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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **IN AND FOR THE COUNTY OF SANTA CLARA**

13 **AT SAN JOSÉ**

14 SAN JOSE POLICE OFFICERS'
15 ASSOCIATION

16 Plaintiff,

17 v.

18 CITY OF SAN JOSÉ, BOARD OF
19 ADMINISTRATION FOR POLICE AND FIRE
20 DEPARTMENT RETIREMENT PLAN OF
21 CITY OF SAN JOSE, and DOES 1-10,
22 inclusive,

23 Defendants.

24 Consolidated Case No. 1-12-CV-225926

25 [*Consolidated with Case Nos. 1-12-CV-225928,
26 1-12-CV-226570, 1-12-CV-226574,
27 1-12-CV-227864, and 1-12-CV-233660*]

28 ASSIGNED FOR ALL PURPOSES TO:
JUDGE PATRICIA LUCAS
DEPARTMENT 2

**AFSCME LOCAL 101'S OPPOSITION TO
DEFENDANTS' AND CROSS-
COMPLAINANT'S MOTION FOR
SUMMARY ADJUDICATION OF ISSUES**

Hearing Date: June 7, 2013
Hearing Time: 9:00 A.M.
Courtroom: 2
Judge: Hon. Patricia Lucas
Complaint Filed: July 5, 2012
Trial Date: June 17-20, 2013

29 AND RELATED CROSS-COMPLAINT AND
30 CONSOLIDATED ACTIONS

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I. INTRODUCTION¹

Defendant, the City of San José and its City Manager in her official capacity (“Defendant” or “City”), has moved for summary adjudication (“Motion”) on the incorrect contention that Plaintiff AFSCME’s members, who participate in and are members of the Federated City Employees’ Retirement System (“System” or “Federated System”), have no vested rights to receive the benefits they have worked towards and to which they have contributed their wages. The City seeks an adjudication of three distinct sections of its recently-enacted “pension reform” charter amendment, Measure B: Section 1506-A relating to “increased employee contributions”; Section 1512-A regarding “funding of retiree health”; and Section 1511-A which eliminates the Supplemental Retirement Benefit Reserve (“SRBR”) component of the System’s pension plan.

While the City purports to base its Motion on the Contracts, Due Process, and Takings Clauses, its Motion addresses only the Contracts Clause. Because a Contracts Clause analysis requires determining whether a contract has been “substantially impaired,” the Court cannot grant the Motion. The effect of Measure B as a whole on employees’ vested and settled pension expectations must drive the analysis, not whether an any individual provision -- construed on its own and in isolation -- creates a substantial impairment. Similarly, the Motion must be denied because Code of Civil Procedure section 437c(f)(1) authorizes summary adjudication only as to an entire cause of action. The City’s motion does not seek to dispose of any cause of action; rather it seeks adjudication of certain provisions of Measure B without regard to particular causes of action.

Putting aside these deficiencies, the City’s primary contention is unsupportable as a matter of law. The City seizes on what it characterizes as a “reservation of rights” clause as conclusive indication that its employees’ pension and retiree health benefits cannot vest. As detailed below, the vague wording of the cited provision does not confer to the City the broad right it asserts. Nor may it be interpreted to create an exception to the Constitutional prohibition of the impairment of contracts, or permit the taking of property without just compensation. Other California courts have rejected the City’s reasoning as “absurd.” In any event, as a matter of law the City has not established a right to

¹ By Order dated February 8, 2013, the Court granted to AFSCME Local 101 leave to file an oversized brief not to exceed 40 pages.

1 adjudication with respect to any of the three specified provisions of Measure B:

2 Section 1506-A requires employees who refuse to opt-into the “Voluntary Election Program”
3 under Section 1507-A, to contribute additional monies to the system in order to pay up to 50% of the
4 pension system’s already-incurred unfunded accumulated actuarial liabilities (“UAAL”). Prior to
5 Measure B, the City was obligated to pay the Systems' unfunded liabilities, and this provision of
6 Measure B is contrary to the nature of a defined benefit pension system, under which the employer
7 bears the risk attributable to investment losses and incorrect assumptions. (*Hughes Aircraft Co. v.*
8 *Jacobson* (1999) 525 U.S. 432, 439; *Koster v. City of Davenport* (8th Cir. 1999) 183 F.3d 762, 765.)
9 Prior to Measure B's passage, the City's Municipal Code (“MuniCode”) explicitly stated the City was
10 responsible for the consequences of plan experience resulting in funding shortfalls, and therefore
11 Measure B improperly shifts this general liability onto a discrete and narrow group of City
12 employees. Further, the City's contention that AFSCME agreed to help fund the City’s unfunded
13 liabilities is factually incorrect; indeed, the City admits it “imposed” changes on AFSCME members.
14 (City's Memo of P’s & A’s ISO of Defendants’ Motion for Summary Adjudication (“MSA”), p. 24.)

15 Section 1512-A requires active employees to pay a minimum of 50% of the cost of all of the
16 City’s promised and vested retiree healthcare obligations, including both the normal cost and
17 unfunded liabilities of active, retired and “deferred vested” members of the system. The City states
18 that AFSCME members “had no vested right in having the City pay for the unfunded liabilities
19 attributable to its retiree health plans,” but this suggestion lacks logic: Neither the Municipal Code,
20 Charter, nor any other authority specifically authorizes the City to charge the System's unfunded
21 liabilities to active employees, and doing so constitutes a retroactive imposition of liability for the
22 City’s previously-incurred general obligations. With respect to AFSCME members, it re-writes their
23 contractual retiree health expectations that the City has repeatedly acknowledged are vested. By
24 purporting to “unvest” retiree health benefits, while also placing on current employees the obligation
25 to fund retirees’ health benefits – with no expectation they will receive any benefits when they retire
26 – this provision undermines employees’ settled contractual expectations.

27 Lastly, Section 1511-A eliminates a supplemental retirement income benefit to which the City
28 contends employees have no vested right. The argument is premised on the incorrect contention that

1 the benefit is purely discretionary (MSA at 33-40). The argument should be rejected because (1)
2 SRBR funds were held in trust for the sole benefit of Federated members and retirees, (2) the
3 discretion with respect to SRBR was limited to payment of the benefit and not its elimination; and (3)
4 the SRBR did not confer a “windfall” benefit as alleged by the City.

5 **II. STATEMENT OF THE CASE**

6 Although not forwarded as a defense, economic necessity pervades the City’s motion papers
7 as justification for Measure B’s unprecedented cutback of vested retirement benefits. Therefore, this
8 discussion is not entirely germane. Because the City puts it forward, AFSCME is compelled to issue
9 a rebuttal. To be sure, the Federated System has UAALs, but the City’s cited-to sources demonstrate
10 that this was almost entirely due to investment losses and incorrect prior actuarial assumptions, and
11 not generous or windfall benefits conferred on employees. For example, the 2012 Federated System
12 auditor’s report states: “Changes to the [unfunded liabilities]” as of June 2009 “were primarily the
13 result of unfavorable investment returns during the prior two years and changes in the actuarial
14 assumptions including healthcare trend assumption changes, changes in economic assumptions and
15 demographic changes in pre-mortality and post-mortality demographic assumptions.” (Doonan
16 Decl., ¶ 99, Exh. 5, p. 3 Exh. 9, p. 57; Gurza Decl., Exh 1, pp. 35-36, 38.) It was poor investment
17 experience that led to trust fund losses of \$214 million in fiscal year (“FY”) 2007-2008 and \$765
18 million in FY 2008-2009, while incorrect actuarial assumptions resulted in approximately \$750
19 million in unexpected obligations. (Gurza Decl., Exh 1 (City Auditor’s Report—Sept. 2010), pp. 35-
20 36, 38.) Fundamentally, because the City assumed this risk by statute, it cannot retroactively re-
21 allocate it to current employees.

22 Other than living longer than anticipated, City workers had nothing to do with the surge of the
23 System’s UAAL. While the City implies otherwise, Federated System members did not receive any
24 retroactive benefit enhancements attributable to the System’s UAAL. (Gurza Decl, Exh. 1, pp. 36-
25 38.) In fact, AFSCME members have received no post-employment benefit improvements or
26 enhancements in several decades, with the last major benefit enhancement to Federated members
27 being to retiree healthcare in 1984. (Doonan Decl., ¶¶ 101-110; Gurza Decl., Exh. 1, p. 14.) Prior to
28 that, Federated members last gained an advantage in 1975 when the benefits multiplier was raised

1 from 2.0% to 2.5%. (Doonan Decl., ¶ 102; Gurza Decl., Exh. 1, p. 14.) This case is not about recent
2 improvident benefit enhancements to which a diminished contractual expectation applies.

3 City workers have shared in the consequences and sacrifice attended by the "great recession,"
4 receiving substantial wage cuts. The System Auditor's Report indicates there were fewer salary
5 increases than actuarially anticipated (Gurza Decl, Exh. 1, p. 41) which combined with deep wage
6 cuts resulted in a significant reduction to the System's UAAL. (*Id.*) This reduction, however, was
7 offset by the demographic consequences of the imposition of changed terms of employment on the
8 workforce.

9 Although the City avers that "between 2002 and 2013, employee contribution rates have only
10 risen from 4% to 5.7%," whereas its contributions increased to "55.3% of payroll in 2014" (MSA at
11 7:9-10), this comparison is meaningless. A high funding-to-payroll ratio indicates only one thing: an
12 imbalance between active employees and retirees (including deferred-vested members). Layoffs and
13 reduced payrolls increase this ratio, and also result in a significant increase to UAAL. Because the
14 City's stated "increase" includes the amortized unfunded liabilities and not simply its obligation with
15 respect to its annual normal cost associated with employee pension benefits (which amount is in fact
16 substantially reduced due to wage reductions), comparing its overall increase to the employees'
17 normal cost contributions is like comparing apples to oranges. The City's statement of a dramatic
18 increase of 41.5% as a "percentage of payroll"² makes no practical sense because the amortized cost
19 of its UAAL has grown when expressed as a percentage of its current reduced³ payroll. This increase
20 in UAALs is the result of benefits associated with the past service of the entire system, including
21 vested-differed members, retirees, early retirees as well as current employees. It makes no sense to
22 compare that "increase" to current employees normal cost payments.

23 Recent layoffs and wage reductions resulted in an exodus of early retirement and diminished
24 funding source, which caused the System's UAALs to spike, and so the City's comparison of UAALs
25 to current payroll reveals the problematic aspects of Measure B: pinning on active employees the
26 liability associated with their coworkers who have fled. By stating that it "pays an additional \$55,300

27 _____
28 ² Although stated in its brief as 55.3%, the City's has not subtracted the 2001 amount in order to properly describe the
resulting "increase" (MSA 7:5-7).

³ Consisting of 2,000 fewer employees paid at a 12% lower rate. (See Allen Decl., ¶ 6.)

1 per year to fund retirement benefits for an employee who makes \$100,000 per year" (MSA at 7:8-10),
2 the City invents a justification because, again, the System's UAL is not associated with any particular
3 employee, let alone a employees currently working for the City.

4 Further, the increases in the employee pension contribution rates, which the City describes as
5 modest, should be considered in light of the greater than twelve percent reduction in AFSCME
6 members' salary. In other words, as a percentage of salary (by which pension contributions are
7 made), AFSCME members' contributions to the system have increased by a much higher amount, in
8 real terms, than the City's characterization indicates. Currently AFSCME members pay 10.74% of
9 their wages to towards retiree healthcare, and 5.79% towards their pension. (Allen Decl., ¶ 18.)
10 Nonetheless, the City contends (without citation) that "[b]ecause of rising retirement costs and
11 reduced revenues, the City has been forced into massive layoffs, service reductions and employee
12 compensation reductions." (MSA, p. 7.) This statement is factually incorrect: City revenues over this
13 period have *increased*. (Doonan Decl., ¶ 91.)

14 In fact the City puts the cart in front of the horse: It is precisely because of the "massive
15 layoffs" as well employce wage cuts that the pension system's actuarial predictions are undermined,
16 its funding base diminished, and a resulting spike in UAALs has required increased contributions on
17 the part of the City.

18 This dynamic may appear counterintuitive, but it is sound. The City's payroll fell from \$323
19 million in fiscal year 2009 to \$240 million in fiscal year 2013. (Gurza Decl., Exh. 58, pp. ii-iii, 28).
20 By reducing its payroll approximately 26% during this time, the City realized around \$83 million in
21 payroll savings. Payroll is further projected to fall to \$205 million in fiscal year 2014. (Gurza Decl.,
22 Exh. 58, p. iii), meaning a 37% decrease since 2009. Although the City reduced the size of its budget
23 through wage cuts and force reductions (and consequent reduced normal costs), this resulted in an
24 increase in unfunded liabilities. This is due to earlier than actuarially-projected retirements, requiring
25 payment of benefits after shorter-than-expected periods of contributions made on behalf of the
26 retiring employees, reduced time-value of money associated with the early retiree's contributions, and
27 acceleration of bcnefits payment owing to earlier than anticipated retirements. (Doonan Dec., ¶¶ 43-
28 55). Cheiron, the System's actuary, stated in its 2012 valuation report: "The large increase in the

1 contribution rate is mainly due to a decreasing Tier 1 payroll which causes the [unfunded actuarial
2 liability] rate to increase.... However, the normal cost is paid on the lower Tier 1 payroll so the
3 dollar amount is less.” (Gurza Decl., Exh. 58, p. iii; see also Doonan Decl., ¶¶ 43-55, Exh. 5 p. 3
4 (“The increase in the City’s contribution rate is also primarily due to assumption changes but is
5 further exaggerated by the decrease in payroll over which the UAL is spread...”).)

6 For this reason, Cheiron’s report for June 30, 2012 through December 2012 shows that the
7 City’s obligations towards normal cost and unfunded liabilities increased in real terms by only
8 6.75%, due to the reduced pension obligations associated with shrinking payroll. (Gurza Decl., Exh.
9 58, p. 5). Why then is the City parading a “53% increase” in its motion papers? To justify what it
10 cannot accomplish through legal means.

11 Unfortunately, Measure B only contributes to the problem (which is why it was rejected at the
12 bargaining table and why PERB has issued a complaint against the City for imposing it). With
13 respect to pension funding, rather than closing this funding gap, Measure B exacerbates it by closing
14 the current pension plan to new hires. (Gurza Decl., Exh. 58, p. 5 (“The increase in the City’s
15 contribution rate is primarily due to investment losses and the decreased payroll over which the UAL
16 is spread. Payroll for Tier 1 is expected to decrease over time as members leave the System and new
17 entrants after September 30, 2012 join Tier 2.”); Doonan Decl., ¶¶ 50, 52.) This guarantees that the
18 City’s Tier 1 payroll will continue to decline and UALs expressed as a percentage of payroll will
19 continue to grow regardless of whether there is any real escalation in unfunded liability. Therefore,
20 the percentage of pay required to pay off the City’s unfunded liabilities rises dramatically for the
21 individuals remaining within the tier. (Doonan Decl., ¶¶ 43-55.) In this way, Measure B most clearly
22 represents a retroactive imposition of liability, as does the “Voluntary Election Program” (“VEP”)
23 component of Measure B authorized by Section 1507-A. Those employees who, lacking the financial
24 resources to choose otherwise, “elect” the VEP and leave Tier 1 and its unfunded liabilities behind
25 them. Tier-1 payroll further declines and the already-incurred plan liabilities are spread over fewer
26 participants, *i.e.* those remaining in Tier 1. Under Measure B, those unable to elect the VEP must
27 shoulder the burden of the plan’s previously incurred UAALs.

28 Despite the dreary picture the City paints, its general fund revenues grew by 12% and its

1 general fund spending shrank by 12% over 2002-2011. (Doonan Decl., ¶ 91, Exh. 10.) The City's
2 economy is larger than New Zealand, Poland, or Hungary, and the San José-Sunnyvale-Santa Clara
3 Gross Domestic Product ("GDP") rose by 60% over that same time period. (Doonan Decl., ¶¶ 92-93,
4 Exhs. 11-12.) From 2002-2011, the City's Net Taxable Assessed Value, or market value of its
5 property tax base rose 57% (although but property taxes revenues increased 35%). (Doonan Decl., ¶
6 94, Exh. 13.) The City has not seriously attempted to raise revenues in this economic climate, and
7 the inefficiencies in its taxing mechanisms remain unaddressed. Had the City more efficiently raised
8 revenues, it may have been able to effectively prefund its retiree health benefits rather than
9 improperly shift its liabilities onto its employees. (Doonan Decl., ¶ 95.)

10 Rather than seeking to raise revenues (Allen Decl., ¶ 20; Doonan Decl., ¶ 96), the City opted
11 to traverse the easier path: shifting its general responsibility for covering the System's UAALs to a
12 discrete group of individuals, its current employees. The three provisions targeted in the City's
13 motion seek to accomplish this. Measure B's reasonableness is doubtful because it sweepingly and
14 fundamentally alters the settled contractual expectations of City workers. Perhaps in recognition of
15 this, the City seeks a "piecemeal" adjudication of Measure B by pursuing adjudication of three of its
16 provisions in the hope the Court will entertain a narrow and clipped view of the Measure.

17 III. ARGUMENT

18 Measure B retroactively shifts responsibility to current employees for financing the City's
19 previously incurred general obligation to fund retirement benefits. Accumulated Actuarial Liability
20 ("AAL") is the present-value of retirement benefits that have been earned. A pension system's
21 Unfunded AALs, or UAALs, are equal to the difference, if any, between its AALs and the value of
22 assets accumulated to finance its obligations. (Doonan Dec., ¶ 11.) As such, UAALs refer to the
23 fiscal shortcoming that arise if market or demographic experience departs from previously made
24 actuarial predictions. UAALs are an inherent risk to any sponsor of a defined benefit plan, a risk
25 universally recognized as born by an employer that establishes a defined benefit system.⁴ For this

26
27 ⁴ Defined benefit plans, or "pension plans," place responsibility for their unfunded liabilities upon the employer. (Doonan
28 Decl., ¶ 14.) This is a concept the City recognizes. (Gurza Decl., Exh. 1, p. 57.) With respect to defined benefit plans,
the United States Supreme Court has stated: "But the employer typically bears the entire investment risk and—short of
the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the
plan's investments." (*Hughes Aircraft Co. v. Jacobson* (1999) 525 US 432, 439; *Koster v. City of Davenport* (8th Cir.

1 reason, it is recognized in California that requiring city employees to increase their contributions
2 towards their pension plans substantially decreases their pension rights and can result in an
3 unconstitutional impairment of contract. (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.)
4 This conclusion is inescapable when the increase in contributions is unrelated to the annual normal
5 cost of the employee's retirement benefits. (*See Bellus v. City of Eureka* (1968) 69 Cal.2d 336.)

6 Measure B imposes on employees an obligation to finance the City's UAALs, which is
7 tantamount to requiring them to pay twice for benefits they have already earned and paid for.
8 Because Federated members enjoy a vested right to pension and health benefits for services already
9 rendered, this aspect of Measure B constitutes a substantial impairment of contract. (*Abbott v. City of*
10 *Los Angeles* (1958) 50 Cal.2d 438, 449 (employees' "earned and vested rights in retirement benefits
11 already provided by the city charter during the period of time for which they rendered services prior
12 to adverse charter amendments".)) Requiring employees to bear the burden of financing obligations
13 related to services already performed, and for services performed by other employees who have since
14 retired, is equally unlawful. (*Allen, supra*, 45 Cal.2d at 131; *Bellus, supra*, 69 Cal.2d at 336.)

15 That employees are not liable for UAALs was recognized in the pre-Measure B Municipal
16 Code, at section 3.28.710:

17 [T]he total amount of normal contributions which will be required of members under the
18 provisions of this chapter will be sufficient to pay, when due, three-elevenths of the amount of
19 all pensions, allowances and other benefits which are and will become payable under this
20 system on account or because of current service rendered on or after July 1, 1975; **provided**
21 **and excepting, however, that if and when, from time to time, the member's normal rate of**
22 **contribution is hereafter amended or changed, the new rate shall not include any amount**
23 **designed to thereafter recover from members ... the difference between the amount of**
24 **normal contributions theretofore actually required to be paid by members and any**
25 **greater or lesser amount which, because of amendments hereafter made to this system or as**
26 **a result of experience under this system, said members should have theretofore been**
27 **required to pay in order to make their normal contributions equal three-elevenths of the**
28 **abovementioned pensions, allowances and other benefits which are or will become**
payable on account or because of current service rendered on or after July 1, 1975, and
before the effective date of the new rate.

(Emphasis added.) This provision conclusively makes the City responsible for UAALs.

1999) 183 F.3d 762, 765 ("The employer bears the risk of market fluctuation in a defined benefit plan. The employer must fund the plan to meet the actuarially-determined pension liability of covered members regardless of the market performance of the fund.")

1 Measure B's provisions must also be scrutinized in light of the fact that upon accepting
2 employment with the City, and in order to participate in the Federated System, City employees
3 forewent participation in Social Security's Old Age, Survivorship, Disability Insurance program
4 ("Social Security"). (Gurza Decl., Exh. 1, p. 1). The Federated System is all the retirement security
5 AFSCME members have. It is therefore an "alternative retirement system," or "ARS," as that term is
6 defined under the Social Security Act, 42 U.S.C. Sect. 301, *et seq.*, and the federal Employment Tax
7 Regulation, 26 C.F.R. section 31.3121(b)(7)-2. To be lawfully excluded from social security as a
8 member of an ARS, the earned benefits under the ARS may not be "subject to any conditions (other
9 than vesting), such as... mak[ing] an election in order to participate." (*Id.* at (d)(1).)

10 The City's motion must be considered in light of, and informed by these principles. First,
11 however, we address the procedural infirmities of the City's motion.

12 **A. THE CITY'S SUMMARY ADJUDICATION MOTION IS PROCEDURALLY**
13 **IMPROPER**

14 Summary adjudication is unwarranted because the Motion fails to dispose of an entire cause
15 of action, and because the constitutionality of Measure B must be evaluated with regard to Measure
16 B's effect on retirement benefits as a whole, and not individually as to each of its subsections.

17 **1. The Motion Fails to Dispose of an Entire Cause of Action**

18 If an MSA will not dispose of any cause of action, it must be denied. (CCP 437c(f);
19 *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853.) The City's Motion seeks
20 to adjudicate an issue it has fabricated: Whether particular provisions of Measure B, taken alone, are
21 unconstitutional. The Complaint's causes of action are not leveled at Measure B's discrete
22 provisions, but with respect to its constitutionality under specified clauses of the state constitution.
23 Even if the City's motion were granted, each cause of action would nevertheless stand. To take one
24 of many examples, with respect to retiree healthcare, AFSCME's complaint challenges Measure B's
25 redefining of the benefit provided under the retiree health plan as "the medical plan which has the
26 lowest monthly premium available to any active employee..." (RJN A (AFSCME Complaint), ¶ 96;
27 RJN B (AFSCME First Amended Complaint), ¶ 98.) It also challenges Measure B's attempt to
28 "unvest" the right to retiree health notwithstanding the fact that AFSCME's members have directly

1 contributed through payroll deduction to the cost of such benefits. (R.J.N A, ¶ 95; R.J.N B, ¶ 97.) The
2 MSA does not address these contentions with respect to retiree health, and the constitutionality of
3 these aspects of Measure B and Section 1512-A will require trial without regard to whether the
4 Motion is granted.

5 **2. Measure B Must Be Considered as a Whole**

6 Measure B's components are intertwined, and its overall impact on retirement security is
7 significant. In order to evaluate its impact on constitutionally protected expectations, its provisions
8 cannot be assessed in isolation; rather, the effect of the Measure as a whole must be assessed with
9 respect to employees' constitutional rights. In an impairment of contracts analysis, "[t]he threshold
10 inquiry is whether the state law has, in fact, *operated* as a substantial impairment of a contractual
11 relationship." (*RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1147 (emphasis
12 added).) Courts focus on the operation and effect of a law, and not whether individual components of
13 the law, viewed in isolation, are each a permissible exercise of legislative authority.

14 To provide one example, by delaying active employees' retirement dates, Measure B
15 diminishes the value of the pension benefits to which members are entitled and towards which they
16 have contributed. (Doonan Decl., ¶ 24). Yet the City asks the Court to ignore this, and other facts in
17 its review of section 1506-A. The VEP, which is not at issue in this motion, postpones the retirement
18 date for current employees who have yearly contributed to their pension. As a result, current
19 employees who accept the lesser "VEP" benefit imposed by Section 1507-A to avoid the "Hobson's
20 choice" wage excise, necessarily will pay *more* towards retiree healthcare for a reduced benefit than
21 has been promised and to which they have contributed. The pension provisions and retiree health
22 provisions are therefore interrelated, and cannot be considered in isolation.

23 The City brushes past this point by incorrectly noting: "there is nothing in Measure B that
24 takes away from anything already contributed by an active employee, or which has been earned and
25 accrued to date." (MSA, p. 2.) This is untrue, because Measure B increases the burden on AFSCME
26 members for financing retirement benefits associated with their past service while reducing the value
27 of benefits already earned, as explained fully in the Declaration of Daniel Doonan at paragraphs 24
28 through 29. Measure B, operating as a whole, imposes additional burdens without any commensurate

1 benefit, which is contrary to California law. (*Allen, supra*, 34 Cal.3d at 114; *Bellus, supra*, 69 Cal.
2 2d at 336.) Other examples of how Measure B’s provisions impair employcees’ expectations include
3 its reduction of COLA and its redefinition of “final compensation” (Section 1507-A, 1510-A), which
4 together ratchet down pension benefits more significantly than if each were viewed in isolation.

5 Although Measure B contains a severability clause, such a clause does not authorize the
6 piecemeal analysis the City requests. (*California Employment Stabilization Commission v. Payne*
7 (1947) 31 Cal.2d 210, 214 (“Such a clause, despite its positive terms, does not deprive the judiciary
8 of its normal power and duty to construe the statute to determine whether the unconstitutional part so
9 materially affects the balance as to render the entire enactment void.”)) The City has neither
10 addressed this issue nor argued the provisions it seeks adjudication are severable, rendering its
11 motion with respect to each discrete provision improvident.

12 **B. PENSION RIGHTS ARE AFFORDED HEIGHTENED PROTECTION**

13 In principal, the City asserts that neither the 1965 Charter nor the Municipal Code “prescribe
14 a vested right that is violated by Measure B.” (MSA, p. 14:24.) The City seeks to avoid the obvious:
15 by enacting and operating a defined benefit pension and inducing employment thereon, it has
16 incurred responsibilities enforceable through the Contracts, Takings, and Due Process clauses.

17 **1. REAOC Does Not Apply to Pension Statutes**

18 The City relies greatly on *Retired Employees Assn. of Orange County, Inc. v. County of*
19 *Orange*, (2011) 52 Cal.4th 1171, 1186-87 (“*REAOC*”), for the proposition that a “statutory scheme is
20 not intended to create private contractual or vested rights” and that plaintiffs bear the “burden of
21 overcoming the presumption.” (MSA, at 12:8-11.) However, *REAOC* is of limited value because it
22 evaluated whether retirees had a vested right to participate in a health insurance pool that included
23 active employees. It neither involved nor discussed pensions, or the social-security status of the plan
24 participants. *REAOC* does not rely on or cite to the landmark pension cases Defendants refer to as
25 “inapposite authority” (MSA at 13 (referring to *Kern v. City of Long Beach* (1947) 29 Cal.2d 848;
26 *Abbott, supra*, 50 Cal.2d at 438)), and courts that have considered *REAOC* have not applied it in the
27
28

1 pension context, with *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, being no exception.⁵

2 In fact, *REAOC* recognized the protected status of pensions and then considered whether other
3 types of retirement benefits received similar protections. (*See, e.g. REAOC, supra*, 52 Cal.4th at
4 1190 (citing *Cal. League of City Employee Ass'ns. v. Palos Verdes Library Dist.* (1978) 87
5 Cal.App.3d 135 (recognizing protected nature of pensions and holding longevity pay was similarly
6 protected).) The *REAOC* Court's analysis is not surprising given the limited question of retiree-
7 health "pooling," and its holding is inapposite because "under California law there is a strong
8 preference for construing governmental pension laws as creating contractual rights for the payment of
9 benefits." (*Walsh v. Bd. of Admin.* (1992) 4 Cal.App.4t 682 (citing cases) ("[A] governmental
10 pension plan should be construed as guaranteeing full payment to those entitled to its benefits...."))
11 Indeed, "[a] public employee's pension constitutes an element of compensation, and a vested
12 contractual right to pension benefits accrues upon acceptance of employment." (*Betts v. Bd. of*
13 *Admin.* (1978) 21 Cal.3d 859, 863.) "By entering public service an employee obtains a vested
14 contractual right to earn a pension on terms substantially equivalent to those then offered by the
15 employer.... '[T]erms substantially equivalent to those then offered' must refer to the rule of *Allen*
16 that while benefits are not absolutely fixed, changes detrimental to the employee must be offset by
17 comparable new advantages." (*Pasadena Police Officers Assn. v. Pasadena* (1983) 147 Cal.App.3d
18 695, 703.) The "rule of *Allen*" is:

19 Although an employee's vested contractual pension rights may be modified prior to
20 retirement for the purpose of keeping a pension system flexible to permit adjustments in
21 accord with changing conditions and at the same time maintain the integrity of the
22 system, [s]uch modifications must be reasonable, and it is for the courts to determine
23 upon the facts of each case what constitutes a permissible change. To be sustained as
24 reasonable, alterations of employees' pension rights must bear some material relation to
25 the theory of a pension system and its successful operation, and changes in a pension plan
26 which result in disadvantage to employees should be accompanied by comparable new
27 advantages.

28 (*Allen, supra*, 45 Cal.2d 128 at 131 (citations and quotes omitted).) Further, benefits added to a
pension system after employment commences but during the course of employment "become a part
of the vested rights of the employees when conferred" as they induce continued employment or

⁵ *Haas* does not generally apply *REAOC* to pensions, as it involved new hires who had not acquired vested rights to the
disputed benefits because union MOUs provided that new hires were not eligible for the "Four Benefits" at issue in the
case and "prospective employees have no right to any benefits prior to accepting employment" (*Id.* 480-81, 495.)

1 retention of experienced employees. (*Betts, supra*, 21 Cal.3d at 867 (quoting cases).)

2 That the City is governed by a charter is of no moment; it is still subservient to the
3 Constitution. (*E.g., Kern, supra*, 29 Cal.2d at 848 (holding charter city's attempt to "rais[e] the rate
4 of an employee's contribution to the city pension" when doing so "obviously constitute[d] a
5 substantial increase in the cost of pension protection to the employee without any corresponding
6 increase in the amount of the benefit payments"); *Allen, supra*, 45 Cal.2d at 131; *see also Wisley v.*
7 *San Diego* (1961) 188 Cal.App.2d 482.) These holdings have been extended to charter city's attempt
8 to avoid responsibility for its system's unfunded liabilities, a central issue here. (*Bellus, supra*, 69
9 Cal. 2d. at 352.)

10 **2. The City Intended to Create Vested Rights**

11 Although the City is the moving party, it asserts it is AFSCME's burden to make a "clear
12 showing' that legislation was intended to create the asserted contractual obligation," citing *REAOC*
13 (MSA at 12: 20-22). Rather, the burden is on the City that such rights were not intended: "[I]n the
14 absence of a clear and unequivocal declaration in the pension provisions that benefits are payable
15 only to the extent of available funds from specified contributions, the liability to pay promised
16 pension benefits is a general obligation of the city." (*Pasadena, supra*, 147 Cal.App.3d at 703 n.3.)
17 "[A]ll pension laws are liberally construed to carry out their beneficent policy" of inducing municipal
18 employees to enter and continue in public service and providing "sufficient subsistence for retired or
19 disabled officers ... who have performed their obligations under the employment contract." (*Bellus,*
20 *supra*, 69 Cal.3d at 345, 351.)

21 In *Bellus*, our Supreme Court held that a charter city was responsible for paying its retirement
22 system's unfunded liabilities:

23 We conclude that a charter city, possessed of plenary power to adopt a pension
24 system imposing upon it a general obligation, cannot escape liability for those
25 pension payments which it has led its employees reasonably to expect. In this respect
26 it is no different than any other employer or public service institution which induces
27 reliance upon a contract which may reasonably be interpreted to afford that protection
28 which has been impliedly promised. We recognize that the City will not be so
obligated if the pension plan which it adopts, either in the ordinance itself or the
statutory scheme which it incorporates, *clearly and explicitly* limits its liability to the
fund which the pension plan establishes.

(69 Cal.2d at 352 (emphasis added)) ("It obviously would be unjust to make the payment of pensions

1 dependent upon the solvency of a particular fund, thereby depriving employees of the benefits of the
2 system, *unless we [are] compelled to do so by a clear, positive command in the [act or ordinance].*”
3 (emphasis in original).

4 Both Sections 1506-A and 1511-A of Measure B involve pension benefits and operate to
5 impair vested pension rights, and so it is the City’s burden to justify these enactments.

6 **C. THE CHARTER’S “RESERVATION OF RIGHTS CLAUSE” DOES NOT**
7 **AUTHORIZE MEASURE B**

8 The City argues that a provision it describes as a “reservation of rights clause” operates to
9 negate the contractual expectations of its employees, thereby depriving them of the protection of the
10 Contracts Clause. In similar contexts, courts have described the City’s argument as “absurd.” But
11 the argument also relies on an incorrect textual analysis of the Charter and relevant Municipal Code
12 provisions and is contrary to canons of statutory construction.

13 **1. The “Reservation of Rights” Argument is “Absurd,” According to the Ninth Circuit**

14 A waiver of statutory or constitutional rights must be clear and unequivocal; it must specify
15 exactly what is being waived and may not be couched in general terms. (*See Bellus, supra*, 69 Cal.2d
16 at 352; *Requa v. Regents of the University of California* (2012) 213 Cal.App.4th 213, 231-32; *Alday*
17 *v. Raytheon Co.* (9th Cir. 2012) 693 F.3d 772, 791 (“a reservation-of rights provision is effective only
18 against contractual obligations explicitly covered by the reservation.”) (citing cases).) Because a
19 waiver of one’s constitutional rights must be “knowing and intelligent” (*Isbell v. County of Sonoma*
20 (1978) 21 Cal.3d 61), a general clause is insufficient to waive protected rights. The City
21 acknowledges the clause here is broadly worded (MSA at 16:1), and so its motion must be denied.

22 Given the vagueness of the provision, and read in light of specific provisions indicating City
23 employees shall not assume the City’s unfunded liabilities, the clause cannot be considered a
24 “knowing and intelligent” waiver of rights. (*Compare* MuniCode § 3.28.710 (stating that employees
25 will not assume City’s unfunded liabilities) *with Haas, supra*, 207 Cal.App.4th at 472 (new
26 employees rights did not vest where MOU specifically waived them); *see also Connally v. General*
27 *Const. Co.* (1926) 269 U.S. 385, 390 (statute couched “in terms so vague that men of common
28 intelligence must necessarily guess at its meaning and differ as to its application violates the first

1 essential of due process of law”).)

2 The City’s argument allows public entities to opt-out of the constitutional prohibition on the
3 impairment of contracts. But, is a contract reasonable if the state retains the authority to revoke it or
4 alter it beyond recognition? Courts have said “no,” and the Ninth Circuit has described the City’s
5 argument in similar contexts as “absurd.” (*Southern California Gas Co. v. City of Santa Ana* (9th Cir.
6 2003) 336 F.3d 885, 893 (“We cannot read the 1938 Franchise in a way that reserves to Santa Ana
7 the power to unilaterally alter the terms of the agreement. Such an interpretation is *absurd*; section
8 8(a) cannot be applied as broadly and retrospectively as its literal language may suggest.”) (*citing*
9 *Cont’l Ill. Nat’l Bank & Trust Co. v. Washington* (9th Cir.1983) 696 F.2d 692, 698–700; *U.S. Trust*
10 *Co. of New York v. New Jersey* (1977) 431 U.S. 1, 25 n. 23 (“A promise to pay, with a reserved right
11 to deny or change the effect of the promise, *is an absurdity*”); *see also Energy Reserves Group, Inc.*
12 *v. Kan. Power & Light Co.* (1983) 459 U.S. 400, 412 n.14 (“When a State itself enters into a contract,
13 it cannot simply walk away from its financial obligations”); (emphases added).)

14 Properly situated, the provision is susceptible to rational application: it reiterates the
15 recognized limitation on the Contracts Clause that a state may not bargain away the public health and
16 the morals of its people and cannot waive such fundamental powers. (*Stone v. Mississippi* (1880) 101
17 U.S. 814, 819; *West River Bridge Co. v. Dix* (1848) 47 U.S. 507 (although legislature may promise
18 not to exercise eminent domain... this does not prevent state from later taking property after paying
19 just compensation because the legislature can not relinquish its right of eminent domain).) The
20 corollary to this principle arises under the contracts clause: if the state makes reasonable contracts,
21 the Contracts Clause requires the state to live up to its bargain. (*New Jersey v. Wilson* (1812) 11 U.S.
22 (7 Cranch) 164 (repeal of tax exemption granted forty-six years earlier violated contract clause).)

23 Recognizing this principle, the Ninth Circuit in *Southern California Gas* noted that the
24 existence of a reservation of rights clause was not indicative of the parties' intentions with respect to
25 their contract, because a state governmental entity cannot contract away its police powers, and
26 thereby reconciled the two. (*Id.* (*citing U.S. Trust; supra*, 431 U.S. at 23–24.) Likewise, in *Cont’l*
27 *Ill., supra*, 696 F.2d at 692, the Ninth Circuit rejected an argument that “a reservation of the state
28 power to modify contracts” permits the state to change the financial terms of its agreements: “We...

1 have difficulty reading the provisions of the contracts in a way that permits destruction of their
2 primary purpose. A promise in a contract that gives one party the power to deny or change the effect
3 of the promise, is an absurdity.” (696 F.2d at 698.)

4 In *Air Cal, Inc. v. San Francisco* (N.D. Cal. 1986) 638 F. Supp. 659, *aff'd*, (9th Cir. 1989) 865
5 F.2d 1112, an impairment of contract case, the Ninth Circuit rejected a municipality's argument that a
6 “reservation of rights” provision permitted San Francisco to enact subsequent ordinances or
7 regulations that altered the contracts. “While the City may retain some powers ... to pass some new
8 rules and regulations to which the airlines might be subject, the City may not change the material
9 terms of the agreements which the City has made with the airlines.” (*Id.* at 664.) In affirming, the
10 Ninth Circuit echoed this reasoning: “Nor can the City succeed by an ‘express reservation’ of rights
11 contained in a lease agreement... in order to overcome a contractual agreement signed by its
12 designated agent...” (865 F.2d at 1116 (*quoting TWA v. San Francisco* (9th Cir. 1955) 228 F. 2d
13 473).)

14 Were the Court to adopt the theory forwarded by the City here, it would render the entire
15 pension system illusory. (*See Alameda County v. Ross* (1939) 32 Cal.App.2d 135, 144 (“One of the
16 commonest kind of promises too indefinite for legal enforcement is where the promisor retains an
17 unlimited right to decide later the nature or extent of his performance.”) It is for these reasons that in
18 *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, relied on by the
19 City, the court noted “not all laws which restrict the future freedom of a legislative body to alter them
20 or to legislate on a specific subject are invalid. An obvious example is the power to bind a public
21 entity by a long-term contract.” (*Citizens, supra*, 1 Cal.App.4th at 1034-35.)

22 Moreover, because the electorate is presumed to have known of the relevant law at the time it
23 adopted the 1965 Charter (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 675), the clause
24 must be construed in light of the judicial distaste for illusory and adhesion contracts, and the
25 established doctrine that pension systems create enforceable rights when employment commences.

26 *National Railroad Passenger Corp.* (1985) 470 U.S. 451 (“*NRPC*”), relied on by the City,
27 does not affect the result, as that case considered regulation via an amendment to the Rail Passenger
28 Service Act (“*RPSA*”). While Congress expressly reserved to itself -- but not Amtrack -- the right to

1 repeal, alter, or amend the Act at any time, the contracts at issue did not involve the government, and
2 the RPSA used the term 'contract' to define the relationship between Amtrak, an independent
3 corporation, and the railroads. Congress could amend the act, because it did "not create or speak of a
4 contract between the United States and the railroad, and it d[id] not in any respect provide for the
5 execution of a written contract *on behalf of the United States.*" (*Id.* at 467 (emphasis original).) The
6 court found that the "reservation of rights" language within the RPSA was merely another factor
7 confirming Congress' intention to enact a regulation and not enter into contracts. The opinion does
8 not demonstrate that the clause was enough to defeat a contractual claim between the parties or that
9 Amtrak breached the contract. (*Id.*)

10 **2. The City Council Has Not Entered Into an *Ultra Vires* "Contract"**

11 The City argues that because the "City Council has no authority to enact measures that would
12 conflict with the Charter's express reservation of rights," it could not have made a "vested rights
13 commitment by ordinance or other legislative enactment..." (MSA at 19:10-14.) For that reason, the
14 City argues, the Court should ignore the Municipal Code's pension provisions as *ultra vires*
15 enactments. (*Id.* at 19:10-15.) The argument must be rejected because the City acts through its
16 governing body, the City Council, and the Charter confers broad discretion to it over employment and
17 retirement matters. The Charter explicitly gave the City Council discretion to increase benefits
18 (Section 1505(e)), necessarily granting it authority to bind the City if it does so. Because the Meyers-
19 Milias-Brown Act authorizes public entites to act throught their "governing body" and enter into
20 binding constituionally-protected contracts with labor organizations, (*REAOC, supra*, 52 Cal.4th at
21 1182), and because retirement benefits are a mandatory subject of bargaining, the City Council
22 enjoyed specific statutory authority to bind the City with respect to retirement benefits. As described
23 above, the City's argument is contrary to established precedent and requires the Court to hold that for
24 over forty years the City Council exceeded its authority by enacting and administering a pension
25 system intended to provide superannuated employees with a guaranteed and ascertainable benefit.

26 The City's authorities are distinguishable because in each case the retirement benefit clearly
27 and directly conflicted with the applicable charter, rendering them irreconcilable. (*E.g., San*
28 *Francisco v. Patterson* (1988) 202 Cal.App.3d 95.) Because the interpretation the City advances

1 conflicts with long-established ordinances and requires a reversal of constitutional law, it has not
2 established that the municipal code and charter provisions are in conflict. If it is possible to read
3 them harmoniously, the court should do so. (*Building Material & Construction Teamsters' Union v.*
4 *Farrell* (1986) 41 Cal.3d 651, 665 (where possible, courts will read charter provisions or statutes to
5 avoid conflict with constitution).)

6 **3. Sections 1500 and 1503 of the Charter Do Not Authorize Measure B**

7 The City may be free to “amend or otherwise change” its plans, but only in a fashion that is
8 tolerable under California jurisprudence. The 1965 Charter affirms this principle by requiring City
9 action on retirement to be done in conformity with “provisions of the laws of the United States or the
10 State of California.” (Charter §1506.) The Charter further clarifies that City authority is
11 circumscribed by Constitutional principles: “The City shall also have all other rights, powers and
12 privileges which are not prohibited by, or in conflict with, the State Constitution,” and limits exercise
13 of powers to that which “a municipal corporation might or could exercise under the Constitution...”
14 (Charter §§ 200 & 400.) Because a legislative body is presumed to be aware of relevant judicial
15 decisions when it enacts language with a definitive judicial construction (*Foley, supra*, 47 Cal.3d at
16 675), and because the vested nature of retirement benefits and the limitation on their modification was
17 settled prior to the adoption of the Charter (*Allen, supra*, 45 Cal.2d at 128; *Abbott, supra*, 50 Cal.2d at
18 438), the purported reservation of rights clause must be construed in light of these precepts. Indeed,
19 “vesting” is a constitutional concept. (*San Marcos Mobilehome Park Owners' Assn. v. City of San*
20 *Marcos* (1987) 192 Cal.App.3d 1492, 1503.) By iterating, the Charter is subservient to conflicting
21 provisions of the constitutions, (*Domar Electric v. Los Angeles* (1994) 9 Cal.4th 161, 170), it is
22 implausible that in adopting the Charter the electorate intended to bar the earning of vested rights.

23 That the “reservation of rights clause” is worded broadly does not help the City because “the
24 court should construe the enactment so as to limit its effect and operation to matters that may be
25 constitutionally regulated or prohibited.” (*Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 505.)
26 Such a construction is in keeping with the City’s pre-Measure B interpretation. The Municipal Code
27 assures employees they are not responsible for additional contributions related to the plan’s
28 investment or actuarial experience (MuniCode § 3.28.710), and defines retirement benefits as

1 “vested.” (Muni Code, section 3.28.1080; See also *Black’s Law Dictionary*, 6th Ed (defining “vested”
2 to mean “Accrued; fixed; settled; absolute; having the character or giving the rights of absolute
3 ownership; not contingent; not subject to be defeated by a condition precedent,” at RJN C).)

4 By their terms, sections 1500 and 1503 do not prohibit vesting. The former provision
5 establishes a duty on the part of the City Council to establish and maintain retirement plans, and the
6 latter provision confirms the retirement systems that were in effect when the electorate adopted the
7 revised charter. Importantly, the provisions are not identical; the term “repeal” is used in Section
8 1503 but not Section 1500. It must be presumed to be a purposeful omission. (*See Imperial*
9 *Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389 (“to express or include one thing implies
10 the exclusion of the other”).) Further, Section 1503 specifically states that “the foregoing sections”
11 related to City retirement “shall prevail over” it. Therefore, the term “repeal” under section 1503 has
12 no bearing on the specific benefits afforded AFSCME members’ under the Federated System.

13 Even if section 1503 were to apply, it only reserves to the City the right to “repeal” retirement
14 “systems” already in existence, and only creates a right to “adopt or establish new or different” plans.
15 The fact that Section 1503 specifically permits repealing older *systems* but not new *plans*
16 conclusively demonstrates the electorate intended that plans were to be maintained with respect to
17 those who participated in them, but that the Council could establish other plans for new employees,
18 so-called “second tiers.” This conclusion is supported by the text of the charter provisions. Pursuant
19 to Section 1503, the City Council could eliminate retirement systems already existing but not those
20 promulgated afterwards, and the 1965 Charter specifically authorized the City Council to “amend,”
21 meaning improve, such older retirement systems. This leaves section 1500, which states: “Subject to
22 other provisions of this Article, the Council may at any time, or from time to time, amend or
23 otherwise change any retirement plan or plans or adopt or establish a new or different plan or plans
24 for all or any officers or employees. On its face, this provision does not support the City’s contention
25 that it has carte-blanche authority to reduce retirement benefits because the language is not
26 sufficiently specific to constitute a waiver of constitutional rights. Indeed, the clause is narrowly
27 drawn and is subservient, or “subject to,” the Charter’s other provisions and the Constitution.

28 Because an enactment must be read as a whole, the Court should consider section 1505(e),

1 which provides: “The benefits hereinabove specified are minimum only; and the Council in its
2 discretion, may grant greater or additional benefits.” The term “grant” connotes bestowing
3 ownership of property or a right. (RJN D, Merriam-Webster Dictionary.) Section 1505(e) further
4 notes: “The City shall not be deemed obligated, by virtue of any of the above provisions, to continue
5 to employ any person or persons until he or she or they qualify for or request any retirement
6 benefits.” This provision is significant; it recognizes that conferring retirement benefits represents an
7 “obligation” but that such obligation does not extend to a right to keep one’s job.

8 Notably, the word “amend” has a positive connotation. The Merriam-Webster Dictionary
9 defines “Amend” to mean “to change or modify for the better: Improve” and notes its synonyms
10 include “improve, better, enhance, enrich....” (RJN E, Merriam-Webster Dictionary definition of
11 “amend.”) Therefore, the term “amend” does not authorize the diminution of retirement benefits or
12 the terms under which they are offered. That the City has only ever improved benefits (Allen Decl., ¶
13 15), is indicative of this conclusion.

14 The broad phrase “otherwise change” lends no insight as to the extent of the City Council’s
15 powers to modify the retirement system for existing employees or to limit application of established
16 constitutional principles. However, our Supreme Court held that a more narrowly-tailored
17 reservation of power clause did not prevent the vesting of rights to pension and retirement benefits.
18 Specifically, the court in *Legislature v. Eu* (1991) 54 Cal.3d 492, observed that the mere existence of
19 a clause within the state constitution authorizing the legislature to “limit the retirement benefits
20 payable to Members of the Legislature” did not “preclude legislators from acquiring pension rights
21 protected by the state or federal contract clauses.” In reaching its decision, the high court construed
22 the purported reservation of power clause as permitting modifications no greater than that permitted
23 by the state and federal contracts clause. (*Id.* at 529-530.)

24 The City argues that the intent of these provisions was to preclude vesting of retirement rights
25 (MSA at 15-16), but the legislative history counsels otherwise. A review of the ballot argument
26 indicates the electorate intended to authorize the City Council to extend additional benefits to safety
27 personnel, stating “The purpose of this amendment is to enable the City Council to take legal steps to
28 provide survivor benefits for your policemen’s and firemen’s families.... SURVIVOR BENEFITS

1 ARE PROHIBITED AT PRESENT IN THE CITY CHARTER!" (RJN F). Nothing in the legislative
2 history points to a contrary interpretation.

3 Although the provision cannot be construed as the City suggests, any doubt must be resolved
4 in favor of vesting: "when the ordinance establishing the pension plan can reasonably be construed to
5 guarantee full payment to those entitled to its benefits regardless of the amount in the fund
6 established by the pension plan" the court is "required to construe the provisions liberally in favor of
7 the applicant so as to carry out their beneficent policy." (*Bellus, supra*, 69 Cal.2d at 351; *Assoc. of*
8 *Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 790.)

9 **4. The City's Authorities Do Not Resolve This Issue**

10 None of the cases on which the City relies support its "reservation of rights" argument, and
11 few involve public employee retirement security, a crucial distinction due to the heightened level of
12 protection accorded public retirement benefits, while those that do are unhelpful to the City.

13 For example, *San Diego City Firefighters, Local 145 v. Bd. of Administrators* (2012) 206
14 Cal.App.4th 594, 607-608, is distinguishable because it involved a city charter that specifically
15 required the city council to establish its retirement system by ordinance, not resolution, and required
16 retirement systems members to vote to approve amendments. The court held that a resolution was
17 void because it "conflict[ed] with the city charter requirements that the [retirement system's]
18 provisions be adopted by ordinance" and its members had not voted to approve it. (*Id.* at 608-609.)
19 More to the point, the repeal of the benefits was required by the Internal Revenue Service in order to
20 ensure the plan complied with qualification rules under the Internal Revenue Code and the plan, like
21 the City's here, contained a savings clause specifically directed at amendments required by the IRS.
22 (*Id.*) The case does not support a broad "unvesting" conclusion.

23 In a case relied heavily on by the City, *Walsh v. Bd. of Admin.*, (1992) 4 Cal.App.4th 682, the
24 court declined to decide the very contention on which the City bases this Motion: whether the
25 petitioner had acquired a vested right to benefits. (*Id.* at 699-700.) Rather, it considered whether the
26 reservation of power clause within the Legislators' Retirement Law ("LRL") was intended to prevent
27 the grant of unwarranted windfall benefits to retirees. (*Id.* at 700, 704.) The Court concluded that
28 such windfall benefits were exactly the type of benefits the legislature was authorized to curtail in

1 order to prevent corruption. (*Id.*) Indeed, the *Walsh* court noted that the retiree’s position in light of
2 the minimal service and the nature of elected office would require “[s]uch an extraordinary result []
3 not permitted under other types of public pension plans and is inconsistent with the purpose of a
4 governmental retirement plan....” (*Id.* at 703-704.) Here, plaintiffs seek to enforce settled and modest
5 retirement expectations undermined by Measure B.

6 Also unavailing is *International Association of Firefighters v. City of San Diego* (1983) 34
7 Cal.3d 292 (“*IAF*”), cited for the sweeping proposition that any changes made “pursuant” to a City’s
8 charters and ordinances do not impair vested rights. (MSA at 14.) In *IAF*, the city charter
9 specifically stated that employees were required to contribute to the retirement system “according to
10 the actuarial tables adopted by the Board of Administration for normal retirement allowances.” (*Id.* at
11 297.) Unlike Measure B, this provision is in keeping with Article 16 of the Constitution, which
12 requires the retirement board to make the retirement system’s actuarial determinations. The
13 Retirement Board, and not the City, is an independent fiduciary body, whose fiduciary duties are
14 owed “exclusively” to retirement plan participants (Cal. Const. Article 16, § 17(a).) The *IAF* court
15 held that any increases in employee contribution rates were permissible *pursuant* to that provision,
16 meaning exercised in accordance with that provision. (*Id.* at 300-302). The court also recognized
17 that unconstitutional impairments occurred in cases where “vested contractual rights were modified
18 by amendment of the controlling provisions of the retirement system in question to reduce (or
19 abolish) the net benefit available to the employees.” (*Id.* at 302). Thus the *IAF* Court specifically
20 disapproved of the type of action contemplated by Measure B. Far from authorizing Measure B, the
21 Code specifically prohibited them (for example, by requiring the City to pay for its UUAL). Because
22 pension rights are constitutionally protected, a vote of the electorate cannot alter them. (*Perry v.*
23 *Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921, 994-95, *aff’d sub nom. Perry v. Brown* (9th
24 Cir. 2012) 671 F.3d 1052 (“fundamental rights may not be submitted to a vote; they depend on the
25 outcome of no elections” (citing *West Virginia State Board of Education v. Barnette* (1943) 319 U.S.
26 624, 638).)

27 The remainder of the City’s authorities are distinguishable because they do not involve public
28 retirement systems governed by California law, the reservation of rights clause in those plans granted

1 the plan sponsor the greater right to *terminate* the *plan* or *benefits*, and the remainder involve retiree
2 health benefits. Thus in *Retired Employees Assoc. of Orange County, Inc. v. County of Orange* (C.D.
3 Cal. Aug. 13, 2012) Case No. SACV 07-1301 AG (MLGx) (“*REAOC IV*”), the court held retirees did
4 not have a vested right to participate in an insurance pool with active employees, pointing to a 1993
5 county resolution that specifically stated it did not create vested rights, and it “specifically reserve[d]
6 the County’s right to amend or terminate the 1993 Plan at any time.” (*Id.* at p. 6.) Because
7 “resolutions” were insufficient to bind the County, the language of the resolution was clear, and the
8 case did not involve benefits paid for by employees nor connected to and administered under a
9 pension system. Indeed, such a clause would be impermissible where the public pension system
10 operates as an alternative to social security.⁶

11 **a. Social Security Cases are Unhelpful**

12 The City's citation to Social Security Act (“SSA”) cases is also unavailing, as Social Security
13 is a public welfare program, not a pension system. As stated in *Flemming v. Nestor* (1960) 363 U.S.
14 603, 609-611, cited by the City, persons covered by the SSA do not have a property interest in benefit
15 payments under the Fifth Amendment in light of the SSA’s history, scope, and purpose. Social
16 Security is a public welfare insurance program funded by payroll taxes, it is decidedly not a pension
17 system. (*Califano v. Goldfarb* (1977) 430 U.S. 199, 208 (“From its inception, the social security
18 system has been a program of social insurance”); *Sims v. Harris* (9th Cir. 1979) 607 F.2d 1253, 1255
19 (describing social security as “a complex statutory scheme designed to administer a trust fund
20 financed, in large part, by taxes levied on the wage earners...” and noting “Congress has provided
21 benefits to persons who have not been in the work force and who have not contributed to the fund”).)
22 The *Flemming* court correctly noted that the statutory reservation of rights was simply further
23 evidence of Congress’ intent not to create a vested property right in its public welfare program,
24 further accentuating the difference between social security and a pension system. (*Id.* at 611 (“That
25

26 ⁶ The Omnibus Budget Reconciliation Act of 1990 (OBRA 90) imposed mandatory Social Security coverage on State
27 and local government employees beginning July 2, 1991 who are not (1) already covered for Social Security under an
28 agreement, or (2) members of a retirement system which meets certain Treasury regulations or requirements. This
provision is intended to ensure that all public employees have some type of retirement protection, either obtained as part
of Social Security or through a plan offered by the employer.”
http://www.ssa.gov/section218training/basic_course_4.htm#5 (Q&A No. 8).

1 provision makes express what is implicit in the institutional needs of the program”).) Unlike Social
2 Security, pension systems constitute deferred compensation earned under the employment contract
3 (*Id.* at 610).

4 *Bowen v. Public Agencies Opposed to Social Security Entrapment*, (1986) 477 U.S. 41, 51, is
5 equally inapposite because “[i]n view of the purpose and structure of the [Social Security] Act” it was
6 permissible for Congress to make an amendment to section 418, which provided for states to contract
7 with the federal government to extend the program to state employees. Nevertheless, the Court found
8 “a limit in that Congress could not rely on that power to take away property already acquired under
9 the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession
10 of contracts lawfully made Congress does not have the power to repudiate its own debts, which
11 constitute 'property' to the lender, simply in order to save money.” (*Bowen, supra*, 477 U.S. at 51-53
12 (citing cases).) But because Social Security is not a contract but a public welfare program, and the
13 states are not the program’s beneficiaries, the Court did not apply a Contracts Clause analysis. (*Id.*)

14 **b. ERISA Cases are Irrelevant**

15 The City also misplaces reliance on private sector retiree health cases governed by the
16 Employee Retirement Income Security Act of 1974 (“ERISA,” 29 USC 1001, *et seq.*).
17 Fundamentally, private parties do not enjoy the heightened constitutional protections of the
18 Contracts, Takings, and Due Process Clauses. Second, in the private sector, employees are covered
19 by Social Security as well as their private pension plans, they don't accept employment under one in
20 lieu of the other. Third, ERISA specifically provides for vesting and anti-cutback rules with respect
21 to retirement security (29 U.S.C. §§ 1053, 1054), and it specifically declines to extend such rules to
22 retiree health plans. (*See, e.g., Moore v. Metropolitan Life Ins. Co.* (2d Cir. 1988) 856 F.2d 488,
23 491.) Finally, ERISA is a “comprehensive and reticulated statute” premised on the concept that
24 private retirement benefits are voluntarily provided by employers (*Black & Decker Disability Plan v.*
25 *Nord* (2003) 538 U.S. 822, 823 (noting employers have great leeway in designing the benefits they
26 choose to provide).) However the City is mandated to provide a pension to employees who forego
27 social security by entering City employment.

28 With these differences in mind, the City’s ERISA cases are easily disposed. The City cites

1 *Moore, supra*, 856 F.2d at 491, a case challenging changes in medical benefits for a class of retirees
2 although “over the years, [the company] had published booklets” which specifically gave it the power
3 to change or terminate the plans or “discontinue any portion of the benefits...” (*Id.* at 490-91.) Since
4 benefits afforded under ERISA health plans do not automatically vest, in the absence of contrary
5 authority, the reservation of rights clause prevented vesting. (*Id.* at 491-92.) Had the booklets
6 described the benefits as vested or affirmed that the benefits promise could be relied on, the Court’s
7 holding would have been much different. (*See Reese v. CNH America LLC* (6th Cir. 2009) 574 F.3d
8 315, 321, 327.) Here the City repeatedly referred to retiree health benefits as “vested.” (*See* Gurza
9 Decl., Exh. 39, p. 3; Allen Decl. ¶ 24, Exh. 3, p. 2; Allen Decl. ¶ 27, Exh. 5, p. 19; *see also* Allen
10 Decl. ¶ 25, Exh. 4, pp. 17, 20.) Therefore, even under an ERISA analysis there is no basis to the
11 City's argument that its retiree health plan is not vested.

12 *Sprague v. General Motors Corp.*, (6th Cir. 1998) 133 F.3d 388, also involved an ERISA
13 welfare plan and a claim that the employer had “committed a breach of the terms of the plan
14 documents when it implemented ... changes.” (*Id.* at 399.) However, the “plaintiffs [did] not
15 seriously dispute[] that the plan itself permitted GM to amend or terminate benefits” and “most of the
16 summary plan descriptions unambiguously reserved GM’s right to amend or terminate the plan.” (*Id.*
17 at 400, 401.) Here, the purported reservation of rights clause did not authorize a decrease in
18 employee benefits, it is neither specific nor unambiguous, and again, its plan descriptions and
19 communications have consistently referred to retiree health benefits as vested or promised.

20 **D. THE CITY HAS FAILED TO ESTABLISH A RIGHT TO ADJUDICATION OF**
21 **SECTIONS 1506, 1511-E & 1512-A OF MEASURE B**

22 In light of the foregoing, the City has failed to establish as a matter of law that it is entitled to
23 summary adjudication. Its factual assertions are incorrect, and its legal authorities are inadequate. In
24 the main, the City contends that alterations to pension and retirement funding applicable to active
25 employees do not implicate the Contracts Clause. However, the funding changes implemented by
26 Measure B with respect to pension and retiree health UAAL fundamentally alter the design of the
27 benefit plans and undermine employees’ settled expectations. California courts have rejected the
28 City’s contention, noting “pension rights can encompass the funding mechanism for the pension

1 when there is a palpable element of exchange involving funding; continued service [] in return for
2 enhanced assurance that funds to pay the pension benefits will be available at retirement.”
3 (*California Teachers Association v. Cory* (1984) 155 Cal.App.3d 494, 506 (“We held in *Valdes*,
4 given its statutory context, that a right to reserve funding of the state retirement system is a
5 contractual pension right within the ambit of the contract clause”); *Board of Administration v. Wilson*
6 (1997) 52 Cal.App.4th 1109, 1133 (“authority is not lacking for the proposition that employee
7 pension beneficiaries have a vested interest in the integrity and security of the source of funding for
8 the payment of benefits.”) This principle -- that pension rights extend to the obligation to fund the
9 pension in accordance with the terms on which the system is established -- is not unique to
10 California.⁷ With this in mind, we turn to each of the three provisions concerned here.

11 **1. Section 1506-A (Increased Employee Contributions)**

12 The City’s argument with respect to section 1506-A is faulty because it fails to recognize the
13 unique nature and protections afforded to pension benefits under state law. The City also fails to
14 show “clear” and “explicit” evidence of an intent *not* to create the vested rights impaired by Section
15 1506-A of Measure B. As shown below, the Municipal Code creates an obligation on the part of the
16 City respecting the System’s UAALs, which is an integral component of the pension contract. To
17 avoid this the City asserts an absence of evidence: that nothing in the Charter prevents its imposition
18 of UAALs against employees. However, Municipal Code states otherwise, as does established
19 precedent. (MuniCode §§ 3.24.730, 3.28.710, 3.28.880). Nor is 1506-A authorized as an adjustment
20 to compensation. The contributions are not a reduction in employee wages; they are an increase in
21 employee contributions directly pegged to the System’s UAALs measured as of the date Measure B
22 was enacted.

23
24 ⁷ *Sgaglione v. Levitt* (1975) 37 N.Y.2d 507, 511, 337 N.E.2d 592, 594 (“The problem is novel and close precedents
25 nonexistent. It is concluded that the legislative device is in violation of the nonimpairment clause, because the means
26 designed to assure benefits to public employees and those already retired will be impaired by the offending device.”);
27 *Weaver v. Evans* (1972) 80 Wash.2d 461, 495 P.2d 639, 649–650; *Dombrowski v. Philadelphia* (1968) 431 Pa. 199, 245
28 A.2d 238; *Yeazell v. Copins* (1965) 98 Ariz. 109, 402 P.2d 541; *Hanson v. Idaho Falls* (1968) 92 Idaho 512, 446 P.2d
634; *Dadisman v. Moore* (1988) 181 W.Va. 779, 791, 384 S.E.2d 816, 828 (“vested interest in the integrity and security
of the funds available to pay future benefits”); *Municipality of Anchorage v. Gallion* (Alaska 1997) 944 P.2d 436; *Stone v.*
State (N.C. Ct. App. 2008) 191 N.C.App. 402, 415, 664 S.E.2d 32, 40; *State Teachers’ Retirement Board v. Giessel*
(1960) 12 Wis.2d 5, 106 N.W.2d 301; *Stone v. State* (N.C. Ct. App. 2008) 191 N.C.App. 402, 415, 664 S.E.2d 32, 40;
Valdes v. Cory (1983) 139 Cal.App.3d 773; *Kaho’ohamohano v. State* 114 Hawai’i (1997) 302, 346 [162 P.3d 696, 740];

1 The City relies on a misconstruction to make its argument, citing Section 1505(c) of the
2 Charter which states, “[t]he foregoing provision, however, does not apply to any contributions
3 required for or because of any prior service or prior service benefits.” However, the term “prior
4 service” or “prior service benefits” applies to service performed prior to the adoption of the
5 retirement system or prior to an employee’s eligibility in the system, for which no normal
6 contributions would have been made. (Sec MuniCode §3.24.050 defining “prior service
7 contributions” as “contributions made by members on account of service rendered prior to July 1,
8 1951); §3.28.030.08 (“Current Service” means all city service rendered by a member on or after July
9 1, 1975, for which the member is entitled to credit under this system”; MuniCode § 3.28.030.23
10 (“Prior service” means all city service rendered by a member prior to July 1, 1975 for which the
11 member is entitled to credit under the provision of this system.”).) Simply, section 1505(c) does not
12 authorize a retroactive imposition of additional payments associated with "current service." As stated
13 above, the Municipal Code specifically prohibits it. (MuniCode §§ 3.24.570, 3.28.710.)

14 Similarly, the more recently enacted Municipal Code Section 3.28.755—entitled “Additional
15 Employee Contributions”— may not be construed to allow retroactive imposition of contributions
16 associated with past service. To construe the provision otherwise would render the code’s prohibition
17 on requiring employees to make contributions based on plan and system experience a surplussage.
18 The Court is required to construe these ordinances in harmony, giving effect to each. (*Farrell, supra*,
19 41 Cal.3d at 665.)

20 Finally, the City suggests Measure B is authorized because in the past city employee unions
21 have agreed to increases in pension contributions. This argument fails with respect to AFSCME,
22 because AFSCME never agreed to contribute towards the City’s UAALs. The City’s MSA admits as
23 much, where it indicates that the City “imposed” these terms on AFSCME members (MSA at 24); but
24 even if AFSCME had so agreed, wage reductions and increased pension contributions are not
25 interchangeable and AFSCME never treated them as such (Doonan Decl. ¶ 35; Allen Decl. ¶ 14.)
26 The City has failed to establish conclusively that Section 1506-A is valid.

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28 ////

1 **2. Section 1512-A (Funding Retiree Health)**

2 For purposes of this Motion, the City does not contest the vested nature of retiree health
3 benefits. Rather it contests whether City employees have a “vested right to the City paying for the
4 unfunded liability for retiree healthcare.” (MSA at 31). Conceding it cannot eliminate the benefit,
5 Measure B places on active employees the obligation to fund half of the City’s previously-incurred
6 unfunded liabilities associated with its retiree health obligations. In that regard, it shifts a general
7 obligation of the City onto a discrete number of individuals: active City employees, and undermines
8 the settled contractual expectations established under the System’s retiree health benefit.

9 As described above, the Court must consider the effect of Measure B on City employees’
10 retiree health benefits. Attempting to describe the benefit as a windfall, the City distorts the equities
11 by stating that it “subsidizes retiree health care premiums” and “pays 100% of the premium for the
12 lowest cost plan.” (MSA at 28.) In fact, all employees contribute to the cost of retiree health benefits
13 with the expectation that they will receive the benefits to which they have contributed. It is not only
14 the City that pays for retiree health care, but the employees who have forgone equivalents in wages
15 and contributed to the plan on their own behalf.

16 Section 1512-A accomplishes two impermissible things: (1) it shifts an obligation and risk
17 that the City assumed onto current employees; and (2) it requires current and new employees to pay
18 for the benefits received by retirees while at the same time taking away any hope they will receive
19 equivalent benefits. As described in the Doonan Declaration, Measure B creates an onerous
20 requirement on the part of a dwindling pool of current employees who have themselves suffered
21 substantial 12%+ wage reductions. (Doonan Decl. ¶¶ 43-55, 71-88, 112). They are obligated under
22 Measure B to pay for the benefits of all retirees, including those that took early retirement as part of
23 the exodus of City employees faced with wage and retirement cuts. (*Id.*) As a direct result of the
24 wage cuts, layoffs and early retirements, the System’s retiree health UAALs spiked exponentially.
25 (*Id.*) Where Measure B imposes on current employees the obligation to pay for the benefits of those
26 who have left city employment, either to retire or work elsewhere (*e.g.* “deferred vested” members),
27 it constitutes a gross impairment of the contractual expectations inherent to the retiree health benefit.
28 As a factual matter, as described in paragraphs 80 through 88 of the Doonan Declaration, AFSCME

1 has not agreed that employees can fund the system's unfunded liabilities under the terms established
2 by Measure B. (*See also* Allen Decl., ¶ 17.)

3 By imposing UAALs on employees, Section 1512-A retroactively imposes additional terms of
4 employment for service already rendered by employees and retirees, making employees liable for the
5 risk associated with the benefits already earned and to which the City committed itself to fund and
6 provide. It does so in a prejudicial and unreasonable manner, by making a dwindling group of
7 employees responsible for the unexpected liabilities of the entire pool of health system members.
8 The City's response to this contention, that it never made a promise to pay UAALs is as blithe as its
9 attitude when first making its commitments: "the City was simply not focused on unfunded liabilities
10 at the time of the legislation." (MSA at 32). The City's attitude, or what it "focused on," is irrelevant
11 in assessing the commitments it made.⁸

12 The case law the City cites includes just two cases: *REAOC, supra*, and *Sappington v. Orange*
13 *Unified School Dist.* (2004) 119 Cal.App.4th 949. (MSA at 32-34.) *Sappington* is cited for the
14 proposition that "generous benefits" that "exceed what is promised in contract" do not reflect a
15 contractual mandate. (MSA at p. 33.) The case bears no resemblance to the facts at hand, because
16 the language establishing the benefit was "curiously brief and unspecific" and merely obligated the
17 district to "underwrite" the cost of a retiree health program. (*Sappington, supra*, 119 Cal.App.4th at
18 954.) *REAOC* itself dismantles *Sappington*:

19 In *Sappington* [], the retiree plaintiffs claimed a vested right to free health insurance
20 through a preferred provider organization (PPO) health benefits plan. The school
21 district had offered a free PPO plan for a period of years but, in 1998, instituted a
22 'buy-up-charge' for the PPO plan, while continuing to offer a health maintenance
23 organization plan at no cost. The Court of Appeal determined that the policy adopted
24 by the board of education, which had stated only that the district "shall underwrite
25 the cost of the District's Medical and Hospital Insurance Program for eligible
26 retirees," did not grant the retirees a vested right to free PPO coverage. In reaching its
27 conclusion, the court relied on dictionary definitions and common understandings of
28 the word "underwrite," extrinsic evidence of the parties' course of conduct, and the
29 absence of any evidence that the retirees had a reasonable expectation of free lifetime
30 PPO coverage. The *Sappington* court thus did not hold that vested benefits could

⁸ The City's position can be analogized as follows: you and your neighbor purchase a car from the same dealership and a certain payment plan is agreed upon; years later and halfway through paying down the purchase money security interest on the terms agreed to, the dealership informs you that, not only has the price increased, but you are now also responsible for paying the balance on your now-deceased neighbor's car. That is the practical effect of section 1512-A of Measure B.

1 never be implied in the public employee context. Indeed, its analytical approach
2 belies any such interpretation.

3 (*REAOC*, 52 Cal.4th at 1190.) In other words, in *Sappington*, retirees merely complained of a change
4 of their no-cost option from a PPO to an HMO, the case did not address or consider the retroactive
5 imposition of additional contributions to fund previously earned benefits. Nonetheless, the City
6 suggests “the instant case is stronger than *Sappington*, and *REAOC*, because there was no consistent
7 past practice. Retiree healthcare contribution rates have always included some portion towards
8 unfunded liability.” (MSA at 33:12-14.) Yet there is no factual basis for this assertion, and the
9 exhibit cited to states nothing of the sort. (See Gurza Decl., Exh. 39, p. 3 (“Based on an outside legal
10 counsel opinion it was determined that retiree healthcare benefits can be considered a vested benefit
11 similar to the pension benefit...”).)⁹

12 Few cases precisely address the issue presented by section 1512-A of Measure B, but long-
13 standing constitutional doctrines make clear that subsequent changes undermining and imposing
14 additional liabilities with respect to binding contracts are impermissible. (*Compare Sturges v.*
15 *Crowinshield* (1819) 17 U.S. (4 Wheat.) 122 (New York legislature violated the contracts clause
16 when it passed a law that discharged debtors from liability for any debt contracted previous to their
17 discharge in bankruptcy) with *Ogden v. Saunders* (1827) 25 U.S. (12 Wheat.) 213 (bankruptcy law of
18 any State which discharges a debtor from liability is not a law impairing the obligation of contracts
19 with respect to debts contracted subsequent to the passage of such law). Here, Measure B imposes
20 liability on current employees for obligations already incurred by the City.

21 Nor does the Municipal Code grant leeway over retiree health, as the City asserts it has. For
22 example, the retiree medical trust is an ancillary pension trust pursuant to, and maintained in
23 accordance with, section 401(h) of the Internal Revenue Code (26 USC § 401(h); (“IRC”).
24 (MuniCode §§ 3.28.380 & 3.28.1995.) The Municipal Code also states: “All contributions to the
25 medical benefits account shall be reasonable and ascertainable.” (MuniCode § 3.28.380.) Measure
26 B’s imposition of retroactive liability on a dwindling few employees cannot be described as
27 “reasonable.” The Municipal Code further requires that contributions to the Medical Benefits

28 ⁹ The “legal opinion” refers to a year 2008 opinion by Jones Day (see Allen Decl., ¶ 25 Exh. 4). Curiously, Jones Day has submitted to the Court a brief on behalf of a purported *amicus* supporting the City’s position.

1 Account are to be established by the board – and not the city – and sets forth the ratio by which they
2 are borne by the city and members (Muni §§ Code 3.28.380(a), (b) & (c); 3.28.1995(b).) The
3 reference to “members” is important, because the term does not refer merely to employees but
4 includes employees, retirees and deferred-vested former employees. (*Compare* MuniCode §
5 3.24.050(18) (defining “member”) *with* MuniCode § 3.24.050(5) (defining “employee”); (Muni Code
6 3.28.380(a) & (b).) The imposition on UAALs on active employees is contrary to the structure
7 established by the Municipal Code.

8 Finally, the Retiree Health provisions of the Municipal Code contain a specific “reservation of
9 rights clause” that is tied directly to the limitations imposed by IRC section 401(h). (MuniCode §
10 3.28.1995(a) (“subject to the Meyers-Milias-Brown Act [] the City reserves the right to amend this
11 part to limit medical benefits as necessary to satisfy the requirements of said section 401(h).”) If the
12 City enjoyed an unqualified reservation of rights this provision would be redundant and superfluous.
13 Rather, the only rights reserved are those required to remain compliant under section 401(h).

14 **3. Section 1511-A (Elimination of SRBR)**

15 Section 1511-A of Measure B impermissibly eliminates an established pension benefit and
16 then raids the trust from which it is funded in order to pay the City's general obligations associated
17 with the System's UAALs. SRBR is neither discretionary nor a windfall benefit, and its elimination
18 constitutes an impairment of contract.

19 Established principles of trust law, contained in the Constitution and the Municipal Code,
20 prohibit eliminating and raiding the assets of the SRBR. The SRBR trust fund was created for the
21 benefit of Federated retirees. The Municipal Code specifies it “shall be used only for the benefit of
22 retired members, survivors of members, and survivors of retired members.” (MuniCode §
23 3.28.340(E)(1); *see also* MuniCode § 3.28.340(E)(2).) This mandate accords with Article 16, section
24 17(a) of the Constitution, which states: “The assets of a public pension or retirement system are trust
25 funds and shall be held for the exclusive purposes of providing benefits to participants in the pension
26 or retirement system and their beneficiaries and defraying reasonable expenses of administering the
27 system.” (*See also Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 337 (discussing elements of express
28 trust); *City of Palm Springs v. Living Desert Reserve* (1999) 70 Cal.App.4th 613, 619 (“The legal title

1 of the res or corpus of any trust is held by the trustee, but the beneficiaries own the equitable estate or
2 beneficial interest”). By eliminating the trust and diverting the corpus to offset the City’s liabilities,
3 Measure B violates the Constitution.

4 Courts have held that a legislature may not transfer funds from one retirement system to
5 another, as doing so violates the due process clause. (See, e.g. *Association of State Prosecutors v.*
6 *Milwaukee County* (1996) 199 Wis.2d 549, 564 [544 N.W.2d 888, 894] (“we hold that vested
7 employees and retirees have protectable property interests in their retirement trust funds which the
8 legislature cannot simply confiscate... we conclude that the transfer of funds from the County Plan to
9 the State Plan ... takes property without due process of law”); *People ex rel. Sklodowski v. State*
10 (1994) 162 Ill.2d 117, 151 [642 N.E.2d 1180, 1194] (Transfer of pension funds “substantially
11 impaired pension benefits.”); *Sgaglione v. Levitt* (1975) 37 N.Y.2d 507, 512 [337 N.E.2d 592, 594-5]
12 (“Although not essential to this conclusion is the salient fact that the reserve funds contain sums at
13 some time paid regularly or specially by contributing employees. These employee-contributed funds,
14 therefore, are not any longer State or municipal funds raised solely by the tax-levying power.”) The
15 City has not addressed a due process analysis, but if it had, sufficient factual disputes deprive the City
16 of entitlement to adjudication. (*Connolly v. Pension Benefit Guaranty Corporation*, (1986) 475 U.S.
17 211, 224 (“Courts must rely on an *ad hoc*, factual inquiry to determine whether a taking arises in a
18 particular case”).)

19 Although not binding, *McCall v. State* (1996) 640 N.Y.S.2d 347, 219 A.D.2d 136, 142, is
20 instructive. In that case, a new statute “grant[ed] State and municipal employers a credit to be
21 assessed against” a Supplemental Reserve Fund (“SRF”), and which the court found unconstitutional
22 because although the SRF was “a separate fund” and not used to pay benefits, it was “indisputably an
23 asset of the retirement system” and was subject to the power of the trustee “to hold, manage and
24 invest the assets contained therein for the benefit of the members and beneficiaries of the retirement
25 systems...” (*Id.* at 140, 640 N.Y.S.2d 347 (citations omitted).) The court held that pension
26 beneficiaries are entitled to protection of the benefit funds under the state constitution’s provision
27 barring the impairment of pensions. (*Id.*) Here, the Municipal Code specifically provides the SRBR
28 is for the exclusive benefit of retirees.

1 The City asserts "vesting" never arises under the SRBR because the City Council has
2 discretion over the distribution of SRBR assets. They point to the term "if any" under section
3 3.28.340(E)(2) of the Municipal Code.¹⁰ This section designates the process by which SRBR
4 distributions to retirees are made from the SRBR Trust "if any" assets are held in the Trust. It does
5 not establish a discretionary benefit; if funds exist as a result of the funding mechanism, they are to
6 be distributed in accordance with fiduciary principles arising under the Article 16 of the Constitution.

7 The Municipal Code does not specify a particular methodology for distributing SRBR
8 assets; rather, the Federated Board suggested a methodology which the City Council adopted
9 through resolution. (Soroushian Decl., ¶ 4, Exh. 1, p. 2.) Former Director of Retirement Services,
10 Russell Crosby, described the distribution methodology as follows: "[T]he total Annual
11 Distribution from the Federated System SRBR is the sum of (a) the amount, if any, in excess of
12 the Minimum Balance ... and (b) the annual interest earned in the SRBR" (Soroushian Decl.,
13 ¶ 4, Exh. 1, p. 2.) This confirms that distributions from SRBR are mandatory if excess earnings
14 in the Fund surpass the mandatory minimum set under the Board's formula. Although the
15 Municipal Code provides discretion to "determine the distribution," it does not mean the benefit
16 is entirely discretionary or that a contractual obligation does not arise. Under California law, an
17 obligation under a contract is not illusory if the obligated party's discretion must be exercised
18 with reasonableness or good faith. (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100
19 Cal.App.4th 44, 61 *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806 ("the
20 implied covenant of good faith is also applied to contradict an express contractual grant of
21 discretion when necessary to protect an agreement which otherwise would be rendered illusory
22 and unenforceable".) Here, the fact that SRBR establishes a trust for the exclusive behalf of
23 retirees, to which Article 16 of the Constitution imposes fiduciary obligations, the discretion
24 conferred to designate the amount of benefit must be exercised in good faith and in accordance
25 with fiduciary principles.

26
27 ¹⁰ The section states in full: "Upon the request of the city council or on its own motion, the board may take
28 recommendations to the city council regarding the distribution, if any, of the [SRBR] to retired members, survivors of
members, and survivors of retired members. The city council, after consideration of the recommendation of the board,
shall determine the distribution, if any, of the [SRBR] to said person."

1 Importantly, the Municipal Code does not confer discretion to discontinue the fund or the
2 benefit itself, and so the City's argument inverts the principle that “the greater power implies the
3 lesser power.” The City's argument was rejected in *Eu, supra*, where the electorate attempted to
4 terminate the Legislators’ Retirement Law (“LRL”) with respect to incumbent legislators. (*Eu*, 54
5 Cal.3d at 528-534.) In that case, the lesser power reserved to the legislature to limit retirement
6 benefits payable to legislators, did not imply the greater power to terminate them, and so
7 completely repealing a previously conferred benefit was unconstitutional. (*Id.*; *Kern, supra*, 29
8 Cal.2d at 848.)

9 The authorities relied on by the City are easily distinguished. *REAOC IV, supra*, simply
10 held that the retirees in that case did not have a vested right to pooling; it did not contend with a
11 pension benefit. Similarly, the court in *Ventura County Retired Employees' Association Inc. v.*
12 *County of Ventura* (1991) 228 Cal.App.3d 1594, 1599, held that the county was “not compelled to
13 offer retirees and active employees a health plan funded by a single and uniform premium to both
14 groups of insureds,” since such a benefit was not mandated by law. Here, the benefit is mandated
15 by ordinance and regulated under Article 16 of the Constitution. Lastly, *Doyle v. City of Medford*
16 (2010) 606 F.3d 667, 679, another retiree health case involving the Due Process clause, is
17 inapplicable because the relevant statute only required local governments to provide retirees with
18 health care “insofar and to the extent possible” which was “vague” and in itself did not create a
19 property right. (*Id.* at 675.)

20 Next, the City asserts SRBR is a “windfall benefit,” stating “the impairment provision
21 does not prevent laws which restrict a party to the gains reasonably to be expected from the
22 contract.” (MSA at 38-40, citing *Bd. of Admin., supra*, 34 Cal.3d at 114.) City employees and
23 retirees enjoy a vested right to the benefit of the assets earmarked for or held in the trust. The
24 SRBR was designed specifically to share a portion of the earnings resulting from plan
25 investments. (Soroshian Decl., ¶ 4, Exh 1, p. 1; Doonan Decl., ¶¶ 89-90; City’s RJN C,
26 MuniCode § 3.28.340.) This makes sense, because employee contributions comprise a
27 component of the System's trust fund assets. While the SRBR was tied to the successes of the
28 stock market, neither its continuation nor the distribution of its assets was ever conditioned on the

1 Federated System's funding status. The fact that the Federated Plan may have been free of
2 unfunded liabilities at the time the SRBR was promulgated is not evidence that the benefit itself
3 constitutes a windfall.

4 *Teachers' Retirement Bd. v. Genest*, (2007) 154 Cal.App.4th 1012, directly deals with the
5 City's arguments, in part because the SRBR is modeled on the reserve fund in that case.
6 (Soroushian Decl., ¶ 4, Exh. 1, p. 1.) In *Genest*, retired teachers enrolled in CalSTRS were
7 entitled to receive an allowance from the Teachers' Retirement Fund's Supplemental Benefit
8 Maintenance Account ("SBMA"). (*Id.* at 1020-21.) The allowance was provided to "retirees
9 whose current defined benefit program allowance ha[d] fallen below 80 percent of the purchasing
10 power of the initial allowance due to inflation." (*Id.* at 1021.) Assembly Bill 1102 later amended
11 the pertinent legislation to guarantee a continuous appropriation from the General Fund into the
12 SBMA (*id.* at 1022), just as Municipal Code section 3.28.340(b)(2)(a) does in this case. In 2003
13 the legislature passed an act "reducing the state's obligation to fund the [SBMA] ... by \$500
14 million for [FY] 2003-2004." (*Id.* at 1020, 1024.) The court rejected the appellants' argument
15 that "requiring the state to fund the SBMA in an amount greater than necessary to provide 80
16 percent purchasing power protection would result in an unreasonable windfall ..." (*id.* at 1034)
17 because it did "not change the amount of purchasing power supplemental benefits, or the manner
18 in which they [we]re calculated; it merely secure[d] the funding stream into the SBMA." (*Id.* at
19 1036.) Similarly, in this case, AFSCME does not contest the City's manner of distributing funds
20 from the SRBR; rather, it requires the City to honor its agreement to "secure the funding stream"
21 into the SRBR and to continue the trust itself.

22 All the cases the City relies on for its "windfall" argument are distinguishable because in
23 each case, the retirees received enhancements contrary to the original purpose of the legislation
24 under which they claimed entitlement. Both *Lyon v. Flourney* (1960) 271 Cal.App.2d 774, and
25 *Board. of Admin, supra*, 34 Cal.3d at 117, (MSA at 39-40), involved challenges to limitations
26 placed on a statute designed to provide legislators with retirement benefits that kept up with the
27 cost of living by pinning them to theoretically fluctuating legislators' salaries. However, because
28 the electorate failed to increase legislators' salaries for over ten years, the Legislature provided

1 retirees with a COLA benefit. Providing retirees with benefits based on a substantial salary
2 increase, the court ruled, would result in an unanticipated and unintended “double cost-of-living”
3 adjustment. (*See Bd. of Admin, supra*, 34 Cal.3d 114 at 124.) Similarly, as previously discussed,
4 the petitioners in *Walsh*, received a benefit that was unwarranted under the circumstances.

5 Defendants have failed to demonstrate that AFSCME members are not entitled to
6 continuation of the benefits of the SRBR fund.

7 **IV. CONCLUSION**

8 For the reasons stated above and for the reasons stated in the Oppositions provided by the
9 other plaintiffs in this case, in which AFSCME Local 101 joins, the Defendants’ Motion should be
10 denied in its entirety.

11 Dated: May 1, 2013

BEESON, TAYER & BODINE, APC

12
13 By: 

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