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9

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

12 SAN JOSÉ POLICE OFFICERS  
ASSOCIATION,

13 Plaintiff,

14 v.

15 CITY OF SAN JOSÉ, BOARD OF  
16 ADMINISTRATION FOR POLICE AND  
FIRE RETIREMENT PLAN OF CITY OF  
17 SAN JOSÉ, and DOES 1-10 inclusive.,

18 Defendants.

19 AND RELATED CROSS-COMPLAINT  
20 AND CONSOLIDATED ACTIONS.

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,  
112CV226570, 112CV226574, 112CV227864]

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' AND CROSS-  
COMPLAINANT'S MOTION FOR  
SUMMARY ADJUDICATION OF ISSUES**

Date: April 23, 2013  
Time: 9:00 a.m.  
Dept.: 8

Complaint Filed: June 6, 2012  
Trial Date: None Set

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1-12-CV-225926

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	3
A. The City of San José and its Retirement Plans.....	3
B. City Finances / Great Recession.....	6
C. Measure B - The Sustainable Retirement Benefits and Compensation Act.....	7
D. The Parties' Claims and Procedural History .....	8
III. LEGAL ARGUMENT .....	9
A. The Court Should Grant Summary Adjudication Regarding Causes of Action Challenging The Three Measure B Sections At Issue Here .....	9
B. General Rules of Construction Favor Upholding Measure B .....	11
1. The Court Must Presume that Measure B is Valid.....	11
2. Plaintiffs Must Overcome Their Burden To Demonstrate That San José Intended To Create Vested Contractual Or Property Rights That Precluded the Changes in Measure B at Issue in this Motion.....	12
3. Plaintiffs Have the Burden to Show a Clear Commitment or Promise.....	12
4. Plaintiffs Will Rely On Inapposite Authority .....	13
C. Each Cause of Action Asserted by Plaintiffs Fails Based On the Charter's Express Reservation of Rights To Modify the Retirement Plans.....	15
1. The Legislative History and Charter Provisions Confirm the City's Longstanding Reservation of Rights to Modify or Otherwise Change the Plans .....	15
2. The Relevant Authorities Compel Application of the Charter's Reservation of Rights .....	16
3. The Municipal Code Cannot Confer a Right in Conflict with the Charter .....	18
D. Every Section of Measure B is Lawful .....	19
1. Plaintiffs' Challenge to Charter Section 1506-A (Increased Contributions to Defray Unfunded Liabilities) Must Be Rejected as a Matter of Law .....	19
a. The Charter's Contribution Ratios Apply to "Normal" Costs – Not Costs Related to Unfunded Liabilities .....	20

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

b.	The Unions Have Agreed to Increased Pension Contributions.....	22
1)	The Union Agreements Confirm the Absence of a Vested Right.....	24
2)	The Unions' Treatment of Contribution Rates and Wages as Interchangeable Further Demonstrates the Absence of Any Vested Right.....	25
c.	The Municipal Code Expressly Calls for Increased Contributions to Defray Additional and Prior Service Liabilities.....	26
2.	Summary Adjudication Must Be Granted With Respect to Plaintiffs' Challenge to Charter Section 1512-A (Retiree Health Care Funding).....	27
a.	Contributions to Retiree Healthcare – Background .....	28
b.	Plaintiffs Cannot Prove They Have A Vested Right to the City Paying for The Unfunded Liability For Retiree Health Care .....	31
3.	The City is Entitled to Summary Adjudication regarding Plaintiffs' Challenge to Charter Section 1511-A (Supplemental Benefit Reserve – “SRBR”).....	33
a.	Plaintiffs' Causes of Action Related to the Elimination of the Supplemental Retiree Benefit Reserve Fail Because SRBR Has Always Been Treated as Discretionary and Thus There Cannot Be a Vested Right to the Fund as a Matter of Law.....	34
1)	Federated Plan .....	34
2)	Police and Fire Plan.....	36
b.	The Fact That the SRBRs Had The Unintended Consequences of Actually Harming the Viability of the Retirement Funds Defeats Plaintiffs' Claims of Vested Contractual or Property Rights.....	38
c.	In Any Event, Employees Who Retired Before The Enactment of SRBR Have No Vested Right To Its Benefits .....	40
IV.	THE COURT SHOULD GRANT SUMMARY ADJUDICATION WITH RESPECT TO THE CITY'S CROSS COMPLAINT FOR DECLARATORY RELIEF .....	41
V.	CONCLUSION .....	41

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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**Page(s)**

**FEDERAL CASES**

*Bowen v. Public Agencies Opposed to Social Security Entrapment*,  
477 U.S. 41 (1986)..... 17, 18

*Doyle v. City of Medford*,  
606 F.3d 667 (9<sup>th</sup> Cir. 2010)..... 35, 38

*Flemming v. Nestor*,  
363 U.S. 603 (1960)..... 17

*Moore v. Metropolitan Life Insurance Company*,  
856 F.2d 488 (2d Cir. 1988)..... 18

*National R. Passenger Corp. v. A.T. & S.F.R. Co.*,  
470 U.S. 451 (1985)..... 12, 17

*Retired Employees' Ass'n of Orange County v. County of Orange*,  
632 F.Supp.2d 983 (C.D. Cal. 2009)..... 13, 35

*Retired Employees' Association of Orange County v. County of Orange*  
(Case No. SACV 07-1301 AG) 2012 U.S. Dist. LEXIS 146637 (C.D. Cal.  
August 13, 2012)..... 17, 38

*San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*,  
568 F.3d 725 (9<sup>th</sup> Cir. 2009)..... 13, 25

*Sprague v. General Motors Corp*,  
133 F.3d 388 (6th Cir. 1998)..... 18

**CALIFORNIA CASES**

*Abbott v. City of Los Angeles*,  
50 Cal.2d 438 (1958)..... 13, 14

*Abbott v. City of Los Angeles*,  
53 Cal.2d 674 (1960)..... 41

*Aguilar v. Atlantic Richfield Co.*,  
25 Cal.4th 826 (2001)..... 11

*Alesi v. Board of Retirement*,  
84 Cal.App.4th 597 (2000)..... 11

1	<i>Allen v. Bd. of Admin of the Public Employees' Ret. Sys.,</i> 34 Cal.3d 114 (1983).....	39, 40
2	<i>Butterworth v. Boyd,</i>	
3	12 Cal.2d 140 .....	25
4	<i>California Housing Finance Agency v. Elliott,</i>	
5	17 Cal.3d 575 (1976).....	12
6	<i>California Teachers' Ass'n v. Parlier Unified School District,</i>	
7	157 Cal.App.3d 174 (1984).....	22
8	<i>Citizens for Responsible Behavior v. Superior Court,</i>	
9	1 Cal.App.4th 1013 (1991).....	19
10	<i>City &amp; County of San Francisco v. Patterson,</i>	
11	202 Cal.App.3d 95 (1988).....	19
12	<i>City of San Diego v. Haas,</i>	
13	207 Cal.App.4th 472 (2012).....	passim
14	<i>Claypool v. Wilson,</i>	
15	4 Cal.App.4th 646 (1992).....	14
16	<i>Domar Electric, Inc. v. City of Los Angeles,</i>	
17	9 Cal.4th 161 (1994).....	18, 21
18	<i>Downey v. Board of Administration,</i>	
19	47 Cal.App.3d 621 (1975).....	4
20	<i>Garrett v. Howmedica Osteonics Corp.,</i>	
21	211 Cal.App.4th 389 (2012).....	11
22	<i>Glendale City Emps. Ass'n, Inc. v City of Glendale,</i>	
23	15 Cal.3d 328 (1975).....	22
24	<i>International Ass'n of Firefighters, Local 145 v. City of San Diego,</i>	
25	34 Cal.3d 292 (1983).....	14, 27
26	<i>International Federation of Professional and Technical Engineers v. City and County of</i> <i>San Francisco,</i>	
27	76 Cal.App.4th 213 (1999).....	11
28	<i>Kern v. City of Long Beach,</i>	
	29 Cal. 2d 848 (1947).....	13, 14
	<i>Lilienthal &amp; Fowler v. Sup. Ct (Karr),</i>	
	12 Cal.App.4th 1848 (1993).....	10, 11

1	<i>Lucchesi v. City of San José,</i> 104 Cal.App.3d 323 (1980).....	18
2	<i>Lunardi v. Great-West Life Assurance Co.,</i> 37 Cal.App.4th 807 (1995).....	11
3		
4	<i>Lyon v. Flournoy,</i> 271 Cal.App.2d 774 .....	39, 40
5		
6	<i>Mathieu v. Norrell Corp.,</i> 115 Cal.App.4th 1174 (2004).....	10, 11
7		
8	<i>Miller v. State of California,</i> 18 Cal.3d 808 (1977).....	25
9		
10	<i>Olson v. Cory,</i> 27 Cal.3d 532 (1980).....	41
11		
12	<i>Pacific Legal Foundation v Cal. Coastal Commission,</i> 33 Cal.3d 158 (1982).....	15
13		
14	<i>Pasadena Police Officers Ass'n v. City of Pasadena,</i> 147 Cal.App.3d 695 (1983).....	27, 41
15		
16	<i>People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach,</i> 36 Cal.3d 591 (1984).....	7, 22
17		
18	<i>Retired Employees Association of Orange County v. County of Orange,</i> 52 Cal.4th 1171 (2011) (“ <i>REAOC</i> ”).....	passim
19		
20	<i>San Diego Firefighters v. Bd. of Admin.,</i> 206 Cal.App.4th 594 (2012).....	18
21		
22	<i>Sappington v. Orange County Unified School District,</i> 119 Cal.App.4th 949 (2004).....	32, 33
23		
24	<i>Sonoma County Organization of Public Employees v. County of Sonoma,</i> 23 Cal.3d 296 (1979).....	3
25		
26	<i>State Building and Construction Trades Council of California v. City of Vista,</i> 54 Cal.4th 547 (2012).....	3
27		
28	<i>Taylor v. Crane,</i> 24 Cal.3d 442 (1979).....	21
	<i>Teachers' Retirement Board v. Genest,</i> 154 Cal.App.4th 1012 (2007).....	36
	<i>Tirapelle v. Davis,</i> 20 Cal.App.4th 1317 (1993).....	25

1	<i>Ventura County Retired Employees' Assn. v. County of Ventura,</i> 228 Cal.App.3d 1594 (1991).....	11, 36, 38
2	<i>Vielehr v. Cal.,</i>	
3	104 Cal App. 3d 392 (1980).....	25
4	<i>Walsh v. Board of Administration,</i>	
5	4 Cal.App.4th 682 (1992).....	12, 17, 40
6	<b>FEDERAL STATUTES</b>	
7	42 U.S.C. § 1304 .....	17
8	<b>CONSTITUTIONAL PROVISIONS</b>	
9	California Constitution, § 5 (b)(4).....	3
10	<b>CALIFORNIA STATUTES</b>	
11	Cal. Civ. Proc. Code, § 437c.....	11, 10
12	Cal. Civ. Proc. Code, § 437c(f)(1) .....	9, 10, 11
13	Cal. Civ. Proc. Code, § 1060 .....	41
14	Cal. Ed. Code, § 22954(c).....	36
15	Cal. Gov. Code §§ 3500 <i>et seq.</i> (Meyers-Milias-Brown Act).....	22
16	<b>SAN JOSE CHARTER</b>	
17	200.....	4
18	400.....	4
19	500.....	4
20	600.....	4
21	602.....	31
22	701.....	4
23	902.....	4, 31
24	1500.....	4, 5, 16, 31
25	1503.....	4, 5, 16
26	1504.....	5
27		
28		

1	1504(b) .....	20, 21
2	1505 .....	5
3	1505(c) .....	20, 21
4	<b>SAN JOSE MUNICIPAL CODE</b>	
5	3.28.010 et seq.....	5
6	3.28.340(B)(2)(a) .....	34
7	3.28.340(C).....	34
8	3.28.340(D)(2).....	34
9	3.28.340(E).....	34
10	3.28.385(C).....	28
11	3.28.700.....	5
12	3.28.710.....	5
13	3.28.755.....	26
14	3.28.850.....	5
15	3.28.860.....	5
16	3.28.1980.....	6
17	3.36.010 et seq.....	5
18	3.36.575(D) .....	28, 31
19	3.36.580 (A) .....	36
20	3.36.580 (B).....	37
21	3.36.580(D)(2).....	37
22	3.36.580(D)(5).....	37
23	3.36.580(E).....	37
24	3.36.1520.....	5
25	3.36.1525.....	5
26	3.36.1525(A) .....	26
27		
28		

1	3.36.1525(B).....	27
2	3.36.1550(D).....	26
3	3.36.1555.....	26
4	3.36.1560.....	26
5	3.52.010.....	5
6	3.54.010.....	5
7	3.56.100.....	5
8	<b>OTHER AUTHORITIES</b>	
9	5 Witkin, California Procedure § 859 (5 <sup>th</sup> ed. 2008).....	41

10  
11  
12  
13  
14  
15  
16  
17  
18  
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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The stakes are enormous in this vested rights challenge to San José's Measure B, which  
3 passed by 70% of the City's voters in the June 2012 election. Under plaintiffs' view, it is  
4 irrelevant whether the City must close some of its most critical resources, such as parks, libraries  
5 and community centers, and layoff police and fire personnel, in order to fund future retirement  
6 benefits. According to plaintiffs, San José's voters are powerless to control the retirement  
7 program, and the voters cannot amend their charter to require increased contributions in order to  
8 fund the plan, or to otherwise amend the plan to make it more affordable, balanced and  
9 sustainable.

10 Plaintiffs' argument is premised on a simplistic, misplaced, and ultimately incorrect,  
11 reading of cases holding that the right to a public sector pension is subject to vested rights  
12 protection under the Contracts Clause of the California Constitution. The City does not dispute  
13 this longstanding principle in this briefing, but the principle does not apply here to invalidate any  
14 provision at issue in Measure B.

15 As the California Supreme Court recently confirmed, the central question in a vested rights  
16 analysis is the intent of the legislative body – here, the residents who voted to adopt the City  
17 Charter and the City Council which enacted the retirement plans in question. Did the voters or  
18 City Council intend to create a financial obligation that was outside of their authority to control,  
19 and which must be funded without question at the expense of eliminating essential City services?

20 The statutes in question here are the City's charter, as amended by Measure B, and  
21 enabling ordinances. In reviewing these statutes, "it is presumed that [the] statutory scheme is not  
22 intended to create private contractual or vested rights and a person who asserts the creation of a  
23 contract...has the burden of overcoming that presumption." *Retired Employees Association of*  
24 *Orange County v. County of Orange*, 52 Cal.4th 1171, 1186.(2011) ("REAOC").

25 Here, in contrast to the authority plaintiffs rely upon, the record shows that the City's  
26 voters *expressly* retained authority to make changes to the retirement plans. Since at least the  
27 1961 Charter, the Charter has provided that "*the Council in its discretion may at any time, or from*



1 is no basis for plaintiffs to argue that employees cannot be required to contribute more  
2 toward the City's unfunded liabilities. The Municipal Code expressly permits it. In fact,  
3 in recent years, City labor unions have *agreed* to increased contributions, or wage  
4 reductions, to reduce unfunded liabilities.

- 5 • Section 1512-A – Retiree Healthcare – This section requires employees to contribute  
6 toward retiree healthcare on a 1 to 1 ratio. This is already a requirement in the City's  
7 Municipal Code, employee labor unions have agreed to it, and Measure B simply confirms  
8 this requirement.
- 9 • Section 1511-A – Supplemental Benefit Reserve Fund (“SRBR”) – This section of  
10 Measure B eliminates a separate discretionary fund created under the Municipal Code that  
11 permitted, but never required, payment of an extra “13th” retirement check. All funds  
12 remain with the retirement trusts. Measure B preserves the original purpose of SRBR by  
13 requiring that supplemental payments cannot deplete plan assets. The SRBR fund has  
14 always been treated as discretionary. Plaintiffs cannot demonstrate that this fund is  
15 somehow “vested” and must be maintained in perpetuity.

16 This Court must begin with the presumption that Measure B, and each provision therein, is  
17 lawful and valid. Plaintiffs cannot overcome this presumption.

## 18 **II. STATEMENT OF THE CASE**

### 19 **A. The City of San José and its Retirement Plans**

20 **Charter City.** The California Constitution, section 5, subdivision (b)(4), gives charter  
21 cities “plenary authority to provide in their charters for the compensation of their employees.”  
22 *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 317  
23 (1979). San José is a charter city, with all provisions subject to approval by the voters. The  
24 charter represents San José's supreme governing law, standing on equal footing with the  
25 California Constitution with respect to municipal affairs. *State Building and Construction Trades*  
26 *Council of California v. City of Vista*, 54 Cal.4th 547, 555-56 (2012).

1 Under settled law, a charter city (as authorized by the voters) can have any retirement plan  
2 it chooses, or no retirement plan. *Downey v. Board of Administration*, 47 Cal.App.3d 621, 629  
3 (1975) (“It is clear that provisions for pensions relate to compensation and are municipal affairs  
4 within the meaning of the constitution.”)

5 The San José City Charter affirms the City’s home rule authority to control compensation.  
6 (Charter, §§ 200, 902.)<sup>1</sup> The Charter states: “The compensation of all City appointive officers  
7 and employees, except as otherwise provided in this Charter, shall be fixed by the Council.” (*Id.*,  
8 § 902.)

9 **Governing structure.** The City is governed by an eleven member City Council of which  
10 the Mayor is the presiding member. Under the City Charter: “All powers of the city and the  
11 determination of all matters of policy shall be vested in the Council . . . .” (Charter, § 400.) The  
12 Council “shall act only by ordinance, by resolution or by motion . . . .” (*Id.*, § 600.) The Council  
13 appoints a City Manager who “shall be the chief administrative officer of the city.” (*Id.*, § 701.)  
14 The City Manager’s Office includes an Office of Employee Relations, which negotiates with City  
15 employee organizations over wages, benefits and other terms and conditions of employment.

16 **Charter Retirement Provisions.** In the exercise of San José’s “plenary authority” over  
17 employee compensation, San José’s Charter, Article XV, contains provisions that govern the  
18 creation and amendment of retirement plans. The Charter grants the City Council the authority to  
19 provide “by ordinance or ordinances for the creation, establishment and maintenance of a  
20 retirement plan or plans for all officers and employees of the City.” (Charter §500 [Duty to  
21 Provide Retirement System].)

22 Critically, the Charter contains two sections granting the City Council the right to “amend  
23 or otherwise change any retirement plan or plans” and “repeal or amend any such retirement  
24 system or systems. . . and to adopt or establish a new or different plan or plans. . . .” (Charter, §§

25 \_\_\_\_\_  
26 <sup>1</sup> The Charter is attached as Exhibit A to the Defendants’ Request for Judicial Notice in Support of City of  
27 San José’s Motion for Summary Adjudication of Issues (“RJN”), filed herewith.

1 1500, 1503) (emphasis added).

2       **Retirement Plans.** The San José City Council enacted two retirement plans per its  
3 authority under the Charter, the “1961 Police and Fire Department Plan” and the “1975 Federated  
4 City Employees Retirement Plan.” (Municipal Code, §§ 3.36.010 et seq., 3.28.010 et seq.)<sup>2</sup> The  
5 plans are administered by two independent appointed boards, which invest the retirement funds,  
6 contract for audit and actuarial services, issue financial reports, and determine employee eligibility  
7 for benefits. (*Id.*, §§ 3.36.300 et seq., 3.36.500 et seq., 3.28.100 et seq.) Based on actuarial  
8 reports, the independent boards establish yearly contribution rates by employees and the City to  
9 fund employee retirement benefits and to keep the plans actuarially sound. (*Id.*, §§ 3.36.1520 et  
10 seq., 3.28.200, 3.28.700 et seq.) The plans also include separate medical benefits or trust accounts  
11 created to fund retiree health benefits. (*Id.*, §§ 3.36.575, 3.28.380 et seq., 3.52.010, 3.54.010,  
12 3.56.100.)

13       Although the retirement boards determine the yearly contributions needed to fund the  
14 plans, the Charter, Municipal Code, and City labor agreements determine how contributions are to  
15 be divided between employees and the City. (Charter §§ 1504, 1505, Municipal Code, §§  
16 3.36.1520, 3.36.1525, 3.36.1560, 3.28.700, 3.28.710, 3.28.850, 3.28.860.)

17       Retirement benefits have dramatically increased over time. (Declaration of Alex Gurza  
18 (“Gurza Dec.”) Exh. 1, pp. 12-14 [Office of the City Auditor, “Pension Sustainability: Rising  
19 Pension Costs Threaten the City’s Ability to Maintain Service Levels – Alternatives for a  
20 Sustainable Future,” September 2010].)<sup>3</sup> Retirees also receive subsidized health care: the City

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22 <sup>2</sup> Cited portions of the Municipal Code are attached as Exh. C (Charter 3.28 “1975 Federated Employees  
Retirement Plan”) and Exh. D (Charter 3.36, “1961 Police and Fire Department Plan”) to the RJN.

23 <sup>3</sup> Under the Police and Fire Plan, an employee can retire at age 50 with 25 years of service, at age 55 with  
24 20 years of service, or at any age with 30 years of service. The employee receives 2.5% of final  
25 compensation for each of the first 20 years of service. For each year over 20 years, police receive 4%.  
26 After 20 years, fire fighters receive 3% for all years of service. Police and fire employees receive monthly  
27 payments constituting up to 90% of their final monthly compensation and a COLA of 3% per year. Under  
the Federated Plan, an employee can retire at age 55 with 5 years of service or at any age with 30 years of  
28 service. The employee receives 2.5% of final compensation for each year of service, monthly payments  
constituting up to 75% of final monthly compensation, and a COLA of 3% per year. (Gurza Dec., Exh. 2,  
at p. 2.)

28

1 pays the entire premium for either a single or family plan based on the lowest cost plan offered.  
2 (Municipal Code §§ 3.28.1980, 3.36.1940.)

3 **Employee unions.** There are 11 employee organizations that represent City of San José  
4 employees. The unions periodically enter into Memoranda of Agreement (“MOAs”) and other  
5 agreements with the City. Absent agreement, after impasse procedures, the City imposes terms  
6 under Last Best and Final Offers (“LBFs”), or in the case of uniformed personnel, submits  
7 disputes to interest arbitration. City unions have agreed, in various MOAs and other agreements,  
8 that their members will make increased contributions, either in the form of additional employee  
9 pension contributions or lower wages, towards both pension and retiree healthcare unfunded  
10 liabilities. (Gurza Dec. ¶¶3-5.)

11 **B. City Finances / Great Recession**

12 Over the last ten years, the City’s yearly cost for employee retirement benefits has greatly  
13 increased, taking funds needed by the City to provide essential services, such as police and fire  
14 protection. These costs have occurred against the backdrop of the Great Recession, and a  
15 worldwide economic crisis.

16 City costs for employee pension benefits have doubled over the last decade, and both  
17 retirement systems are deep in red ink. (Gurza Dec., Exh. 1 at pp. 18-21, 33-42 [Office of the City  
18 Auditor, “Pension Sustainability: Rising Pension Costs Threaten The City’s Ability To Maintain  
19 Service Levels – Alternatives For A Sustainable Future,” September 2010].) The increased costs  
20 are attributable in large part to investment losses, retroactive application of benefit enhancements,  
21 and actuarial assumptions that did not hold true. (*Id.* at pp. 33-42.)

22 The most recent actuarial report for the Federated City Employees’ Retirement System  
23 shows pension unfunded actuarial liabilities of \$1.12 billion, with the pension fund only 61.1%  
24 funded. (Gurza Dec., Exh. 58 [Cheiron, Federated System, Actuarial Valuation for period ending  
25 June 30, 2012, p. 6].) The most recent actuarial report for the Police and Fire System shows  
26 pension unfunded actuarial liabilities of \$726.8 million. (Gurza Dec., Exh.59 [Cheiron, Police and  
27 Fire System Actuarial Valuation for period ending June 30, 2011].) The most recent actuarial

1 reports on the funds created to pay retiree healthcare benefits show Federated unfunded actuarial  
2 liabilities of \$604 million (only 19% funded) and Police and Fire unfunded actuarial liabilities of  
3 \$529 million (only 11% funded). (Gurza Dec., Exh. 60, p. 8, Exh. 61, p. 10.)

4 These unfunded liabilities have caused unsustainable increases in City payments towards  
5 employee retirement benefits. Between 2001 and 2013, the City's contribution rate for Federated  
6 System pensions rose from 13.8% of payroll to 44.5% of payroll and is projected to be 55.3% of  
7 payroll in 2014. (Gurza Dec., Exh 58, [Cheiron Dec. 2012 Report] at p. 7.) This means the City  
8 pays an additional \$55,300 per year to fund retirement benefits for an employee who makes  
9 \$100,000 per year. In contrast, between 2002 and 2013, employee contribution rates have only  
10 risen from 4% to 5.7%. (*Id.*)

11 Between 2003 and 2013, the City's contribution rate to Police and Fire System pensions  
12 rose from 12.01% to 57.7% and is projected to be 70.55% of payroll by 2014. (*Id.*, Exh. 59 at p.  
13 4 [Cheiron Police and Fire System Actuarial Valuation dated December 2012]. In contrast, police  
14 officers and firefighters contribution rates increased from 8.44% to 11.16%. (*Id.*)

15 By 2014-15, without taking into account Measure B's savings, the City is projected to pay  
16 combined contribution rates of more than 63% of payroll for Federated employees and 73% of  
17 payroll for Police and Fire employees, for a total contribution of \$300 million, a significant  
18 percentage of the general fund. (Gurza Dec., Exhs. 56, 57 [letters dated January and February  
19 2012, Cheiron projections of future contribution rates].)

20 Because of rising retirement costs and reduced revenues, the City has been forced into  
21 massive layoffs, service reductions, and employee compensation reductions.

22 **C. Measure B - The Sustainable Retirement Benefits and Compensation Act**

23 After negotiating with City labor unions as required by *Seal Beach*,<sup>4</sup> the City Council  
24 voted to place Measure B on the ballot. On June 5, 2012, 70% of the voters enacted Measure B –  
25 “The Sustainable Retirement Benefits and Compensation Act.” (Gurza Dec., ¶¶ 11-12; RJN Exh.

26  
27 <sup>4</sup> *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal.3d 591 (1984).

1 B [Measure B, Charter sections 1501-A to 1515-A).]<sup>5</sup>

2 The voters made eight findings in connection with approving Measure B. For example, the  
3 voters found that: “The following services are essential to the health, safety, quality of life and  
4 well-being of San José residents: police protection; fire protection; street maintenance; libraries;  
5 and community centers (hereafter ‘Essential City Services’).” (§1501-A, Finding No. 1.) The  
6 voters also determined that “[w]ithout the reasonable cost containment provided in this Act, the  
7 economic viability of the City, and hence, the City’s employment benefit programs, will be placed  
8 at an imminent risk.” (*Id.*, Finding No. 4.)

9 By enacting Measure B, the voters intended “to ensure that the City can provide reasonable  
10 and sustainable post employment benefits while at the same time delivering Essential City  
11 Services to the residents of San José.” (§1502-A).

12 Measure B contains a number of provisions designed to ensure that the City is able to  
13 continue providing fair post employment benefits to its workforce. In sum, Measure B provides  
14 for: either increased pension contributions by active employees toward the plans’ unfunded  
15 liabilities, or directly decreased compensation (§§1506-A, 1514-A); one to one contributions  
16 toward unfunded liabilities in the retiree medical program (§1512-A); elimination of a  
17 discretionary retiree benefit fund (§1511-A); various reforms in the City’s disability retirement  
18 program (§1509-A); and authorization to suspend certain annual increases in the event of a future  
19 fiscal emergency (§1510-A). Measure B also contains a comprehensive severability clause in the  
20 event any sections are found unenforceable. (§1515-A.)

21 Greater detail regarding each section at issue in this motion is discussed below.

22 **D. The Parties’ Claims and Procedural History**

23 Soon after the enactment of Measure B, Plaintiffs filed five lawsuits challenging various  
24 provisions of Measure B.<sup>6</sup> The Court consolidated these lawsuits for pretrial purposes. Plaintiffs

25 \_\_\_\_\_  
26 <sup>5</sup> A complete copy of Measure B is included for the Court’s convenience as “Attachment B” to this brief.

27 <sup>6</sup> A chart listing the lawsuits and the claims brought in each is included as “Attachment A” to this brief.

1 bring claims based on impairment of contract, takings and due process rights under the California  
2 constitution, and estoppel. Because plaintiffs purposefully refused to plead violation of federal  
3 rights (and because federal rights are implicated), the City filed a cross-complaint for declaratory  
4 relief to obtain a declaration that certain provisions of Measure B do not violate plaintiffs' federal  
5 constitutional rights. All parties have answered.

6 The City filed two motions for judgment on the pleadings. The first motion sought  
7 dismissal of the San José Police Officers' Association's cause of action for violation of the  
8 Meyers-Milias-Brown Act, a claim brought only by the SJPOA. The second motion sought  
9 dismissal of claims made by the SJPOA and AFSCME alleging that Measure B constitutes an  
10 illegal Bill of Attainder and an illegal Excise Tax, and violates the Right to Petition, the Bane Act,  
11 the Pension Protection Act, and Separation of Powers. Both motions were heard on January 29,  
12 2013, and the Court issued its order dated February 4, 2013, granting the City's motion for  
13 judgment on the pleadings with respect to various claims, and overruling others.<sup>7</sup>

14 The parties have engaged in extensive discovery. The City has produced thousands of  
15 pages of documents and has responded to two sets of special interrogatories in the *Sapien* case,  
16 and special interrogatories and requests to admit in the *AFSCME* case. The case is now ready for  
17 summary adjudication in the City's favor with respect to key elements of Measure B.

### 18 **III. LEGAL ARGUMENT**

#### 19 **A. The Court Should Grant Summary Adjudication Regarding Causes of Action** 20 **Challenging The Three Measure B Sections At Issue Here**

21 Under Code of Civil Procedure section 437c(f)(1): "A party may move for summary  
22 adjudication as to one or more causes of action within an action... or one or more issues of duty, if  
23 that party contends that the cause of action has no merit... or that one or more defendants either  
24 did or did not owe a duty to plaintiff or plaintiffs."

25 \_\_\_\_\_  
26 <sup>7</sup> A true and correct copy of the Court's order is included for the Court's convenience as Attachment C.  
27 The claims at issue in the instant motion are not affected by the Court's order.

1 The City's motion seeks summary adjudication in the City's favor as to three sections of  
2 Measure B: (1) Section 1506-A, which requires current employees to pay (or contribute) towards  
3 unfunded pension liabilities; (2) Section 1512-A, which requires employees to pay half the cost of  
4 retiree medical benefits including unfunded liabilities, (3) Section 1511-A, which eliminates the  
5 Supplemental Retiree Benefit Reserve ("SRBR").

6 As explained above, plaintiffs bring causes of action based on violation of contractual  
7 rights, due process and other rights. But under each cause of action, plaintiffs allege a number of  
8 separate wrongs – the various provisions of Measure B that they claim violate their rights. For  
9 example, the SJPOA's first cause of action is for contractual impairment, but under that cause of  
10 action, the SJPOA seeks adjudication that Measure B Sections 1506-A, 1512-A, and 1511-A,  
11 among other sections, each separately violate its contractual rights. (See *SJPOA First Amended*  
12 *Complaint ("FAC")* at ¶¶ 40-48, 54-57, 72.) The same is true of causes of action alleged in the  
13 *AFSCME* and *Sapien/Harris/Mukhar* Complaints.<sup>8</sup> Each Complaint begins by listing the  
14 provisions of Measure B claimed to be illegal, and then incorporates this list under each cause of  
15 action for violation of contractual and other rights. (*SJPOA FAC* at ¶¶40-48, 54-57, 72, 78, 85;  
16 *AFSCME Complaint* at ¶¶ 56-69, 82-97, 111, 130, 140, 175; *Harris FAC* ¶¶12(c); 12(d); 12(e), 24,  
17 28, 32; *Sapien/Mukhar Complaints* at ¶¶ 14(c), 14(d), 14(e), 26, 30, 34.)

18 Under Section 437c(f)(1), each of these provisions of Measure B forms a different  
19 "ground[] for liability" in plaintiffs' complaints and therefore "constitute separate 'Causes of  
20 Action.'" *Lilienthal & Fowler v. Sup. Ct (Karr)*, 12 Cal.App.4th 1848, 1854-1855 (1993) ("we  
21 hold that under subdivision (f) of section 437e, a party may present a motion for summary  
22 adjudication challenging a separate and distinct wrongful act even though combined with other  
23 wrongful acts alleged in the same cause of action"); *Mathieu v. Norrell Corp.*, 115 Cal.App.4th  
24 1174, 1188 (2004) (directing trial court to grant summary adjudication for one ground for liability  
25 (harassment) but not the other (retaliation) where plaintiff had combined both into a single cause

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26  
27 <sup>8</sup> The *Sapien*, *Harris* and *Mukhar* complaints are virtually identical.

1 of action because “two separate and distinct grounds for liability constitute separate cause of  
2 action for purposes of Code of Civil Procedure section 437c, subdivision (f)(1)”; see *Garrett v.*  
3 *Howmedica Osteonics Corp.*, 211 Cal.App.4th 389, 399, fn. 7 (2012), applying both *Lilienthal* and  
4 *Mathieu*. Accordingly, the City may bring a motion for summary adjudication addressed to the  
5 individual provisions of Measure B challenged in the Complaints. Based on plaintiffs’ allegations,  
6 each is a separate and distinct wrong or basis for liability by the City.

7 The standard governing summary adjudication of issues is the same as the standard for  
8 summary judgment. Cal. Civ. Proc. Code, § 437c(f)(1); *Lunardi v. Great-West Life Assurance*  
9 *Co.*, 37 Cal.App.4th 807, 819 (1995) (“A summary adjudication motion is subject to the same  
10 rules and procedures as a summary judgment motion”). Accordingly, a motion for summary  
11 adjudication “shall be granted if all the papers submitted show there is no triable issue as to any  
12 material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.*; Cal. Civ.  
13 Proc. Code, § 437c; *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 850 (2001).

14 “It is well settled that the interpretation and application of a statutory scheme to an  
15 undisputed set of facts is a question of law . . . .” *Ventura County Retired Employees’ Assn. v.*  
16 *County of Ventura*, 228 Cal.App.3d 1594, 1598 (1991) (Government code did not require County  
17 to provide same health benefits to retirees that it provided to active employees). The City bases  
18 this motion on the text of Measure B, the City Charter, City Municipal Code, City resolutions, and  
19 City agreements with employee unions. None present disputed issues of material fact.

## 20 **B. General Rules of Construction Favor Upholding Measure B**

21 Charters are construed in the same manner as statutes. *Alesi v. Board of Retirement*, 84  
22 Cal.App.4th 597, 601 (2000); *International Federation of Professional and Technical Engineers v.*  
23 *City and County of San Francisco*, 76 Cal.App.4th 213, 224-225 (1999). There are several key  
24 principles of statutory interpretation that must guide the Court in evaluating Plaintiffs’ claims.

### 25 **1. The Court Must Presume that Measure B is Valid**

26 The Court must begin with the presumption that Measure B is valid. “In considering the  
27 constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the

1 Act. Unless conflict with a provision of the state or federal constitution is clear and  
2 unquestionable, we must uphold the Act.” *California Housing Finance Agency v. Elliott*, 17  
3 Cal.3d 575, 594 (1976); *see also City of San Diego v. Haas*, 207 Cal.App.4th 472, 496 (2012)  
4 (“Legislative enactments are presumed valid”).

5                   **2. Plaintiffs Must Overcome Their Burden To Demonstrate That San José**  
6                   **Intended To Create Vested Contractual Or Property Rights That**  
7                   **Precluded the Changes in Measure B at Issue in this Motion**

8                   In *REAOC*, the California Supreme Court confirmed the presumption “that a statutory  
9 scheme is not intended to create private contractual or vested rights.” *REAOC*, 52 Cal.4th at 1186-  
10 1187. “[A] person who asserts the creation of a contract with the state has the burden of  
11 overcoming that presumption.” *Id.* at p. 1186. The Court explained that an ordinance or  
12 resolution “may be said to create contractual rights when the statutory language or circumstances  
13 accompanying its passage ‘clearly’... evince a legislative intent to create private rights of a  
14 contractual nature enforceable against the [governmental body].” *Id.*, quoting *Walsh v. Board of*  
15 *Administration*, 4 Cal.App.4th 682, 697 (1992).

16                   The rationale for imposing this stringent standard is based on the core principles of our  
17 representative democracy. First, “to construe laws as contracts when the obligation is not clearly  
18 and unequivocally expressed would be to limit drastically the essential powers of a legislative  
19 body.” *REAOC*, 52 Cal.4th at 1185-1186, quoting *National R. Passenger Corp. v. A.T. & S.F.R.*  
20 *Co.*, 470 U.S. 451, 466 (1985). Second, “[t]he requirement of a ‘clear showing’ that legislation  
21 was intended to create the asserted contractual obligation (citation) should ensure that neither the  
22 governing body nor the public will be blindsided by unexpected obligations.” *Id.* at 1188-1189.

23                   **3. Plaintiffs Have the Burden to Show a Clear Commitment or Promise**

24                   Although there are certain differences in the elements of each cause of action, in the end  
25 each requires an enforceable “commitment” or “promise” that is somehow violated by the  
26 Measure B sections at issue in this motion. For the contract impairment claims, the inquiry  
27 focuses on “whether a contract exists *as to the specific terms allegedly at issue.*” *San Diego*

1 *Police Officers' Ass'n v. San Diego City Employees' Retirement System*, 568 F.3d 725, 736-737  
2 (9<sup>th</sup> Cir. 2009) (emphasis added). Similarly, for the due process and “unlawful takings” claims,  
3 the inquiry is whether there is some property right that is vested. *Id.* at 740; *City of San Diego v.*  
4 *Haas*, 207 Cal.App.4th at 498 (citation omitted). And, promissory estoppel claims require  
5 evidence of a clear and unambiguous promise. *Retired Employees' Ass'n of Orange County v.*  
6 *County of Orange*, 632 F.Supp.2d 983, 987 (C.D. Cal. 2009) (“Plaintiff’s claim for promissory  
7 estoppel also fails, since the retirees could not have reasonably relied on a “clear promise” from  
8 the Board to continue the pooling benefit throughout their lifetimes”).

9 **4. Plaintiffs Will Rely On Inapposite Authority**

10 Plaintiffs undoubtedly will rely upon pension vested rights cases that flow from *Kern v.*  
11 *City of Long Beach*, 29 Cal. 2d 848 (1947), which held that the right to a pension becomes vested  
12 and, once earned, is protected by the contract clause of the Constitution. In particular, they will  
13 rely on *Abbott v. City of Los Angeles*, 50 Cal.2d 438 (1958) which, following *Kern*, held that  
14 alterations of employees’ pension rights must bear some “reasonable relation to the theory of a  
15 pension system and its successful operation, and changes in a pension plan which result in  
16 disadvantages to employees should be accompanied by comparable new advantages.” *Abbott*, 50  
17 Cal. 2d at 488-89. The City has no argument here with this long line of authority, but it does not  
18 control this case.

19 The City anticipates that the plaintiffs will ask the Court simply to apply the general  
20 principle flowing from these cases – that pension rights are vested and therefore cannot be  
21 changed without substituting a comparable benefit – and argue that Measure B is unlawful because  
22 it makes some changes affecting employee compensation. This simplistic argument is wrong  
23 because it ignores the core question – exactly what “right” is at issue, and what is vested. This  
24 question necessarily requires a rigorous review of the Charter and related City enactments to  
25 determine what has lawfully become “an irrevocable interest in the benefit.” *REAOC*, 52 Cal.4th  
26 at 1186, 1189 n. 3 (“[t]he implication of suspension of legislative control must be ‘unmistakable’”  
27 quoting *Claypool v. Wilson*, 4 Cal.App.4th 646 (1992). Notably, none of the foregoing authority

1 involved a discussion of the impact of a reservation of rights clause – such as the one existing in  
2 San José’s charter.

3 In *REAOC*, the California Supreme Court emphasized the importance of proceeding  
4 cautiously “both in identifying a contract within the language of a ... statute and in defining the  
5 contours of any contractual obligation.” *REAOC*, 52 Cal.4th at 1189. Prior to *REAOC*, the  
6 Supreme Court had affirmed this basic principle in determining whether a City Charter had  
7 conferred a vested right. *International Ass’n of Firefighters, Local 145 v. City of San Diego*, 34  
8 Cal.3d 292 (1983). In *International Association of Firefighters*, the fire union challenged the  
9 City’s increase to the firefighters’ rate of contribution to the city’s retirement system. The  
10 Supreme Court rejected the challenge, and distinguished authorities such as *Kern* and *Abbott*.

11 “While it is clear ... that employees’ “vested” contractual rights may not be  
12 destroyed or impaired, plaintiff fails to identify exactly what employee rights  
13 are vested under City’s retirement system, and thereby misses the crucial  
14 distinction between the cases cited and the matter before us....What  
15 distinguishes each of these cases from the one before us in the nature of the  
16 contractual rights which became vested in plaintiff’s members upon their  
17 acceptance of employment...In the present case, no modification was made in  
18 the retirement system; instead, the revision in the factor representing future  
19 compensation of employees and the resulting revision in the rate of  
20 contribution of employees were made *pursuant* to the charter and ordinances  
21 which delineate City’s retirement system and prescribe the employees’ vested  
22 rights.”

19 *Int’l Ass’n of Firefighters*, 34 Cal. 3d at 300-302. Here, just as *International Association of*  
20 *Firefighters*, Measure B’s changes were made “pursuant” to the City’s charter and ordinances.

21 This brief does not challenge the existing vesting rights doctrine.<sup>9</sup> Rather, the motion for  
22 summary adjudication is premised on San José’s own charter, which quite clearly reserves to the  
23 City the right to make modifications, and San José’s Municipal Code, under which the City retains  
24 legislative discretion. Neither “prescribe” a vested right that is violated by Measure B.

25  
26  
27 <sup>9</sup> The City, of course, reserves its rights in the event that this case is subject to trial or appeal.

1                   **C.       Each Cause of Action Asserted by Plaintiffs Fails Based On the Charter's**  
2                   **Express Reservation of Rights To Modify the Retirement Plans**

3                   As set forth above, as a charter city San José can devise any retirement plan it chooses, or  
4 have no retirement benefits whatsoever. Here, since the 1961 Charter, the City's voters  
5 recognized the need to maintain flexibility over its plans, and expressly reserved the right to make  
6 changes. This express reservation of rights is dispositive of each challenge to the Measure B  
7 sections at issue in this motion for summary adjudication.

8                   **1.       The Legislative History and Charter Provisions Confirm the City's**  
9                   **Longstanding Reservation of Rights to Modify or Otherwise Change**  
10                  **the Plans**

11                  The Charter's reservation of rights provisions made their first appearance in the 1961  
12 amendments to the 1915 Charter. Under Proposition A, the voters approved a new section entitled  
13 "Discretionary Powers Of Council Respecting Retirement." The section stated: "Anything in  
14 Section 78A of the Charter to the contrary notwithstanding, *the Council in its discretion may at*  
15 *any time, or from time to time, by ordinance, amend or otherwise change the retirement plan*  
16 *established pursuant to said Section 78a, or adopt or establish a new or different plan or plans for*  
17 *eligible members of the police or fire departments of the City of San José" to provide benefits in*  
18 *excess of those authorized under Section 78a "all as the Council may deem proper and subject to*  
19 *such conditions, restrictions, limitations, terms and other revisions as the Council may deem*  
20 *proper; . . ."* (RJN, Exh. E [1961 Charter, § 78b].)

21                  The ballot argument in favor of Proposition A stated: "THIS AMENDMENT GIVES  
22 DISCRETIONARY POWERS TO THE CITY COUNCIL! It is good government to allow the  
23 City Council to be responsible for investigating problems and deciding how to solve them. THIS  
24 AMENDMENT IS SIMPLE! Leave all the technical details to your City Council. They have a  
25 staff to assist them including a very capable City Attorney." (RJN, Exh. F, "Argument in Favor of  
26 Proposition A"], emphasis in original.) *Pacific Legal Foundation v Cal. Coastal Commission*, 33  
27 Cal.3d 158, 162-163 n.1 (1982) ("Statements in ballot arguments in support of a successful  
28 initiative measure are properly considered as evidence of the intent behind the measure").

1 The 1965 Charter followed the format initiated in the 1961 Charter – A broad reservation  
2 of rights to “modify or otherwise change” retirement plans coupled with minimum requirements  
3 for retirement plans. As adopted by the voters, the 1965 Charter states: .

4 Except as hereinafter otherwise provided, the Council shall provide,  
5 by ordinance or ordinances, for the creation, establishment and  
6 maintenance of a retirement plan or plans for all officers and  
7 employees of the City. Such plan or plans need not be the same for  
8 all officers and employees. *Subject to other provisions of this  
Article, the Council may at any time, or from time to time, amend or  
otherwise change any retirement plan or plans or adopt or establish  
a new or different plan or plans for all or any officers or  
employees.”*

9 (RJN, Exh. G (Charter as adopted in 1965), § 1500.)

10 The Charter also provides, as to retirement systems already existing in 1965, the City shall  
11 have *“the power and right to repeal or amend any such retirement system or systems, and to adopt  
12 or establish a new or different plan or plans for all or any officers or employees.”* Charter, § 1503  
13 (emphasis added).<sup>10</sup>

14 This record demonstrates that the voters have very clearly reserved discretion to modify or  
15 change City retirement plans with the only proviso being that benefits not be reduced below  
16 minimum benefits specified in the Charter.

17 **2. The Relevant Authorities Compel Application of the Charter’s**  
18 **Reservation of Rights**

19 A reservation of rights clause “is explicit evidence of legislative intent regarding the  
20 question of vested retiree health benefits” that “falls squarely” against the finding of vested rights.

21 \_\_\_\_\_  
22 <sup>10</sup> Section 1503 states:

23 "Any and all retirement system or systems, existing upon adoption of this Charter, for the retirement of  
24 officers or employees of the City, adopted under any law or color of any law, including but not limited to  
25 those retirement systems established by Parts 1, 2 and 4 of Chapter 9 of Article II of the San José Municipal  
26 Code, are hereby confirmed, validated and declared legally effective and shall continue until otherwise  
27 provided by ordinance. ... However, subject to other provisions of this Article, the Council shall at all  
times have the power and right to repeal or amend any such retirement system or systems, and to adopt or  
establish a new or different plan or plans for all or any officers or employees, it being the intent that the  
foregoing sections of this Article shall prevail over the provisions of this Section."

1 *Retired Employees' Association of Orange County v. County of Orange* (Case No. SACV 07-1301  
2 AG) 2012 U.S. Dist. LEXIS 146637, \*29 (C.D. Cal. August 13, 2012). Like federal courts,  
3 California courts recognize the power of reservation of rights clauses to preclude the establishment  
4 of vested rights to retirement benefits. "The modification of a retirement plan pursuant to a  
5 reservation of the power to do so is consistent with the terms of any contract extended by the plan  
6 and does not violate the contract clause of the federal constitution." *Walsh*, 4 Cal.App.4th at 700.

7 In *Walsh*, relied upon by the California Supreme Court in *REAOC*, the Court of Appeal  
8 applied a state constitutional provision that "contained an express reservation of power to the  
9 Legislature to limit the retirement benefits of members of the Legislature before their retirement."  
10 *Id.* The Court used ordinary dictionary definitions of the term "limit" to find that the state  
11 Legislature had the authority to "confine" Walsh's benefits "by repealing provisions which would  
12 have made him eligible for extraordinary benefits." *Id.*

13 Other authorities support application of the City's reservation of rights in the context of the  
14 City's retirement plans. For example, in *National Railroad Passenger Corporation*, relied upon  
15 by the California Supreme Court in *REAOC*, the United States Supreme Court rejected a  
16 Constitutional Contracts clause claim, stating: "Indeed, lest there be any doubt in these cases about  
17 Congress' will, Congress 'expressly reserved' its right to 'repeal, alter or amend' the Act at any  
18 time. (citation omitted) This is hardly the language of contract." *See National R. Passenger*  
19 *Corp.*, 470 U.S. at 466.

20 Similarly, the Social Security Act includes a clause reserving "the right to alter, amend, or  
21 repeal any provision of the Act." 42 U.S.C. § 1304. In *Flemming v. Nestor*, 363 U.S. 603, 610-  
22 611 (1960), the Supreme Court explained, "It was doubtless out of an awareness of the need for  
23 such flexibility that Congress included in the original Act, and has since retained, a clause  
24 expressly reserving to it 'the right to alter, amend, or repeal any provision' of the Act."  
25 (emphasis added.) Later, in *Bowen v. Public Agencies Opposed to Social Security Entrapment*,  
26 477 U.S. 41, 51 (1986), relying on the same reservation of rights, the Court explained, "Since the  
27 Act was designed to protect future, as well as present, generations of workers, it was inevitable

1 that amendment of its provisions would be necessary in response to evolving social and economic  
2 conditions unforeseeable in 1935. . . .”

3 Courts also have held that reservation of rights clauses in private plans for retiree health  
4 insurance permit the alteration of health benefits. See *Moore v. Metropolitan Life Insurance*  
5 *Company*, 856 F.2d 488 (2d Cir. 1988) (Metropolitan had issued “summary plan descriptions” that  
6 stated that the company “reserves the right to change or discontinue any portion of the benefits  
7 described in this summary”); *Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998)  
8 (“The Corporation reserved the right to amend, modify, suspend or terminate its benefit Plans or  
9 Programs by action of its Board of Directors”).

10 Here, the drafters of the 1965 Charter preserved the City’s ability to respond “to evolving  
11 social and economic conditions unforeseeable” at the time, by expressly reserving the right to  
12 make changes. *Bowen*, 477 U.S. at 51.

### 13 3. The Municipal Code Cannot Confer a Right in Conflict with the 14 Charter

15 Plaintiffs may argue that because the City Council (through enactments in the Municipal  
16 Code) granted benefits that were in excess of the minimums established by the Charter, those  
17 benefit levels became “vested” and were not subject to the Charter’s reservation of rights to  
18 amend. If this argument is made, it must be rejected.

19 It is hornbook law that a provision in a municipal code that conflicts with the charter is  
20 void and unenforceable. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 171 (1994)  
21 (“Any act that is violative of or not in compliance with the charter is void”); *Lucchesi v. City of*  
22 *San José*, 104 Cal.App.3d 323, 328 (1980) (“Ordinances passed pursuant to the plenary authority  
23 of article XI, section 5 of the state Constitution are invalid if they conflict with a city’s charter”);  
24 see *San Diego Firefighters v. Bd. of Admin.*, 206 Cal.App.4th 594, 608-09 (2012) (voiding pension  
25 benefit enacted in conflict with city charter).

1 Specifically, an ordinance or other legislative enactment – short of a charter amendment –  
2 cannot alter or limit power provided to the City Council, including a reservation of power to alter  
3 retirement plans. *City & County of San Francisco v. Patterson*, 202 Cal.App.3d 95, 105 (1988)  
4 (where the “charter grants the board of supervisors the power to sell (or lease) real property under  
5 specific terms and conditions,” “[n]either the electorate nor the board can attempt to legislatively  
6 alter these provisions so as to bind a future board except by an appropriate charter amendment”);  
7 *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013, 1034 (1991) (ordinance  
8 could not delete city council’s plenary power to address issues of discrimination provided by city  
9 charter).

10 The City Council has no authority to enact measures that would conflict with the Charter’s  
11 express reservation of rights. Thus, nothing in the Municipal Code can abrogate the express right  
12 to reform the pension plans. To the extent that the City Council is alleged to have made a vested  
13 rights commitment by ordinance or other legislative enactment that is inconsistent with the  
14 Charter’s express reservation of rights, the commitment would be void, ultra vires, and  
15 unenforceable.

16 **D. Every Section of Measure B is Lawful**

17 This brief now turns to the details of those sections of Measure B at issue in this motion,  
18 and the impact on existing Charter and Municipal Code sections. Even in the absence of the  
19 Charter’s reservation of rights, each section is unquestionably lawful, as no section impairs a  
20 vested right.

21 **1. Plaintiffs’ Challenge to Charter Section 1506-A (Increased**  
22 **Contributions to Defray Unfunded Liabilities) Must Be Rejected as a**  
23 **Matter of Law**

24 Charter section 1506-A has no impact on retirees, but only active employees. Section  
25 1506-A requires employees, beginning June 23, 2013, to make additional retirement contributions  
26 of 4% per year, capped at 16%. This section was specifically designed to defray unfunded  
27 liabilities threatening the viability of the plans – liabilities that are currently valued at  
28 approximately \$1.7 billion.

1 Plaintiffs' current challenge to section 1506-A is meritless and must be adjudicated in the  
2 City's favor for multiple reasons. There is nothing in the Charter that restricts the City from  
3 requiring employees to pay for unfunded liabilities. In fact employee unions have entered into  
4 agreements to pay for unfunded liabilities, and the Municipal Code permits it. Moreover,  
5 employees and the City have treated contribution rates and wages as interchangeable elements of  
6 "total compensation" – to which there is no vested right.

7 **a. The Charter's Contribution Ratios Apply to "Normal" Costs –**  
8 **Not Costs Related to Unfunded Liabilities**

9 Charter sections 1504(b) and 1505(c) each provide for a maximum contribution ratio of 3  
10 (employee) to 8 (City) for "current service or current service benefits" and no ratio for "prior  
11 service or prior service benefits." The contribution ratio for current service does not impact  
12 Measure B's requirement that employees pay towards pension system *unfunded* liabilities.

13 Generally, pension contribution rates involve two categories of expense: (a) "normal cost"  
14 contributions based on an employees' current salary and benefits scheduled upon retirement, and  
15 (b) contributions towards retirement plan deficiencies called "unfunded actuarially accrued  
16 liabilities" ("UAAL") or in short "unfunded liabilities." (Gurza Dec., Exh. 1 at pp. ii, iv, 33.)

17 Unfunded liabilities result when past "normal cost" pension contributions are inadequate to  
18 fund currently promised retirement benefits. Unfunded liabilities may be caused by retroactive  
19 increases in pension benefits, underperformance of the pension fund, or unrealized actuarial  
20 assumptions, such as assumptions about investment returns, mortality and retirement rates, or  
21 salary increases. (*Id.*)<sup>11</sup>

22 On its face, the Charter does *not* require the City to pay all unfunded liabilities, or prohibit  
23 employees from paying towards unfunded liabilities. In its section on "minimum benefits" the  
24

25 <sup>11</sup> "Actuarial Accrued Liability (or Pension Liability)" is the "value of benefits promised to employees and  
26 retirees for services already provided." "Unfunded liability" is "the unfunded pension obligation for prior  
27 service costs, measured as the difference between the accrued liability and plan assets" also referred to as  
"the Unfunded Actuarial Accrued Liability." (Gurza Dec., Exh. 1, at p. iv.)

1 Charter describes only two pension contribution categories: “current service or current service  
2 benefits” (under which employees pay a maximum of 3/11ths of the required contribution, the 3 to  
3 8 ratio) and “prior service and prior service benefits” (under which no ratio applies and thus either  
4 employees or the City may pay these contributions). (Charter, §§ 1504(b), 1504(c).) The Charter  
5 does not assign unfunded liabilities to either category.

6 Plaintiffs understand and admit that the 3 to 8 ratio in the Charter applies only to normal  
7 costs. In the brief in support of a preliminary injunction, plaintiffs state: “[T]he *normal* rate of  
8 contribution is to be in a ratio of 3 by employees to 8 by the City.”<sup>12</sup>

9 Given the absence of express Charter restrictions, the Charter sections on contribution rates  
10 cannot be interpreted to limit the City’s authority to require increased contributions – at least  
11 above and beyond “normal cost” contributions. Under a City Charter, the City possesses all  
12 authority over municipal affairs unless clearly restricted by the Charter. “Charter provisions are  
13 construed in favor of the exercise of the power over municipal affairs and ‘against the existence of  
14 any limitation or restriction thereon which is not expressly stated in the charter....’ *Domar*  
15 *Electric*, 9 Cal.4th at 171. “Thus, [r]estrictions on a charter city’s power may not be implied.”  
16 *Id.* at 171, quoting *Taylor v. Crane*, 24 Cal.3d 442, 451 (1979). This standard is consistent with  
17 the California Supreme Court’s decision in *REAOC*, which requires plaintiffs to demonstrate  
18 “clear” and “unmistakable” legislative intent to give up all legislative discretion and create a  
19 vested right. *REAOC*, 52 Cal.4th at 1185-1186.

20 Here, there is nothing in the Charter that requires the City to pay for all unfunded  
21 liabilities. And as conceded by Plaintiffs, the three to eight ratio for “current service or current  
22 service benefits” applies only to “normal cost” contributions. Clearly, the City’s voters did not  
23 give away their inherent right to require employees to contribute towards huge unfunded liabilities  
24 that threaten the sustainability of essential City services as well as the plans themselves.

25 \_\_\_\_\_  
26 <sup>12</sup> Memorandum of Points and Authorities in Support of Preliminary Injunction for Plaintiffs and Cross-  
27 Defendants Robert Sapien, et al., dated January 31, 2013, page 5, lines 26-27.



1 required to make. The parties specifically understand that this agreement neither  
2 alters nor conflicts with the City Charter Section 1505(c) because under this  
3 agreement, employees will be subsidizing the City's Section 1505(c) contribution.

4 (Gurza Dec., Exh. 2). Other Union proposals, including proposals by the SJPOA and Firefighters  
5 Union, also proposed that employees would pay additional pension contributions. (Gurza Dec.,  
6 Exhs. 3-6)

7 Ultimately many unions either agreed to an increase in the employee contribution rate for  
8 the purpose of paying for unfunded liabilities or agreed to a reduction in employee  
9 compensation.<sup>13</sup> (Gurza Dec. ¶¶ 24, 25.) For example, the 2010-2011 MOA between the City and  
10 AEA, of which plaintiff Mukhar is the president, states at Section 10.1.1:

11 Ongoing Additional Retirement Contributions. Effective June 27,  
12 2010, all employees who are members of the Federated City  
13 Employees' Retirement System will make additional retirement  
14 contributions in the amount of 7.30% of pensionable compensation,  
15 and the amounts so contributed will be applied to *reduce the*  
16 *contributions that the city would otherwise be required to make for*  
17 *the pension unfunded liability*, which is defined as all costs in both  
18 the regular retirement fund and the cost-of-living fund, except  
19 current service normal costs in those funds. This additional  
20 employee retirement contribution would be in addition to the  
21 employee retirement contribution rates that have been approved by  
22 the Federated City Employees' Retirement system Board. *The*  
23 *intent of this additional retirement contribution by employees is to*  
24 *reduce the City's required pension retirement contribution rate by a*  
25 *commensurate 7.30% of pensionable compensation as illustrated*  
26 *below . . .*

19 <sup>13</sup> The following six unions agreed to pay additional employee contributions and accept wage reductions of  
20 approximately 10% during fiscal year 2010-2011 to be used to defray pension plan unfunded liabilities,  
21 except the POA agreed to a 5.25% additional contribution.

- 22 • Association of Engineers and Architects (AEA) (plaintiff Mukhar is president),
- 23 • Association of Maintenance Supervisory Personnel (AMSP) (plaintiff Dapp is president)
- 24 • City Association of Management Personnel (CAMP)
- 25 • International Brotherhood of Electrical Workers, Local 332 (IBEW) International Union of  
26 Operating Engineers, Local No. 3 (representing plaintiffs in the Harris case)
- 27 • San José Police Officers Association (plaintiff in the SJPOA case).

(Gurza Dec., Exhs. 11, 15, 17, 23, 25, 29.)

28 The following unions agreed to a wage reduction rather than paying higher pension contribution rates, or  
the City imposed a wage reduction:

- Association of Building, Mechanical and Electric Inspectors (ABMEI)
- Association of Legal Professionals (ALP).
- Executive Management and Professional Employees (Unit 99), and other unrepresented employees.

(Gurza Dec., Exhs. 9, 13, 32, 33.)

1 (Gurza Dec., ¶ 27, Exh. 11, emphasis added.)

2 In addition, the union agreed to an additional one time contribution “in the amount of  
3 3.35% of pensionable compensation, and the amounts so *contributed will be applied to reduce the*  
4 *contributions that the City would otherwise be required to make during that time period for the*  
5 *pension unfunded liability....” (Id., Section 10.1.2, emphasis added.) The union also agreed to*  
6 *the City amending the Municipal Code to provide for the payment by employees of these*  
7 *“additional contributions.” (Id. at Section 10.1.4)) (Gurza Dec. ¶¶ 27-28.)*

8 The next year, the City reached an agreement with most unions, including the Firefighters  
9 Union for a 10% compensation reduction, and imposed a wage reduction on plaintiff AFSCME.  
10 (Gurza Dec., (Gurza Dec. ¶¶ 26, 30, Exhs. 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 31, 34.)  
11 Whether in the form of additional contribution rates, or reduced wages, the purpose was to defray  
12 the City’s pension contributions for unfunded liabilities and thereby preserve City services.

13  
14 **1) The Union Agreements Confirm the Absence of a Vested Right**

15 If pension contribution levels were “vested” and inalterable, then the unions themselves  
16 would have violated their members’ vested rights by agreeing to increased contributions. Having  
17 agreed that their members may be required to make additional pension contributions, or equivalent  
18 wage reductions, the unions here cannot credibly argue that Measure B’s requirement of  
19 additional contributions violates any vested right. On the contrary, the unions are estopped from  
20 making this argument.

21 “Vested rights may not be implied ... where, as here, they are contrary to the express terms  
22 of the parties’ contract.” *City of San Diego v. Haas*, 207 Cal.App.4th at 495, citing *REAOC*, 52  
23 Cal.4th at 1179-1182, 1187. In *Haas*, employees had claimed vested rights to certain retirement  
24 benefits, but the court rejected their claim because it was contrary to a union agreement. *Id.* at  
25 495. Similarly, here, the unions agreed that their members would pay increased contribution rates,  
26 and that the Municipal Code could be revised to authorize them. The agreements defeat any  
27 vested rights claims.

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2) **The Unions' Treatment of Contribution Rates and Wages as Interchangeable Further Demonstrates the Absence of Any Vested Right**

There is no vested right to contribution rates for an additional reason. The unions treated contribution rates and wage reductions as interchangeable, and there is no vested right to wages.

"It is well established that public employees have no vested rights to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority." *San Diego Police Officers' Ass'n*, 568 F.3d at 737, quoting *Tirapelle v. Davis*, 20 Cal.App.4th 1317, 1332 (1993); see also *Butterworth v. Boyd*, 12 Cal.2d 140, 150 (same). Although reduced compensation will lower an employee's "final compensation" for retirement purposes, it is established that "indirect effects on pension entitlements do not convert an otherwise unvested benefit into one that is constitutionally protected." *Id.* at 738, citing *Vielehr v. Cal.*, 104 Cal App. 3d 392, 395-396 (1980) and *Miller v. State of California*, 18 Cal.3d 808, 814-816 (1977). In *San Diego Police Officers Association*, the court rejected the union's contention that employees had a vested right to the employer continuing to "pick up" a portion of the employee's pension contribution, even though the City's action resulted in employees paying a higher contribution rate. *Id.*

Here, the unions agreed to pay for unfunded pension liabilities through both additional contribution rates and lower wages. (Gurza Dec. ¶¶ 30-31.) The only difference between increased contributions and a straight wage decrease is that the City specifically earmarks contributions to offset the unfunded liabilities in the retirement plans. In fact, as admitted by union representatives who proposed the increase in employee pension contributions, increasing contribution rates, as opposed to decreasing wages, is more beneficial to employees. Increased contributions are deducted pre-tax from employees' salaries and deposited into the employee's retirement account. Therefore, not only do employees not pay income tax on the contributions, if employees leave before retirement, they may obtain a refund of the contributions. (Gurza Dec., Exh. 35.)

1 Courts must strive to construe statutes to make them reasonable and rational. Given the  
2 interchangeability of compensation and contributions, it would be irrational to construe the  
3 Charter as permitting compensation reductions, but precluding employee contributions toward  
4 unfunded liabilities (particularly when contributions end up more favorable to employees than a  
5 straight compensation reduction).

6 **c. The Municipal Code Expressly Calls for Increased**  
7 **Contributions to Defray Additional and Prior Service Liabilities**

8 In the wake of City discussions with labor unions over paying increased contribution rates,  
9 the City enacted ordinances providing that employees may be required to make “additional”  
10 contributions towards pension system unfunded liabilities. No union challenged the legality of  
11 these ordinances. The ordinances are presumptively lawful.

12 For Federated employees, the Municipal Code provides: “Notwithstanding any other  
13 provisions of this Part 6 or of Chapter 3.44, *members of this system shall make such additional*  
14 *retirement contributions as may be required by resolution adopted by the city council or by*  
15 *executed agreement with a recognized bargaining unit.”* (Municipal Code 3.28.755) (emphasis  
16 added).

17 Under the Police and Fire Plan, employees already were required to pay “special prior  
18 service contributions” towards plan unfunded liabilities created by certain benefit enhancements.  
19 (Municipal Code 3.36.1555).<sup>14</sup> The Municipal Code added authorization for “additional  
20 contributions” by Police and Fire Plan employees. Under the Code:

- 21 • Police and Fire Plan employees not subject to interest arbitration “*shall make such*  
22 *additional retirement contributions as may be required by resolution adopted by the city council*  
23 *or by executed agreement with a recognized bargaining unit.”* (Municipal Code 3.36.1525(A),

24  
25 <sup>14</sup> Although called “prior service contributions” these contributions are the equivalent of contributions for  
26 unfunded liabilities because they make up for “current service” contributions that would have been required  
27 in the past to pay for the increased retroactive benefit. The Municipal Code specifically carves these  
28 payments out of the City’s obligations to pay contributions to make the plan “actuarially sound.”  
(Municipal Code 3.36.1550(D).)

1 emphasis added.)

2 • Police and Fire Plan employees subject to interest arbitration, “shall make such  
3 additional retirement contributions for fiscal years 2010-2011 as may be required by executed  
4 agreement with a recognized bargaining unit or binding order of arbitration.” (Municipal Code  
5 3.36.1525(B).)

6 Based on the Charter and Municipal Code, plaintiffs cannot meet their burden under  
7 *REAOC* to prove that the City’s statutory scheme “clearly” demonstrates “a legislative intent”  
8 that the City pay all unfunded liabilities. *REAOC*, 52 Cal.4th at 1186-1187. Both the California  
9 Supreme Court and courts of appeal have permitted increases in employee contribution rates  
10 based on the language of the pension statute. *See International Ass’n of Firefighters v City of San*  
11 *Diego*, 34 Cal.3d at 295; *Pasadena Police Officers Ass’n v. City of Pasadena*, 147 Cal.App.3d  
12 695, 710-11 (1983). In *International Association of Firefighters*, the city’s charter did not fix  
13 employee contribution rates, but rather left the matter to city ordinances and actuaries. 34 Cal.3d  
14 at 295-300. The Court held that: “Rather than being foreign to the City’s retirement system,  
15 modification of contribution rates of both employees and the City is intrinsic to the ordinances  
16 basing those rates on actuarial factors, which can be revised.” *Id.* at 300; *Pasadena Police*  
17 *Officers Ass’n*, 147 Cal.App.3d at 711. Similarly, the San José City Charter does not fix  
18 contribution rates for unfunded liabilities, but leaves the matter to City ordinances, which under  
19 the contribution rates can be – and were – revised. Clearly, employees have no inherent “right”  
20 never to suffer increased employee contribution rates to pay for unfunded liabilities.

21 In the end, Measure B simply imposes what the Municipal Code already authorizes –  
22 increased contributions to defray additional unfunded liabilities facing the retirement plans. The  
23 contention that there is anything unlawful by Charter section 1506-A is wrong.

24 For all of the foregoing reasons, plaintiffs’ challenges to section 1506-A (contractual  
25 impairment, due process, unconstitutional “takings,” and estoppel) fail as a matter of law.

26 **2. Summary Adjudication Must Be Granted With Respect to Plaintiffs’**  
27 **Challenge to Charter Section 1512-A (Retiree Health Care Funding)**

28 Measure B requires that: “Existing and new employees must contribute a minimum of

1 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.”  
2 (Section 1512-A.) Plaintiffs claim that this provision violates their vested rights because it is the  
3 City’s sole obligation to pay towards the plan’s unfunded liabilities; Measure B forces employees  
4 to pay 50% of that cost; and they have no responsibility to help contribute toward unfunded  
5 liabilities. (SJPOA Compl., p. 15; Sapien Compl., p 8; Mukhar Compl., p. 7; Harris FAC., p. 6-7;  
6 AFSCME Compl., p. 14-16.)

7 Plaintiffs are wrong. As demonstrated above, the Charter’s reservation of rights authorizes  
8 this provision, but even if it did not apply, the City *never* promised to pick up 100% of unfunded  
9 liabilities in perpetuity. In fact, this section of Measure B simply confirms an *existing* Municipal  
10 Code requirement that the City and employees pay for retiree healthcare in a ratio of one to one.  
11 Indeed, in the last few years, many unions, including plaintiffs and unions representing individual  
12 plaintiffs, have agreed to their members paying increased contributions up to 50% of the unfunded  
13 liabilities, consistent with the one-to-one ratio in the Municipal Code.

14 **a. Contributions to Retiree Healthcare – Background**

15 The City subsidizes retiree health care premiums for eligible retirees, some with as little as  
16 15 years service with the City. The City pays 100% of the premium for the lowest cost plan  
17 offered by the City, for either single or family coverage. Payments for retiree medical premiums  
18 are made from a medical benefits account, or a trust fund, within the retirement system. These  
19 accounts are separate from the pension trust accounts. (Gurza Dec. ¶ 33.)

20 In the case of both the Federated and the Police and Fire retirement plans, the Municipal  
21 Code requires that employees and the City make contributions towards retiree medical benefits on  
22 a one to one ratio. (Municipal Code § 3.28.385(C) [“Contributions for other medical benefits shall  
23 be made by the city and the members in the ratio of one-to-one.”]; Municipal Code § 3.36.575(D)  
24 [“Contributions for other benefits provided through the medical benefits account shall be made by  
25 the city and the members on the ratio of one-to-one.”]) The Municipal Code does not distinguish  
26 contributions for current service from contributions for unfunded liabilities.

27

28

1 Under Sections 3.28.385 and 3.36.575(D), contribution rates for retiree medical benefits,  
2 which are separate from pension contribution rates, are established by “the retirement board as  
3 determined by the board’s actuary ....”<sup>15</sup> Historically, the contributions from employees and the  
4 City did not fully prefund the cost of employee retiree medical benefits. (Gurza Dec., ¶ 35.)

5 In 2007, the City was grappling with GASB reporting standards that required state and  
6 local governments to disclose the full cost of “unfunded actuarial liabilities” for “Other Post-  
7 Employment Benefits” (“OPEB”) such as retiree health care.<sup>16</sup> Actuarial studies reported the  
8 City’s unfunded liability for retiree health care to be as high as \$1.65 billion, if it did not prefund  
9 the health care costs, and \$1.14 billion if it prefunded the costs. (Gurza Dec. ¶¶ 35-36, Exhs. 36,  
10 37, 38.) [Memorandum dated July 24, 2007, to Mayor and City Council, re “Retiree Health Care”;  
11 Retiree Healthcare Plan, June 30, 2007, Federated City Employees, p. 1]. In response, the City  
12 Council directed City staff to begin negotiations with City unions over employee contributions  
13 towards payment of the full “Annual Required Contribution” (“ARC”) – the contribution needed  
14 on an annual basis in order to cover the estimated costs of the retiree health care benefit for current  
15 and future retirees. The ARC is calculated as a percentage of payroll. (Gurza Dec. ¶37.)

16 Ultimately, beginning in 2009, the City reached agreement with most City unions for  
17 employees to make annual contributions to fund up to 50% of the unfunded liabilities of retiree  
18 healthcare costs. (Gurza Dec. ¶¶ 38, 39, Exhs. 21, 39-41.)<sup>17</sup> A typical agreement stated:

19 \_\_\_\_\_  
20 <sup>15</sup> Again, the retirement boards are subject to direction from the City Council by legislative action, such as  
ordinances.

21 <sup>16</sup> The Governmental Accounting Standards Board (“GASB”) is an independent organization that  
22 establishes and improves accounting standards for local government in the United States. In June 2004,  
GASB issued new accounting and financial reporting standards with respect to “Postemployment Benefits  
23 Other than Pensions” (“OPEBs”).

24 <sup>17</sup> The City reached agreements with the following Federated unions:

25 Association of Building, Mechanical and Electrical Inspectors (ABMEI), Association of Engineers and  
26 Architects, IFPTE Local 21 (AEA Units 41/42 and 43), Association of Maintenance Supervisory Personnel  
(AMSP), City Association of Management Personnel (CAMP), International Brotherhood of Electrical  
Workers, Local No. 332 (IBEW); Municipal Employees’ Federation, AFSCME Local 101 (MEF);  
Confidential Employees Association, AFSCME Local 101 (CEO). (Gurza Dec., Exhs. 21, 39-41.)

27 In 2011, the City also reached agreements with the International Association of Firefighters, Local 230 and  
28 (footnote continued)

1 The City and the Employee Organization agree to transition from  
2 the current partial pre-funding of retiree medical and dental  
3 healthcare benefits (referred to as the "policy method") to  
4 prefunding of the full Annual Required Contribution (ARC) for the  
5 retiree healthcare plan ("Plan"). The transition shall be  
6 accomplished by phasing into fully funding the ARC over a period  
7 of five (5) years beginning June 28, 2009. The Plan's initial  
8 unfunded retiree healthcare liability shall be fully amortized over a  
9 thirty year period so that it shall be paid by June 30, 2039 (closed  
10 amortization). ....The City and Plan members (active employees)  
11 shall contribute to funding the ARC in the ratio currently provided  
12 under Section 3.28.380(C)(1) and (3) of the San José Municipal  
13 Code. Specifically, contributions for retiree medical benefits shall  
14 be made by the City and members in the ratio of one-to-one.  
15 Contributions for retiree dental benefits shall be made by the City  
16 and members in the ratio of eight-to-three. ....

9 The Municipal Code and/or applicable plan documents shall be  
10 amended in accordance with the above.

11 (Gurza Dec., Exh. 39, AEA, 2010-2011 MOA, Art. 12.1.)

12 The payments of the full ARC were to be phased in incrementally but: "[B]y the end of  
13 the five year phase-in, the City and plan members shall be contributing the full Annual Required  
14 Contribution in the ratio currently provided under Section 3.28.380 (C) (1) and (3) of the San José  
15 Municipal Code." (Gurza Dec., Exh. 39, AEA §12.3.) This or similar language was agreed to by  
16 AFSCME, a plaintiff in these lawsuits, AEA and AMSP which represent the *Mukhar* plaintiffs.  
17 (Gurza Dec. Exh. 39.) The City imposed these terms on OE3 as a Last, Best and Final Offer (*Id.*,  
18 Exhs. 42, 43.)

19 Of the unions, the Firefighters and POA have a slightly different agreement, which caps  
20 the agreement to pay towards unfunded liabilities at 10% of pensionable pay for employees and  
21 provides for meet and confer and dispute resolution procedures for amounts over that percentage.  
22 (Gurza Exh. 21, Article 29 [Firefighters], Exh. 41, Article 50 [SJPOA].) The Firefighters  
23 represent plaintiffs in the *Sapien* action. The SJPOA is a plaintiff in the *SJPOA* action.

24 Therefore, through these agreements, most City unions involved in these actions agreed to  
25 incrementally phase in payment of 50% of the "full ARC" – that is, 50% of the full cost of paying

26 \_\_\_\_\_  
27 the San José Police Officers Association.

1 future retiree health benefits, including the unfunded actuarial liabilities. Even the agreements  
2 with the Firefighter and Police Officer unions did not foreclose future increases above the 10%  
3 cap. Measure B *requires no more than what was already agreed to by almost every union* in the  
4 City.

5 **b. Plaintiffs Cannot Prove They Have A Vested Right to the City**  
6 **Paying for The Unfunded Liability For Retiree Health Care**

7 Plaintiffs' claims with respect to Measure B, section 1512-A, all hinge on whether they can  
8 prove that the City made an irrevocable commitment to pay all unfunded liabilities for retiree  
9 healthcare. Plaintiffs cannot meet their burden of proof.

10 First, it is clear that there has never been an express commitment by the City to pay all  
11 unfunded liabilities for retiree healthcare. The Municipal Code states only that employees and the  
12 City shall pay for retiree healthcare in a ratio of one to one and is silent as to unfunded liabilities.  
13 (Municipal Code §§ 3.28.385(C), 3.36.575(D).)

14 Second, Plaintiffs cannot show some "implied" vested contract commitment to pay  
15 unfunded liabilities in perpetuity. Here, San José's Charter requires all retirement provisions to be  
16 enacted by ordinance.<sup>18</sup> As stated above, there is nothing in the Code that implies the City should  
17 pay for all unfunded liabilities. *REAOC*, 52 Cal.4th at 1185 (where retirement benefits must be set  
18 by ordinance, courts must look to ordinances to determine parties' contractual rights and  
19 obligations.)

20 Nor is there anything in the legislative history of the Municipal Code or the parties'  
21 conduct that supports a requirement that the City pay for all unfunded liabilities. As explained  
22 above, under *REAOC* those seeking to enforce an alleged vested right face a "heavy burden" to  
23 overcome the presumption against vesting. *REAOC*, 52 Cal.4th at 1186-1187. The Court must  
24

25 <sup>18</sup> The Charter requires that employee compensation and benefits be fixed by the City Council. (Charter, §  
26 902) Under the Charter, "The following acts of the Council shall be by ordinance: (a) Those acts required  
27 by specific provision of this Charter to be by ordinance. (*Id.*, § 602.) Under the retirement section, the  
Charter requires that all acts establishing the City's retirement plans be by ordinance. (*Id.*, § 1500.)

1 find clear legislative intent to create a vested right, an intent that clearly and unmistakably appears  
2 from the legislative record. *Id.* Here, the impact of GASB caused closer scrutiny of different post  
3 employment liabilities, including retiree medical benefits. The fact that the City did not require a  
4 specific contribution attributable to unfunded liabilities – before GASB served to highlight the  
5 costs – is not evidence of a “clear and unmistakable” intention to pay all unfunded liabilities into  
6 the future. On the contrary, if anything, this fact indicates that the City was simply not focused on  
7 unfunded liabilities at the time of the legislation.

8 Here, the record shows just the opposite of an intent to treat payment of unfunded  
9 liabilities as a vested benefit because *all parties treated the issue as subject to change and fully*  
10 *negotiable*. In fact, the labor unions and the City have all negotiated and agreed in MOAs that  
11 their members would make increased payments with the goal of paying 100% of the ARC at the  
12 ratio of one-to-one with the City. Based on these agreements, Plaintiffs cannot prove that  
13 members of these unions have a vested right not to contribute toward unfunded liabilities. As  
14 demonstrated in the section on pension contribution rates: “Vested rights may not be implied ...  
15 where, as here, they are contrary to the express terms of the parties’ contract.” *City of San Diego*  
16 *v. Haas*, 207 Cal.App.4th at 495, citing *REAOC*, at 1179-1182, 1187.

17 Plaintiffs may also point to a course of conduct – that is, in the past employees did not pay  
18 for unfunded liabilities related to the retiree medical plan. This very argument was rejected in  
19 *Sappington v. Orange County Unified School District*, 119 Cal.App.4th 949, 953 (2004), which  
20 analyzed a claim by retirees that they had a vested right to a free employer paid PPO plan because  
21 the District’s 20 year “practice” was to subsidize the higher cost PPO plan. The *Sappington* court  
22 looked at the record, and found the express language – that required the District to “subsidize”  
23 retiree healthcare – “curiously brief and unspecific,” particularly in light of the vested rights  
24 challenge.

25 As explained in *Sappington*: “The fact that the District provided a free PPO benefit for 20  
26 years – before health insurance premiums skyrocketed and the cost of PPO coverage began far  
27 outpacing the cost of HMO coverage – does not prove the District promised to provide that option

1 forever.” *Sappington*, 119 Cal.App.4th at 955. “Generous benefits that exceed what is promised  
2 in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual  
3 mandate.” *Id.*

4 On remand, the federal district court ruling in *REAOC* confirmed this principle, rejecting  
5 the claim by Orange County retirees that “the County’s 23-year practice of annually authorizing  
6 this generous [subsidization] policy morphed into an implied contract requiring the County to  
7 guarantee this benefit for life.” *REAOC*, 2012 U.S. Dist. LEXIS 146637, \*\*1, 37 (C.D. Cal.  
8 2012). The Court concluded that the retirees were asking the county “to pay for a promise that it  
9 never made: to continue using a favorable ‘pooling’ methodology to calculate the health care  
10 premiums of its retired employees.” *Id.* Absent authorizing legislation, past practice does not  
11 create an “implied contract” giving rise to vested rights.

12 The instant case is stronger than *Sappington*, and *REAOC*, because here there was no  
13 consistent past practice. Retiree healthcare contribution rates always included some portion  
14 towards unfunded liabilities. (Gurza Dec., ¶35, Exh. 36.).

15 For all the foregoing reasons, including the City’s express reservation of rights to amend  
16 its retirement programs, plaintiffs’ challenge to section 1512-A must be summarily adjudicated in  
17 the City’s favor. Plaintiffs’ challenges to section 1512-A (contractual impairment, due process,  
18 unconstitutional “takings,” and promissory estoppel) fail as a matter of law.

19 **3. The City is Entitled to Summary Adjudication regarding Plaintiffs’**  
20 **Challenge to Charter Section 1511-A (Supplemental Benefit Reserve –**  
21 **“SRBR”)**

22 Measure B states: “The Supplemental Retiree Benefit Reserve shall be discontinued, and  
23 the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees  
24 in addition to the benefits authorized herein shall not be funded from plan assets.” (Measure B, §  
25 1511-A.) Again, the Charter’s reservation of rights authorizes the termination of the SRBR.  
26 Moreover, under the Municipal Code, the City always held, and in fact exercised, its discretion on  
27 whether to make SRBR distributions. This discretion defeats any claim of a vested right.  
28 Moreover, Measure B’s prohibition on making supplemental payments from plan assets restores

1 the original purpose of SRBR.

2 a. **Plaintiffs' Causes of Action Related to the Elimination of the**  
3 **Supplemental Retiree Benefit Reserve Fail Because SRBR Has**  
4 **Always Been Treated as Discretionary and Thus There Cannot**  
5 **Be a Vested Right to the Fund as a Matter of Law**

6 1) **Federated Plan**

7 **Legislative History.** In 1986, the City Council amended the Municipal Code to add the  
8 SRBR to the Federated Plan, providing that each year the retirement board “shall credit to the  
9 supplemental benefit reserve” certain interest payments and a portion of the “excess earnings”  
10 from the retirement fund. (Municipal Code 3.28.340(B)(2)(a),(C).)<sup>19</sup>

11 At the time it authorized the SRBR, the City Council expressly reserved its discretion over  
12 the funds. The Municipal Code provided, “Upon the request of the city council or on its own  
13 motion, the board may make recommendations to the city council regarding distribution, *if any*, of  
14 the supplemental retiree benefit reserve” to retirees and their survivors. (Municipal Code  
15 3.28.340(E) [emphasis added].) Further, “[t]he city council, after consideration of the  
16 recommendation of the board, shall determine the distribution, *if any*, of the supplemental benefit  
17 reserve to said persons.” (*Id.*, emphasis added.)

18 City labor unions and the City Council all recognized the discretionary nature of SRBR.

19 • From 1986 to 1999, the City Council did not approve any distributions to retirees  
20 from the SRBR.

21 • In 1988, in a public memorandum to the Mayor and City Council, the City  
22 Attorney advised the Council that it initially could fund certain additional retirement benefits from  
23 the SRBR, and if there were insufficient funds, the Council could eliminate the SRBR through an  
24 amendment to the Municipal Code. (RJN, Exhs. I to K [Memorandum from City Attorney Joan

25 <sup>19</sup> “Excess earnings” was defined as follows: “If the balance remaining in the [general retirement fund]  
26 income account is greater than zero, the board shall by written resolution declare that balance to be the  
27 excess earnings for the applicable fiscal year . . .” (Muni Code, § 3.28.340(D)(2).) By limiting the  
28 definition of “excess earnings” to the *income* for a particular fiscal year, the definition was not tied to the  
health of the retirement plan’s *assets*.

1 Gallo to Mayor and City Council dated March 21, 1988, re “Benefit Increases-Federated  
2 Retirement System; see also 2/24/88 Memorandum from Frances Galloni to Mayor and City  
3 Council; 2/24/88 Memorandum to Mayor and City Council from Federated Board of  
4 Administration.]

5 • Beginning in 2010, City Council resolutions suspended distribution of SRBR funds  
6 for the fiscal years 2010-2011, 2011-2012, and 2012-2013. (RJN, Exhs. L (Resolution No. 75635),  
7 M (Resolution No. 76204).) In memoranda to the City Council, the City Manager recommended  
8 suspension of SRBR distributions due to “the plans’ significant unfunded liabilities” while  
9 “retirement reform discussions continue.” (Gurza Dec., Exhs. 44, 45, 46 [Memorandum dated  
10 October 22, 2010 from Debra Figone to Honorable Mayor and City Council re “Suspension of  
11 SRBR Payments”; Memorandum dated May 13, 2011 from Debra Figone to Honorable Mayor  
12 and City Council re “Continued Suspension of SRBR Payments”; Memorandum dated April 9,  
13 2012 from Debra Figone to Honorable Mayor and City Council, re “Suspension of SRBR  
14 Payments.”].)

15 **The Retention and Exercise of Discretionary Authority Defeats Any Claim To A**  
16 **Vested Right.** The Charter’s reservation of rights permits modification or changes to the SRBR,  
17 which is part of the City’s retirement plans. But even if the Charter’s reservation of rights did not  
18 apply, there is no vested right to the SRBR.

19 Given that the Municipal Code expressly makes SRBR distributions subject to City  
20 Council discretion; the City Council consistently exercised discretion over payments and the fund;  
21 and the unions acknowledged that elimination of the SRBR could be subject to negotiation,  
22 plaintiffs cannot establish the existence of a contractual right in their favor. *Doyle v. City of*  
23 *Medford*, 606 F.3d 667, 675 (9<sup>th</sup> Cir. 2010) (no property interest under due process analysis when  
24 city retains discretion); *Retired Employees' Ass'n of Orange County*, 2012 U.S. Dist. LEXIS  
25 146637, \*28-29 (no finding of vested right where governing body exercised its discretion each  
26 year).

27

28

1 Had the City Council intended to create a right to perpetual SRBR payments “it surely  
2 would have said so.” *Ventura County Retired Employees’ Ass’n*, 228 Cal.App.3d at 1598 (lack of  
3 vested right demonstrated by discretionary language that legislative body “may authorize payment  
4 of all, or such portion as it may elect” of healthcare premiums for retired employees). For  
5 example, in *Teachers’ Retirement Board v. Genest*, 154 Cal.App.4th 1012 (2007), the court *did*  
6 find a vested right to the continuation of payments to a Teacher’s Retirement System  
7 Supplemental Benefits Maintenance Account (“SBMA”) where the statute providing the benefit  
8 specifically stated, “*It is the intent of the Legislature in enacting this section to establish the*  
9 *supplemental payments pursuant to Section 24415 as vested benefits pursuant to a contractually*  
10 *enforceable promise to make annual contributions from the General Fund to the [SBMA] in the*  
11 *Teachers’ Retirement Fund in order to provide a continuous annual source of revenue for the*  
12 *purposes of making the supplemental payments under Section 24415.*” *Id.* at 1022, quoting Cal.  
13 Ed. Code, § 22954(c) (emphasis in original).

14 Plaintiffs cannot meet their burden of proving a vested contractual right in the continuation  
15 of the SRBR in the Federated Plan. Nothing in the ordinances providing for the SRBRs supports  
16 such a right, and the City Council has never suspended “legislative control” over SRBR payments  
17 and the fund.

## 18 2) Police and Fire Plan

19 For the same reasons as with the Federated Plan, plaintiffs cannot establish a vested right  
20 to continuation of the SRBR applicable to the Police and Fire Plan.

21 **Legislative History.** In 2001, the City Council amended the Municipal Code to add the  
22 SRBR to the Police and Fire Retirement Plan, which provided, “The board shall establish a reserve  
23 in the retirement fund to be known as the supplemental retiree benefit reserve or SRBR.”  
24 (Municipal Code §3.36.580 (A).) The SRBR was initially funded with “ten percent of the plan’s  
25 prefunded actuarial accrued liability” and then each year, with “the investment earnings  
26  
27  
28

1 attributable to the balance in the SRBR” and ten percent of the “excess earnings” of the retirement  
2 fund. (Municipal Code §3.36.580 (B).)<sup>20</sup>

3 The City Council again clearly retained discretion over the SRBR. The City Council  
4 reserved discretion to approve the methodology for distributions developed by the Retirement  
5 Board. (Municipal Code §3.36.580(D)(5) [“Upon the approval of the methodology by the City  
6 Council, the Board shall make distributions in accordance with such methodology”].) And, as in  
7 the case of the Federated SRBR, the City Council *exercised* its legislative discretion over SRBR  
8 distributions for Police and Fire retirees. For example:

9 • In 2002, the City Council adopted Resolution No. 70822, which approved “The  
10 Methodology for the Distribution Of Moneys In the Supplemental Retiree Benefit Reserve Of the  
11 Police and Fire Department Retirement Fund.” (RJN, Exh. N (Resolution No. 70822).) The  
12 resolution stated that: “This approval shall remain in effect *until such time as the Board*  
13 *recommends a subsequent methodology and the Council adopts a resolution approving the*  
14 *subsequent methodology.*” (*Id.*, emphasis added.)

15 • Beginning in 2010, the Council amended the Code to provide that “there *shall be*  
16 *no distribution* during calendar years 2010, 2011, 2012 or during calendar year 2013 ....”  
17 (Municipal Code 3.36.580 (D)(2)[emphasis added].)

18 **The Retention and Exercise of Discretionary Authority Defeats Any Claim To A**  
19 **Vested Right.** As in the case of the Federated Plan, the Charter’s reservation of rights permits  
20 modification or changes to the Police and Fire SRBR, which is part of the City’s retirement plans.  
21 But even if the Charter’s reservation of rights did not apply, there is no vested right to the SRBR.

22 Like the SRBR in the Federated System, the ordinances governing the SRBR for Police  
23 and Fire made the distribution of funds from the SRBR discretionary, and the City Council

24  
25 <sup>20</sup> “Excess earnings” was defined as “the earnings of the retirement fund that remain after interest has been  
26 credited to the SRBR . . . and the actuarial assumed earnings rate adopted by the board . . . has been  
27 credited to other reserves.” (Municipal Code section 3.36.580(E).) Like the Federated SRBR, the funding  
28 to the Police and Fire SRBR was based on retirement fund “excess earnings” in a particular year, and not  
the level of assets in the retirement fund.

1 exercised its discretion not to authorize payments. Accordingly, the police and fire plaintiffs  
2 cannot establish the first element of any cause of action related to elimination of the SRBR – the  
3 existence of a contractual right. *REAOC*, 52 Cal.4th at 1186; *Doyle*, 606 F.3d at 675; *Retired*  
4 *Employees' Association of Orange County*, 2012 U.S. Dist. LEXIS 146637, \*28-29; *Ventura*  
5 *County Retired Employees' Ass'n*, 228 Cal.App.3d at 1598; *Haas*, 209 Cal.App.4th at 498.

6 **b. The Fact That the SRBRs Had The Unintended Consequences of**  
7 **Actually Harming the Viability of the Retirement Funds Defeats**  
8 **Plaintiffs' Claims of Vested Contractual or Property Rights**

9 The fact that SRBR has always been treated as discretionary, and the City has reserved its  
10 rights to change the retirement plans, in itself compels summary adjudication in the City's favor.  
11 Yet, there is an additional, separate and independent basis to grant summary adjudication. The  
12 SRBR led to unintended consequences that had no legitimate relation to the fundamental objective  
13 of the plan – to provide a system of fair and sustainable benefits to City workers.

14 In 1986, when the City Council authorized the Federated SRBR, and in 2001, when the  
15 City Council authorized the Police and Fire SRBR, the actuaries reported that the City's two  
16 retirement funds were fully funded. (RJN , Exh. O [November 22, 1985 Letter from Coates,  
17 Herfurth & England, to Edward F. Overton, Retirement and Benefits Administrator, re: SB650  
18 Study]; Gurza Dec., Exh. 59 [Actuarial Valuation Report, City of San José Police and Fire  
19 Department Retirement Plan, as of June 30, 2012, at p. 5 (showing plan overfunded at 114.8% as  
20 of June 30, 2001, even after SRBR implementation].) The City created the SRBR to enable  
21 retirees to share in the success of the plans.

22 But beginning in 2009, the actuaries reported that the retirement funds began to experience  
23 significant increases in unfunded liabilities due in large part to investment losses. The unfunded  
24 liability is the difference between the projected pension liability (for current and future retirees)  
25 and the value of plan assets. The actuaries reported that the two retirement plans had unfunded  
26 liabilities due to investment losses, granting of retroactive benefit enhancements and unrealized  
27 actuarial assumptions set by the system's actuaries. (Gurza Dec., Exhs., 58, 59 [Cheiron Actuarial  
28 Valuation, Federated Employees' Retirement System, June 30, 2012 Valuation, dated December

1 2012, at p. 6 Cheiron Actuarial Valuation, Police and Fire Employees' Retirement System, June  
2 30, 2012 Valuation, dated December 2012 at p. 5 (history of increases in unfunded liabilities)] .)

3       The unfunded liabilities resulted in an anomaly. Although the retirement systems had  
4 large future unfunded liabilities, the actuaries reported that they earned enough in a particular year  
5 to have "excess earnings" for the year – as defined in the Municipal Code – to fund the SRBR.  
6 And under the resolutions that established the methodology for distribution to retirees, the  
7 actuaries reported that the SRBR in turn had sufficient funds to make supplemental distributions to  
8 retirees. (Gurza Dec., Exhs 44, 45, 46 [2010 Memo at pp. 3-5; 2011 Memo at pp. 3-5; 2012  
9 Memo at pp. 4-5; Exhs. 47, 48 [SRBR actuarial reports].) For example, in 2012, the actuaries  
10 reported that the Federated SRBR contained \$30.5 million and the existing distribution resolution  
11 would have resulted in an estimated distribution of \$6.5 million. The actuaries also reported that  
12 the Police and Fire SRBR contained \$33.4 million and the existing distribution resolution would  
13 have resulted in an estimated distribution of \$1.28 million. (*Id.*, Exh. 46.) This outcome is plainly  
14 anomalous and wrong given the enormous unfunded liabilities facing the plan.

15       As a result of the large unfunded liabilities, in 2010, 2011 and 2012, the City Manager  
16 recommended to the City Council that it suspend the SRBR distributions and that the City study  
17 alternatives. (Gurza Dec., Exhs. 44, 45, 46.) In response, beginning in 2010, the City Council has  
18 not authorized any supplemental payments for Federated retirees and amended the Municipal  
19 Code to eliminate payments to the Police and Fire retirees. Measure B simply recognizes and  
20 formalizes what the City Council accomplished over the prior three years.

21       In this situation, the City addressed "the discrepancy between the theoretical objective and  
22 the actual operation of the" SRBR, and thus did not violate any "vested right." *Allen v. Bd. of*  
23 *Admin of the Public Employees' Ret. Sys.*, 34 Cal.3d 114, 123 (1983) The vested rights doctrine  
24 does not protect "unforeseen advantages" with "no relation to the fundamental theory and  
25 objective" of the retirement plan. *Id.* at 122 (citations omitted). "Constitutional decisions 'have  
26 never given a law which imposed unforeseen advantages or burdens on a contracting party  
27 constitutional immunity against change.'" *Lyon v. Flournoy*, 271 Cal.App.2d 774, 782 (1969



1 rights – which the City denies – employees who retired before those dates have no vested rights to  
2 the existence of SRBR or its benefits. *Pasadena Police Officers Ass'n v. City of Pasadena*, 147  
3 Cal.App.3d at 706; *Olson v. Cory*, 27 Cal.3d 532, 540 (1980).

4 **IV. THE COURT SHOULD GRANT SUMMARY ADJUDICATION WITH RESPECT**  
5 **TO THE CITY'S CROSS COMPLAINT FOR DECLARATORY RELIEF**

6 The City filed a cross complaint for declaratory relief pursuant to section 1060 of the Code  
7 of Civil Procedure. The cross complaint seeks a judicial declaration that specified provisions of  
8 Measure B, including those at issue in this motion, do not violate the federal constitution or  
9 otherwise state a claim. (See the City's Cross Complaint, dated November 16, 2012.)

10 Under section 1060 of the Code of Civil Procedure, the City may seek a "declaration of  
11 any question of construction or validity arising under the instrument or contract." This section  
12 applies to test the validity of statutes. *See, e.g., Abbott v. City of Los Angeles*, 53 Cal.2d 674  
13 (1960); *see generally* 5 Witkin, *California Procedure* § 859 (5<sup>th</sup> ed. 2008).

14 For all of the reasons described above, and based on the authorities cited, the Court should  
15 grant summary adjudication upholding the validity of Charter sections: 1506-A (increased  
16 contributions); section 1512-A (retiree healthcare); and 1511-A (supplemental payments to  
17 retirees). There are no triable issues of material fact with respect to these sections, as plaintiffs  
18 cannot show any promise or commitment to continue any particular benefit affected by Measure  
19 B.

20 **V. CONCLUSION**

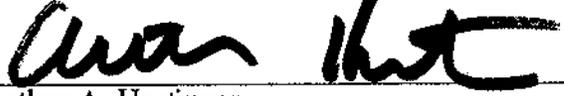
21 Plaintiffs' claims at issue in this motion all fail because they are unable to establish that  
22 Measure B infringes upon an irrevocable commitment. Rather, the City's voters wisely retained  
23 the authority to make changes to the plans. This is a unique feature in San José's Charter, and the  
24 Court must enforce this reservation of rights.

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The Court is urged to grant summary adjudication as outlined above.

DATED: February 7, 2013.

MEYERS, NAVE, RIBACK, SILVER & WILSON

By:   
Arthur A. Hartinger  
Attorneys for Defendant and Cross-Complainant  
City of San José

2045794.1

Attachment A

MEASURE B CASES  
COMPLAINTS AND CAUSES OF ACTIONS (2014830.1)

CASE TITLE	CAUSES OF ACTION
<p><b>SAN JOSE POLICE OFFICERS' ASSOCIATION V. CITY OF SAN JOSE</b> Santa Clara Co. Superior Court Case No. 1-12-CV-225926</p>	<p>1<sup>st</sup> Impairment of Contract (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 2<sup>nd</sup> Taking (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 3<sup>rd</sup> Due Process (Cal. Const. art I, § 7 and Cal. Civ. Code § 52.1) 4<sup>th</sup> Freedom of Speech – Right to Petition (Cal. Const. art I, §§ 2 and 3 and Cal. Civ. Code § 52.1) 5<sup>th</sup> Separation of Powers Doctrine (Cal. Const. art III, § 3 and Cal. Civ. Code § 52.1) 6<sup>th</sup> Breach of Contract 7<sup>th</sup> Violation of MMBA (Gov. Code § 3512) 8<sup>th</sup> California Pension Protection Act (Cal. Const. art XVI § 17 and Cal. Civ. Code § 52.1)</p>
<p><b>SAPIEN V. CITY OF SAN JOSE</b> Santa Clara Co. Superior Court Case No. 1-12-CV-225928</p>	<p>1<sup>st</sup> Request for Declaratory Relief 2<sup>nd</sup> Impairment of Contract (Cal. Const. art I, § 9) 3<sup>rd</sup> Substantive Due Process (Cal. Const. art I, § 7) 4<sup>th</sup> Taking (Cal. Const. art I, § 19) 5<sup>th</sup> Petition for Writ of Mandate, Prohibition or other Appropriate Write Relief</p>
<p><b>HARRIS, et al. v. CITY OF SAN JOSE, et al.</b> Santa Clara Co. Superior - Case No. 1-12-CV-226570</p>	<p>1<sup>st</sup> Request for Declaratory Relief 2<sup>nd</sup> Impairment of Contract (Cal. Const. art I, § 9) 3<sup>rd</sup> Substantive Due Process (Cal. Const. art I, § 7) 4<sup>th</sup> Taking (Cal. Const. art I, § 19) 5<sup>th</sup> Petition for Writ of Mandate, Prohibition or other Appropriate Write Relief</p>
<p><b>MUKHLAR, et al. v. CITY OF SAN JOSE, et al.</b> Santa Clara Co. Superior Court - Case No. 1-12-CV-226574</p>	<p>1<sup>st</sup> Request for Declaratory Relief 2<sup>nd</sup> Impairment of Contract (Cal. Const. art I, § 9) 3<sup>rd</sup> Substantive Due Process (Cal. Const. art I, § 7) 1<sup>st</sup> Unconstitutional Impairment of Contract (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 5<sup>th</sup> Petition for Writ of Mandate, Prohibition or other Appropriate Write Relief</p>
<p><b>AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 101 v. CITY OF SAN JOSE</b> Santa Clara Co. Superior Court - Case No. 1-12-CV-227864</p>	<p>1<sup>st</sup> Unconstitutional Impairment of Contract (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 2<sup>nd</sup> Unconstitutional Bill of Attainder (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 3<sup>rd</sup> Unconstitutional Taking of Private Property Attainder (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 4<sup>th</sup> Unconstitutional Taking of Private Property Without Due Proc. (Cal. Const. art I, § 9 &amp; Civ. Code § 52.1) 5<sup>th</sup> Violation of California's Pension Protection Act (Cal. Const. art XVI § 17 &amp; Civ. Code § 52.1) 6<sup>th</sup> Violation of Constitutional Right to Petition (Cal. Const. art I §§ 2, 3 &amp; Cal. Civ. Code § 52.1) 7<sup>th</sup> Illegal <i>Ultra Vires</i> Tax, Fee or Assessment (Cal. Const. art I, § 7 &amp; Cal. Civ. Code § 52.1) 8<sup>th</sup> Promissory Estoppel and Equitable Estoppel 9<sup>th</sup> Request for Declaratory Relief (Code of Civ. Pro. § 1060) 10<sup>th</sup> Request for Injunctive Relief (Code of Civ. Pro. §§ 525, 526, and 526(a)) -Taking (Cal. Const. art I, § 19) 11<sup>th</sup> Petition for Writ of Mandate (Code of Civ. Pro. § 1085)</p>
<p><b>SAN JOSE RETIRED EMP ASSOC ET AL v CITY OF SAN JOSE</b> Santa Clara Co. Superior Court - Case No. 1-12-CV-233669</p>	<p>1<sup>st</sup> Request for Injunctive Relief (Cal. Const. art I, § 9) 2<sup>nd</sup> Request for Declaratory Relief 3<sup>rd</sup> Petition for Writ of Mandate</p>
<p><b>GEORGE WIEGER v. CITY OF SAN JOSE</b> Santa Clara Co. Superior Court - Case No. 1-12-CV-234048</p>	<p>1<sup>st</sup> Request for Injunctive Relief</p>

**Attachment B**

FULL TEXT OF MEASURE B

**ARTICLE XV-A  
RETIREMENT**

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO  
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS  
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as:  
*"The Sustainable Retirement Benefits and Compensation Act."*

**Section 1501-A: FINDINGS**

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits – primarily health benefits – are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

February 8, 2012

Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

**Section 1502-A: INTENT**

This Act is intended to ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services to the residents of San Jose.

February 8, 2012

The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned and accrued for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree or to take away any cost of living increases paid to retirees as of the effective date of the Act.

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

**Section 1503-A. Act Supersedes All Conflicting Provisions**

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

February 8, 2012

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

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

**Section 1505-A. Reservation of Rights to City Council**

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

**Section 1506-A. Current Employees**

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to

February 8, 2012

amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions.

**Section 1507-A: One Time Voluntary Election Program ("VEP")**

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

February 8, 2012

IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

- (i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.
- (ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.
- (iii) The current age of eligibility for service retirement under the existing plan as approved by the City

February 8, 2012

Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

- (iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.
- (v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.
- (vi) “Final compensation” shall mean the average annual pensionable pay of the highest three consecutive years of service.
- (vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

February 8, 2012

worked (including paid leave, but not including overtime).

(c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.

(d) VEP Survivorship Benefits.

(i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.

(ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.

(e) VEP Disability Retirement Benefits.

(i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

February 8, 2012

- (ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

**Section 1508-A: Future Employees – Limitation on Retirement Benefits – Tier 2**

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

- (a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

February 8, 2012

the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose - San Francisco - Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

February 8, 2012

(f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).

(g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

**Section 1509-A: Disability Retirements**

(a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

(b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:

(i) An employee cannot do work that they did before; and

February 8, 2012

(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.

February 8, 2012

**Section 1510-A: Emergency Measures to Contain Retiree Cost of Living Adjustments**

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

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

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

**Section 1511-A: Supplemental Payments to Retirees**

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets.

February 8, 2012

**Section 1512-A: Retiree Healthcare**

(a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.

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

(c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

**Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)**

(a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.

(b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

February 8, 2012

through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

(c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:

- (i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and
- (ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.

(d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:

- (i) the funding objectives and actuarial assumptions of the plans; and
- (ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

February 8, 2012

**Section 1514-A: Savings**

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

**Section 1515-A: Severability**

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

February 8, 2012

(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

ADOPTED this 6th day of March, 2012, by the following vote:

AYES:            CONSTANT, HERRERA, LICCARDO, NGUYEN,  
                     OLIVERIO, PYLE, ROCHA; REED.

NOES:            CAMPOS, CHU, KALRA.

ABSENT:         NONE.

DISQUALIFIED:  NONE.



CHUCK REED  
Mayor

ATTEST: 

DENNIS D. HAWKINS, CMC  
City Clerk

**Attachment C**

**FILED**

FEB - 1 2013

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of Santa Clara County  
BY: [Signature] DEPUTY

Ingrid Stewart

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS'  
ASSOCIATION,

Plaintiff,

vs.

CITY OF SAN JOSE, et al.,

Defendants.

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

ORDER RE: MOTIONS FOR JUDGMENT  
ON THE PLEADINGS

AND CONSOLIDATED ACTIONS AND  
RELATED CROSS-COMPLAINT.

The (1) motion for judgment on the pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown Act by defendant City of San Jose; and (2) motion for judgment on the pleadings by City of San Jose came on for hearing before the Honorable Peter H. Kirwan on January 29, 2013, at 9:00 a.m. in Department 8. The matters having been submitted, the court orders as follows:

1 Defendant's request for judicial notice in support of motion for judgment on the  
2 pleadings as to the San Jose Police Officers' Association's seventh cause of action for violation  
3 of the Meyers-Milias-Brown Act, exhibit A, is GRANTED. (See Evid. Code §452, subs. (b) –  
4 (c); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.)  
5 Defendant's request for judicial notice in support of motion for judgment on the pleadings as to  
6 the San Jose Police Officers' Association's seventh cause of action for violation of the Meyers-  
7 Milias-Brown Act, exhibits B – F, is DENIED.

8 Defendant City of San Jose's motion for judgment on the pleadings as to the San Jose  
9 Police Officers' Association's seventh cause of action for violation of the Meyers-Milias-Brown  
10 Act is GRANTED WITHOUT LEAVE TO AMEND. “[A]n action in the nature of *quo*  
11 *warranto* constitutes the exclusive method for appellants to mount their attack on the charter  
12 amendments based upon the city's failure to comply with the Meyers-Milias-Brown Act.”  
13 (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698; see  
14 also 95 Ops.Cal.Atty.Gen. 31.) Plaintiff San Jose Police Officers' Association argued that the  
15 seventh cause of action alleges a *substantive* violation of the Meyers-Milias-Brown Act and  
16 hence, *quo warranta* is not the exclusive method of attack. This court respectfully disagrees and  
17 finds the seventh cause of action alleges a *procedural* violation of the Meyers-Milias-Brown Act,  
18 both ripe and unripe.

19 -----oOo-----

20 Defendant's request for judicial notice in support of motion for judgment on the  
21 pleadings by the City of San Jose, exhibits A – B, is GRANTED. (See Evid. Code §452, subs.  
22 (b) – (c); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027.)

23 Plaintiff AFSCME Local 101's request for judicial notice in support of opposition to  
24 motion for judgment on the pleadings by City of San Jose is GRANTED. To the extent the  
25 request for judicial notice is granted, the court takes judicial notice of the existence of the  
26 documents, not necessarily the truth of any matters asserted therein. (See Evid. Code, §452,  
27 subd. (d); *People v. Woodell* (1998) 17 Cal.4th 448, 455.)  
28

1 Defendant City of San Jose's motion for judgment on the pleadings as to the second  
2 cause of action in plaintiff AFSCME Local 101's complaint is GRANTED with 10 days' leave  
3 to amend.

4 Defendant City of San Jose's motion for judgment on the pleadings as to the sixth cause  
5 of action in plaintiff AFSCME Local 101's complaint and the fourth cause of action in plaintiff  
6 San Jose Police Officers' Association's first amended complaint is DENIED.

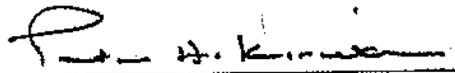
7 Defendant City of San Jose's motion for judgment on the pleadings as to the seventh  
8 cause of action in plaintiff AFSCME Local 101's complaint is GRANTED with 10 days' leave  
9 to amend.

10 Defendant City of San Jose's motion for judgment on the pleadings as to the first through  
11 seventh causes of action in plaintiff AFSCME Local 101's complaint and the first through fifth  
12 and eighth causes of action in plaintiff San Jose Police Officers' Association's first amended  
13 complaint is DENIED. A defendant cannot demur (or, similarly, move for judgment on the  
14 pleadings) to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987)  
15 189 Cal.App.3d 764, 778—" [A] defendant cannot demur generally to part of a cause of action;"  
16 see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not  
17 lie to a portion of a cause of action.") Defendant City of San Jose's alternative motion to strike  
18 portions of the first through seventh causes of action in plaintiff AFSCME Local 101's complaint  
19 and portions of the first through fifth and eighth causes of action in plaintiff San Jose Police  
20 Officers' Association's first amended complaint is DENIED.

21 Defendant City of San Jose's motion for judgment on the pleadings as to the fifth cause  
22 of action of AFSCME Local 101's complaint and eighth cause of action of San Jose Police  
23 Officers' Association's first amended complaint is DENIED.

24 Defendant City of San Jose's motion for judgment on the pleadings as to the fifth cause  
25 of action of San Jose Police Officers' Association's first amended complaint is DENIED.

26  
27 Dated: 1/31/13

  
Hon. Peter H. Kirwan  
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
191 N. First Street  
San Jose, CA 95113-1090

**FILED**

FEB - 1 2013

DAVID H. YAMASAKI  
Chief Executive Officer  
Superior Court of California, County of Santa Clara  
BY *[Signature]*  
Ingrid Stewart

TO: FILE COPY

RE: San Jose Police Officers' Association vs City Of San Jose  
Case Nbr: 1-12-CV-225926

PROOF OF SERVICE

ORDER RE: MOTIONS FOR JUDGMENT ON THE PLEADINGS

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

---

Parties/Attorneys of Record:

CC: Teague P. Paterson , Beeson Tayer & Bodine  
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44 Montgomery Street, Suite 400, San Francisco, CA 94104  
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Arthur A Hartinger , Meyers Nave Riback Silver Et Al  
555 12th Street, Suite 1500, Oakland, CA 94607  
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101 Second Street, Suite 1800, San Francisco, CA 94105-3659

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 02/01/13. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Ingrid C Stewart, Deputy