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8 Employees Association, Howard E. Fleming,  
9 Donald S. Macrae, Frances J. Olson, Gary J. Richert  
and Rosalinda Navarro

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

13 SAN JOSE POLICE OFFICERS'  
14 ASSOCIATION,  
15 Plaintiff,

16 v.

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

23 AND RELATED CROSS-COMPLAINT  
24 AND CONSOLIDATED ACTIONS.

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

) (Hon. Patricia M. Lucas, Dept. 2)

) **SEPARATE STATEMENT OF DISPUTED**  
) **MATERIAL FACTS OF SAN JOSE**  
) **RETIRED EMPLOYEES ASSOCIATION,**  
) **HOWARD E. FLEMING, DONALD S.**  
) **MACRAE, FRANCES J. OLSON, GARY J.**  
) **RICHERT AND ROSALINDA NAVARRO**  
) **IN OPPOSITION TO MOTION FOR**  
) **SUMMARY ADJUDICATION OF ISSUES**

) Date: June 7, 2013  
) Time: 9:00 a.m.  
) Dept.: 2

) Complaint Filed: June 6, 2012  
) Trial Date in Consolidated Actions:  
) July 22, 2013  
)

I. 1

**INTRODUCTION**

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Plaintiffs/Petitioners San Jose Retired Employees Association, Howard E. Fleming, Donald S. Macrae, Frances J. Olson, Gary J. Richert and Rosalinda Navarro (hereinafter (“SJREA”)) submit the following Separate Statement of Disputed Material Facts in support of its Opposition to Motion for Summary Adjudication Defendants San Jose and Debra Figone in her official capacity (hereinafter “City”):

SJREA joins in Paragraph Nos. 42 through 59 of AFSCME’s Separate Statement of Disputed Material Facts with respect to the First Cause of Action (at pages 23 through 30), Third Cause of Action (at pages 53 through 60), and Fourth Cause of Action (at pages 83 through 90) and supplements its Separate Statement with the following additional undisputed material facts and evidence in support thereof as set forth below.

<b>SJREA’s Additional Undisputed Material Facts and Supporting Evidence</b>	<b>Moving Party’s Response and Supporting Evidence</b>
<p>1. Section 1501 of the San Jose City Charter entitled “Exclusions” states:</p> <p>The Council in its discretion may exclude all or any of the following persons from any or all retirement plans, to wit: Persons mentioned in sub-paragraphs(1), (2), (4), (5), (6), and (7) of sub-section (a) of Section 1101 of this Charter; all persons employed or whose services are contracted for pursuant to any transfer, consolidation or contract mentioned or referred to in Section 1109 of this Charter; persons employed pursuant to Section 1110 of this Charter; persons in City service primarily for training, study or educational purposes; persons employed or paid on a part-time, per diem, per hour or any basis other than a monthly basis; temporary employees; persons employed pursuant to any relief or anti-poverty program primarily for the purpose of giving relief or aid to such persons. Also, persons who are members of any other retirement or pension system, other than the federal social security system or any other federal retirement or pension system, and who are receiving credit in such</p>	

1 other system for service rendered to the City  
2 may be excluded, as to such service, from  
3 any such plan or plans.

Supporting evidence: RJN, Exh. 1.

4 2. Section 1503 of the San Jose City  
5 Charter entitled "Continuance of Existing  
6 Retirement Systems" states:

7 Any and all retirement system or systems,  
8 existing upon adoption of this Charter, for  
9 the retirement of officers or employees of  
10 the City, adopted under any law or color of  
11 any law, including but not limited to those  
12 retirement systems established by Parts 1, 2  
13 and 4 of Chapter 9 of Article II of the San  
14 Jose Municipal Code, are hereby confirmed,  
15 validated and declared legally effective and  
16 shall continue until otherwise provided by  
17 ordinance. The foregoing provisions of this  
18 Section shall operate to supply such  
19 authorization as may be necessary to  
20 validate any such retirement system or  
21 systems which could have been supplied in  
22 the Charter of the City of San Jose or by the  
23 people of the City at the time of adoption or  
24 amendment of any such retirement system  
25 or systems. However, subject to other  
26 provisions of this Article, the Council shall  
27 at all times have the power and right to  
28 repeal or amend any such retirement system  
or systems, and to adopt or establish a new  
or different plan or plans for all or any  
officers or employees, it being the intent  
that the foregoing sections of this Article  
shall prevail over the provisions of this  
Section.

Supporting evidence: RJN, Exh. 1

3. Section 1505 of the San Jose City  
Charter entitled "Minimum Benefits for  
Officers and Employees Other Than  
Members of the Police or Fire Departments"  
states:

The Council, by ordinance, shall provide the  
following minimum benefits for all officers  
and employees of the City excepting those  
who are hereinafter excluded from the  
application of this Section.

1 (a) SERVICE RETIREMENT. An officer  
2 or employee of the City, other than those  
3 hereinafter excluded, shall be entitled, upon  
4 his or her request, to be retired from City  
5 service and to receive during such  
6 retirement until his or her death an annual  
7 retirement allowance equal to two percent  
8 (2%) of his or her "final compensation,"  
9 hereinafter defined, per each year of his or  
10 her first twenty-five (25) years of service,  
11 hereinafter defined, plus one percent (1%)  
12 of such final compensation per each year of  
13 his or her service in excess of twenty-five  
14 (25) years, subject to a maximum of eighty-  
15 five percent (85%) of such final  
16 compensation, if he or she:

17 (1) Completes twenty-five (25) years or  
18 more of "service," hereinafter defined, and  
19 attains, while holding such office or  
20 employment, the age of fifty-five (55) years  
21 or more;

22 or

23 (2) Attains, while holding such office or  
24 employment, the age of seventy (70) years  
25 or more regardless of his or her years of  
26 service.

27 (b) DISABILITY RETIREMENT. An  
28 officer or employee of the City, other than  
those hereinafter excluded, who has  
completed ten (10) years of "service,"  
hereinafter defined, and is "disabled," as  
such term is hereinafter defined, while  
holding such office or employment, and  
applies for a disability retirement while  
holding such office or employment, shall be  
entitled, upon his or her request, to be  
retired from City service because of such  
disability, and to thereafter receive, during  
the period of such disability, a monthly  
disability retirement allowance equal in  
amount to the monthly disability retirement  
allowance provided for in Topic 16 of Part 4  
of Chapter 9 of Article II of the San Jose  
Municipal Code as said Topic and Chapter  
read on the effective date of this Charter.

(c) CONTRIBUTIONS. Contributions  
required to be made by officers and  
employees of the City, other than those  
hereinafter excluded, to any retirement fund,  
system or plan for or because of current  
service or current service benefits of or for

1 such officers or employees, in relation to  
2 and as compared with contributions made  
3 by the City for such purpose, shall not  
4 exceed the ratio of three (3) for such officers  
5 and employees to eight (8) for the City. The  
6 foregoing provision, however, does not  
7 apply to any contributions required for or  
8 because of any prior service or prior service  
9 benefits, nor to any contributions required  
10 for or because of membership in the Federal  
11 Old Age and Survivorship Insurance  
12 Program or any other Federal insurance or  
13 retirement program or for or because of any  
14 benefits provided by any such program.

15 (d) DEFINITIONS. As used in this Section,  
16 "service" means all service for which an  
17 officer or employee is entitled to credit  
18 under the provisions of the retirement  
19 system established by Part 4 of Chapter 9 of  
20 Article II of the San Jose Municipal Code as  
21 such Part 4 reads on the effective date of  
22 this Charter; and "final compensation"  
23 means final compensation as defined on the  
24 effective date of this Charter in Topic 1 of  
25 Part 4 of Chapter 9 of Article II of the San  
26 Jose Municipal Code. Also, as used in this  
27 Section, "disabled" means the incurrence of  
28 a disability, short of death, resulting from  
injury or disease, which renders the officer  
or employee incapable of continuing to  
satisfactorily assume the responsibilities and  
perform the duties and functions of his or  
her office or position and of any other office  
or position in the same classification of  
offices or positions to which the City may  
offer to transfer him or her.

(e) MISCELLANEOUS. The benefits  
hereinabove specified are minimum only;  
and the Council in its discretion, may grant  
greater or additional benefits. The City shall  
not be deemed obligated, by virtue of any of  
the above provisions, to continue to employ  
any person or persons until he or she or they  
qualify for or request any retirement  
benefits. Also, anything hereinabove to the  
contrary notwithstanding, any service or  
disability retirement allowance may be  
terminated and cancelled if the person  
otherwise entitled thereto commits treason  
or is convicted of a felony.

1 (f) PERSONS EXCLUDED. The provisions  
2 of this Section shall not apply to any of the  
3 following persons, the same being hereby  
4 excluded from the application of the above  
5 provisions, to wit: Any and all persons  
6 mentioned or referred to in Section 1501;  
7 and any and all officers and employees in  
8 the Police Department and Fire Department  
9 of the City; any person or persons who have  
10 been retired from the service of the City  
11 prior to the effective date of this Charter;  
12 and any and all persons to whom, on the  
13 effective date of this Charter, the provisions  
14 of Topic 15A of Part 4 of Chapter 9 of  
15 Article II of the San Jose Municipal Code,  
16 as it reads on the effective date of this  
17 Charter, do not apply.

18 Supporting evidence: RJN, Exhibit 1

19 4. Section 1502-A of Measure B entitled  
20 "INTENT" states:

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

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

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

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

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

The City expressly retains its authority

1 existing as of January 1, 2012, to amend,  
2 change or terminate any retirement or other  
3 post employment benefit program provided  
4 by the City pursuant to Charter Sections  
5 1500 and 1503.

6 Supporting evidence: RJN, Exh. 2

7 5. Ballot Argument in Favor of Measure B  
8 states:

9 Annual retirement costs skyrocketed from  
10 \$73 million to \$245 million over the last  
11 decade, causing service cuts throughout the  
12 city. The City's share of retirement costs  
13 exceeds 50% of payroll, far more than the  
14 6.2% of payroll private employers pay for  
15 social security. Retirement costs consume  
16 more than 20% of the general fund and are  
17 projected by independent actuaries to  
18 increase for years. This is unsustainable.  
19 Many city retirees receive more than  
20 \$100,000 per year, plus healthcare benefits.  
21 Future generations of taxpayers will have to  
22 pay billions of dollars for unfunded  
23 liabilities created by the retirement plans.

24 Measure B would protect retirement benefits  
25 already earned by current employees but  
26 would reduce the cost to the city by making  
27 changes going forward. It would not cut  
28 current payments to retirees. It would  
prohibit spiking of pension benefits.

Current city employees will pay a larger  
share of the cost of retirement benefits, a  
step already taken by over 200 California  
cities. New employees and the city would  
share the cost of retirement benefits with a  
50/50 match in a new lower-cost plan. Over  
100 California cities have adopted lower-  
cost plans for new employees.

City employees are presently paying less  
than 1/4 of the cost of their retirement  
benefits. Private sector employees usually  
pay 1/2 of the cost. Measure B will require  
current city employees to pay more than 1/3  
of the cost of their retirement benefits and  
new city employees to pay 1/2 of the cost of  
their retirement benefits.

The City Charter gives the voters the right

1 to change retirement benefits. The city will  
2 seek judicial review before changes are  
implemented to minimize legal disputes.

3 Mayor Reed, Vice Mayor Nguyen, and  
4 Councilmembers Constant, Herrera,  
Liccardo, and Oliverio support Measure B.  
Vote yes on Measure B for pension reform.

5 Signatories

6 Chuck Reed, Mayor of San Jose  
7 Matthew Mahood, President & CEO, San  
8 Jose Silicon Valley Chamber of  
9 Commerce  
10 John Roeder, President, Santa Clara County  
11 Taxpayers Association  
12 Suzanne Salata, San Jose Small Business  
13 Owner  
14 Fernando R. Zazueta, Attorney at law

15 Supporting evidence: RJN, Exh. 3

16 6. Prior to the passage of Measure B  
17 Section 3.28.340 of the San Jose Municipal  
18 Code entitled "Disposition of Earnings"  
19 stated:

20 A. Definitions. For the purpose of this  
21 Section 3.28.340, the terms listed herein  
22 shall have the following meanings:

23 1. "Income account" means the account  
24 established in the general reserve pursuant  
25 to subsection B. below.

26 2. "Interest crediting rate" means the  
27 interest rate determined by the Board for  
28 crediting the employee contribution reserve.

B. Retirement fund reserves. There shall be  
established in the retirement fund the  
following reserves:

1. The employee contribution reserve.

a. The board shall credit to the  
employee contribution reserve all  
contributions made by members of the  
retirement system and all interest payable  
pursuant to subsection C. below.

b. Moneys in the employee contribution  
reserve shall be available for the payment of  
benefits and for the return of contributions  
pursuant to Section 3.28.780.

2. The supplemental retiree benefit  
reserve.

a. The board shall credit to the

1 supplemental retiree benefit reserve all  
2 interest payable pursuant to subsection C.  
3 below and that portion of the excess  
4 earnings determined pursuant to subsection  
5 D. below.

6 b. Distributions from the supplemental  
7 retiree benefit reserve shall be made in  
8 accordance with subsection E. below.

9 3. The general reserve.

10 a. The board shall establish an income  
11 account and shall credit the income account  
12 with all rents, interest, dividends, realized  
13 gains and losses, unrealized gains and  
14 losses, and all other income other than  
15 employer contributions, received during the  
16 fiscal year. The board shall pay from the  
17 income account all expenses and  
18 administrative costs as they are incurred.

19 b. The board shall credit to the general  
20 reserve all contributions made by the city,  
21 all interest payable pursuant to subsection C.  
22 below, and that portion of the excess  
23 earnings determined pursuant to subsection  
24 D. below.

25 c. Moneys in the general reserve shall be  
26 available for the payment of benefits and for  
27 the payment of the expenses and  
28 administrative costs of the retirement  
system.

4. Such other reserves as the board may  
determine from time to time.

C. Credit to contributions and reserves. All  
interest credited pursuant to this subsection  
C. shall be deducted from the income  
account.

1. Interest shall be credited to the  
employee contribution reserve on a semi-  
annual basis, or more frequently if  
authorized by the board, at the interest  
crediting rate.

2. Interest shall be credited to the  
supplemental retiree benefit reserve at the  
actuarially assumed annual rate of return  
adopted by the board pursuant to Section  
3.28.200 or at the actual rate of return  
earned by the retirement fund during the  
applicable fiscal year, whichever is lower.  
Interest credited to the supplemental retiree  
benefit reserve shall be calculated as though  
the transfer of excess earnings required by  
subsection D. had been made on July 1 of  
the calendar year, regardless of the actual

1 date such transfer is made.

2 3. Interest shall be credited to the general  
3 reserve as follows:

4 a. Interest at the actuarially assumed  
5 annual rate of return adopted by the board  
6 pursuant to Section 3.28.200 or at the actual  
7 rate of return earned by the retirement fund  
8 during the applicable fiscal year, whichever  
9 is lower; plus

10 b. Interest calculated as the difference  
11 between (i) the interest that would have  
12 been credited to the employee contribution  
13 reserve had the employee contribution  
14 reserve been credited at the actuarially  
15 assumed annual rate of return adopted by  
16 the board pursuant to Section 3.28.200 or at  
17 the actual rate of return earned by the  
18 retirement fund during the applicable fiscal  
19 year, whichever is lower, and (ii) the interest  
20 actually credited to the employee  
21 contribution reserve pursuant to subsection  
22 C.1. above; provided, however, that there  
23 shall be no offset to the general reserve in  
24 any case where this difference is a negative  
25 number.

26 4. Interest shall be credited to any other  
27 reserves established by the board in the  
28 same manner as interest is credited to the  
supplemental retiree benefit reserve.

D. Excess earnings.

1. Within ninety days from and after  
receipt of audit reports for each fiscal year,  
the board shall determine the balance  
remaining in the income account after  
crediting of interest as provided in  
subsection C. above, and after payment of  
administrative costs and expenses of the  
retirement system for the applicable fiscal  
year.

2. If the balance remaining in the income  
account is greater than zero, the board shall  
by written resolution declare that balance to  
be the excess earnings for the applicable  
fiscal year, shall transfer ten percent of the  
excess earnings to the supplemental retiree  
benefit reserve, and shall transfer the  
remaining ninety percent of the excess  
earnings to the general reserve. If the  
balance remaining in the income account is  
less than or equal to zero, the board by  
written resolution shall declare that there are  
no excess earnings and shall adjust the

1 general reserve to reflect any negative  
2 balance in the income account so that the  
3 balance in the income account is zero as of  
4 the beginning of each fiscal year.

5 E. Distributions from the supplemental  
6 retiree benefit reserve.

7 1. The supplemental retiree benefit  
8 reserve shall be used only for the benefit of  
9 retired members, survivors of members, and  
10 survivors of retired members.

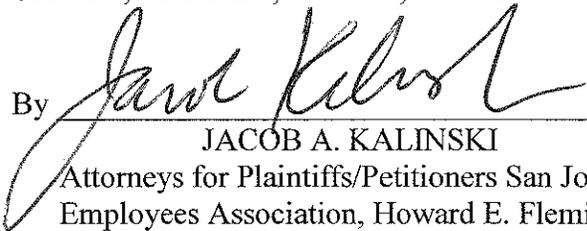
11 2. Upon the request of the city council or  
12 on its own motion, the board may make  
13 recommendations to the city council  
14 regarding the distribution, if any, of the  
15 supplemental retiree benefit reserve to  
16 retired members, survivors of members, and  
17 survivors of retired members. The city  
18 council, after consideration of the  
19 recommendation of the board, shall  
20 determine the distribution, if any, of the  
21 supplemental retiree benefit reserve to said  
22 persons.

23 Supporting evidence: RJN, Exh. 4.

24 Respectfully submitted,

25 SILVER, HADDEN, SILVER, WEXLER & LEVINE

26 Date: May 8, 2013

27 By 

28 JACOB A. KALINSKI

Attorneys for Plaintiffs/Petitioners San Jose Retired  
Employees Association, Howard E. Fleming, Donald S.  
Macrae, Frances J. Olson, Gary J. Richert and Rosalinda  
Navarro

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On May 8, 2013, I served the document(s) described as SEPARATE STATEMENT OF DISPUTED MATERIAL FACTS OF SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT AND ROSALINDA NAVARRO IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION OF ISSUES on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth on the attached service list:

[XX] [By Electronic Mail] I caused the document(s) to be transmitted to the addressee(s) via electronic mail at the addresses listed on the attached Service List.

[XX] [By Overnight Delivery] I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service

Executed on May 8, 2013, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LISA L. HILL



SIGNATURE

SERVICE LIST

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