per year up to a maximum of 16% of pay.  
3 This reduction is in addition to the 10% reduction in wages negotiated between the  
4 employee unions and the City in July 2011. (See Platten Decl. ¶ 9) Because the employees  
5 have vested contractual rights in the retirement plans which include the aforesaid  
6 limitations the City cannot indirectly reduce either the benefit or protections contained in the  
7 plan by causing the employees compensation to be reduced to allow the City to recover up  
8 to fifty percent of the amount it is contractually obligated to pay for the unfunded liabilities  
9 of the plans.

10 Implementation of Section 1506-A(b) will create a disadvantage, i.e., increase the  
11 employees contribution to retirement up to 16% of compensation, or alternatively, reduce  
12 their compensation by 16%. Nothing in Measure B provides any offsetting comparable  
13 advantage.

14 **B Measure B Section 1509-A Eviscerates the Pension Plans' Disability**  
15 **Retirement Benefit.**

16 Employees who are members of the Federated Plan are entitled to disability  
17 retirement benefits if they become disabled. Under SJMC Section 3.28.1210 a member is  
18 deemed disabled if the member becomes incapable of performing the work of the position  
19 which the member holds and of any other positions in the *same* classification to which the  
20 City may offer to transfer the member. Thus an employee is eligible for disability retirement  
21 benefits if an injury or illness prevents the employee from performing the duties of a  
22 defined range of jobs in the same classification. As an example, a building inspector  
23 incapable of performing the duties of that position, but capable of performing the duties of a  
24 receptionist (a different classification) is nevertheless entitled to a disability retirement.  
25 Further even if an employee is incapable of performing the duties of the position held at the  
26 time of the disability, but the employee could perform the duties of another position in the  
27 same classification, the employee would be entitled to a disability pension unless the City  
28 offered him or her employment in that alternative position.

1 In contrast, Section 1509-A(a) and (b)(1) provides that to qualify for disability  
2 retirement benefits the employee "must be *incapable of engaging in any gainful*  
3 *employment for the City*" [emphasis added] and further that the employee would not be  
4 entitled to a disability retirement even if another position which the employee could perform  
5 was not available or offered to him or her. Thus, for example, the building inspector who is  
6 incapable of doing that job, but who could perform clerical work in the City Clerk's office  
7 would not be eligible for a disability retirement benefit *even if* no clerical position was  
8 available or offered to him or her.

9 In the Police and Fire Plan the employees have requirements for disability  
10 retirement benefits. SJMC Section 3.36.900 provides that a member is entitled to a  
11 disability retirement benefit if the member becomes incapable of performing the duties of  
12 the "position then held by him or any other position *in the same classification of positions* to  
13 which the City may offer to transfer him . . . ." (emphasis added). Thus, for example, a  
14 firefighter who becomes incapable of performing the duties of a firefighter on the line, but  
15 who could perform the duties of another position in the same classification, for example a  
16 fire marshal inspector, would not be entitled to disability retirement pension, but only if the  
17 latter position was offered to him or her. Conversely, a firefighter disabled from line duties  
18 but who could perform clerical duties in the fire department would be eligible for a disability  
19 pension.

20 Under Measure B, Section 1509-A(b)(ii), a firefighter who became unable to perform  
21 the duties of the firefighter classification, but was capable of performing the functions of  
22 some clerical position in the fire department, would not be eligible for a disability retirement  
23 pension even if no such position was open or even if an open position was not offered.

24 Disability retirement benefits are part of the pension system, and vest upon  
25 commencement of employment. Changes which impose substantial, lesser alternatives in  
26 the eligibility for disability benefits run afoul of the constitutional protection against  
27 impairment of contracts. The right to a disability pension like other public pension rights  
28 accrue immediately upon employment and a change in eligibility requirements after the

1 right has vested causes an impermissible impairment of contract. *Frank v. Board of*  
2 *Administration of the Public Employees' Retirement System* (1976) 56 Cal.App.3d 236,  
3 243. The court in *Frank* recognized that there can be reasonable modifications in pension  
4 plans provided that any disadvantages are accompanied by comparable new advantages  
5 and so long as any "modification does not frustrate the reasonable expectations of the  
6 parties to the contract of employment." *Id.* at 244.

7 In both plans the Measure B changes cause a significant diminution of the right to  
8 disability retirement benefits. In essence, Measure B Section 1509-A eliminates the  
9 eligibility for a disability retirement pension for all employees other than those who are so  
10 impaired that they are incapable of any gainful employment. Further, there are no  
11 compensating advantages to justify these changes.

12 **C Measure B Section 1509-A(c) Improperly Displaces the Fiduciary Duties**  
13 **of the Boards of the Retirement Plans to Non-Fiduciaries**

14 Under the Federated Plan, the Board of Administration Board established by Section  
15 3.28.100 is charged with the duties of managing, administering and controlling the Plan.  
16 (SJMC Section 3.28.110) Among other duties the Board is required to undertake is the duty  
17 to determine whether or not an employee is incapacitated and otherwise eligible to retire  
18 for disability (Section 3.28.1260) and further the Board is empowered to determine whether  
19 or not the disability is service connected.<sup>3</sup> (Section 3.28.1270)

20 Under the Police and Fire Plan, the Board of Administration is charged with the  
21 duties of managing, administering, and controlling the Plan, including determining whether  
22 an applicant for disability retirement is eligible and if so whether or not the disability is  
23 service connected. (SJMC Sections 3.36.010, 3.36.300, 3.36.310, 3.36.320, 3.36.970 and  
24 3.36.980.)

25 Article XVI, Section 17(b) of the California Constitution provides that board members  
26 of a public pension system, such as the Boards of the Federated Plan and the Police and  
27

28 <sup>3</sup> A determination that a disability is service connected results in a greater pension benefit than a non-service  
connected disability pension benefit under both pension plans.

1 Fire Plan, have fiduciary duties and are to "discharge their duties with respect to the  
2 system solely in the interest of, and for the exclusive purpose of providing benefits to,  
3 participants and their beneficiaries, minimizing employer contributions thereto, and  
4 defraying reasonable expenses of administering the system." A retirement board's duties to  
5 its participants and their beneficiaries shall take precedence over any other duty. *Ibid.*

6 Measure B, Section 1509-A destroys the Boards' power and duty to determine  
7 whether or not an applicant for a disability pension is disabled and if so, whether the  
8 disability is service connected. It transfers that authority to medical doctors appointed by  
9 the City.

10 A right to a disability pension is part of the pension plan protected from impairment  
11 by the *Kern* line of cases. This includes the right to have board members who owe fiduciary  
12 duties to the participants, make the important determinations of whether an applicant is  
13 disabled, and if so whether the disability is service connected. These provisions protect the  
14 participants from decisions that might otherwise be made by the City with the resultant  
15 conflict of interest. Section 1509-A(c) would have the determination of eligibility for  
16 disability pensions and whether the disability was service connected made by medical  
17 doctors chosen (and presumably paid) by the City. These appointees would owe no  
18 fiduciary duty to the employees, nor would they be required to give preference to the rights  
19 of employees over any other duty. Further, since the "independent medical experts" would  
20 be employed by and at the will of the City they could be discharged at any time the City  
21 became dissatisfied with their decisions. This creates an obvious conflict of interest which  
22 is totally at odds with the fiduciary duties of the Boards required under Article 16, § 17.

23 The requirements of Article 16, § 17 and the retirement plans' provisions for  
24 disability pensions are for the benefit and protection of the participants and as such  
25 represent an important aspect of the pension system that would disappear if Section 1509-  
26 A (c) were implemented. There are no comparable advantages to offset the obvious  
27 disadvantages to the employees and future applicants for disability retirement.

28

1           **D     The Supplemental Retirement Benefits Reserves Are Part of Vested**  
2           **Pension Benefits.**

3           In 1986 the City Council enacted Ordinance No. 22263 which established a  
4           Supplemental Retirement Benefit Reserve fund (SRBR) for the Federated Plan. (SJMC  
5           Section 3.28.340) (See RJN No. 4.) The purpose of this fund was to provide supplemental  
6           pension benefits to pensioners whose pensions were comparably less because of their  
7           earlier retirement. Platten Decl. Exh. 5, p. 1167:6-1169:5.

8           The SRBR is a "gain-sharing" plan which allocates excess earnings derived from  
9           employee and City contributions. The SRBR is funded by transfers to it of 10% of any  
10          earnings of the Plan in excess of the actuarially assumed earnings rate (net of interest  
11          crediting and payment of administrative expenses in any year (Section 3.28.340 D, 2). The  
12          SRBR funds are required to "be used only for the benefit of retired members, survivors of  
13          members and survivors of retired members." (Section 3.28.340 E, 1). The SRBR fund is  
14          part of the pension plan and the vested right thereto became part of the deferred  
15          compensation earned while working. See Platten Decl. Exh. 5, p. 1167:9-1169:5

16          Similarly, the Police and Fire Plan was amended in 2002 by Ordinance No. 26536  
17          set up an almost identical SRBR for the police and fire department employees. (See RJN  
18          No. 3). This SRBR was initially funded and then additionally funded on an annual basis by  
19          allocation of a percentage of excess earnings arrived from employees and City  
20          contribution. (SJMC Section 3.36.580 B)

21          The Federated and Police and Fire SRBRs benefits were initially to go to retirees  
22          and their beneficiaries. The benefits were intended to be distributed to provide greater  
23          benefits to persons whose pension benefits were comparably lower due to the greater  
24          length of their retirement status.

25          Measure B, Section 1511-A which provides for the discontinuance of the SRBR  
26          funds and transfer of the funds to the appropriate retirement trust funds is inconsistent with  
27          the SRBR fund ordinances, would cause an impairment of vested contractual rights of  
28          retirees and current employees, and offers no advantage to offset this disadvantage.

1                   **E     The Cost of Living Benefits are Vested Contractual Benefits**

2           Both pension plans include a cost of living provision to adjust pension benefits to  
3           account for inflation (COLA). These provisions have existed in various iterations from 1970.

4           Finally in February of 2002 the prior formula was changed to a flat 3% per annum for  
5           the Police and Fire Plan. See SJMC Section 3.44.150. The Federated Plan pension was  
6           changed to a flat 3% per annum in April 2006. See Section 3.44.160. These COLAs are  
7           integral parts of the two pension systems and represent vested contractual rights.

8           The effect of Measure B, Section 1510-A is to allow the City to abrogate the vested  
9           rights by simply adopting a resolution declaring a fiscal and service level emergency and  
10          making a finding of necessity to suspend the COLA. In essence, by fiat the City could end  
11          the COLA payment. This has two significant effects. For those who retired after the  
12          effective dates of the COLA ordinances but who retired prior to the effective date of  
13          Measure B, there would be an unconstitutional impairment of a right that not only was  
14          vested but which had fully matured and was wholly earned. There is no precedent for that.

15          Those employees who continued employment after the effective date of Measure B  
16          now face a contingency that was not part of their vested contractual rights to the set COLA.  
17          Thus the disadvantage they face a potential loss of the COLA without any comparable  
18          advantage.

19                   **F     Measure B Abrogates The Vested Rights For Employee Contribution  
20                   Levels Toward Retiree Health Benefits**

21          Measure B, Section 1512-A abrogates existing vested contractual obligations that  
22          set contribution for retiree healthcare levels of both plans. The Federated Plan provides for  
23          retiree health benefits both medical and dental. (SJMC Sections 3.28.1950 – 3.28.2045)  
24          The existing provisions require members to pay 50% of the cost of the medical and 3/11th  
25          of the cost of the dental. (SJMC Section 3.28.385) The Police and Fire Plan also have  
26          provisions for medical and dental benefits for retirees. (SJMC Sections 3.36.1900 -  
27          3.36.1950) The contributions rate for employees is 50% for medical and 1 per employee to  
28          3 for the City for dental. (SJMC Section 3.36.575) Thus in both plans the cost sharing

1 obligation of the employees is set and there are no provisions requiring the employees to  
2 bear the cost of any unfunded liability.

3 Measure B, Section 1512-A(a) makes two significant changes. The ratio of  
4 contributions for dental benefits are raised to 50/50 from 3/8 for Federated and to 50/50 for  
5 Police and Fire from one to three. The measure also requires that the employees bear 50%  
6 of any unfunded liability. These are significant changes in the costs to the members for  
7 retiree liabilities. These disadvantages are not balanced by any advantage.

### 8 CONCLUSION

9 Each of these Measure B modifications will cause significant disadvantages, both  
10 economic and otherwise to existing employees with no comparable advantages provided.  
11 Each modification represents a unilateral effort by the City to either decrease its  
12 expenditures or shift its liabilities to the employees or both. There is no obvious relationship  
13 to the theory of a pension and the economic hardship to employees and to retirees –  
14 namely a reduction in income in violation of the constitutional protection against impairment  
15 of contract cannot be adequately compensated in later recovery of damages.

16 Therefore a preliminary injunction in the form requested in the notice of motion  
17 should be granted.

18  
19 Dated: January 31, 2013

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22   
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