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10 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SANTA CLARA**
12

13 SAN JOSE POLICE OFFICERS' ASSOCIATION
14

15 Plaintiff,

16 v.
17

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

22 Defendants.
23

24 AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS
25
26
27
28

Case No. 1-12-CV-225926 .

(and Consolidated Actions 1-12-CV-
225928, 1-12-CV-226570, 1-12-CV-
226574, and 1-12-CV-227864)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION FOR SUMMARY
ADJUDICATION OF ISSUES**

Date: June 7, 2013

Time: 9:00 a.m.

Dept: 2

Judge: Hon. Patricia M. Lucas

Trial Date: July 22, 2013

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INTRODUCTION

1
2 In their complaints plaintiffs allege that Measure B, approved by the voters in June 2012,
3 violates the California Constitution Art. 1, § 9 which prohibits impairment of contract. Under
4 California law public employees earn the right to retirement benefits both pension and medical and
5 the right to earn these benefits becomes a vested contractual right at the commencement of the
6 public employment. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855; *Allen v. City of Long*
7 *Beach* (1955) 45 Cal.2d 128, 131, 133; *Thorning v. Hollister School District* (1992) 11 Cal.App.4th
8 1598, 1606-1607.) Plaintiffs seek injunctive and mandamus relief to prevent implementation of the
9 unconstitutional provisions.

10 The City now seeks a summary adjudication of limited issues relating primarily to the claims of
11 impairment of contract.

12 This motion should be denied. First because Code of Civil Procedure Section 437c does not
13 allow piece-meal summary adjudication of issues; second, because defendant's moving papers fail
14 to establish that the City is entitled to relief as a matter of law. To the contrary, the City Charter
15 Sections 1501¹ and 1503² do not give the City unfettered authority to make unilateral changes to its
16 pension plans. These provisions provide that changes may be made and new plans may be adopted.
17 But these powers do not vitiate the long line of cases which hold that the right to a public pension
18 vests upon commencement of employment and that changes creating a disadvantage must be
19 compensated by a comparable advantage. Therefore the premise of the City's motion is erroneous.

ARGUMENT

20
21 The salient question presented is: Prior to Measure B, did the City give its employees
22 deferred compensation in the form of a reasonable pension in exchange for their labor which the
23 employees could rely on, provided they met other conditions; or did the City offer its employees a

24
25 ¹ "Subject to other provisions of this Article, the Council may at any time, or from time to time, amend or otherwise
26 change any retirement plan or plans or adopt or establish a new or different plan or plans for all or any officers or
employees; provided, however the Council shall not establish any new or different plan after November 3, 2010 that is
not actuarially sound."

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employees; provided, however the Council shall not establish any new or different plan after November 3, 2010 that is
not actuarially sound."

1 mere expectancy which might or might not be available at the conclusion of their career depending
2 solely on the largess of the City? Logic points to the former; the terms of the City's two pensions
3 plans support the former; and the law confirms that the City employees earn a vested right to a
4 reasonable pension upon commencement of their employment.

5 **I Defendant's Motion Is Not Authorized By Code of Civil Procedure Section 437c.**

6 Section 437c(f)(1) provides as follows:

7 A party may move for summary adjudication as to one or more causes
8 of action within an action, one or more affirmative defenses, one or
9 more claims for damages, or one or more issues of duty, if that party
10 contends that the cause of action has no merit or that there is no
11 affirmative defense thereto, or that there is no merit to an affirmative
12 defense as to any cause of action, or both, or that there is no merit to a
13 claim for damages, as specified in Section 3294 of the Civil Code, or
14 that one or more defendants either owed or did not owe a duty to the
15 plaintiff or plaintiffs. *A motion for summary adjudication shall be
16 granted only if it completely disposes of a cause of action, an
17 affirmative defense, a claim for damages, or an issue of duty.*
18 (Emphasis added)

19 The complaints in Sapien, et al., Harris, et al., and Mukhar, et al. each allege that the changes
20 to both the pension plans³ wrought by Measure B impair vested contractual rights of employees and
21 retirees. The breached duty underlying these claims is the duty of the City to not impair its
22 employees vested contractual rights. The complaints allege the following similar or common facts
23 all arising *from the enactment of Measure B* in support of that theory:

- 24 1. Revised definition of disability retirement entitlement and method for determination
25 of disability;
- 26 2. Revised cost of living adjustments now subject to council approbation;
- 27 3. Increased employee contributions for unfunded liabilities, previously the sole liability
28 of the City;
4. Expanded employee obligations for unfunded liabilities for retiree health benefits;
5. Eliminated supplemental retirement benefits.

These factual allegations establish distinct common factual issues, but not separate causes of

³ The 1961 Police and Fire Department Retirement Plan and the 1975 Federated City Employees Retirement Plan.

1 action or separate issues of duty, within each of plaintiffs' complaints.⁴

2 The City's motion seeks summary adjudication on three of these factual issues set forth in
3 plaintiffs' complaints.⁵ It does not address, nor eliminate all of the factual allegations supporting the
4 causes of action, nor does it eliminate an issue of duty.

5 **A The City's Motion For Summary Adjudication Is Improper Under Section 437c**
6 **Because It Does Not Dispose Of A Cause Of Action.**

7 As noted above summary adjudication is only an appropriate procedure here if the motion
8 would eliminate a cause of action or an issue of duty. Defendant's motion, if granted, will
9 accomplish neither. The motion does not even purport to attack (and thus eliminate) any cause of
10 action. It only attacks some of the bases for the causes of action. Nor can the motion eliminate an
11 issue of duty. The duty at issue is the duty of the City employer to refrain from impairing the
12 employee's vested contractual rights. Even if granted the motion does not eliminate that duty, i.e.,
13 the remaining bases for the impairment claim remain. Therefore, the motion is improper under
14 Section 437c, subdivision (f) (1) and should be denied.

15 Defendant cites *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848. It
16 involved a legal malpractice action against former attorneys where the plaintiff alleged that the
17 attorneys committed legal malpractice "at different times on two separate and distinct matters". (*Id.*,
18 at 1850.) As the court noted "there is no dispute that the two matters have no relation to each other
19 and involve legal services performed at different times, with different and distinct obligations and
20 distinct and separate alleged damages." (12 Cal.App.4th at 1854.) In interpreting the provisions of
21 § 437c, subdivision (f), the court held that a motion for summary adjudication was appropriate as to
22 one of the claims where there were separate distinct wrongful acts even though contained in one
23 count. (12 Cal.App.4th at 1854-1855.) Here, however, plaintiffs do not allege separate and distinct
24 wrongful acts, but rather allege that Measure B violates the constitution for several different factual
25

26 ⁴ The three complaints brought by plaintiffs set forth five cause of action, all premised on "facts common to all causes of
action" and on three essential claims of Measure B's unconstitutionality under the California Constitution.

27 ⁵ See City's Mem. P & A at ¶ III D 2 (employee liability to unfunded retiree health care); at ¶ III D (increases in
28 employee contributions for unfunded pension liabilities); and at ¶ III D 3 (elimination of the supplemental retirement
reserve benefit).

1 reasons. Unlike the setting in the *Lilienthal & Fowler* case, here there is only one wrongful act, one
2 violation of duty. Thus, the *Lilienthal* case does not establish grounds for the City's motion!

3 After *Lilienthal & Fowler* was decided, the Legislature amended the provisions of
4 subdivision (f) (1) of Section 437c. The limited reach of *Lilienthal v. Fowler* was explained in
5 *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1094, where a defendant brought a motion for summary
6 adjudication of 130 "issues" in response to a complaint asserting seven causes of action. In footnote
7 number 2, (73 Cal.App.4th at 1097), the court discussed the limited reach of *Lilienthal & Fowler*:

8 The authority for this extraordinary motion is *Lilienthal & Fowler*
9 *v. Superior Court* (1993) 12 Cal.App.4th 1848. 16 Cal.Rptr.2d 458,
10 in which Division Two of the First District construed the language
11 now found in subdivision (f)(1) of section 437c to permit summary
12 adjudication motions to challenge a separate and distinct wrongful
13 act, even though it is combined with other wrongful acts alleged
14 within the same cause of action. We question whether *Lilienthal*
15 properly construed subdivision (f)(1) of section 437c (which, as
16 drafted, authorizes a motion for summary adjudication as to "one or
17 more causes of action within an action, one or more affirmative
18 defenses, one or more claims for damages, or one or more issues of
19 duty." (Italics added.) As subsequently amended, subdivision (f)(1)
20 now provides that a "motion for summary adjudication shall be
21 granted only if it completely disposes of a cause of action, an
22 affirmative defense, a claim for damages, or an issue of duty."
23 (Citation omitted.) In any event, the *Lilienthal* court was faced with
24 three requests for summary adjudication. We cannot imagine that
25 the results would have been the same had the request been for one
26 hundred and thirty separate summary adjudications.

27 The City's reliance on two additional cases as authority for the propriety of its motion for
28 summary adjudication of issues is also misplaced.

29 In *Mathieu v. Norrell* (2004) 115 Cal.App.4th 1174, the plaintiff alleged in one cause of
30 action two claims for violation of the Fair Employment and Housing Act, one for sexual harassment
31 and one for retaliation. The court of appeal noted that these two claims constituted a violation of
32 separate sections of Government Code § 12940 and constituted separate causes of action even
33 though combined in one count. (*Mathieu, supra*, 115 Cal.App.4th at 1189.) Thus, summary
34 adjudication was appropriate as to one cause of action since under Government Code § 12940 a
35 violation of subdivision (a) (sexual discrimination) is a separate and distinct cause of action (and
36 breach of a separate duty) from a claim of violation of subdivision (h) prohibiting retaliation.
37 (*Mathieu, supra* at 1185.) But here plaintiffs allege only one central cause of action: violation of the
38

1 constitutional prohibition on impairment of contract – circumstances different from the facts
2 presented in *Mathieu*.

3 In *Garrett v. Howmedica Osteonics Corp.* (2012) 211 Cal.App.4th 389, the plaintiff alleged
4 that he sustained damages as a result of a prescribed prosthetic device and filed a complaint alleging
5 strict products liability based on manufacturing defects, design defects, failure to warn, breach of
6 express warranty and negligence. The court ruled that summary adjudication as to the design defect
7 cause of action under either the risk benefit or consumer expectation test was appropriate given the
8 status of the motion and the opposition but that the motion was improperly granted as to the other
9 causes of action. (*Id.*, 211 Cal.App.4th at 398-399, 403.) The court noted in a footnote that the
10 defective design and defective manufacture were alleged in one count but since they were two
11 separate bases for liability (i.e., breach of separate duties) they could have been alleged in separate
12 counts, and therefore summary adjudication of the design defect claim was authorized since it
13 disposed of a cause of action. (211 Cal.App.4th at 399, n. 7.) This result is appropriate since the
14 granting of the motion disposed of one cause of action and/or issue of duty. Finally, in *Linden*
15 *Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508 the trial court granted summary
16 adjudication on the question of whether a defendant owed plaintiff a duty. On appeal the defendant
17 claimed that the summary adjudication was improperly granted since it did not dispose of an entire
18 cause of action. 62 Cal.App.4th at 519. The appellate court upheld the ruling:

19 We hold that on a motion for summary adjudication, the court may
20 rule whether a defendant owes or does not owe a duty to plaintiff
21 without regard for the dispositive effect of such ruling on other
22 issues in the litigation, *except that the ruling must completely dispose*
23 *of the issue of duty.* (62 Cal.App.4th at 522 (Emphasis added).)

23 In the course of its discussion the court reviewed the decision in *Lilienthal & Fowler v.*
24 *Superior Court* (1993) 12 Cal.App.4th 1848 and explained:

25 At bar in *Lilienthal* was the question whether a trial court may refuse
26 to rule under Code of Civil Procedure section 437c, subdivision (f)
27 when such an adjudication would not dispose of an entire cause of
28 action because two separate and distinct wrongful acts were
combined in the same cause of action. The court held that the trial
judge may not refuse to rule as to one claim, simply because, *as a*

1 *pleading tactic*, two claims are combined in the same cause of
2 action. 62 Cal.App.4th at 520 (Emphasis supplied).

3 Here defendant attempts to justify its motion by claiming that each portion of Measure B
4 complained of would by itself be a breach of a separate duty or a separate cause of action. Under
5 defendant's reasoning a defendant in a negligence action arising out of an auto accident, and who
6 was speeding but also failed to stop at the stop sign would have breached two separate duties. That
7 is not the law in California. For example the court stated in *Mahoney v. Corralejo* (1974) 36
8 Cal.App.3d 966, 972:

9 The cause of action as it appears in the complaint . . . will therefore
10 always be the facts from which the plaintiff's primary right and the
11 defendant's correspondence primary duty have arisen, together with
12 the facts which constitute the defendant's delict or act of wrong.
13 (Citations omitted)

14 (See also, *Bay Cities Paving & Grading v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860)
15 (Contractor had single primary right to be free of negligence of attorney retained to collect debt,
16 notwithstanding that attorney breached right in two ways by failing to serve stop notice on lenders
17 and failing to file complaint to foreclose mechanic's lien.)

18 In summary, the City owed plaintiffs a duty not to impair their vested contractual rights by
19 passage and implementation of Measure B. The complaints allege that this duty was breached by a
20 number of provisions in the Measure. Defendant's motion for summary adjudication only addresses
21 some of the factual bases involving this breach of duty, but does not dispose of the issue of duty.
22 Therefore defendant's motion does not comply with the restrictions set forth in Code of Civil
23 Procedure Section 437c(f) and must be denied.

24 **B The City Did Not Comply With The Limited Procedure Under Section 437c**
25 **Permitting Consideration Of Its Motion.**

26 In 2011 the California legislature added a new subdivision to § 437c. (Stats. 2011, ch. 419,
27 § 3.) This new provision, subdivision (s) (1) - (7), provides a limited procedure for summary
28 adjudication of a legal issue even though it does not completely dispose of a cause of action as
 required by subdivision (f). There are two conditions which must be met to make such a motion.
 First all parties must stipulate to the motion, and second the court has to approve of the proceeding.

1 Absent compliance with Section 437c, subdivision (s), there is no authority to bring a motion for
2 summary adjudication of issues which is not dispositive. Because the City is not proceeding under
3 subdivision (s), the motion is improper.

4 **II Public Employee Pension Rights Are Vested Contractual Rights.**

5 There is no language in the Charter's so-called reservation of rights provision, Charter
6 Sections 1501 and 1503, from which one could discern or imply that the rights of the employees to a
7 reasonable pension plan do not vest upon commencement of employment.

8 The Charter provisions allow for a change and/or substitution, but not without a reasonable
9 comparable substitution replacement. Long before the charter was adopted, established case law
10 specifically recognized the vested rights created by public pension plans and the right of a public
11 entity to make reasonable changes in pensions subject to conditions. The 1965 Charter provision in
12 Sections 1500 and 1503 were not enacted in a vacuum. By 1965, the California Supreme Court had
13 repeatedly ruled regarding the vesting of public pension rights and the permissible changes that
14 could be made.

15 An employee's vested contractual pension rights may be modified
16 prior to retirement for the purpose of keeping a pension system
17 flexible to permit adjustments in accord with changing conditions and
18 at the same time maintain the integrity of the system. (*Wallace v. City*
19 *of Fresno*, 42 Cal.2d 180, 184 [265 P.2d 884]; *Parker v. Board of*
20 *Retirement*, 35 Cal.2d 212, 214 [217 P.2d 660]; *Kern v. City of Long*
21 *Beach*, 29 Cal.2d 848, 854-855 [179 P.2d 799].) (2) Such
22 modifications must be reasonable and it is for the courts to determine
23 upon the facts of each case what constitutes a permissible change. (3)
24 To be sustained as reasonable, alterations of employees' pension
25 rights must bear some material relation to the theory of a pension
26 system and its successful operation, and changes in a pension plan
27 which result in disadvantage to employees should be accompanied by
28 comparable new advantages.

23 (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.)

24 When legislation is enacted the public body does so with knowledge of existing laws, both
25 judicial and statutory:

26 Both the legislature and the electorate by the initiative process are
27 deemed to be aware of laws in effect at the time they enact new laws
28 and are conclusively presumed to have enacted the new laws in light
of existing laws having direct bearing upon them. (*Viking Pools, Inc.*
v. Maloney (1989) 48 Cal.3d 602, 609 [257 Cal.Rptr. 320, 770 P.2d

1 732]; *People v. Weidert* (1985) 39 Cal.3d 836, 844 [218 Cal.Rptr.
2 57, 705 P.2d 380]; *People v. Sikverbrand* (1990) 220 Cal.App.3d
3 1621, 1628 [270 Cal.Rptr. 261])

4 *Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332. See also *Barajas v. City of*
5 *Anaheim* (1993) 15 Cal.App.4th 1808, 1814-1815 (Legislature is deemed to be aware of existing
6 laws and judicial decisions in effect at the time legislature is enacted and to have enacted and
7 amended statutes in light of such decisions as have direct bearing upon them). Thus when the 1965
8 Charter was adopted it was in the context of the *Kern* and *Allen* line of decisions. Therefore, any
9 changes made to pension plan provisions pursuant to the authority of Sections 1500 or 1503 must
10 bear some material relation to the theory of a pension system and any disadvantage created be offset
11 by a comparable advantage.

12 The City's places emphasis on the alleged financial burden on the City caused by the pension
13 plans in apparent justification for the drastic change in the pension plans but ignores the concomitant
14 requirement of offsetting disadvantages with advantages. As the appellate court in *Claypool v.*
15 *Wilson (Claypool)* opined:

16 Changes made to effect economies and save the employer money do
17 "bear some material relation to the theory of a pension system and its
18 successful operation . . ." (*Betts v. Bd. Of Administration, supra*, 21
19 Cal.3d at p. 864, 148 Cal.Rptr. 158, 582 P2d 614.) That is not to say
20 that a purpose to save the employer money is a sufficient justification
21 for change. *The change must be otherwise lawful and must provide*
22 *comparable advantage to the employees whose contract rights are*
23 *modified.* We hold only that the monetary objective will not invalidate
24 a modification which is otherwise valid.

25 (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 666)⁶

26 The City does not contend that Measure B provides any compensating advantages offsetting
27 its significant disadvantages. Instead, the City argues that the reservation of rights clause eliminates
28 any vesting of pension rights. In examining that contention the opinion in *Newman v. City of*
Oakland Retirement Board (1978) 80 Cal.App.3d 450 is instructive. In discussing a subsequent
change in a disability retirement system and its effect on an officer who had been retired for
disability, the court noted that pension provisions must be liberally construed in favor of a pension

⁶ (See also, *County of Orange v. Ass'n of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 39 fiscal
imprudence does not trump vested pension rights).

1 and that the “the nature and extent of (the City’s) statutory obligation must be ascertained not only
2 from the language of the pension provision but also from the judicial construction of this or similar
3 legislation at the time of contractual relationship is established.” (80 Cal.App.3d 458) (citation
4 omitted)

5 Furthermore, the structure and terms of the Police and Fire and Federated Plans as well as
6 the history of their creation and modification support the conclusion that the City intended to enter
7 into binding contractual commitments as initially enacted and later modified and that these
8 contractual rights were and are vested upon commencement of employment.

9 As examples:

- 10 • All employees are required to become members of the appropriate plan upon
11 commencement of employment. (Sections 3.28.440 and 3.36.400)
- 12 • The plans are actuarially based – anticipating fiscal soundness and assurance of the stated
13 benefits upon retirement. (Sections 3.28.160 and , 3.36.150 et seq.)
- 14 • Each employee is required is to make contributions determined by the Board of
15 Administration based on the actuarial calculations. (Sections 3.328700, et seq and
16 3.36.1520)
- 17 • Except as otherwise agreed by the employee representatives the City is solely responsible
18 for any short fall in the accumulated pension funds resulting from investment experience
19 or change in benefits. (Heredia Decl. ¶¶ 3, 4, 5 and 6; Platten Decl. ¶¶5, 6, 8 &10; SJMC
20 Sections 3.28.850, 3.28.880, 3.28.770, 3.36.1550 and 3.36.1525)
- 21 • The City used the basic benefits of the pension plans in its employee recruitment.
22 (Sekany Decl. ¶4, Exh.2)
- 23 • On numerous occasions attorneys and management officials of the City have stated that
24 the pension rights are vested, that changes cannot occur unless any disadvantage is
25 balanced by a comparable advantage. (Platten Decl. ¶¶3,4, and 5, Exhs. 1-4; RJN No. 1;
26 Sekany Decl. ¶3, Exh. 1)

27 Notwithstanding the extensive case authority which upholds vested pension rights, the City
28 claims that those principles do not apply because of the provisions in Sections 1500 and 1503. But

1 the cases cited by the City do not support its assertion that the reservation of rights clause trumps the
2 vested right doctrine. For example, the City cites the district court opinion in *Retired Employees’*
3 *Association of Orange County v. City of Orange*, No. SACV 07-1301 AG, 2012 U.S. Dist. LEXIS
4 146637 (C.D. Cal., August 13, 2012). This is a subsequent trial of the case in which the California
5 Supreme Court previously rendered its opinion in *Retired Employees’ Association of Orange County*
6 *v. County of Orange* (2011) 52 Cal.4th 1171. (RJN No. 3) (*REAOC*) Aside from the fact that a
7 district court judgment is of no precedential effect and that this August 2012 judgment has now been
8 appealed,⁷ the case is of no help to defendant. The City quotes from the trial court’s decision:

9 “A reservation of rights clause ‘is explicit evidence of legislative
10 intent regarding the question of vested health benefits’ that ‘falls
11 squarely’ against the finding of vested rights.” 2012 U.S. Dist.
LEXIS at 29.

12 But the City fails to quote the preceding sentence explaining that the plan at issue *explicitly*
13 *stated that it created no vested rights:*

14 The 1993 Plan *expressly states that it creates no vested rights*, and
15 reserves the County’s right to amend or terminate the 1993 Plan at
16 any time. This is explicit evidence of legislative intent regarding the
17 question of vested retiree health benefits, and it falls squarely on the
County’s side. 2012 U.S. Dist. LEXIS at 28-29 (emphasis added).
RJN No. 3

18 The San Jose Charter contains no such explicit reservation of rights.

19 The City next argues that the holding in *Walsh v. Board of Administration* (1992) 4
20 Cal.App.4th 682 supports its argument of blanket authority to amend the San Jose plans. *Walsh*
21 involved amendments to the Legislative Retirement System, at the time the legislature was
22 converting to full time operations and reapportionment was occurring. A special statute was enacted
23 to protect rights of legislators who reapportioned out of office. The special legislation was repealed
24 by the legislature while the plaintiff was still in office. He was denied a pension benefits under the
25 repealed statute and brought suit claiming an impairment of contract under the federal constitution.
26 The lawsuit did not involve a challenge under the California Constitution. At the time the California

27 _____
28 ⁷ See RJN Nos. 3, 4 & 5. . This fact was known by defense counsel since he represents the County of Orange in this
litigation.

1 Constitution Art. IV, Section 4, paragraph 3 provided: "The legislature may prior to their retirement,
2 limit benefits payable to members who serve during or after the term commencing in 1967." (*Walsh*,
3 *Supra*, 4 Cal.App.4th at 701.) The legislature did limit retirement benefits by repealing the special
4 statute effective prior to the end of the 1974 legislative session. The appellate court held that Mr.
5 Walsh who left office at the end of the 1974 legislative session could not recover retirement benefits
6 under the special statute for two reasons. First since there was not an ongoing appropriation for the
7 benefit under the special statute and therefore there was no contract, and second because, in any
8 event, there could be no vesting of a contractual right since the legislature had the authority to limit
9 and pension rights.

10 Defendant relies heavily on two statements in *REAOC, supra*, at 1171.⁸ However in *REAOC*
11 the California Supreme Court was asked by the Ninth Circuit Court of Appeals to answer: "Whether
12 as a matter of California law, a California county and its employees can form an implied contract
13 that confers vested right to health benefits on retired county employees." (52 Cal.4th 1176.) In
14 *REAOC* the county had, for over 20 years pooled the premiums for health insurance for employees
15 and retirees (having the effect of lowering the costs to retirees) confirmed in the Memorandum of
16 Understanding with the employee unions. When the county stopped pooling (thus raising the costs
17 to retirees) the retirees sued. The Supreme Court ruled that under certain conditions there can be
18 implied contracts.⁹

19 In contrast to *REAOC* the contracts or pension plan benefits *are explicit*, not implied. Both
20 the Federated and the Police and Fire Plans set forth the City's obligation to provide retiree benefits

21 _____
22 ⁸ "It is presumed that (the) statutory scheme is not intended to create private contractual or vested rights and a person
23 who asserts the creation of a contract has the burden of overcome that presumption." (Def. Memo of Points and
24 Authorities 1:21-24).

23 "First to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be limit
24 drastically the essential power of a legislative body."

25 "Second, (t)he requirement of a clear showing that legislation was intended to create the asserted contractual obligation
26 (citation) should ensure that neither the governing body nor the public will be blindsided by unexpected obligations."
27 (Def. Memo Points and Authorities 12:16-22)

26 ⁹ Following the Supreme Court's decision in *REAOC* the Third District Court of Appeal held that successive
27 Memorandum of Understanding (MOU) between City and employees' union could, notwithstanding the limited term of
28 the MOU, constitute express agreements to provide retiree medical benefits to retirees in the future beyond the term of
the MOU. (*International Brotherhood of Electrical Workers Local 1245 v. City of Redding* (2012) 210 Cal.App.4th
1114, 1120-1126).

1 and the rights of employees to earn those benefits. There is nothing to be implied. Both plans
2 establish retirement plans (SJMC Sections 3.28.010 and 3.36.010) with provisions for funding with
3 contributions from the City and the employees and with established benefits. Further at the time
4 these pension plans were adopted the vested nature of such plans was clearly established by the
5 California Supreme Court. (See *Kern and Allen, supra.*) Hence, the City's argument misses the
6 mark.

7 California courts have on occasion held that certain unilateral changes to retirement benefits
8 did not impair vested rights. For example in *International Firefighters Local 1450 v. City of San*
9 *Diego* (1983) 34 Cal.3d 292, the union claimed that an increase in employee contributions impaired
10 the vested rights of the employees to a set rate. The Supreme Court held there was no improper
11 impairment because the contribution increase was a result of actuarial adjustments specifically
12 permitted under the pension plan. As the court said "a change in contribution is implicit in the
13 operation of the City's system and is *expressly authorized by that system* and no vested right is
14 impaired by effecting such change." (34 Cal.3d 292, 303¹⁰ (emphasis added).) By contrast, the
15 changes to pensions brought on by Measure B are not actuarial changes (which are permitted under
16 both plans) but are material changes to the plans themselves unilaterally imposed and for which no
17 advantage is offered to compensate for the obvious disadvantages.

18 Defendant's reliance on federal court decisions is misplaced. None of those cases dealt with
19 the impairment of contracts under the California Constitution nor do any of the cases, with one
20 exception,¹¹ deal with public employee pension plans. As the court in *Walsh v. Board of*
21 *Administration, supra*, explained:

22 On some occasions the United States Supreme Court has upheld
23 modification of state pension plans under the contract clause. (*Dodge*
24 *v. Board of Education, supra*, 302 U.S. at pp. 78-81, 58 S.Ct. at pp.
25 100-101, 82 L.Ed. at pp. 61-63; *Phelps v. Board of Education, supra*,
300 U.S. at pp. 323, 57 S.Ct. at 485, 81 L.Ed. at p. 677.) However,

26 ¹⁰ Similarly the case of *Pasadena Police Officers Ass'n v. City of Pasadena* (1983) 147 Cal.App.3d 695, 711 involved
changes to contributions rates in accordance with the specific provisions of the plan.

27 ¹¹ *San Diego Police Officers Assoc. v. San Diego City Employees Retirement System* (9th Cir. 2007) 725 F.3d 725. This
28 case involved a claim that a reduction in the amount of the employer's subsidy of pension contribution violated the
federal constitution. The court held that the subsidy which had been in the prior MOU, but which was not renewed was
not part of the vested pension rights but was compensation, the right to which was not vested. (568 F.3d 738.)

1 under California law there is a strong preference for construing
2 governmental pension laws as creating contractual rights for the
3 payment of benefits. (See *Allen v. City of Long Beach* (1955) 45
4 Cal.2d 128, 287 P.2d 765; *Terry v. City of Berkeley* (1953) 41 Cal.2d
5 698, 263 P.2d 833.; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848,
6 179 P.2d 799.) Where it is feasible to do so the enactment of a
7 governmental pension plan should be construed as guaranteeing full
8 payment to those entitled to its benefits with the provision of adequate
9 funds for the purpose. (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336,
10 351, 71 Cal.Rptr.135, 444 P.2d 711. See also *Carman v. Alvord*
11 (1982) 31 Cal.3d 318, 332, 182 Cal.Rptr, 506, 644 P.2d 192.)

12 (*Walsh, supra*, at pp. 697-698.)

13 The decision of the *California Supreme Court in Legislature v. Eu* (1991) 54 Cal.3d 492
14 dispels any doubt whether the purported reservation of rights in the City Charter transcends the well-
15 established law that enforces vested contractual rights. There the argument was made that a section
16 in the California Constitution allowing the legislature to limit retirement benefits eliminated any
17 vesting. The Supreme Court responded:

18 In response to petitioners' assertions, respondent Eu and intervener
19 first contend that incumbent legislators do not have a vested right
20 under the LRS to continue to accrue pension benefits through
21 continued service. In this regard, they suggest that article IV, section
22 4, of the state Constitution precludes legislators from acquiring any
23 vested right to continue to earn pension benefits. We disagree.

24 Article IV, section 4 of the State Constitution, provides in pertinent
25 part that *Legislature* may, prior to their retirement, limit the retirement
26 payable to Members of the Legislature...." (Italics added.) That
27 provision, seemingly empowering the Legislature to exercise some
28 measure of control over the pension rights of its own members prior to
their retirement, may create some uncertainty as to the full amount or
extent of a legislator's pension rights during his term of office. But the
provision neither states nor implies that these rights are thus deemed
inchoate and unprotected from impairment by the initiative process.
Significantly, we have never suggested that the mere existence of
article IV, section 4, precludes legislators from acquiring pension
rights protected by the state or federal contract clauses. (Cf. *Allen v.*
Board of Administration, supra, 34 Cal.3d at pp. 119-120, 192
Cal.Rptr. 762, 665 P2d 534.)

(54 Cal3d. at pp.305-306.)

25 **C Measure B, § 1506-A Improperly Increases the Pension Contributions Required**
26 **of Employee Members**

27 Under the 1975 Federated City Employee Retirement Plan (Federated Plan) the City and
28 employees contribute to the pension plan; the amount of the employees' contribution is set and

1 adjusted by the Pension Board pursuant to SJMC Sections 3.28.710 and 3.28.720. There are two
2 significant requirements in Section 3.28.710 which protect the employees' level of contribution.
3 First the contribution rates for normal costs are to be in a ratio of 3 by employees to 8 by the City.
4 Second, any new or adjusted rate may not include any contributions required "because of the system
5 changing the time at which members may retire, or changing the benefits members will receive, or
6 as a result of experience under the system." In short the employees may not be required to pay for
7 any unfunded liability. Rather, any unfunded liability is the responsibility of the City. SJMC
8 Sections 3.28.850 and 3.28.880 require the City to make contributions toward any deficiency caused
9 by any changes in retirement system or the earnings experience.

10 Under the 1961 Police and Fire Department Retirement Plan (P&F Plan) the contributions
11 required of participants are set forth in SJMC Section 3.36.1520 which includes similar limitations
12 that the rates of contributions for normal costs shall not include any amount required to make up any
13 deficits caused by prior inadequate rates and that the contribution ratio is 3 for participants and 8 for
14 the City. Section 3.36.1550 D requires that the City "contribute to the retirement fund, monthly all
15 such amounts as the retirement board shall find must be contributed to the fund to make the plan
16 actuarially sound to the extent that such amounts are not provided by member and City's current
17 service contributions as provided for in Section 3.36.1520." This liability for unfunded liabilities has
18 been admitted by the City Attorney and management in interest arbitrations held pursuant to San
19 Jose City Charter § 1111. (Platten Decl. ¶¶ 5, 6, 8 and 9, Exhs. 3, 4 and 6 thereto.) ("City is solely
20 responsible to pay any deficit.")

21 Section 1506-A (b) of Measure B specifically removes the limitation and protection of the
22 above sections and requires additional contributions from employees of 4% per year up to 16% to
23 pay for "pension unfunded liabilities" not to exceed 50% of the unfunded liability. As a result the
24 City would shift up to 50% of its liability to pay for unfunded liabilities to the employees and the
25 employees' ratio of contribution of 3/11ths provided in SJMC Sections 3.24.710 and 3.36.1520
26 would increase. The provision makes a significant change in the vested contractual rights for all
27 employees first employed prior to the time Measure B was approved.

28 The City argues that because some the unions negotiated and agreed to have their members

1 provide specified additional contributions and the code was amended to add Sections 3.28.755 A
2 and 3.36.1525 in order to accommodate these contributions, that the City has the ultimate authority
3 to unilaterally impose a requirement of additional contributions on the employees. However, the
4 additional specific contributions were a result of the negotiation process under Meyers-Milias-
5 Brown Act (Government Code Section 3500, et seq.)The provisions upon which defendant relies for
6 its claims that the municipal code authorize the City to require additional contributions to the
7 pension plans (Municipal Code §3.28.755 for the Federated Plan and Section 3.36.1525 A for the
8 Police and Fire Plan) were added specifically to facilitate the specific concessions made by the
9 various unions to pay additional contributions that were agreed to in 2010 at the request of the
10 City.(Gurza Decl. ¶¶ 11, 12, 15 16 and 17) The agreements agreed to do not provide for payment of
11 contributions for unfunded liabilities – although they reduce payments which the City would
12 otherwise have to make. (Gurza Decl., Exh. 12, p. 148). Significantly, these additional contributions
13 by the employees are credited to the individual employee accounts subject to withdrawal . (Gurza
14 Decl., Exh. 12, p. 150).

15 The amended sections do not, contrary to defendants argument give the City the right or
16 authority to unilaterally change the rate of retirement contributions or any other material provisions
17 in the pension plans.

18 The two sections relied on by the City (3.28.775 and 3.36.1525 A and B) contemplate that
19 any further changes must go through the collective bargaining process. This is clear from the
20 language of the sections. For the Police and Fire Plan any additional contributions may only be a
21 result of an “executed argument with a recognized bargaining unit or binding order of arbitration.
22 (Section 3.36.1525 B), i.e., only after completion of the collective bargaining process. For the
23 Federated Plan such increased contributions may only result from an executed agreement with a
24 recognized bargaining unit or by resolution of the City Council. In other words absent an agreement
25 reached with a union and assuming the issue of additional contributions was negotiated and impasse
26 occurred the City could impose its last and best offer. Tellingly for unions which did not agree to the
27 increased contributions the City imposed a wage reduction, not an increase in contribution. (Gurza
28 Decl. ¶¶19-26 & Exhs 9, 11, 13 15 17, 32 and 33.)

1 Measure B did not go through the collective bargaining process.¹² Rather the City submitted
2 the measure to the voters which if implemented will add additional contributions on top of those
3 negotiated by the unions.

4 The City also argues that the unions negotiated and in most cases agreed to specific changes
5 in contributions, showing that there is no vested contractual right to the levels of contributions.
6 Defendant asserts that the unions are estopped from even making such an argument suggesting that
7 when vested benefits are there can be no change. That argument implies that vested contractual
8 rights are immutable. However, the *Kern* line of cases hold changes can be made subject to the
9 conditions set forth in *Allen, supra*. In the context of Meyers-Milias-Brown Act it is clear that such
10 changes could be accomplished when negotiated with the employee unions. For support of its
11 argument the City cites *California Teachers Association v. Parker Unified Scholl District* (1984)
12 157 Cal.App.3d 174, 183. But that case does not hold that pension rights cannot be amended – rather
13 it holds that a statutory right affording teachers certain leave of absence pay could not be bargained
14 away because the Education Code Section 44924 specifically prohibits waiver of the rights provided
15 by the section in question. (158 Cal.App.3d 183.) It is inapposite to the argument.

16 Nor do *International Ass'n of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292 and
17 *Pasadena Police Officers v. City of Pasadena* (1983) 147 Cal.App.3d 695, support the City's
18 argument. In the *City of San Diego* case the court held that a retirement plan which allowed the
19 retirement board to periodically set contributions rates based on advise of the actuary allowed such
20 adjustment and did not violate the employees vested rights. (34 Cal.3d at pp. 299, 300.) In the *City*
21 *of Pasadena* case the court held that an adjustment in contribution rate (allowed by the plan) based
22 on actuarial calculations did not impair vested rights. (147 Cal.App.3d 710, 711.) Again, neither
23 case has relevance here. Both of the San Jose pension plans allow similar actuarial adjustments in
24 contribution rates based on actuarial studies. Measure B, however, is not such an actuarial
25 adjustment but a unilateral action of the City shifting plan burdens.

26 ¹² The City alleges otherwise at page 7:22-24 of its Memo of Points and Authorities, however, to the extent the City is
27 relying on this disputed fact this court does not have jurisdiction to decide it because the Public Employee Relations
28 Board (PERB) has issued an unfair practice charge on the very issue (RJN No. 2) and PERB has exclusive jurisdiction to
determine the matter. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 601; *City of
San Jose v. IAFF Local 230* (2009) 178 Cal.App.4th 408, 414.)

1 In apparent recognition that this shift in liability might be unenforceable or illegal the City
2 included Section 1514-A in Measure B which provides that if Section 1506-A(b) is determined to be
3 "illegal, invalid or unenforceable" the hoped for savings (to the City) are to be recouped by reducing
4 employees' pay by 4% per year up to a maximum of 16% of pay. This after the employee unions
5 negotiated with the City and agreed to a 10% reduction in wages in July 2011. (See Platten Dec. ¶ 9)
6 Since the employees have vested contractual rights in the retirement plans which include the
7 aforesaid limitations the City cannot indirectly reduce either the benefit or protections contained in
8 the plan by causing the employees compensation to be reduced to allow the City to recover from the
9 employee 1/2 of the amount it is contractually obligated to pay for the unfunded liabilities of the
10 Plans.

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

14 **D The Supplemental Retiree Benefit Reserve**

15 Section 1511-A abolishes the supplemental retiree benefit reserve in both the Federated and
16 the P&F Plans. These benefits were established to supplement retiree pensions and as such are
17 subject to the same protection as other pension benefits. (Platten Dec. ¶ 7 and Exh. 5 thereto) The
18 termination of these retirement benefits obviously does not relate to the theory of pension nor does
19 Measure B afford any offsetting advantages. The City's only justification is its desire to cut costs.
20 But as the discussion in *Claypool, supra*, makes clear, the desire of a city to reduce expenditures is
21 not by itself justification to tamper with vested contractual rights.

22 **1. The Federated SRBR Created a Vested Right.**

23 The City's argues that the language in Municipal Code Section 3.28.340 giving the City
24 Council the right to determine the "distribution, if any, of the supplemental retiree benefit reserve to
25 said (retirees) persons" defeats a vesting of the SRBR benefits. But this cramped reading ignores the
26 mandatory language in the code requiring the calculation of excess earnings and the mandate that a
27

28 ¹³ The provision suffers from the same jurisdictional problem discussed in footnote #12, supra.

1 percentage of said excess earning be transferred to the SRBR. Defendant's argument has no merit
2 here because plaintiffs' complaints do not allege that an SRBR distribution should have been made
3 and is owing. Plaintiffs' complaints seek protection of vested prospective benefits.

4 Section 3.28.340 does not reserve to the City Council discretion as to whether to establish
5 the SRBR.¹⁴ Nor does the code reserve to the City any discretion to prevent the Board from crediting
6 the SRBR or transferring funds when appropriate.

7 Section 3.28.340 B.2.a says the Board shall credit the SRBR account and 3.28.340 D 2
8 requires the Board to transfer of funds if the Board determines there are excess earnings. Thus the
9 current employees have earned and will continue to earn a retirement benefit of a fund. The fact that
10 the City has discretion each year to determine what, if anything, will be distributed does not mean
11 the retirees past and future can be deprived of the right to lobby the City Council each year for
12 distribution. The City has not provided any advantage in place of this obvious disadvantage.

13 2. The Police and Fire Plans SRBR.

14 In addition to the comments above, The Police and Fire Plan's SRBR has additional
15 provisions which both confirm the vested rights of employees and retirees and prevent the City from
16 abolishing the benefit.

17 Section 3.36.580 A 2:

18 The purpose of the SRBR shall be to provide a source of funding
19 benefits to supplemental supplement those benefits otherwise provided
20 by this plan or Charter 3.32 plan to former members of such plans
who are receiving benefits.

21 Section 3.36.580 B 1, 2, 3 and 4 provides for the funding which, assuming there are excess
22 earnings, is a mandatory duty of the Board of Administration.

23 Subsection C provides for a limited reduction of SRBR balances.

24 Subsection D 1, 2, 3 and 4 requires the Board to make distributions. (That Board *shall make* .
25 . . . distributions.)

26 Subsection D 6 forbids a total transfer or distribution of SRBR funds except under of the

27 _____
28 ¹⁴ Section 3.28.340 B(2) states: there shall be established in the retirement fund the following reserve: the supplemental retiree benefit reserve.

1 pension plan terminates.

2 In essence the Police and Fire SRBR create a funded supplemental benefit for retirees that
3 would last for the duration of pension plan.

4 Defendant argues that the City Council's initial approval of a methodology for distribution of
5 SRBR funds which included a provision continuing that methodology until a subsequent
6 methodology was approved somehow gave it discretion to either stop distribution or terminate the
7 SRBR. This is nonsensical. The provision of Subsection D 5 does not lend itself to defendant's
8 interpretation that it could (although to date it has not) approve a subsequent methodology that not
9 only ends all distribution but transfers the funds in violation of Subsection D 6. (Also see Dec. of
10 Robert Cocilova.)

11 In sum, both pension plans provide a promise of supplemental benefits for retirees that
12 current and former members began to earn upon commencement of employment. Measure B's
13 Section 1511-A abolishes those rights contrary to the language of the plans without any counter-
14 balancing advantage to the employees or retirees.

15 **E Section 1512-A of Measure B Increases Employees Liability for Retiree Health**
16 **Care**

17 Just as the provisions of Section 1506-A (employee contributions increase) and Section
18 1511-A (discontinuance of SRBR) materially affect vested contractual rights of employees and
19 retirees so too does Section 1512-A which increases the liability of employees for additional
20 contributions for retiree medical benefits neither provided for in the pension plans nor negotiated
21 with the employee unions.

22 As set forth in defendant's memorandum of points and authorities (at page 29-30) the City
23 negotiated with the employee unions and reached agreement with all but one union. Defendant then
24 argues that "Measure B requires no more than was agreed to by almost every union." What
25 defendant does not address is the fact that the agreements regarding retiree health care costs
26 negotiated with "most" of the City's union contained a 5 year phase in period and provided that the
27 "initial unfunded retiree healthcare liability shall be fully amortized over a 30 year period so that it
28 shall be paid by June 30, 2039." (Gurza Dec. ¶40).

1 Measure B on the other hand eliminates. both the 5-year phase in and the 30 year
2 amortization of the initial unfunded retiree healthcare liability, thereby materially altering the
3 employees immediate liability for the costs of 50% of all liabilities without the protection of the
4 phase in period or a 30 year amortization schedule for the initial unfunded liability.

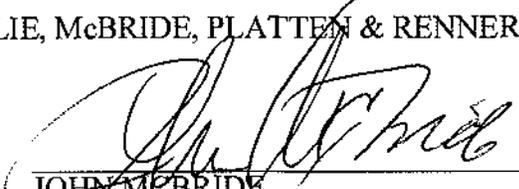
5 Once again there are no comparable advantages given to offset the obvious disadvantages as
6 required by case history.

7 **CONCLUSION**

8 For all the foregoing reasons defendant's motion for summary adjudication of issues should
9 be denied.

10 Dated: May 2, 2013

WYLIE, McBRIDE, PLATTEN & RENNER

11
12 By: 
13 JOHN McBRIDE

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