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ENDORSED
FILED

2013 FEB 26 A 9:03

David H. Yamasaki, Clerk of the Superior Court
County of Santa Clara, California
By: A. Ramirez
Clerk

11 Attorneys for Plaintiffs and Cross-Defendants Robert Sapien,
12 Mary Kathleen McCarthy, Than Ho, Randy Sekany,
13 Ken Heredia, Teresa Harris, Jon Reger, Moses Serrano,
14 John Mukhar, Dale Dapp, James Atkins, William Buffington
15 and Kirk Pennington

16 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
17 **IN AND FOR THE COUNTY OF SANTA CLARA**

18 SAN JOSE POLICE OFFICERS' ASSOCIATION,

19 Plaintiff,

20 vs.

21 CITY OF SAN JOSE AND BOARD OF
22 ADMINISTRATION FOR THE POLICE AND FIRE
23 DEPARTMENT RETIREMENT PLAN OF CITY OF
24 SAN JOSE

25 Defendants.

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

**DECLARATION OF JOHN MCBRIDE IN
SUPPORT OF PLAINTIFFS' MOTION
TO STRIKE AND/OR DISMISS
DEFENDANT CITY OF SAN JOSE'S
MOTION FOR SUMMARY JUDGMENT**

26 and Consolidated Actions

27 CITY OF SAN JOSE

28 Cross-Complainant,

vs.

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

Cross-Defendants.

Date: March 15 2013
Time: 9:00 a.m.
Dept: 8
Judge: Hon. Peter H. Kirwan

1 I, John McBride, say:

2 1. I am one of the attorneys for plaintiffs Robert Sapien, *et al.* (Case No.
3 112CV225928), Teresa Harris, *et al.* (Case No. 112CV226570), and John Mukhar, *et al.*
4 (Case No. 112CV226574).

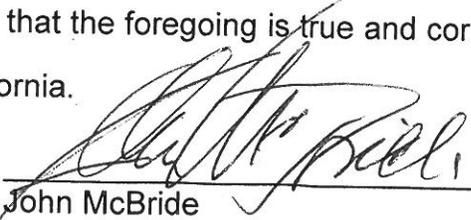
5 2. Defendants motion for summary adjudication of issues was hand delivered to
6 our office in a bankers box. It consists of a notice of motion which itself is 7 pages in length,
7 a 41 page memorandum of points and authorities to which are attached 21 pages of
8 attachments, a declaration of Alex Gurza consisting of 21 pages and 61 exhibits, a request
9 for judicial notice of 16 separate documents, and a 193 page separate statement of
10 undisputed facts in support of the motion.

11 3. After reviewing the motion I wrote to Mr. Hartinger, who represents the City of
12 San Jose pointing out that the motion did not comply with the provisions of Code of Civil
13 Procedure §437c(f) which requires that a motion for summary adjudication may only be
14 granted " if it completely disposes of a cause of action, an affirmative defense, a claim for
15 damages, or an issue of duty. I asked him to withdraw the motion. Attached hereto as
16 Exhibit 1 is a true and correct copy of my communication to Mr. Hartinger.

17 4. I received a reply from Mr. Hartinger declining to dismiss, but admitting the
18 motion would not dispose all the issues and further litigation would be necessary. Attached
19 hereto as Exhibit 2 is a true and copy of Mr. Hartinger's response.

20 5. After giving notice of our intention to make an ex parte appearance on Friday
21 morning February 22, 2013, I received a phone call from Linda Ross, another one of the
22 City's attorneys requesting that our ex parte motion to be continued to Tuesday morning
23 February 26, 2013. I agreed and confirmed this in my letter marked Exhibit 3 attached
24 hereto.

25 I declare under penalty of perjury that the foregoing is true and correct. Executed on
26 February 25, 2013, at San Jose, California.

27 
28 John McBride

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EXHIBIT 1

**WYLIE, MCBRIDE,
PLATTEN & RENNEN**

A Law Corporation

2125 CANOAS GARDEN AVENUE, SUITE 120
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CAROL L. KOENIG
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AMY L. SEKANY

RICHARD J. WYLIE, Retired

Direct Dial Number

February 11, 2013

Arthur A. Hartinger
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Ste. 1500
Oakland, CA 94607

Via E-Mail & U.S. Mail

Re: *Sapien, et al vs. City of San Jose; Case No. 1-12-CV-225928; Harris et al v. City of San Jose et al; Case No. 1-12-CV-226570; Mukhar et al v. City of San Jose, et al; Case No. 1-12-CV-226574*

Dear Mr. Hartinger:

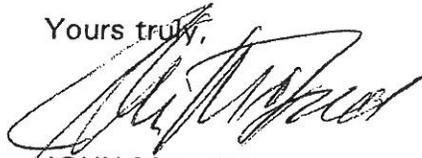
We have reviewed your motion for summary adjudication. We believe your motion is not properly brought because of the proscriptions of CCP §437c(f)(1). Your motion does not address the issues contained in our clients' complaints regarding the drastic changes to disability retirement pension or the COLA changes. Thus, even if the court were to accept one or more of your arguments, the issues of the impairment to these additional rights would remain. Put simply, your motion does not address entire causes of action as set forth in the complaints.

The legislative history of the 1993 amendments supports our reading that you can no longer obtain a summary adjudication of issues.

We ask that you withdraw your motion. Even if your motion was granted there are still issues to be tried. A court trial will allow you to present the same arguments as advanced by your motion.

We would be happy to discuss,

Yours truly,



JOHN MCBRIDE
JMB:imt

cc: All counsel

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EXHIBIT

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EXHIBIT 2

February 12, 2013

Via E-mail

John McBride
WYLIE, MCBRIDE, PLATTEN &
RENNER
2125 Canoas Garden Avenue, Suite 120
San Jose, CA 95125

Re: *POA, et al./ San Jose*
Case No. No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and
1-12-CV-227864)
Letter dated February 11, 2013
Motion for SAI
Motion for Preliminary Injunction
Trial Procedures

Dear Mr. McBride:

I write to respond to your letter sent yesterday, and to raise a few additional issues.

We do not agree with your analysis of CCP Section 437c. We are very comfortable that the issues we have articulated are appropriate for summary adjudication.

We do agree that the motion will not dispose of all issues, and that further litigation will be necessary in any event. Last week, you will recall that we discussed the possibility of a structured trial, to be set as early as possible. I will circulate by another cover letter a draft stipulation for your and other counsels' consideration.

With respect to the motion for preliminary injunction, we believe that motion should either be withdrawn or coordinated with the hearing on the MSA or trial. To our knowledge, there is nothing to enjoin within the next few months. And in any event, we want to confirm our willingness to stipulate to have the hearing specially set. We see no reason why the motion cannot be continued to a convenient date for all counsel.

John McBride
February 12, 2013
Page 2

We look forward to discussing these issues further.

Very truly yours,



Arthur A. Hartinger
AAH:kt

C: Christopher E. Platten
Mark S. Renner
Teague P. Paterson
Vishtap M. Soroushian
Gregg McLean Adam
Jonathan Yank
Gonzalo Martinez
Jennifer Stoughton
Amber West

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EXHIBIT 3

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RICHARD J. WYLIE, Retired

Direct Dial Number

February 21, 2013

Via Facsimile & E-Mail

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Linda M. Ross, Esq.
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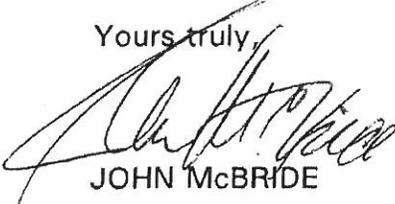
Harvey L. Leiderman, Esq.
Reed Smith, LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

Re: *Sapien, et al vs. City of San Jose; Case No. 1-12-CV-225928; Harris et al v. City of San Jose et al; Case No. 1-12-CV-226570; Mukhar et al v. City of San Jose, et al; Case No. 1-12-CV-226574*

Dear Counsel:

At Linda Ross' request, we will not be appearing Ex Parte tomorrow, February 22, but will instead appear Tuesday, February 26, 2013 at 8:15 a.m. in Department 8 with our Application to specially set a hearing on our Motion to Dismiss or Strike the City of San Jose's Motion for Summary Adjudication of Issues set for hearing on April 23, 2013.

Yours truly,



JOHN MCBRIDE

JMB:imt

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EXHIBIT 3