

1 Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
2 Gonzalo C. Martinez, No. 231724
Amber L. West, No. 245002
3 **CARROLL, BURDICK & McDONOUGH LLP**
Attorneys at Law
4 44 Montgomery Street, Suite 400
San Francisco, CA 94104
5 Telephone: 415.989.5900
Facsimile: 415.989.0932
6 Email: gadam@cbmlaw.com

7 Attorneys for Plaintiff and Cross-Defendant
San Jose Police Officers' Association

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

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

No. 1-12-CV-225926
(and Consolidated Actions
1-12-CV-225928, 1-12-CV-226570,
1-12-CV-226574, 1-12-CV-227864,
and 1-12-CV-233660)

**PLAINTIFF SAN JOSE POLICE OFFICERS'
ASSOCIATION'S OPPOSITION TO CITY'S
MOTION FOR SUMMARY ADJUDICATION**

Date: June 7, 2013
Time: 9:00 a.m.
Place: Dept. 2
Judge: Hon. Patricia M. Lucas

19 AND RELATED CROSS-COMPLAINT
20 AND CONSOLIDATED ACTIONS

Complaint Filed: June 6, 2012
Trial Date: July 22, 2013

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The City of San Jose’s (“City”) summary adjudication motion (“MSA”) promised a rigorous analysis justifying its argument that Measure B violated no vested rights. The MSA, however, falls short because it ignores the *evidence*—i.e., specific sections of the San Jose Municipal Code (“SJMC”) codifying city ordinances and the San Jose City Charter (“Charter”) itself—that *expressly* created the vested rights plaintiff San Jose Police Officers’ Association (“SJPOA”) asserts on behalf of its members (“Police Officers”). The City tries mightily to argue that this case is in the vein of outlier pension cases where plaintiffs asserted vested rights that did not exist. But here the City *itself* created the vested rights codified in the SJMC, and this case therefore falls squarely within California’s vested rights doctrine.

The MSA asks this Court to find that Sections 1506-A, 1511-A, and 1512-A of Measure B do not violate the vested rights of Police Officers. But the City is not entitled to judgment as a matter of law. **First**, it inappropriately seeks adjudication of three individual sections of Measure B, even though that would fail to “completely dispose[]” of any cause of action. (See Part III; Code Civ. Proc. § 437c (f)(1).) **Second**, the City flatly misstates the law on vested rights and the evidence by which vested rights are established. **Third**, the purported “reservation of rights” in the Charter does not apply to voter-enacted initiatives like Measure B or authorize the City to rewrite its existing pension obligations to its employees. **Fourth**, the undisputed evidence is that the Charter *expressly* authorized the City Council to grant benefits through the SJMC, including those at issue here: Police Officers’ vested rights to (a) City payment of pension unfunded actuarial accrued liability (“UAAL”); (b) the Supplemental Retiree Supplemental Reserve (“SRBR”); and (c) payment of the “lowest cost” retirement medical plan available to Police Officers. Measure B infringed on those rights by unilaterally increasing employee contributions to saddle employees with all UAAL, abolishing the SRBR, and reducing retiree healthcare benefits.

1 In sum, the City is not entitled to judgment as a matter of law and this Court
2 should deny the MSA in its entirety.

3 **II. BACKGROUND FACTUAL STATEMENT AND PROCEDURAL HISTORY**

4 SJPOA generally sets forth the undisputed material facts in relation to each
5 ground for summary adjudication below, but provides some background information in
6 this section.

7 SJPOA is a union representing Police Officers working for the City of San
8 Jose. (AUF 1.) It filed this action on behalf of its members on June 6, 2012 after the
9 voters enacted Measure B (AUF 2), an initiative placed on the ballot by the City of San
10 Jose. As relevant here, SJPOA asserted Measure B violated Police Officers’ vested
11 pension rights created by the Charter and SJMC, and that it violated certain rights under
12 its collective bargaining agreement (“memorandum of agreement” or “MOA”). (AUF 3.)

13 The Charter obligates the City to establish and maintain a retirement plan for
14 its employees. (AUF 4.) The Charter mandates certain minimum retirement benefits for
15 Police Officers, and expressly authorizes the City Council to grant additional or greater
16 benefits through the SJMC. (AUF 5.) Accordingly, the SJMC details Police Officers’
17 pension benefits and rights in Chapter 3.36, the 1961 Police and Fire Department
18 Retirement Plan (“P&F Retirement Plan”). (AUF 6.) The P&F Retirement Plan is
19 administered by the Board of Administration of the Police and Fire Department
20 Retirement Plan (“Retirement Board”). The Retirement Board establishes contribution
21 rates on an actuarial basis—i.e., to keep the P&F Retirement Plan actuarially sound.
22 (AUF 7.) The City Council and Mayor have no discretion over employee contribution
23 rates paid into the P&F Retirement Plan. (See *id.*)

24 Retirement benefits are granted as a form of deferred compensation and
25 inducement to future service with the City. (AUF 9.) Police Officers and the City pay
26 into the P&F Retirement Plan to fund it, as specified in the funding provisions of the
27 Charter and the SJMC. (AUF 8.)

1 In 2011, the City began a campaign to reduce all City employees’ pension
2 benefits, including those of Police Officers, by threatening to declare a fiscal emergency
3 and by sponsoring a voter ballot initiative, Measure B, to attack pension rights. The
4 City’s mayor made repeated—and inaccurate— public assertions that, by Fiscal Year
5 (“FY”) 2015-16, the City’s retirement contribution costs would reach \$650 million per
6 year. (AUF 10.) The mayor did not acknowledge that the City’s projected retirement
7 contribution increases were partly rooted in the City’s unilateral decision to reduce its
8 pension contributions by \$80 million when the P&F Retirement Plan had an actuarial
9 surplus in fiscal years 1993 through 2004.¹ The Retirement Board later concluded in 2011
10 that this subsequently increased the P&F Retirement Plan’s unfunded liability by
11 approximately 44%. (AUF 11.) Employee contributions were not similarly reduced
12 during the actuarial surplus years. (See *id.*)

13 Notwithstanding the mayor’s public pronouncements about dramatically
14 escalating pension costs, in early 2012, the independent actuary for the P&F Retirement
15 Plan issued a report with updated projections for the City’s retirement costs showing the
16 City’s retirement contributions just for Fiscal Year 2012-13 would actually be \$55 million
17 *less than* previously budgeted by the City. The actuary estimated that FY 2015-16 costs
18 would be approximately \$320 million for both the P&F Retirement Plan and the Federated
19 Plan. (AUF 12.)

20 The Mayor immediately withdrew his fiscal emergency proposal but
21 nonetheless the City Council placed Measure B on the ballot for voter approval. (AUF
22 13.) Measure B was enacted by San Jose’s voters on June 5, 2012. (AUF 14.)²

24 _____
25 ¹ An actuarial surplus exists when a retirement system has more assets than its total
26 expected liabilities. The P&F Retirement System experienced large surpluses in the late
27 1990s and early 2000s. (See AUF 11.)

28 ² After Measure B was enacted, the California State Auditor determined the City’s
retirement cost projections were “unsupported and likely overstated.” (AUF 15; SJPOA
RJN Ex. 16, p. 1 [the City “referred to a projection that the city’s annual retirement costs
could increase to \$650 million by fiscal year 2015–16, a projection that our actuarial
consultant determined was unsupported and likely overstated”].)

1 Measure B purports to change Police Officers’ pension rights going forward.
2 (AUF 16.) In reality, however, the City is seeking to saddle Police Officers with
3 responsibility for paying unfunded liabilities that accrued *before* Measure B was enacted.

4 Measure B further provides that it “Supersedes all Conflicting Provisions,”
5 including other Charter and SJMC sections. (AUF 17.)

6 **III. SUMMARY ADJUDICATION STANDARD AND WHY THE MOTION MUST BE DENIED**
7 **FOR PROCEDURAL DEFECTS**

8 “[A] summary adjudication motion is subject to the same rules and procedures
9 as a summary judgment motion.” (*Rehmani v. Sup. Ct.* (2012) 204 Cal.App.4th 945, 950-
10 951.) Code of Civil Procedure section 437c, subdivision (f)(1), allows a defendant to
11 move for summary adjudication “as to one or more causes of action ... if that party
12 contends that the cause of action has no merit....” Defendant thus “bears the burden of
13 persuasion that there is no triable issue of material fact *and* that [it] is entitled to judgment
14 as a matter of law” by showing “that one or more elements of the cause of action in
15 question cannot be established, or that there is a complete defense thereto.” (*Aguilar v.*
16 *Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [emphases added; internal citations
17 omitted].) “If the defendant fails to make this initial showing, it is *unnecessary* to
18 examine the plaintiff’s opposing evidence and the motion must be denied.” (*Rehmani,*
19 *supra*, 204 Cal.App.4th at 950 [emphases added; citations and quotations omitted].)

20 But if defendant makes “a prima facie showing that justifies a judgment in the
21 defendant’s favor, the burden then shifts to the plaintiff to make a prima facie showing of
22 the existence of a triable material factual issue. A prima facie showing is one that is
23 sufficient to support the position of the party in question.” (*Ibid.*) Courts “must view the
24 evidence in a light favorable to [plaintiff], liberally construing [its] evidentiary submission
25 while strictly scrutinizing defendants’ own showing, and resolving any evidentiary doubts
26 or ambiguities in plaintiff’s favor.” (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th
27 763, 768.)

1 **A. The City May Not Parse Out Individual Sections of Measure B for**
2 **Summary Adjudication**

3 California law only allows summary adjudication of *complete causes of action*
4 rather than individual issues. The City’s MSA fails Code of Civil Procedure 437c, subd.
5 (f)(1)’s requirement that summary adjudication “completely dispose[]” of a cause of
6 action.³ The City’s procedurally-deficient motion, even if granted, would fail to do that—
7 especially as to SJPOA’s complaint.⁴

8 For example, the City moves for summary adjudication that three different
9 sections of Measure B do not violate the Contracts Clause (i.e., sections 1506-A, 1511-A,
10 and 1512-A). That fails section 437c(f)(1)’s standard for at least two reasons. First,
11 SJPOA’s Contracts Clause claim alleges that several *other* sections of Measure B also
12 violate the Contracts Clause, e.g., sections 1507-A, 1509-A, 1510-A. (SJPOA FAC ¶¶
13 42-46 [section 1507-A violates vested pension rights]; *id.* ¶¶ 29, 49-50 [same re section
14 1509-A]; *id.* ¶¶ 51-53 [same re section 1510-A].) The City’s motion would thus not
15 “completely dispose[]” of the Contracts Clause cause of action because SJPOA’s claims
16 as to these sections would remain live even if the City’s motion were granted.

17 Second, even if the Court accepts the City’s dubious argument that each
18 section of Measure B can be adjudicated independently (which it should not, as outlined
19 below), SJPOA’s complaint alleges that sections 1506-A and 1512-A *additionally* violate
20 the parties’ MOA. (SJPOA FAC ¶¶ 40-41, 45 [section 1506-A violates contractual
21 salaries]; *id.* ¶¶ 35, 56 [section 1512-A violates contractual cap on contributions for retiree
22 healthcare and contractual salaries].) The City only sought summary adjudication as to
23 sections 1506-A and 1512-A *under the constitutional Contracts Clause*; it did *not*
24 additionally seek adjudication *under the parties’ MOA*. Consequently, the City’s motion

25 _____
26 ³ Indeed, the City’s motion is the second non-conforming motion it has brought before
27 this Court improperly seeking *partial* adjudication of issues. (See 2/1/13 Order at 3:10-20
[denying City’s motion for judgment on the pleadings because a party cannot bring such a
28 motion only as “to a portion of a cause of action”].)

⁴ These arguments equally apply to the City’s federal claims because its cross-complaint
essentially parrots SJPOA’s allegations.

1 would not “completely dispose[]” of SJPOA’s challenges to sections 1506-A and 1512-A
2 because, even if the City were to prevail on the merits of its motion, these two sections
3 may still be otherwise unlawful under the MOA.

4 The City’s cited authorities do not support the City’s novel theory that the
5 individual sections of Measure B can be separately adjudicated. *Lilienthal & Fowler v.*
6 *Superior Court* (1993) 12 Cal.App.4th 1848, 1854 (cited at MSA at 10-11) was decided
7 under the former version of Code of Civil Procedure section 437c which did *not* require
8 summary adjudication “completely dispose[]” of a cause of action. (*See* 12 Cal.App.4th at
9 pp. 1851-1852 [quoting former statute]; *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092,
10 1095 fn.2 [noting *Lilienthal* decided under former statute].)

11 Moreover, the ruling is inapposite: the appellate court allowed summary
12 adjudication of the two wrongs pled in one cause of action because they truly were
13 separate and distinct: one matter involved malpractice in an unlawful detainer in 1987 and
14 the other involved malpractice in the purchase of real estate in 1989. (12 Cal.App.4th at
15 p. 1850.) The same is true of *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174
16 (cited at MSA at 10-11). That case allowed summary adjudication of two claims pled as
17 one under FEHA precisely because they were distinct in subject matter and time: one
18 involved the initial hostile work environment claim in February 1999 and the other
19 involved a subsequent retaliation claim in March 1999 after plaintiff was terminated. (115
20 Cal.App.4th at pp. 1180, 1188.)⁵

21 By contrast, here the wrongs alleged all flow from Measure B and all sections
22 of Measure B were enacted at the same time. (AUF 3.) The City does not argue
23 otherwise. “[I]f a plaintiff alleges that the defendant’s single wrongful act invaded two
24 different primary rights, he has stated two causes of action.” (*Hindin v. Rust* (2004) 118

25
26
27 ⁵ Recently re-published *Garrett v. Howmedica Osteonics Corp.* (Mar. 6, 2013) 214
28 Cal.App.4th 173, 185 fn.7, also does not help the City as it too contained distinct wrongs
occurring at different times: a defect in design and, separately, a defect in manufacturing
according to that design.

1 Cal.App.4th 1247, 1257 [reversing summary adjudication that did not completely dispose
2 of cause of action].) Summary adjudication is improper.

3 **IV. THE CITY FLATLY MISSTATES THE LAW ON THE CREATION OF VESTED RIGHTS**

4 If the Court reaches the merits of the City’s motion, it should still deny it in
5 whole. Rather than defending Measure B as reasonable or necessary to keep the P&F
6 Retirement Plan solvent, the City insists there are no vested rights to infringe. That is
7 incorrect.

8 **A. REAOC Affirmed Decades of Vested Rights Cases and Did Not**
9 **Overrule Them**

10 Under decades of California case law, pension benefits of public employees are
11 deferred compensation protected by the California Contract Clause. “A public
12 employee’s pension constitutes an element of compensation, and a vested contractual right
13 to pension benefits accrues upon acceptance of employment. Such a pension right may
14 not be destroyed, once vested, without impairing a contractual obligation of the employing
15 public entity.” (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863; *Allen v. City*
16 *of Long Beach* (1955) 45 Cal.2d 128, 131; *Kern v. City of Long Beach* (1947) 29 Cal.2d
17 848, 855 [an “employing governmental body may not deny or impair the contingent
18 liability [of pensions] any more than it can refuse to make the salary payments which are
19 immediately due”]); *Carman v. Alvord* (1982) 31 Cal.3d 318, 325; *Frank v. Board of*
20 *Administration* (1976) 56 Cal.App.3d 236, 242; Cal. Const. art I, §§ 9, 7, 19.) These
21 rights vest in such a sense that they cannot be destroyed by charter amendment even
22 before the time for retirement has arrived. (*Kern, supra*, 29 Cal.2d at pp. 855-856.)

23 The Charter and SJMC sections that define the P&F Retirement Plan create
24 such vested rights. “Where ... services are rendered under ... a pension statute, the
25 pension provisions become a part of the contemplated compensation for those services,
26 and so in a sense of a part of the contract of employment itself.” (*O’Dea v. Cook* (1917)
27 176 Cal. 659, 661-662.) Accordingly, public employees have the “right to earn future
28 pension benefits through continued service, on terms substantially equivalent to those”

1 existing at the time they began working, or enhanced during their service. (*Legislature v.*
2 *Eu* (1991) 54 Cal.3d 492, 528; *Carman, supra*, 31 Cal.3d at p. 325; *Sweesy v. Los Angeles*
3 *County Peace Officers' Retirement Board* (1941) 17 Cal.2d 356 [public employees
4 entitled to subsequent benefit increases]; *Kern, supra*, 29 Cal.2d at p. 855 [even though
5 pension right vests upon employment, “the amount, terms and conditions [of] the benefits
6 may be” increased].) The right to pension benefits vests at employment, even if the
7 entitlement to benefits does not fully mature until retirement or disability. (See *Wallace v.*
8 *City of Fresno* (1954) 42 Cal.2d 180, 183.) “[T]he well-recognized rule [is] that all
9 pension laws are liberally construed to carry out their beneficent policy.” (*Bellus v. City*
10 *of Eureka* (1968) 69 Cal.2d 336, 345.)

11 Once rights vest, “there are strict limitations on the conditions which may
12 modify the pension system in effect during employment.” (*Eu, supra*, 54 Cal.3d at 529.)
13 Specifically, vested pension rights may be modified only if “[s]uch modifications [are]
14 reasonable,” meaning that any “alterations [to] employees’ pension rights must bear some
15 material relation to the theory of a pension system and its successful operation, *and*
16 *changes in a pension plan which result in disadvantage to employees should be*
17 *accompanied by comparable new advantages.*” (*Betts, supra*, 21 Cal.3d at p. 864 [italics
18 original].)

19 The California Supreme Court has consistently re-affirmed these core
20 principles and—contrary to the City’s argument—did so again most recently in *Retired*
21 *Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th
22 1171 (“*REAOC*”). That case distinguished between express and implied contracts giving
23 rise to vested pension rights: “*The terms of an **express contract** are stated in **words**. The*
24 *existence and terms of an **implied contract** are manifested by **conduct**. The distinction*
25 *reflects no difference in legal effect but merely in the mode of manifesting assent.*
26 Accordingly, a contract implied in fact consists of obligations arising from a mutual
27 agreement and intent to promise where the agreement and promise have not been
28 expressed in words.” (52 Cal.4th at 1178 [italics added; internal citations and quotations

1 omitted].) The court noted further that “[e]ven when a written contract exists, evidence
2 derived from experience and practice can now trigger the incorporation of additional
3 implied terms” so long as such terms do not “vary express terms.” (*Id.* at 1178-79.) It re-
4 affirmed long-standing California law that “a vested right could be conferred by statute or
5 other valid regulation.” (*Id.* at pp. 1189 [internal citations and quotations omitted].)

6 The City asserts *REAOC* created a presumption against vested rights. (MSA at
7 12.) But, even if true (*Bellus, supra*, 69 Cal.2d at p. 345 [“all pension laws are liberally
8 construed to carry out their beneficent policy”]), that is *not* an onerous burden. *REAOC*
9 expressly held that any such presumption is extinguished “when the statutory language *or*
10 circumstances accompanying its passage clearly evince a legislative intent to create
11 private rights of a contractual nature enforceable against the [government body],” citing a
12 *pension* case—*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786—for that formulation. (52
13 Cal.4th at p. 1187 [italics added; quotations omitted].) Indeed, the Supreme Court
14 approvingly relied on another pension case, *California Teachers Assn. v. Cory* (1984) 155
15 Cal.App.3d 494, for the proposition that “a legislative intent to grant contractual rights can
16 be implied from a statute if it contains an *unambiguous element of exchange of*
17 *consideration by a private party for consideration offered by the state.*” (52 Cal.4th at p.
18 1186, italics added; *Olson v. Cory* (1980) 27 Cal.3d 532, 540 [“a public employee’s
19 pension rights are an integral element of compensation”].) This element of exchange
20 (deferred compensation in return for employee labor) is at the core of the vested rights
21 doctrine.⁶ Because public employees labor under pension statutes, in many cases for
22 several years, California law limits employers’ ability to unilaterally amend those statutes.
23 The same is true here. The City cannot dispute that it offered the pension benefits
24 contained in the Charter and SJMC as a form of deferred compensation, i.e., payment in

25 _____
26 ⁶ On this theory, *REAOC* reaffirmed an oft-criticized case that found fringe benefits were
27 protected vested rights because “these benefits had been an inducement to remain
28 employed with the district, and were a form of compensation which had been earned by
remaining in employment.” (52 Cal.4th at p. 1190, citing *California League of City
Employee Associations v. Palos Verdes* (1978) 87 Cal.App.3d 135.)

1 exchange for Police Officers’ labor or as an inducement to continued service.⁷ (See
2 *Olson, supra*, 27 Cal.3d at p. 539 [“a judge entering office is deemed to do so in
3 consideration of . . . salary benefits then offered by the state for that office”]; SJPOA RJN
4 Ex. 18 [Total Compensation Information: “the value of the City’s total compensation
5 package also includes the cost of benefits, such as health insurance and retirement
6 benefits”]; Declaration of John Robb in Support of Plaintiff San Jose Police Officers’
7 Association’s Opposition to Motion for Summary Adjudication (“Robb Decl.”) ¶ 9, Exs.
8 B-C [City recruiting flyers listing retirement as element of compensation] and Ex. D
9 [1980-81 recruiting booklet: “For San Jose Police Officers, security now means fully-paid
10 medical and dental coverage [p] Security for the future means . . . a retirement
11 program”].)

12 The City relies on federal cases with an unduly narrow construction of
13 California’s vested rights doctrine. Those cases do not control here. California law is
14 intentionally *more* protective of public employee pension rights than is federal law. The
15 California Supreme Court has held that “*California law places earned pension rights of*
16 *public officers and employees under the protection of the contract clause regardless of*
17 *any characterization adopted by the federal courts.”* (*Eu, supra*, 54 Cal.3d 492 [italics
18 original, quoting *Lyon v. Flournoy* (1969) 271 CalApp.2d 774, 781].) As *Walsh v. Board*
19 *of Administration* (1992) 4 Cal.App.4th 682, 697-698 explained:

20 There is nothing inherent in government retirement plans which
21 compels the conclusion that they are protected against modification
22 under the **federal** Constitution. For example, *federal laws which*
23 *create pension plans* are considered to be social and economic
legislation and the pension plans are not contractual in nature and
thus may be modified or even eliminated. [Citations] [p]

24 However, under **California** law there is *a strong preference for*
25 *construing governmental pension laws as creating contractual*
rights for the payment of benefits. [Citations]

26 ⁷ The City asserts it would be unfair for the “governing body [or the public [to] be
27 blindsided by unexpected obligations.” (MSA at 12:21-22.) But the Charter has required
28 the P&F Retirement Plan be actuarially sound since 1946 (SJPOA RJN Ex. 1 [1946
Charter]), from which it is reasonable to infer there was some actuarial analysis *before*
benefits were increased, and thus neither it nor the public were “blindsided.”

1 (emphases added.) Thus, the City’s federal cases are inapposite because California law
2 gives pension rights greater protection. In sum, California cases, rather than the federal
3 ones relied on by the City, control here.⁸

4 **B. Police Officers’ Vested Pension Rights Are Authorized By, And**
5 **Harmonious With, San Jose’s Charter**

6 At the outset, the City overstates its powers over the retirement system. (MSA
7 at 15:2-3 [“as a charter City San Jose can devise any retirement plan it chooses, or have no
8 retirement benefits whatsoever”].) The Charter expressly requires the City to have a
9 retirement system for its employees. (Charter 1500.) It directly creates minimum pension
10 rights, and expressly authorizes ordinances creating additional retirement rights. (Charter
11 1504, esp. subd. (e).) And the SJMC expressly states that even upon “termination of this
12 plan . . . the rights of each member . . . to benefits accrued . . . shall be nonforfeitable.”
13 (SJMC 3.36.120.A, B.3.) More fundamentally, the City’s authority over the retirement
14 system is constrained by the California Constitution, which protects employees’ property
15 rights under the P&F Retirement Plan. (See *Domar Electric, Inc. v. City of Los Angeles*
16 (1994) 9 Cal.4th 161, 170 [“the charter represents the supreme law of the City, subject
17 only to conflicting provisions in the federal and state Constitutions and to preemptive state
18 law”].) Indeed, the California Supreme Court long ago conclusively rejected the
19 argument that a charter city may unilaterally alter or abolish its retirement system at will.
20 (See *Kern, supra*, 29 Cal.3d at 850, 855.)

21 **1. Charter Section 1500 Does Not Prevent the Creation of**
22 **Vested Rights or Authorize Unilateral Modification**

23 The City relies heavily on its flawed reading of Charter Section 1500, but cites
24 no evidence supporting its argument. That means the summary adjudication burden did
25

26 ⁸ That is especially true for cases involving federally-granted pension benefits. And the
27 City’s cases involving private insurance contracts are irrelevant because they do not
28 implicate government attempting to modify government obligations—the core iniquity at
which the Contracts Clause is directed. (E.g., MSA at 17-18; see *Sonoma County*
Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 310.)

1 not shift. But even if it did, the City is wrong on the law and not entitled to summary
2 adjudication.⁹

3 **a. Section 1500 does not apply to Measure B.**

4 The City argues that Charter section 1500 contains a “reservation of rights”
5 that purportedly prevents the creation of vested rights. The text and legislative history of
6 that section do not support that argument. Further, Police Officers’ rights cannot be
7 unilaterally abolished by the City because the broad language on which it relies was never
8 intended to authorize decreases in benefits, let alone destruction of vested rights.
9 Alternatively, it is ambiguous whether such language applies to *existing* benefits.

10 Charter Section 1500 provides:

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

16 (City RJN Ex. A [Charter, emphases added].) Section 1500 cannot justify Measure B
17 because Measure B is not an ordinance and because it was not enacted by the City
18 Council. ***First***, the plain text of Section 1500 provides the “*Council may . . . amend*” and
19 does not authorize Measure B—a *charter* amendment enacted by the *voters*.¹¹ Our

20 _____
21 ⁹ Strictly speaking, Charter Section 1503 governs the 1961 P&F Retirement Plan because
22 the plan existed before Section 1503 was enacted and because that Section confirmed the
23 plan. However, Section 1503 expressly says it is subject to Section 1500, and the two
24 sections use materially similar “reservation” language. Accordingly, the same analysis
25 applies to both.

26 ¹⁰ Although the City cannot use this language to deprive Police Officers of existing vested
27 rights, this language could authorize the City to change the pension benefits of those
28 employees whose rights had not vested, i.e., new employees who did not exchange their
labor for the pension rights at issue here.

29 ¹¹ The City’s placement of Measure B on the ballot cannot satisfy Section 1500’s mandate
30 that “the Council” enact the amendment. A proposed charter amendment is not the law of
31 San Jose until the *voters* enact it and it is then filed with the Secretary of State. (Cal.
32 Const. art. XI § 3(a) [“a county or city may adopt a charter by majority vote of its electors
33 The charter is effective when filed with the Secretary of State. A charter may be
34 amended, revised, or repealed in the same manner”].)

1 Supreme Court has held that analogous “reservation of rights” language must be read in
2 strict conformance with its stated terms. In *Eu*, the court analyzed a much broader
3 “reservation of rights” clause, and yet the high court refused to find that it authorized
4 voter initiatives affecting legislators’ pension rights or that such language meant
5 legislators had no vested rights in the first place:

6 Article IV, section 4 of the state Constitution, provides in pertinent
7 part that “The *Legislature* may, prior to their retirement, limit the
8 retirement benefits payable to Members of the Legislature”
9 (Italics added.) That provision, seemingly empowering the
10 Legislature to exercise some measure of control over the pension
11 rights of its own members prior to their retirement, may create some
12 uncertainty as to the full amount or extent of a legislator's pension
13 rights during his term of office. *But the provision neither states nor*
14 *implies that these rights are thus deemed inchoate and unprotected*
15 *from impairment by the initiative process. **Significantly, we have***
16 *never suggested that the mere existence of article IV, section 4,*
17 *precludes legislators from acquiring pension rights protected by*
18 *the state or federal contract clauses....*

19 We conclude that incumbent legislators had a vested right to earn
20 additional pension benefits through continued service, despite the
21 *potential but unexercised* limitations contemplated by article IV,
22 section 4, of the state Constitution.

23 (54 Cal.3d at p. 529-530.) That reasoning applies equally here. Measure B is a voter-
24 enacted law, and was not enacted by the City Council. And Section 1500 does not state or
25 imply that Police Officers’ pension rights are “inchoate,” nor does it authorize unilateral
26 modification by the voters. As outlined below, it did not prevent Police Officers from
27 acquiring protected pension rights, i.e., it did not act as an anti-vesting clause. Moreover,
28 Section 1500 is much narrower than the language in *Eu*: Section 1500 does not authorize
limiting benefits before retirement.¹²

Second, Section 1500 does not contain *any* express language preventing the
creation of vested rights, let alone evidence such intent. That alone distinguishes it from

¹² The City relies heavily on *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682,
which applied the same “reservation of rights” as *Eu* but on substantially different facts.
Section 1500 simply does not include the same power to limit benefits before retirement at
issue there. More fundamentally, it was the Legislature, rather than voters, who exercised
its authority to limit Walsh’s retirement rights, *consistent* with Article IV, section 4. (*Id.*
at p. 704, distinguishing *Eu* on this ground.)

1 the retiree healthcare benefits at issue in *REAOC v. County of Orange*, 2012 U.S. Dist.
2 Lexis 146637 (C.D. Cal. Aug. 13, 2012), which found no intent to create vested rights
3 because the retirement plan “expressly states that it creates no vested rights, *and* reserves
4 the County’s right to amend or terminate the 1993 Plan at any time.” (emphases added;
5 cited at MSA 16-17.)¹³ In fact, the City made up for these perceived gaps in its authority
6 through Measure B by adding a reservation of voter rights and express anti-vesting
7 language. (See City’s RJN Ex. B [Sections 1504-A, 1508-A(h)].) But the pre-Measure B
8 Charter contains no such provisions, let alone any statement the rights at issue here are
9 revocable. (See City RJN Ex. A [Charter].)

10 **Third**, the Council’s authority under Section 1500 to “amend or otherwise
11 change any retirement plan . . . or adopt or establish a new or different plan” is expressly
12 subject to the benefits guaranteed elsewhere in the Charter, in particular the minimum
13 benefits for Police Officers contained in Charter Section 1504, including City payment of
14 all UAAL. (See Part IV.B.b.2.) Arguably, that limitation on Section 1500 further extends
15 to ordinances granting higher benefits enacted pursuant to Section 1504(e).

16 In sum, Section 1500 cannot justify Measure B.

17 **b. Section 1500’s Legislative History Confirms It Was**
18 **Not Intended to Prevent Vested Rights or Authorize**
19 **Reductions to Benefits.**

20 The legislative history and amendments to Section 1500 confirm the limited
21 nature of the “reservation of rights” language, including that it was never intended to
22 authorize the City to decrease benefits. That City’s own evidence confirms this.

23 The 1961 Charter amendments added the “reservation of rights” language
24 *solely* to allow the City Council to *increase* pension benefits. The “reservation of rights”
25 language was first added to the Charter in 1961 as Section 78b, which provided in relevant
26 part:

27 _____
28 ¹³ Further, the *REAOC* district court found no vested rights there because the resolution at
issue “did not arise out of a bargained-for exchange with employees.” (*Id.* at p. *27.)

1 *[T]he Council in its discretion may at any time, or from time to*
2 *time, by ordinance, amend or otherwise change the retirement plan*
3 *or plans established pursuant to said Section 78a or any retirement*
4 *plan or plans established pursuant to said Section 78a, or adopt or*
5 *establish a new or different plan or plans for eligible members of*
6 *the police or fire departments of the City of San Jose, for the*
7 ***purpose of providing benefits for members . . . in excess of those***
8 ***benefits authorized or required by the provisions of said Section***
9 ***78a,** including service retirement allowances, disability retirement*
10 *allowances and death, survivorship and other such benefits payable*
11 *to deceased members’ surviving spouses, dependents or estates . . . ;*
12 *provided, however, that [p] (1) The Council shall not decrease any*
13 *of said benefits below those which Section 78a makes mandatory ...*

8 (City RJN Ex. E [1961 Charter Amendment, emphases added].) This “reservation of
9 rights” language was needed because, before the amendment, the P&F Retirement Plan
10 was contained exclusively in the Charter and the City Council had no authority to change
11 it. (City RJN Ex. F [Proposition A Ballot Pamphlet].) Indeed, that is how it was
12 presented to the voters.

13 Section 78b was introduced as Proposition A and “placed on the ballot by the
14 City Council at the request of the members of your police and fire departments.” (City
15 RJN Ex. F.)¹⁴ Voters were informed that:

16 The purpose of this amendment is to enable the City Council to take
17 legal steps to provide survivor benefits for your policemen’s and
18 firemen’s families

18 **SURVIVOR BENEFITS ARE PROHIBITED AT PRESENT IN**
19 **THE CITY CHARTER!** In order to allow the city Council to adopt
20 reasonable benefits, it is necessary to amend the City Charter. In
21 other words, this amendment merely unties the hands of your City
22 Council

21 Two years ago, a very long, detailed plan was presented and
22 defeated. Opponents of this plan argued that this matter should be
23 referred to the City Council for action and not included as
24 mandatory provisions of the City Charter. This amendment will do
25 just that. This amendment will allow the City Council to have legal
26 authority to act on survivor benefits by ordinance and thereby
27 provide protection for widows and orphans.

25 (*Id.*) This legislative history confirms the “reservation of rights” language was not
26 intended to give the City authority to take away existing benefits or to decrease them—as

27 _____
28 ¹⁴ The argument in favor of Proposition A was submitted by the chiefs of the San Jose
Police and Fire Departments. No opposing argument was submitted. (*Id.*)

1 it tries to do with Measure B. The undisputed evidence is that voters' intent, rather, was
2 to give the Council amendment authority only to grant additional benefits by ordinance
3 beyond those already in the Charter.

4 The 2010 Charter amendments confirmed the limited nature of Section 1500.
5 The City proposed Measure W to the voters in 2010 to revise Section 1500 and 1501 to
6 give the Council authority to exclude new employees from (1) existing retirement plans
7 and (2) minimum benefits in the charter. (See SJPOA RJN Ex. 2 [City Attorney's
8 Analysis of Measure W].) If Section 1500's "reservation of rights" language were as
9 broad as the City argues, there would have been no need for such amendments because
10 these goals could both have been accomplished by the Council within the authority the
11 City relies on to support Measure B. Indeed, the City's MSA argument would make
12 Measure W superfluous. That Measure W was necessary to amend the Charter to
13 authorize the City Council to reduce benefits for new employees further demonstrates the
14 limited nature of Section 1500's text and purpose.

15 **c. General contract and statutory terms do not control**
16 **over specific ones, and it is "absurd" to read Section**
17 **1500 as broadly the City argues.**

18 The City's reading of Section 1500 is unreasonable. First, under principles of
19 contract and statutory construction, specific terms (such as those creating specific rights)
20 control over general ones (such as a "reservation of rights"). (See *Kashmiri v. Regents of*
21 *University of California* (2007) 156 Cal.App.4th 809, 834 ["Under well-established
22 principles of contract interpretation, when a general and a particular provision are
23 inconsistent, the particular and specific provision is paramount to the general provision"];
24 *General Ins. Co. v. Truck Ins. Exch.* (1966) 242 Cal.App.2d 419, 426 ["a specific
25 provision relating to a particular subject will govern in respect to that subject, as against a
26 general provision, even though the latter, standing alone, would be broad enough to
27 include the subject to which the more specific provision relates"]); *Arce v. County of Los*
28 *Angeles* (2012) 211 Cal.App.4th 1455, 1487 ["It is a well settled principle of construction

1 that specific terms covering the given subject matter will prevail over general language of
2 the same or another statute which might otherwise prove controlling.”].)

3 Second, the court in *Southern California Gas Co. v. City of Santa Ana* (9th Cir.
4 2003) 336 F.3d 885 dealt with analogous language in a Contracts Clause case where the
5 city argued “reservation of rights” language allowed it to modify its franchise agreement
6 with a gas company. The court found the agreement created property rights protected by
7 the Contracts Clause because it “emobodie[d] a bargain between Santa Ana and the Gas
8 Company.” (*Id.* at 889.) Santa Ana argued that section 8(a) of that contract “subject[ed]
9 the Gas Company’s rights to all ordinances ‘heretofore or hereafter adopted ... in the
10 exercise of [Santa Ana’s] police powers.” (*Id.* at 893.) The court flatly rejected that
11 argument, reasoning that:

12 While the 1938 Franchise may acknowledge the need for further
13 regulation . . . *it does not enable Santa Ana to adopt ordinances that*
14 *compromise its material terms. We cannot read the 1938 Franchise*
15 *in a way that reserves to Santa Ana the power to unilaterally alter*
*the terms of the agreement. Such an interpretation is **absurd**;*
section 8(a) cannot be applied as broadly and retrospectively as its
literal language may suggest.

16 (*Ibid.*, emphases added, citations omitted.) This reasoning applies here. San Jose, like
17 Santa Ana, cannot invoke general “reservation of rights” language to “compromise . . .
18 material terms” or to “unilaterally alter the terms of the agreement” with its employees.
19 Indeed, *Southern California Gas* correctly noted it would be “absurd” to apply such
20 language “as broadly and retrospectively as its literal language may suggest.” That is
21 especially true given the text and legislative history of San Jose Charter 1500.

22 **2. The Charter Expressly Authorizes the City Council to** 23 **Create Pension Rights Through the SJMC**

24 The City advances an extraordinary and unsupported argument that it can walk
25 away from its pension obligations in the SJMC because they supposedly “conflict” with
26 the Charter. (E.g., MSA at 2:5-6 [“the City Council had no authority to adopt an
27 ordinance that would conflict with the Charter’s reservation of rights”].) The City cites no
28 case that only charter provisions create vested rights. To the contrary, the City’s own

1 cases confirm municipal codes are valid and enforceable sources of vested rights.
2 (*International Assn. of Firefighters v. San Diego* (1983) 34 Cal.3d 292, 302 (“IAF”)
3 [charter, ordinances, and municipal codes]; *REAOC, supra*, 52 Cal.4th at 1194
4 [ordinances].)

5 While it is generally true that ordinances cannot conflict with charter
6 provisions, no such conflict exists here. Charter Section 1500 itself authorizes and directs
7 that the City Council “*shall provide, by ordinance or ordinances, for the creation,*
8 *establishment and maintenance* of a retirement plan.” (City RJN Ex. A [Charter, italics
9 added].) And the benefits granted in the Charter are intended to be minimum benefits
10 only. Charter Section 1504(e) *expressly* authorizes the City Council to grant “greater or
11 additional” benefits: “The benefits hereinabove specified are minimum only; and the
12 Council, in its discretion, may grant greater or additional benefits.” (City RJN Ex. A.)

13 The City does not explain how ordinances enacted pursuant to Charter sections
14 1500 and 1504(e) conflict with the Charter, nor does it explain the nature of such a
15 conflict. To the extent the City argues that any vested obligation originating in the SJMC
16 abrogates its “reservation of rights”—that argument holds no water. (See Part IV.B.1,
17 *supra*.)

18 *San Diego Firefighters v. Board of Administration* (2012) 206 Cal.App.4th 594
19 (cited at MSA 18) confirms why the SJMC is a valid source of vested rights. There, the
20 court found a benefit granted by *resolution* was insufficient to create a vested right
21 because the San Diego charter required pension benefits be granted through *ordinances*.
22 (*Id.* at 607-608 [“the city charter sets forth a specific method for creating benefits . . .
23 which was not followed”].) This was a significant distinction because resolutions are
24 temporary “expression of the opinion of the legislative body,” but “an ordinance
25 prescribes a *permanent* rule of conduct or of government.” (*Id.*, italics added.) Likewise,
26 Charter Sections 1500 and 1504 authorize pension benefits granted through ordinances
27 and the SJMC are codified ordinances. There is no conflict between the Charter and the
28 SJMC.

1 **V. SUMMARY ADJUDICATION SHOULD BE DENIED BECAUSE THE CITY FAILED TO**
2 **ESTABLISH THAT MEASURE B SECTIONS 1506-A, 1511-A, AND 1512-A DO NOT**
3 **VIOLATE POLICE OFFICERS’ VESTED RIGHTS AS A MATTER OF LAW**

4 The summary adjudication burden did not shift because, as shown below, the
5 City’s own evidence—e.g., the Charter and SJMC—defeats its motion. In any event, this
6 section satisfies *REAOC*’s requirements of “identifying a contract” within the relevant
7 statutes and “defining the contours of any contractual obligation.” (52 Cal.4th at 1188.)
8 That is, unlike the plaintiffs in *IAF*—or for that matter, *Sappington v. Orange County*
9 *Unif. Schl. Dist.* (2004) 119 Cal.App.4th 949, and the City’s other cited cases—Police
10 Officers here cite specific Charter and SJMC sections specifically creating cognizable,
11 vested contractual rights. That distinction confirms that the City is not entitled to
12 summary adjudication because what Measure B attempts to do (unilateral increase to
13 contributions to pay for UAAL, abolishing the SRBR, and reducing retiree healthcare
14 benefits) is unlawful.¹⁵

14 **A. Section 1506-A Is Invalid Because the SJMC Created a Vested Right**
15 **to City Payment of UAAL for Service Retirement That Cannot Be**
16 **Legislated Away**

17 Section 1506-A mandates an employee salary reduction, effective June 23,
18 2013, of 4% per year with a 16% maximum deduction to pay for up to half of “any”
19 UAAL. (City RJN Ex. B.) But the undisputed facts show Police Officers have a vested
20 right to City payment of UAAL in the SJMC and that they have only paid that UAAL
21 generated by increased benefits. Further, only the Retirement Board—and not the City—
22 has authority to increase pension contributions, and even then for actuarial necessity.

22 **1. The SJMC and Charter Established This Vested Right; It**
23 **is Confirmed by Their Legislative History**

24 The City is *expressly* responsible for all UAAL under the SJMC for the general
25 retirement plan.¹⁶ *First*, consistent with the Charter, SJMC 3.36.1520 (“Current service

26 ¹⁵ The *IAF* court rejected plaintiffs’ argument that a particular municipal code section
27 gave them a vested right because that section contemplated that multiple factors could
28 affect the claimed right (to a fixed contribution rate). The City here cites no analogous
provision allowing it to unilaterally modify the three rights at issue here.

¹⁶ This argument does not apply to UAAL for retiree healthcare. (See Part V.C.)

1 contributions”) requires an actuarially sound system (i.e., a fully funded system), but it
2 specifically exempts Police Officers from paying UAAL:

3 The *retirement board* shall determine and fix, and from time to time
4 it may change, the amount of monthly or biweekly contributions for
5 *current service* which must be required *of the City of San José and*
6 *of members* of this plan *to make and keep this plan and the*
7 *retirement system at all times actuarially sound.* For the purpose of
8 this section, ... "contributions for current service" for members
9 employed in the police department shall mean the sum of the
10 normal costs for each actively employed member in the police
11 department as determined under the entry age normal actuarial cost
12 method, divided by the aggregate current compensation of such
13 members. *Rates for current service shall not include any amount*
14 *required to make up any deficit resulting from the fact that previous*
15 *rates of contribution made by the city and members were*
16 *inadequate to fund benefits attributable to service rendered by such*
17 *members prior to the date of any change of rates, and shall not*
18 *include any amount required for payment of medical or dental*
19 *insurance benefits.*

20 (SJMC 3.36.1520.A [City RJN Ex. D, emphases added].) Requiring the City maintain an
21 actuarially sound system while simultaneously exempting Police Officers from paying
22 “any deficit” in the retirement system means the City bound itself to pay for any UAAL.
23 Moreover, only the retirement board, and *not* the City, is authorized to require increases in
24 pension contributions. (*Id.*)

25 *Second*, SJMC 3.36.1550 (“Contributions for prior service benefits”) makes
26 that obligation even more explicit:

27 [E]xcept as provided in Section 3.36.1555, *the City of San José*
28 *shall contribute* to the retirement fund, monthly, *all such amounts*
as the retirement board shall find must be contributed to the fund, *to*
make this plan actuarially sound to the extent that such amounts
are not provided by member and city's current service contributions
as provided for in Section 3.36.1520.

(SJMC 3.36.1550.D [City RJN Ex. D, emphases added].)¹⁷ This language is mandatory
and expressly binds the City to pay “all such amounts” necessary to “make this plan
actuarially sound.” It contemplates no exception or limitation on the City’s obligation to
pay all UAAL.

¹⁷ SJMC 3.36.1550.C contains a substantially similar provision making the City
responsible for UAAL generated by the plan predating the 1961 P&F Retirement Plan.
(City RJN Ex. D.)

1 While Section 3.36.1555 does contemplate that employees pay “prior service”
2 contributions that is *only* in exchange for new “increased benefits”—consistent with the
3 law on vested pension rights—and even then only in an amount that makes up for past
4 contributions that *employees* would have paid had that benefit existed previously. (SJMC
5 3.36.1555.A-B [City RJN Ex. D, emphases added].) Moreover, Section 3.36.1555 itself
6 only applies to three specifically identified increases to the formula used to calculate
7 retirement benefits—i.e., those increases granted in SJMC 3.36.805, 3.36.1020.B.3, and
8 Ordinance No. 27721. (*Id.*; SJPOA RJN Ex. 3 [Ordinance No. 27721]) But, once
9 employees paid these “prior service” contributions, the City is required to pay any
10 remaining UAAL to make the system actuarially sound. (See SJMC 3.36.1550.)

11 Municipal ordinances can properly “manifest[] an express intent to cover past
12 [UAAL]” and give rise to a vested right. (*Assoc. of Blue Collar Workers v. Wills* (1986)
13 187 Cal.App.3d 780, 789.) *Wills* found that city ordinances substantially similar to SJMC
14 3.36.1520 and 3.36.1550 created such rights (*id.* at p. 792 [“the nature of the vested right
15 has been identified”]), and held that “[t]he right vested in the employees is their
16 reasonable expectation that the city would meet its statutory obligations to finance the
17 unfunded liability for past accumulated debt.” (*Ibid.* [“The employees here lost a right to
18 have the city finance the [UAAL]”; see also fn.2 [Fresno Municipal Code sections 2-1821
19 and 2-1822].) It thus rejected Fresno’s attempt to force employees to pay for UAAL
20 through unilateral payroll deductions because the municipal code expressly made the city
21 responsible for UAAL. (*Id.* at pp. 789, 794 [“Because the pension cases treat the
22 municipal code as a contract between the parties, a violation of the code necessarily
23 becomes a violation of the contracts clause”].)

24 **Third**, SJMC 3.36.1520, 3.36.1550, and 3.36.1555 are fully consistent with the
25 Charter. Charter Section 1504(e) expressly authorizes the City Council to “grant greater
26 or additional benefits” beyond those in the Charter. (City RJN Ex. A.) And Charter
27 Sections 1504(b)-(c) require the retirement system (and any new benefits) be actuarially
28 sound. (*Id.*) Read together these two Charter provisions authorize the City to grant

1 benefits and require it to make sure such benefits are fully funded. SJMC 3.36.1520,
2 3.36.1550, and 3.36.1555 implement these requirements. Thus, while the Charter itself is
3 silent on the allocation of UAAL, it *authorizes* the allocation of all UAAL to the City in
4 the SJMC.

5 ***Fourth***, none of these SJMC sections expressly say the City reserves its rights
6 to revoke its payment of all UAAL as to current employees, let alone without granting
7 employees additional benefits.

8 ***Fifth***, these express provisions are buttressed by the legislative history of the
9 pension system and the City’s own understanding of its obligation to pay all UAAL. The
10 requirement the SJMC now imposes has existed in various forms since at least 1946; that
11 is, the pension system not only ***currently*** requires the City pay all UAAL but has done so
12 ***historically***.

13 **The 1946 Charter amendments expressly allocated UAAL to the City,**
14 much like the current SJMC. These amendments added Charter Section 78a, sub. (2)(k),
15 which required an actuarially sound system and expressly stated that “*Any actuarial*
16 *deficiency* in the fund *shall* be made up over a period of years by gifts, waivers, donations,
17 earnings and contributions *by the City.*” (SJPOA RJN Ex. 1 [1946 Charter Amendment].)

18 **The 1961 Charter amendments retained this requirement, but permitted**
19 **the City to require contributions from members *only* for UAAL generated by**
20 **increased benefits.** These amendments left Charter Section 78-A untouched, but added
21 Section 78b which, as outlined above, authorized the Council to grant new benefits
22 beyond those in the Charter. Section 78b, subd. (2) required that such new benefits or
23 plans be actuarially sound, and it gave the Council discretion to decide how UAAL for
24 such *new* benefits was to be paid: “the Council . . . may in its discretion provide for the
25 payment by the City of San Jose of all such amounts as must be contributed to the
26 retirement fund on account of such prior service benefits to render the plan and fund
27 actuarially sound . . . , or may require contributions for such purposes by both City and
28 members provided that contributions required of members . . . shall never exceed \$3 for

1 each \$8 contributed . . . by the City.” (SJPOA RJN Ex. 4 [1961 Charter Amendments].)
2 Thus, employees paid UAAL *only* in exchange for increased benefits that are applied to
3 prior service.

4 **The 1965 Charter also required an actuarially sound system, but was**
5 **silent on UAAL allocation, thereby authorizing the City Council to allocate UAAL**
6 **by ordinance.** The 1965 Charter added Section 1504(c)—which is still the version in
7 effect today. (City RJN Exs. A, G.) That Charter section required an actuarially sound
8 system, but apparently gave the Council discretion to allocate UAAL. Accordingly, from
9 1965 to 1971 the Retirement Board used an actuarial method that defined “current
10 contributions” to include UAAL generated by the P&F Retirement Plan such that
11 employees and the City paid UAAL during that time period. However, in 1971 the City
12 Council enacted a resolution declaring the Council’s intent to amend the P&F Retirement
13 Plan so that only the City paid UAAL; it also changed the actuarial method employed to
14 reduce volatility in contribution rates. (See SJPOA RJN Ex. 5 [Resolution 40129 [“the
15 new rates thereby established by the Board for all such members shall not include any
16 amount required to make up any deficit resulting from the fact that previous rates of
17 contribution thereto . . . were inadequate”]].)

18 The Council formally amended the Retirement Plan in 1979 through Ordinance
19 19690, which enacted the immediate precursors to SJMC 3.36.1520 and 3.36.1550 where
20 the City expressly bound itself to pay for all UAAL. (SJPOA RJN Ex. 6 at 2-3
21 [Ordinance 19690].) All current Police Officers were hired after Ordinance 19690 was
22 enacted in 1979 which gives rise to the vested right to City payment of UAAL asserted
23 here. (Robb Decl. ¶ 13; SJPOA RJN Ex. 6) These facts make clear that except for a brief
24 six-year period before all current Police Officers were hired, employees have had a vested
25 right to City payment of all UAAL.

26 The City gives no cognizable reason why the SJMC cannot itself create that
27 vested right. Indeed, the City understood its obligation to pay all UAAL and used it to
28 justify its allocation of all actuarial gains to itself when the P&F Retirement Plan was

1 overfunded in 1993-2004. It did so consistent with a theory that because it was required
2 to pay all UAAL it was accordingly entitled to take all gains. (AUF 11-12.) That
3 underfunding directly contributed to the present UAAL the City is now trying force
4 employees to pay. (*Id.*)¹⁸

5 **2. The City’s Scattershot Arguments Do Not Defeat Police**
6 **Officers’ Vested Right to City Payment of UAAL**

7 The City makes several unpersuasive arguments why no vested right exists. Its
8 core argument is that Police Officers “waived” this right based on SJPOA’s one-time
9 agreement to pay increased pension contribution rates in Article 5.1 of the 2010-2011
10 MOA. (MSA at 22-27.)¹⁹ But the undisputed evidence is that Police Officers did *not* pay
11 any UAAL and that their additional contributions were paid directly to their individual
12 retirement accounts. Further, the SJMC does not support the City’s argument it has
13 unilateral authority to require Police Officers to pay UAAL.

14 **a. MOA Article 5.1 Does Not Implicate Vested Rights**

15 During the negotiations for the 2010-2011 MOA that led to Article 5.1, SJPOA
16 did not waive the vested rights of its members relating to the City’s payment of UAAL.
17 In fact, the parties negotiated and their ultimate agreement was that Police Officers’
18 increased pension contributions were credited to their individual retirement accounts, not
19 to general UAAL. (Vado Decl. ¶¶ 7-11; Robb Decl. ¶¶ 16-20.)

20 Accordingly, nothing in the parties’ resulting contract stated that Police
21 Officers directly paid UAAL or that Officers waived vested rights, including the specific

22 ¹⁸ Additionally, the City is judicially estopped from arguing it is not responsible for
23 general pension UAAL for the P&F Retirement Plan based on its prior admissions in
24 various court filings. (See *Sapien* Plaintiffs’ concurrently-filed Declaration of Christopher
25 E. Platten in Opposition to Motion for Summary Adjudication, ¶¶ 3-8 & Exs. 1-6; see also
26 *Sapien* RJN Ex. 1; *M. Perez Co. v. Base Camp Condominiums Ass’n No. One* (2003) 111
27 Cal.App.4th 456, 463 [“Judicial estoppel is an equitable doctrine aimed at preventing
28 fraud on the courts. It prohibits a party from taking inconsistent positions in the same or
different judicial proceedings”; “It seems patently wrong to allow a person to abuse the
judicial process by first advocating one position, and later, if it becomes beneficial, to
assert the opposite”].)

¹⁹ Unlike some of the other unions, SJPOA did *not* agree its members would make any on-
going contributions. (See MOA Art. 5.1; SJPOA’s Objections to Gurza Decl. No. 1.)

1 rights delineated in SJMC sections 3.36.1550 and 3.36.1520, which remained in effect
2 during the period in question. Instead, Article 5.1 of the MOA merely provided that
3 Police Officers were paying “One-Time Additional Retirement Contributions” of 5.25%
4 of their pay from June 2010 through June 2011. (Gurza Exs. 29, 30 at 571 [subsequent
5 MOA deleting provision for increased contributions].) The MOA expressly stated that
6 “the amounts so contributed will be applied *to reduce the contributions that **the City***
7 *would otherwise be **required** to make for [UAAL]”* and that “the intent of this additional
8 ... contribution ... is to reduce ***the City’s required pension contribution rate.***” (*Ibid.*)
9 Such contributions undoubtedly increased the P&F Retirement Plan’s assets—and, as a
10 result, decreased UAAL. But any employee contribution has that effect, and that does not
11 mean employees are paying any UAAL.²⁰

12 Indeed, Police Officers’ contributions were *not* credited to the P&F Retirement
13 Fund’s UAAL, but rather to Police Officers’ *individual* retirement accounts. (*Id.* See
14 Article 5.1 at 552 [“These contributions shall be treated in the same manner as any other
15 employee contributions,” i.e., “on a pre-tax basis” and “subject to withdrawal, return and
16 redeposit”]; Vado Decl. ¶¶ 7-11; Robb Decl. ¶¶ 16-20; Robb Ex. F.) Had their
17 contributions directly paid for UAAL as the City claims, Police Officers would not have
18 such rights.

19 The City does not cogently explain how MOA Article 5.1 means no vested
20 rights exist. The statement in *San Diego v. Haas* (2012) 207 Cal.App.4th 472 that
21 “[v]ested rights may not be implied ... where ... they are contrary to the express terms of
22

23 ²⁰ Certain pre-MOA bargaining letters appear to adopt the City’s characterization of these
24 contributions as “an additional member contribution to prior service retirement costs.”
25 (Gurza Ex. 5 at 89-90.) But that parol evidence cannot contradict the terms of the MOA.
26 (*Casa Herrera, Inc. v. Beydown* (2004) 32 Cal.4th 336, 343 [extrinsic evidence may not be
27 relied upon to alter or add to the terms of a contract].) Regardless, those documents
28 reflect that the parties were negotiating the specific contract terms they eventually settled
on, i.e., those outlined above, which left vested rights untouched. (See *id.* at 90 fn.1
[noting SJPOA’s bargaining counsel “is providing you under separate cover with the
precise language discussed”].) It would be unreasonable to read these documents as
forfeiting decades-long vested rights. In any event, at most those letters create a factual
dispute defeating summary adjudication.

1 the parties’ contract” does not help the City. The right to City payment of UAAL is
2 express, not implied. (Part V.A.1, *supra*.) But even if implied, as noted above, the City
3 does not explain how the contract and the implied right “are contrary,” i.e., how a
4 temporary one-year carve out that preserves vested rights somehow results in a complete
5 forfeiture. There is no such conflict because the MOA and the vested right can be
6 harmonized: employees paid additional contributions to “offset” the City’s decision to pay
7 less of its required UAAL contribution, but they did not pay UAAL directly.

8 The City’s corollary argument that the union improperly bargained away
9 individual rights holds no water. (MSA at 22-24.) But even if true, that would mean that
10 Article 5.1 *itself* was invalid. It would not mean, e.g., that no vested right existed to City
11 payment of UAAL. *CTA v. Parlier Unif. Schl. Dist.* (1984) 157 Cal.App.3d 174 does not
12 so hold and is distinguishable because there the Education Code specifically prohibited
13 waiver through the collective bargaining process of the rights at issue there. (*Id.* at p. 183
14 [“Education Code section 449246 prohibits waiver”].) *Board of Administration v. Wilson*
15 (1997) 52 Cal.App.4th 1109, 1152 flatly rejected the argument that acquiescence to “past
16 legislation—which had limited scope and duration” means that a party “thereby agreed to
17 any and all future modifications.” More fundamentally, that a right is “vested” means that
18 the City cannot unilaterally change it (see *REAOC, supra*, 52 Cal.4th at 1189 fn.3), not
19 that employees acting through their union cannot temporarily suspend that right in a
20 bilateral agreement with their employers.

21 *San Diego Police Officers Assoc. v. San Diego City Employees’ Retirement*
22 *System* (9th Cir. 2009) 568 F.3d 725 also does not help the City. Plaintiffs there claimed a
23 vested right to the city’s “pickup” of a portion of police officers’ retirement contributions
24 that was purportedly created by the city charter, municipal code, and the parties’ MOA.²¹
25 The court held a prior settlement barred plaintiffs’ claims based on the charter and
26 municipal code. (*Id.* at pp. 735-736.) It further held the MOA was not a source of vested

27 _____
28 ²¹ The city’s “pick up” was *in addition* to its own employer contribution. (*Id.* at p. 730.)

1 rights because it had *expired*. (*Id.* at pp. 738-39.) These holdings do not apply here. The
2 City does not “pickup” any employee UAAL contributions because the City bound itself
3 to pay for all UAAL. There is no settlement barring this Court from examining the
4 municipal laws giving rise to that vested right, and Police Officers do not claim a vested
5 right arising from an expired MOA. More fundamentally, the *San Diego* court’s finding
6 that the “*historical* practice of negotiating the amount of pickup . . . in lieu of or in
7 conjunction with salary increases” in prior MOAs confirmed that the pickup was “a
8 compensation term, not a [vested] retirement benefit” (*id.* at p. 739) also does not apply.
9 There is no analogous “historical practice” here. By its terms Article 5.1 was a “one-
10 time” agreement.²²

11 Finally, SJPOA does *not* assert it has a vested right to a “fixed contribution
12 rate” (MSA at 24:15 [asserting plaintiffs allege “pension contribution [rates] were ‘vested’
13 and inalterable”]; *id.* at 25:3-4; *id.* at 27:19-20), but rather that its members have a vested
14 right not to pay UAAL at all and that Police Officers’ wages are set by the MOA. (See
15 FAC ¶¶ 25-26, 31-32, 45.) Accordingly, the City’s opaque argument that no vested right
16 exists because “[t]he unions treated contribution rates and wage reductions as
17 interchangeable” (MSA at 25:3-4) is flatly incorrect. The City appears to be arguing that
18 *other* unions treated employee pay and pension contribution rates as *negotiable*, but it
19 cites no evidence SJPOA specifically did so. The undisputed evidence is that SJPOA did
20 not. (Vado Decl. ¶¶ 7-11; Robb Decl. ¶¶ 16-20.) Moreover, the vested right SJPOA
21 asserts is not that its members are entitled to fixed pension contribution rates, but rather
22 that the City pays all UAAL. Further, the City’s argument that “it would be irrational to
23 construe the Charter as permitting compensation reductions, but precluding employee
24 contributions toward [UAAL]” (*id.* at 26:2-3) holds no water because the City has no

25
26 ²² The City further asserts that “the unions agreed to pay for [UAAL] through both
27 additional contribution rates and lower wages” (MSA at 25:17-18, citing Gurza Dec. ¶¶
28 30-31), but nothing in the Gurza Declaration or Exhibits supports that assertion as to
SJPOA. The 2011-2012 MOA reflects the parties’ agreement to a 10% pay reduction, but
says nothing about it being used to pay the City’s UAAL contribution. (See Gurza Ex. 30
at 571.) The same is true of the 2011-2013 MOA. (See Gurza Ex. 31 at 596.)

1 authority to impose unilaterally either one. Duly-enacted SJMC 3.36.1520 and 3.36.1550
2 expressly allocate UAAL to the City and are consistent with Charter Sections 1500 and
3 1504. And the MOA sets Police Officer salaries, which may not be reduced even by color
4 of Charter authority. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15
5 Cal.3d 328 [collective bargaining agreements and salary terms are binding and
6 enforceable on charter city]; *Olson, supra*, 27 Cal.3d at p. 538.) As outlined below, only
7 the Retirement Board, and not the City, may *unilaterally* require increased contributions.

8 **3. The SJMC Does Not Authorize the City to Force Police**
9 **Officers to Pay for UAAL; Only the Retirement Board and**
10 **Not the City Council May Raise Police Officers'**
11 **Contribution Rates**

12 The SJMC allows only the Retirement Board to increase employee
13 contribution rates, and even then only to maintain an actuarially sound system. (SJMC
14 3.36.1520; SJMC 3.36.1550; see also SJMC 3.36.510 [“The retirement board shall have
15 the exclusive control of the administration and investment of the retirement fund.”].) The
16 City has no authority allowing it to raise employee contributions unilaterally. (See *id.*) In
17 fact, Police Officers’ contributions have changed depending on revisions to actuarial
18 assumptions and plan performance. (Robb Decl. ¶¶ 10-12; see, e.g., Robb Ex. F; see also
19 SJPOA Exs. 11-15 [actuarial letters reflecting changes to member contribution rate based
20 on actuarial reasons].)

21 For that reason *IAF* and *Pasadena Police Officers Assn. v. City of Pasadena*
22 (1983) 147 Cal.App.3d 695 do not help the City. Those cases found lawful increases in
23 employee contributions rates because the very ordinances at issue allowed such increases.
24 (*IAF, supra*, 34 Cal.3d at p. 300; *Pasadena POA, supra*, 147 Cal.App.3d at p. 711 [“The
25 employees' contribution was not absolutely fixed but was dependent upon actuarial tables
26 and assumptions, which the board was authorized by the charter to determine and revise
27 from time to time”].) These cases would apply here, e.g., if the Retirement Board
28 increased employee contributions for actuarial necessity. Such an increase would be fully
consistent with the SJMC. But *IAF* and *Pasadena POA* do not authorize what Section

1 1506-A tries to do because the Charter and the SJMC do not allow the City to change
2 unilaterally contribution rates to pay for UAAL. The City cites no law or facts supporting
3 its claim the Council has authority to direct the Retirement Board to increase employee
4 contributions untied to actuarial necessity.

5 The City cites numerous SJMC sections purportedly allowing it to saddle
6 Police Officers with UAAL. First, it relies on SJMC 3.36.1525, of which sub. (B)
7 provides that “members . . . shall make such additional retirement contributions for fiscal
8 years 2010-2011 as may be required by executed agreement with a recognized bargaining
9 unit or binding order of arbitration.” But that section was added to validate what the
10 parties mutually agreed to in the MOA outlined above, which was a bilateral agreement.²³
11 More fundamentally, neither the MOA nor SJMC 3.36.1525 expressly state that
12 employees directly pay any UAAL.

13 The City’s extended argument (MSA at 26-27) that past ordinances enacted
14 under SJMC 3.36.1555 and 3.36.1525 that required employee contributions for UAAL
15 somehow demonstrate no vested right exists fails for the same reasons outlined above.
16 (Part V.A.1.) More fundamentally, payment of UAAL *in exchange* for increased benefits
17 (i.e., a “new advantage”) does not violate the Contracts Clause or implicate vested rights.

18 **4. Alternatively, Measure B’s mandate that it applies only**
19 **prospectively would only allow employee payment of**
20 **UAAL accrued *after* it was enacted.**

21 By its terms Measure B applies only prospectively. (Section 1502-A [City
22 RJN Ex. B] [“This Act is not intended to deprive any current or former employees of
23 benefits earned and accrued for prior service as of the time of this Act’s effective date;
24 rather, the Act is intended to preserve earned benefits as of the effective date of the
25 Act.”].) That means that even *if* the City is able to legislate away Police Officers’ right
26 not to pay UAAL, such employees could not be saddled with any *existing* UAAL incurred

27 ²³ By its terms, SJMC 3.36.1525.A—a parallel section that does not limit such increases to
28 2010-2011—does not apply to Police Officers. Police Officers are subject to interest
arbitration. (See Robb Decl. ¶ 6; Vado Decl. ¶¶ 6.)

1 by the retirement system. Measure B on its face, however, requires Police Officers to pay
2 for *existing* UAAL accrued when the SJMC mandated the City pay for it. (See City RJN
3 Ex. B [Section 1506-A].)

4 But under the law, Measure B can only make Police Officers pay for UAAL
5 incurred prospectively—i.e., from the date Measure B was enacted. (E.g., *Wills, supra*,
6 187 Cal.App.3d at p. 793-794; *Healdsburg Police Officers Association v. City of*
7 *Healdsburg* (1976) 57 Cal. App. 3d 444, 454-455 [“where the new [law] failed to provide
8 for retroactivity and where [plaintiffs] had previously acquired valuable procedural and
9 substantive rights under the former [law],” revisions did not divest police officers of
10 vested rights], overruled on other grounds by *Palma v. U.S. Indus. Fasteners, Inc.* (1984)
11 36 Cal.3d 171, 182 fn.9.)

12 **B. Section 1511-A Is Invalid Because Police Officers Have a Vested**
13 **Right to the SRBR**

14 **1. Under the P&F Retirement Plan SRBR distributions are**
15 **not discretionary.**

16 The undisputed evidence shows Police Officers have a vested right to the
17 SRBR. SJMC 3.36.580 created Police Officers’ vested right, which provides retirees a
18 supplemental check when certain investment goals are met. Charter section 1500 and
19 1504 authorized that SJMC section.

20 There is no time limitation or express reservation of rights to modify the SRBR
21 in the SJMC. (SJMC 3.36.580, subd. E.1 and B.2-B.3 [City RJN Ex. D].) It applies only
22 to members who were receiving retirement benefits as of June 2001. (*Id.* at subd. D.3.)
23 Section 3.36.580 establishes a funding mechanism (*id.* at subd. B), sets the only
24 conditions for distribution or transfer of SRBR funds (*id.* at subd. C-D) and mandates that
25 the *Retirement Board* “shall” distribute funds to eligible retirees on a yearly basis when
26 those investment goals are met (*id.*, subd. D.2 [“the *board* shall make an annual
27 distribution from the annual SRBR”] [italics added].) Specifically, SRBR benefits are
28 funded from earnings from the SRBR fund and “excess earnings” from the P&F
Retirement Plan. (SJMC 3.36.580.B.) The SJMC unequivocally creates a vested right to

1 the SRBR. (SJMC 3.36.580; see *Teachers Retirement Board v. Genest* (2007) 154
2 Cal.App.4th 1012, 1029 [statute created vested right to continuous annual transfer from
3 general fund to supplemental fund].) And these SJMC provisions are consistent with the
4 authority granted in Charter Sections 1500 and 1504(e). Despite this vested right,
5 Measure B unilaterally abolished the SRBR. (City RJN Ex. B [Section 1511-A]; Gurza
6 Ex. 55 [Ordinance amending Municipal Code effective March 1, 2013].)²⁴

7 The City argues there is no vested right because the City Council maintained
8 discretion over whether to grant SRBR distributions. (MSA at 33, 36-38.) That is
9 incorrect. Unlike the Federated Retirement Plan, the City Council has *no discretion* under
10 SJMC 3.36.580 of the P&F Retirement Plan *whether* SRBR funds are distributed. The
11 P&F Retirement Plan has no analogue to SJMC 3.28.340.E of the Federated Plan which
12 gives the Council such discretion. Further, the SJMC makes distribution of SRBR funds
13 mandatory. (See SJMC 3.36.580, subd. D.2 [“the board *shall* make an annual distribution
14 from the annual SRBR”] [emphases added].)²⁵

15 In fact, the *only* discretion the City Council has under SJMC 3.36.580 is its
16 approval of the Retirement Board’s proposed methodology for SRBR distributions, but
17 even then the SJMC directs that it is *the Board* and not the City that distributes SRBR
18 funds: “Upon approval of the methodology by the city council, the board shall make
19 distributions in accordance with such methodology.” (See *id.*, subd. D.5.) The City
20 already approved that methodology in 2002. (City RJN Ex. N [Resolution 70822].) The
21 City Council’s limited power merely to approve the Board’s distribution “methodology”

22
23 ²⁴ The City cited *Genest* to imply that only the express funding language in that case
24 creates a vested right. (MSA at 36.) But *Genest* does not so hold and, in fact, there was
25 no dispute there that the statute at issue created a vested right. (154 Cal.App.4th at 1026
[the government “does not dispute the trial court's determination that a vested contractual
right exists”].) Instead, the reasoning of *Genest* confirms that courts enforce express
vested rights to supplemental payments such as that in SJMC 3.36.580.

26 ²⁵ Further, that SRBR distributions are made when certain investment goals are met does
27 not defeat the existence of a vested right because these are merely conditions precedent
28 established in the SJMC are satisfied, the Retirement Board has no discretion not to
distribute SRBR funds. (See *ibid.*)

1 does *not* mean it has the greater power to decide *whether* to distribute funds, let alone
2 establish that SRBR distributions distributed by the Retirement Board were somehow
3 accomplished through an exercise of City discretion.²⁶

4 The City’s amendments to SJMC 3.36.580, subd. D.2, such that there were no
5 SRBR distributions in 2010-2013, is not evidence the SRBR did not create vested rights.
6 Rather, it is merely evidence the City violated current retirees’ vested rights. (See *CTA*,
7 *supra*, 155 Cal.App.3d at p. 506 [“This is a circular argument; it uses evidence of a
8 violation of a contract to show there was no contract”].) That SJPOA and retirees did not
9 challenge the City withholding of SRBR benefits does not mean they acquiesced in the
10 City’s outright abolition of the SRBR. (See *Wilson, supra*, 52 Cal.App.4th at p. 1152.)
11 As such Measure B cannot “recognize[] and formalize[]” (MSA at 39:19-20)—i.e., make
12 lawful—the City’s unlawful decision to withhold SRBR distributions because it had no
13 authority to withhold them in the first place.

14 The City additionally argues that “[ha]d the City Council intended to create a
15 right to perpetual SRBR payments ‘it surely would have said so.’” (MSA at 36:1-2,
16 quoting *Ventura County Retired Employees Assn. v. County of Ventura* (1991) 228
17 Cal.App.3d 1594, 1598.) But the undisputed evidence is that the SJMC did create an
18 established funding mechanism and directed that the Board “shall” distribute available
19 funds; and it placed no time limitations on either. Moreover, the P&F Retirement Plan
20 does not grant the City Council the same authority over whether to grant SRBR benefits
21 as it has in the Federated Plan. That is, unlike *Ventura County*, there is no “discretionary
22 language” whereby the Council “may authorize payment of all, or such portion as it may
23 elect” of the SRBR. (228 Cal.App.3d at 1598-1599.) Rather, SJMC 3.36.580, subd. D.2
24 & D.5 mandate that the administrative body—the Retirement Board—“shall” make the
25 SRBR distributions of available funds.

26 _____
27 ²⁶ SJMC 3.36.580, subd. D.6’s language referencing “termination of this plan” does not
28 prevent vested rights from arising because that clause is directed at limiting the
Retirement Board’s authority to distribute funds; it is *not* authorization for the City
Council to abolish the SRBR.

1 **2. The City’s policy arguments do not support its elimination**
2 **of Police Officers’ vested rights to the SRBR.**

3 The City’s policy argument that it could abolish the SRBR because it requires
4 distributions when the retirement system has UAAL has no support. At most, the City’s
5 reasoning may have justified amending the SRBR to limit distributions to such situations,
6 but it does not allow the City to abolish the SRBR, let alone that Police Officers had no
7 vested rights in that benefit.

8 Rather than being an “unintended consequence” or “anomaly” (MSA at 38:11,
9 39:3), the City itself enacted the SRBR in the manner the City now objects to, Police
10 Officers labored under that pension statute, and the courts do not step in to rewrite such
11 statutes. (Cf. *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 475.) If the City
12 wanted to limit SRBR distributions to years when the entire retirement system had no
13 UAAL it could have done so; the fact that it did not means the City did not require the
14 existence of no UAAL before retirees’ were entitled to SRBR distributions. (*Bellus*,
15 *supra*, 69 Cal.2d at p. 352 [“It obviously would be unjust to make the payment of
16 pensions dependent upon the solvency of a particular fund, thereby depriving employees
17 of the benefits of the system, *unless we are compelled to do so by a clear, positive*
18 *command in the act or ordinance*”] [italics original].)

19 The City relies heavily on *Allen, Lyon, and Walsh* (cited at MSA 39-40)²⁷, but
20 those cases merely held that under the Contracts Clause a party can lawfully be limited to
21 its reasonable contractual expectations—which do not include unintended windfalls.
22 Those cases rejected pensioners’ arguments they were entitled to a pension calculated on
23 substantial increases in salary paid to subsequent employees even though they themselves
24 never earned those higher salaries or paid into the retirement system with such salaries.

25 In *Allen*, our Supreme Court held certain retired legislators did not have a
26 reasonable expectation to a pension calculated on current legislators’ salaries, in part,

27 _____
28 ²⁷ Citing *Allen v. Board of Administration* (1983) 34 Cal.3d 114; *Lyon, supra* 271
Cal.App.2d 774; *Walsh, supra* 4 Cal.App.4th 682.

1 because doing so “would afford them pensions dwarfing their relatively modest
2 contributions.” (34 Cal.3d at 125.) Relying on *Lyon*, the *Allen* court reasoned that the
3 repealed statutory provisions allowing the higher benefit operated functionally as cost of
4 living adjustments. (*Id.* at 121-124.) When the retirees were in state service, they earned
5 \$500 monthly salaries; those salaries were increased to \$16,000 after the employees left
6 the Legislature, but those salary increases also expressly did not apply to calculate prior
7 Legislators’ pensions. *Allen* and *Lyon* thus held the retirees had no reasonable expectation
8 to pensions based on a \$16,000 salary, especially because a separate cost-of-living statute
9 protected their reasonable expectations: the repealed right “was now being met with a
10 *substitute formula*, which tied the benefit amount to cost indices rather than current
11 salaries.” (34 Cal.3d 122, 124-125; 271 Cal.App.2d at 785.) *Walsh* was decided
12 similarly. (4 Cal.App.4th at pp. 688, 703-704 [rejecting argument pension statutes
13 “entitled [Walsh] to immediate retirement with minimal service and without regard to age
14 or disability” at windfall rates].)

15 These cases do not help the City for at least two reasons. First, the City offered
16 no evidence that the SRBR results in a “windfall” for any employee. The SRBR was
17 initially funded directly from the P&F Retirement Plan into which both retirees and
18 current Police Officers’ paid. And the City itself enacted and approved the SRBR plan in
19 its current form—as opposed to allowing such distributions only when the entire
20 retirement plan had no UAAL. (See SJMC 3.36.580.) On these facts, Police Officers’
21 expectation the SRBR would be in place when they retired is not a “windfall” nor is it an
22 unreasonable contract expectation as a matter of law.

23 More importantly, *Allen*, *Lyon*, and *Walsh* might justify the City’s modification
24 of the SRBR to allow distributions only when there is no retirement UAAL. But these
25 cases simply do not justify the City’s elimination of the SRBR in its entirety. (*Allen*,
26 *supra*, 34 Cal.3d at p. 120 [Contracts Clause does “not permit[] a construction which
27 permits contract repudiation or destruction” even though it allows “restrict[ing] a party to
28 the gains reasonably to be expected from the contract”]; *Walsh*, *supra*, 4 Cal.App.4th at p.

1 702 [Legislature “did not eliminate Walsh’s retirement benefits; rather it confined his
2 benefits to those consistent with” what he would have been eligible for in the first place];
3 see also *Kern, supra*, 29 Cal.2d at p. 853 [“an employee’s pension rights may [not] be
4 entirely destroyed”].)

5 **C. Section 1512-A Is Invalid Because Officers Have MOA-Based Rights**
6 **Capping Payment of Retiree Healthcare UAAL, and Also Have a**
7 **Vested Right to City Payment of the Premium for the “Lowest Cost”**
8 **Retirement Healthcare Plan Available to Active Police Officers**

9 The City seeks summary adjudication that Police Officers have no vested right
10 to City payment of all UAAL for retiree healthcare. (See MSA 27-28.) But that is *not*
11 SJPOA’s claim and “[s]ummary judgment cannot be granted on a ground not raised by the
12 pleadings.” (*Bostrom v. San Bernardino* (1995) 35 Cal.App.4th 1654, 1663; *Laabs v. City*
13 *of Victorville* (2008) 163 Cal.App.4th 1242, 1258 [“[i]t is the allegations in the complaint
14 to which the summary judgment motion must respond”].)²⁸ For that reason alone, the City
15 is not entitled to summary adjudication on Section 1512-A.

16 But even if the Court reaches the merits of the City’s argument, it should still
17 deny summary adjudication. The FAC alleges Section 1512-A violates employees’
18 *contractual caps* on retiree healthcare contributions *and* employees’ *vested right* to City
19 payment of the premium for the “lowest cost” retirement health care plan available to
20 active Police Officers—two separate grounds not encompassed by the City’s motion.

21 **1. The MOA Caps Contributions for Retiree Healthcare**

22 SJPOA pled Section 1512-A was invalid because it violated officers’
23 *contractual rights* under the MOA expressly capping contributions for retiree healthcare.
24 (See FAC ¶¶ 35-36, 56 [Measure B section 1512-A violates MOA cap on contributions
25 for retiree healthcare and contractual salaries], 97-100; Gurza Exs. 29 [at art. 50.1] and
26 41.) Those MOA-based rights are protected by the Contracts Clause. (*Olson, supra*, 27
28 Cal.3d at p. 538 [collective bargaining agreements protected by contracts clause].)

27 _____
28 ²⁸ SJPOA does not dispute its members already pay some UAAL for retiree healthcare
(E.g., Gurza Exs. 29 [at art. 50.1] and 41), but that does not make Section 1512-A lawful.

1 Specifically, the MOA creates several contractual rights. Contributions for
2 retiree healthcare benefits are made by the City and Police Officers on a 1:1 ratio. (Gurza
3 Exs. 29 [at art. 50.1] and 41.) More importantly, the MOA expressly *caps* any increase in
4 contribution rates for Police Officers at 1.25% per year. (*Id.* at art. 50.3 [“member cash
5 contribution rate shall not have an incremental increase of more than 1.25% of
6 pensionable pay in each fiscal year”].) The MOA further provides that employees shall
7 *not* pay more than 10% of their pensionable salary to fund retiree healthcare. (*Id.* at art.
8 50.4) Currently, SJPOA members already pay 7.90% of their pensionable pay toward
9 retiree healthcare costs. (SJPOA RJN Ex. 29 [P&F Retirement Board Resolution No.
10 3761.]

11 Section 1512-A mandates employees “contribute a minimum of 50% of the
12 cost of retiree healthcare, including both normal costs and unfunded liabilities.” (City
13 RJN Ex. B). Currently, each active Police Officer pays 7.90% (and starting in July 2013,
14 9.11%) of his or her pay toward retiree medical care. (SJPOA RJN Exs. 29, 30 [P&F
15 Retirement Board Resolution Nos. 3761, 3800.]

16 If Measure B Section 1512-A is applied to Police Officers, their contributions
17 can exceed the yearly and overall contractual caps in the MOA, and Police Officers would
18 not be able to invoke the meet and confer provisions of the MOA the parties negotiated to
19 determine how to pay for any contributions above 10%. But the MOA’s provisions are
20 fully binding on the City, and its unilateral breach of them violates the Contracts Clause.
21 (*Glendale, supra*, 15 Cal.3d 328; *Olson, supra*, 27 Cal.3d at p. 538.)

22 Citing no evidence, the City asserts that SJPOA’s MOA “did not foreclose
23 future increases above the 10% cap.” (MSA at 31.) That is incorrect. MOA art. 50.4
24 provides: “Nothing in this Article shall be construed to obligate Plan members to pay
25 more than 10% of pensionable pay or the City to pay more than 11% of pensionable pay
26 to fund retiree healthcare.” (Gurza Exs. 29 [at art. 50.1] and 41.) Moreover, nothing
27 authorizes the City Council or voters to unilaterally breach that cap, especially
28 considering only the Retirement Board is authorized to increase contribution rates for

1 retiree healthcare and even then only based on actuarial necessity. (*Id.*; SJMC 3.36.575
2 [“Contribution rates . . . shall be established by the board as determined by the board’s
3 actuary and shall be borne by the city and members of the plan”].)

4 **2. Upon Retirement, Police Officers Have a Vested Right to**
5 **Payment for the “Lowest Cost” Healthcare Plan available**
6 **to active Police Officers**

7 The FAC also pleads an implied vested right upon retirement to payment of the
8 premium for the “lowest cost” retirement health care plan then available to active Police
9 Officers. (FAC ¶¶ 57 [“Measure B detrimentally re-defines ‘lowest cost plan’ to mean
10 ‘the medical plan which has the lowest monthly premium available to *any* active
11 employee in *either* the Police and Fire Department or Federated City Employees’
12 Retirement Plan,” meaning “the lowest cost plan *City-wide*”] [italics added]; *id.* ¶¶ 72-77
13 [Contracts Clause cause of action incorporating prior allegations].) To the extent the
14 Court finds these facts are insufficiently pled in the FAC, SJPOA respectfully asks for
15 leave to amend to plead these facts. (See *Bostrom, supra*, 35 Cal.App.4th at p. 1663-64
16 [on summary adjudication if “it appears from the materials submitted in opposition to the
17 motion that the plaintiff could state a cause of action, the trial court should give the
18 plaintiff an opportunity to amend the complaint”; “[s]uch requests are routinely and
19 liberally granted”].)

20 In 1984, the City extended the availability of healthcare benefits to retired
21 Police Officers. (SJPOA RJN Ex. 7 [Ordinance 21686].) Those benefits were consistent
22 with the authority granted in Charter Section 1500 and 1504(e). Retired Police Officers
23 thus paid a premium “in the same amount as is currently paid by an employee of the City
24 *in the classification from which the member retired* or which the member held at the time
25 of death.” (*Id.* § 5 [former SJMC 3.36.1930] [italics added].) Retirement Handbooks
26 provided to employees in 1995 and 1997 represented that “You and your survivors will be
27 required to pay a portion of the premiums equal to the amount paid by City employees *in*
28 *the same position you held at the time of your retirement.*” (SJPOA RJN Exs. 8 and 9
[1995 and 1997 P&F Retirement Plan Handbooks, italics added].)

1 The City amended SJMC 3.36.1930 in 1998 to implement an arbitration
2 decision whereby the P&F Retirement Plan would pay the cost of healthcare premiums.
3 (SJPOA RJN Ex. 10 [Ordinance 25615].) Specifically, the P&F Retirement Plan would
4 pay the premium for the “lowest cost medical plan” which was defined as “the lowest
5 monthly premium of all eligible medical plans then in effect, determined as of the time the
6 premium is due and owing.” (*Id.* § 3 [SJMC 3.36.1930.D].) Although the SJMC was
7 ambiguous whether the premium paid was with reference to Police Officers or all City
8 employees (see *id.*), since then the P&F Retirement Plan told retired Police Officers at
9 various times they would receive “the same” healthcare benefits as active employees or
10 that it would pay “100% of the lowest priced medical insurance plan available to an active
11 police and fire employee.” (SJPOA RJN Exs. 11-15 [P&F Retirement Plan Annual
12 Financial Reports, FY 2007-11]; Salvi Decl. ¶¶ 3-5; Fehr Decl. ¶¶ 3-5; Robb Decl. ¶¶ 25-
13 26.) Indeed, the City has always tied retiree healthcare to what active employees
14 received, and the City has never offered retirees a plan not connected to what active
15 employees are actually in. (See Robb Decl. ¶¶ 22-26.) These undisputed facts give rise to
16 an implied vested right to payment of the premium for the “lowest cost” retirement health
17 care plan available to active Police Officers. (*Requa v. Regents of the Univ. of Cal.* (2012)
18 213 Cal.App.4th 213 [reversing judgment as a matter of law because retirement plan
19 booklets and publications may create implied vested right to continued retiree
20 healthcare].)

21 **VI. THE CITY IS NOT ENTITLED TO SUMMARY ADJUDICATION ON ITS FEDERAL**
22 **CROSS-CLAIMS**

23 California and federal courts apply different standards and approaches to
24 public employee vested pension rights. (See Part IV.A, *supra.*) The City waived any
25 advantage from such federal cases by failing to argue federal law is more favorable to it or
26 that the result would be different under federal law. It thus conceded the MSA should be
27 decided under California law. In any event, federal law looks to state law to determine
28 whether a protected property right exists for purposes of the federal Contracts Clause,

1 Takings, and Due Process. (*San Diego Police Officers' Ass'n, supra*, 568 F.3d at p. 737
2 [Contracts Clause: “federal courts look to state law to determine the existence of a
3 contract”]; *id.* at p. 740 [Takings: “In order to state a claim under the Takings Clause, a
4 plaintiff must first establish that he possesses a constitutionally protected property
5 interest”]; *Portman v. County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, 904 [“[t]he
6 Due Process Clause does not create substantive rights in property; the property rights are
7 defined by reference to state law”].) Accordingly, for reasons outlined above, the City is
8 not entitled to summary adjudication on its federal cross-claims.

9 **VII. CONCLUSION**

10 For all these reasons, the City’s motion should be denied in its entirety.

11
12 Dated: May 3, 2013

CARROLL, BURDICK & McDONOUGH LLP

13
14 By _____



15 Gregg McLean Adam
16 Gonzalo C. Martinez
17 Amber L. West

18 Attorneys for Plaintiff and Cross-Defendant
19 San Jose Police Officers' Association
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