Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
Linda M. Ross (SBN: 133874)
lross@meyersnave.com
Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Defendant and Cross-Plaintiff
City of San Jose and Defendant Debra Figone

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive, Defendants.	Case No. 1-12-CV-225926 [*Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864, 112CV233660*] **CITY'S CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION** Date: June 6, 2013 Time: 9:00 a.m. Dept.: 2 Judge: Hon. Patricia M. Lucas
AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	Complaint Filed: June 6, 2012 Trial Date: July 22, 2013

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I. INTRODUCTION

As predicted, Plaintiffs rely on an old line of cases establishing the general principle that pension rights are vested and cannot be altered to the detriment of a pensioner without substituting some comparable advantage. The City has not disputed this longstanding principle, but plaintiffs' simplistic and broad brush application of the principle is misplaced here. Plaintiffs' argument that the City has no control over anything related to the cost of pensions or retiree healthcare regardless of circumstances and financial consequences is clearly wrong.[1]

Most critically, Plaintiffs' central theme – that pensions in general are protected as vested rights – ignores the initial inquiry about what is *specifically* at issue that is claimed to be vested, and whether Measure B substantially impairs *that right*. AFSCME's argument that this Court should disregard the California Supreme Court's most recent decision relating to vested rights in the context of post-employment benefits (*REAOC)* is startling and obviously wrong.

In *REAOC*, the Supreme Court laid out the rigorous standard necessary for plaintiffs to prove that the City of San Jose gave up any right to control its benefit plans through the reforms under Measure B. Plaintiffs did not and cannot meet this burden with respect to the issues in this motion: the pension contribution rate, and retiree healthcare contributions, and SRBR

There are no triable issues of material fact with respect to the issues presented in this motion. Summary adjudication must now be granted in the City's favor.

City Charter's Reservation of Rights. Contrary to Plaintiffs' arguments, *Walsh v. Board of Administration*, 4 Cal.App.4th 682, 700 (1992) and other California cases acknowledge that a general reservation of rights clause, like that contained in the City's Charter, provides flexibility to address changing or unanticipated circumstances: "The modification of a retirement plan pursuant to a reservation of the power to do so is consistent with the terms of any contract extended by the

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[1] The stakes are enormous. The City's cost for pensions and retiree healthcare has gone up $30.4 million from last year, to total $275.8 million in 2013-14 and is projected to cost the City $329.6 million in 2017-2018. (2013-2014 City Manager's Budget Request, dated February 2013 at p. 18 (available at sanjoseca.gov/DocumentCenter/View/12833).)

plan and does not violate the contract clause of the federal Constitution." A reservation of rights clause does not "take away" vested rights. It simply maintains legislative flexibility to address changed circumstances, as occurred here.

Plaintiffs invite the Court to imply a Charter limitation on the City's authority – that the City may only increase benefits. Not only is this argument directly contrary to the plain language of the Charter's reservation of rights clause, it is also contrary to the fundamental principle that limitations on power under a municipal charter may not be implied. *E.g., Domar Electric Co. v. City of Los Angeles*, 9 Cal.4th 161 (1994). The legislative history demonstrates that the 1965 drafters of the Charter believed that the retirement benefits could be decreased, which is why they included specified "minimum benefits." The Charter's express reservation of rights is dispositive in this briefing.

Pension Contributions. Measure B Section 1506-A requires City employees to make additional pension contributions to help defray unfunded liabilities that threaten the plans. In support of their vested rights arguments, plaintiffs cite a litany of decades-old cases that hold vested rights are violated by requirements that employees pay increased pension contributions.

None of their cases involve, or address, the circumstances of this case: an express reservation of rights to amend the plan; unchallenged Municipal Code sections that expressly authorize "additional" contributions; union agreements and a course of conduct recognizing that pension contributions are negotiable; a Charter contribution ratio (3/8) that applies to *normal cost only* as conceded by plaintiffs; and no showing whatsoever that Measure B impacts the normal cost ratio.

The record shows that employees have paid for unfunded liabilities through both increased pension contributions and wage decreases. As noted by the City's amicus curiae, and admitted by Plaintiffs in their declarations, the substitution of a 4% contribution (which is pre-taxed and refundable), is *comparatively better for employees* than a 4% wage decrease (which is post-tax, not refundable and which lowers "final compensation" for purposes of calculating retirement benefits). The City's plenary authority over employee compensation supports the requirement that employees pay towards unfunded liabilities – whatever the form.

Retiree Healthcare Contributions. Measure B Section 1512-A requires the City and employees to share the yearly costs to fund retiree healthcare on a one-to-one ratio including unfunded liabilities. The legality of Section 1512-A is simple and may be dealt with summarily by this Court. Even before the enactment of Measure B, the Municipal Code required that employees and retirees make contributions in a one-to-one ratio towards retiree healthcare *with no requirement that the City pay for unfunded liabilities*. (Municipal Code §§ 3.28.385(C), 3.36.575(D).) Even before the enactment of Measure B, the yearly contribution rates paid by the City and employees included some amounts for unfunded liabilities, and since 2009, all unions represented here have agreed to their members paying towards unfunded liabilities. (Gurza Dec., ¶¶ 38, 39, Exhs. 21, 39-41.)

Plaintiffs argue only that Measure B violates their expectations, but that contention, without a legislative basis, is not sufficient under *REAOC*. Based on the undisputed facts, plaintiffs cannot prove any legislative intent to create a vested right for the City to pay for all unfunded liabilities.

SRBR. Measure B Section 1511-A requires that SRBR funds be returned to the general retirement fund and that any future supplemental distributions not be made from plan assets. Plaintiffs have not and cannot overcome the City's points: SRBR has always been treated as a discretionary fund, and therefore it cannot be "vested" as a matter of law; the SRBR funds *remain with the plans* in order to pay benefits to plan members; and Measure B corrected an irrational outcome of paying extra benefits at a time when unfunded liabilities are threatening the overall sustainability of the plans. The SRBR funds have *already* been returned to the trust for the current plan year, saving the City approximately $17 million this coming year.

There are no disputed facts requiring a trial with respect to SRBR. Summary adjudication on this issue should be granted in the City's favor.

II. ARGUMENT

A. THE CITY'S MOTION FOR SUMMARY ADJUDICATION IS PROCEDURALLY PROPER BECAUSE THE SECTIONS OF MEASURE B ADDRESSED BY THE MOTION INVOLVE SEPARATE ALLEGED WRONGS OR VIOLATIONS OF DUTY WITH SEPARATE POTENTIAL DAMAGES.

The City's motion is brought under Code of Civil Procedure section 437c(f)(1): "A party may move for summary adjudication as to *one or more causes of action* within an action... or *one or more issues of duty*, if that party contends that the cause of action has no merit... or that one or more defendants either did or did not owe a duty to plaintiff or plaintiffs." (Emphasis added).

Plaintiffs claim that the City's motion does not dispose of entire "causes of action" because it does not seek adjudication of every single section of Measure B challenged in their complaints as an impairment of contract. Plaintiffs are wrong. Each section of Measure B addressed by this motion is expressly severable under the terms of Measure B (§ 1515-A); each concerns a distinct and separate issue; each resolves the questions of the City's duty; and each may properly be considered a separate issue under Section 437c.

1. The Case Law Interpreting Section 437c(f)(1) Supports The City, Not Plaintiffs.

Plaintiffs misapply the case law interpreting Section 437c(f)(1). In *Lilienthal & Fowler v. Superior Court*, 12 Cal.App.4th 1848 (1993), the Court held that complaints of separate instances of legal malpractice brought under one legal cause of action could be separately adjudicated because they were "separate and distinct" wrongful acts with "different and distinct obligations and distinct and separate alleged damages." *Id.* at 1854.

In *Lilienthal*, as here, plaintiffs alleged different illegal actions, but contended that each was illegal under the same legal theory. In *Lilienthal*, the legal theory was malpractice; here it is violation of the contracts clause. Contrary to Plaintiffs' argument, the fact that Measure B was enacted at one time does not make its entire contents one legal wrong.

Contrary to Plaintiffs' contentions, *Bagley v. TRW, Inc.*, 73 Cal.App.4th 1092 (1999), does not undercut the City's arguments. *Bagley* addressed a different issue – the prohibition of consecutive motions for summary adjudication without new evidence or a change in the law. *Id.*

at 1092. In *dicta*, *Bagley* pointed out that Section 437c had been amended to provide that a "motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue or duty." *Id.* at 1095 n.2. Here, the City's motion for summary adjudication, if granted, would in fact "completely" dispose of a cause of action or an issue of duty – the legality of the individual sections of Measure B addressed by the City's motion.[2]

Plaintiffs fail in their attempts to distinguish other cases relied upon by the City. Again, they confuse actions – alleged wrongs or violations of legal duty – that give rise to liability, with the legal theory of liability. Plaintiffs contend that *Mathieu v. Norrell*, 115 Cal.App.4th 1174 (2004) does not support the City because the two claims in *Mathieu*, for sexual discrimination and retaliation, involved different subsections of Government Code section 12940, or occurred at different times. (Sapien/Harris/Mukhar Br. at p. 4, SJPOA Br. at p. 6.)

The decision in *Mathieu*, however, was not based on the existence of separate subsections of the Government Code, or the timing of events. Rather, citing *Lilienthal*, the Court relied on the existence of separate alleged wrongs: "the initial hostile environment sexual harassment by Fluck and retaliation for complaining about the harassment," explaining that these "two separate and distinct grounds for liability constitute separate cause of action for purposes of Code of Civil Procedure section 437c, subdivision (f)(1)." *Mathieu*, 115 Cal.App.4th at 1188. Here, the City has shown that the different sections of Measure B involve different grounds for potential liability, and different potential remedies.

Plaintiffs contend that *Garrett v. Howmedica Osteonics Corp.*, 214 Cal.App.4th 173, 185 n.7 (2013) does not assist the City because, in *Garrett*, the theories of defective design and

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[2] Moreover, *Bagley* distinguished *Lilienthal* as involving only "three requests for summary adjudication" as opposed to the "one hundred and thirty separate summary adjudications" requested in *Bagley*. In *Bagley*, plaintiff had alleged that he was not offered one of 24 available positions due to age discrimination and other factors. Defendant had attempted to obtain summary adjudication, person by person, of whether defendant offered each of the persons the positions for non-discriminatory reasons. Here, as in *Lilienthal*, the City is seeking summary adjudication as to only three provisions of Measure B.

defective manufacture, although alleged under one count, "were two separate theories" and thus "could have been alleged in separate counts, and therefore summary adjudication of the design defect claim was authorized since it disposed of a cause of action." (Sapien/Harris/Mukhar Br. at p. 5.) This point supports the City's position here, as each section of Measure B could have been pleaded as a separate cause of action.

Even if Plaintiffs were correct in their interpretation of "cause of action" (which they are not), Section 437c(f)(1) also permits summary adjudication of one or more "issues of duty." In *Linden Partners* v. *Wilshire Linden Associates*, the Court held that an "issue of duty" included an alleged breach of contract. 62 Cal.App.4th 508, 519-20 (1998). The Court concluded that "on a motion for summary adjudication, the court may rule whether a defendant owes or does not owe a duty to Plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty." *Id.* at 522. Here, adjudication in favor of the City on a particular section of Measure B would completely dispose of the issues of whether the City had a "duty" to plaintiffs related to: (1) contributions to pension plans; (2) contributions toward the retiree health plans; and (3) supplemental payments under SRBR.

Finally, some Plaintiffs compare the City's position with a defendant who causes an auto accident because the defendant was both speeding and failed to stop at a stop sign. (Sapien/Harris/Mukhar Br. at p. 6.) But in that hypothetical, there was only one damaging incident – the accident. Here, Plaintiffs allege that distinct sections of Measure B inflict multiple, and different, damages on employees and retirees.

2. The Recent Amendments To Section 437c Do Not Affect This Case.

Plaintiffs claim that the City is limited to proceeding under the new amendments to Section 437c – subdivision (s) – which provide procedures for summary adjudication of issues that do not completely dispose of a cause of action or issue of duty under subdivision (f). (Sapien/Harris Mukhar Br. at pp. 6-7.)

Subdivision (s) does not apply here. The *Garrett* case, decided in 2012 and again in 2013, *after* the 2011 amendments took effect, relied on the line of cases beginning with *Lilienthal* and

demonstrates that they are still good law. *Garrett*, *supra*, 214 Cal.App.4th at 184 n.7. Moreover, there is nothing in the legislative history of subdivision (s) that indicates it was intended to overrule the *Lilienthal* line of cases.[3] Similarly, no judicial decision supports the claim that Sen. Bill No. 384 was intended to change prior law.

B. THE PLAINTIFFS MAKE CONFLICTING ARGUMENTS AND MISSTATE THE GOVERNING LAW AND THE PARTIES' BURDENS IN PROVING THE EXISTENCE OF VESTED RIGHTS.

Under *Retired Employees of Orange County v. County of Orange*, 52 Cal.4th 1171 (2011), it is presumed that a statutory scheme does not create "private contractual or vested rights" and for a plaintiff to overcome this presumption, the "statutory language or circumstances must "'clearly' ... evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]." *Id.* at 1186-87.

AFSCME. AFSCME contends that *REAOC* is "of limited value" because it does not apply to pension statutes, but *REAOC* itself refused to apply a different standard to retiree health benefits than to pensions. *REAOC*, 52 Cal.4th at 1188. (AFSCME Br. at p. 11.) In addition, *REAOC* relied on a line of state pension cases in articulating its rigorous standards. (*Id.* at 1186, 1187 ("From these cases . . ."), quoting *California Teachers Assn. v. Cory*, 155 Cal.App.3d 494 (1984); *Claypool v. Wilson*, 4 Cal.App.4th 646 (1992), and others. Moreover, AFSCME's argument is contrary to *City of San Diego v. Haas*, 207 Cal.App.4th 472 (2012), which applied *REAOC* to reject an assertion that vested *pension* rights could be implied from the San Diego

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[3] The Bill Analysis for subsection (s) simply repeats the existing rule, stating that existing law provides that "a motion for summary adjudication shall be granted only if completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." See City's Request for Judicial Notice in Support of Opposition to Sapien, Harris, and Mukhar Plaintiffs' Motion to Stike, Exh. A (Sen. Floor, Analysis of Sen. Bill No. 384 (2011–2012 Reg. Sess.) as amended Sept. 8, 2011, pp. 3-4.) The Analysis then summarizes the addition to the rule: "This bill authorizes a motion for summary adjudication of a legal issue or a claim of damages other than punitive damages that does not completely dispose of a cause of action, an affirmative defense, or an issue of duty . . . ." (*Id.*) The Bill Analysis does not indicate any intent to change existing law. (*Id.*) Existing law, as discussed above, holds that separate legal wrongs (or breaches of contract) constitute separate "causes of action" or "issues of duty" and can therefore be subject to a motion for summary adjudication. (*Id.*)

Municipal Code. Nothing in *REAOC* suggests that its analysis for determining vested rights does not apply to pension benefits. *REAOC* plainly applies here.

As predicted in the City's opening brief, AFSCME cites to older pension cases such as *Allen*, *Betts* and *Kern*,[4] for the proposition that pension rights vest upon employment, and are subject to modification only if a comparable advantage is substituted. (AFSCME Br. at p. 13.) But those cases, unlike *REAOC*, did not address the analysis required to determine the threshold issue of whether a governmental body in fact intended to create a vested right to a particular retirement plan feature.

AFSCME claims that it has no burden to prove that the City intended to create vested rights, but rather "the burden is on the City that such rights were not intended." (AFSCME Br. at p. 15.) Not only is this argument contrary to the decision in *REAOC*, which addressed a "plaintiff's heavy burden," but the cases AFSCME relies upon are inapposite. These cases discussed a discrete issue not present here – whether pension benefits can be limited to amounts available in a pension fund. *See Pasadena Police Officers Ass'n v. City of Pasadena*, 147 Cal.App.3d 695, 703 n. 23(1983) (COLA benefits); *Bellus v. City of Eureka*, 69 Cal.2d 336, 350 (1968) (pension payments).

SJPOA. Like AFSCME, the SJPOA cites to the *Betts*, *Allen* and *Kern* line of cases. (SJPOA Br. at p. 7.) Unlike AFSCME, however, the SJPOA admits that *REAOC does* apply here. (SJPOA Br. at p. 9.) The SJPOA contends, however, that the *REAOC* standards are easily satisfied. The SJPOA reasons that the mere existence of a "retirement benefit" means it is automatically vested. But this is exactly the type of assumption rejected in *REAOC*, which warned:

> "A court charged with deciding whether private contractual rights should be implied from legislation, however, should 'proceed cautiously both in identifying a contract within the language of a . . . statute and defining the contours of any contractual obligation.' [citation omitted] The requirement of a 'clear showing' that

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[4] *Betts v. Bd. of Admin.*, 21 Cal.3d 859 (1978); *Allen v. City of Long Beach,* 45 Cal.2d 128 (1955); *Kern v. City of Long Beach*, 29 Cal.2d 848 (1947).

> legislation was intended to create the asserted contractual obligation [citation omitted] should ensure that neither the governing body nor the public will be blindsided by unexpected obligations."

REAOC, 52 Cal.4th at 1188-89.

The SJPOA also contends that the City relies on federal cases that are less protective of public employee pensions than California cases. (SJPOA Br. at p. 10.) But *REAOC* did not distance itself from federal law; *it relied on federal law* in articulating the standards to be applied in determining whether legislative action confers a vested right. *REAOC*, 52 Cal.4th at 1185-86 (relying on *National R. Passenger Corp. v. A.T.& S.F.R. Co.*, 470 U.S. 451 (1985) ["to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body"], at 1187 (relying on *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977) [legislative action must "clearly . . . evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]"). The California Supreme Court thus confirmed the viability of federal law standards as applied to contractual impairment claims made under California state law.

Further, in arguing that federal law is less protective than California law, the SJPOA mischaracterizes the role of federal law in determining whether vested rights have been impaired under the federal contracts clause. In *Walsh*, the Court explained that: "Whether a law violates the contract clause of the federal Constitution is a federal question, but determining the existence and meaning of a contract requires reference to state law." 4 Cal.App.4th at 697-98. In *Walsh*, and *Legislature v. Eu*, the Court cited to United States Supreme Court cases that applied the law *of the state* to determine whether the public entity had made a promise protected by the federal contracts clause. *Id.* at 697, 698; *Legislature v. Eu*, 54 Cal.3d 492, 532-33 (1991) (e.g., discussing *Dodge v. Board of Education*, 302 U.S. 74 (1937) [applying Illinois law], *Higginbotham v. Baton Rouge*, 306 U.S. 535 (1939) [applying local law]). And, in *Eu*, the Court distinguished some of these cases as involving only the right to job tenure and not to pension rights. *Eu* at 533-34 (discussing *Higginbotham*). There is no question that laws among the states vary on the creation and modification of vested rights. Here, the Court will of course be applying California law, but California law is consistent with the federal approach on determining whether a public entity

intended to create a vested right.

Sapien/Harris/Mukhar. These plaintiffs also contend that federal law is not instructive here (Sapien/Harris/Mukhar Br. at p. 12), but as explained above, California law is entirely consistent with federal standards.

C. PLAINTIFFS HAVE FAILED TO OVERCOME THE CHARTER'S RESERVATION OF RIGHTS CLAUSE.

1. California Courts Have Acknowledged The Validity Of General Reservation Of Rights Clauses, Like Those In San Jose's Charter, As Applied To Public Pension Systems.

Plaintiffs contend that a reservation of rights clause is antithetical to a public pension system. (See AFSCME Br. at p. 16:14-15 [stating that the City's reservation of rights argument "would render the entire pension system illusory"].) To the contrary, California courts have acknowledged the propriety of reservation of rights clauses written in general terms, similar to the terms used in San Jose's reservation of rights clause. *Walsh,* 4 Cal.App.4th at 700 ("The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967," quoting former Cal. Const., art. IV, § 4, ¶ 3); *Teachers' Retirement Board v. Genest*, 154 Cal.App.4th 1012, 1021-22 (2007) ("*Genest*") (acknowledging the following reservation of rights clause [Cal. Ed. Code § 22954(d)] before its repeal: "[T]he Legislature reserves the right to reduce or terminate the state's contributions to the [SMBA] in the Teachers' Retirement Fund provided by this section and to reduce or terminate the distributions required by Section 24415."); *International Ass'n of Firefighters v. City of San Diego*, 34 Cal.3d 292, 299 (1983) (holding that San Diego had the authority to increase employees' pension contribution rates pursuant to a provision stating: "On the basis of any and all such investigations, valuations and determinations the Board shall adopt such mortality, service and other tables and interest rates as it deems necessary and make such revisions in rates of contributions of members as it deems necessary to provide the benefits for which the rates of normal contributions are required to be calculated").

Contrary to Plaintiffs' contentions (AFSCME Br. at p. 21), the decision in *Walsh* is not limited to situations in which there was a "windfall" to retirees. Rather, *Walsh* held that an

unexpected benefit *and* a funding shortfall was exactly the type of situation contemplated by the legislature in enacting the reservation of rights. *Walsh*, *supra*, 4 Cal.App.4th at 704. Similarly, here, the unprecedented dramatic spike in unfunded liabilities is a situation contemplated by a reservation of rights.

AFSCME attempts to distinguish *International Association of Firefighters*, *supra*, arguing that there, unlike in this case, "increases in employee contribution rates were permissible *pursuant* to that provision (permitting "revisions" in rates), meaning exercised in accordance with that provision." (AFSCME Br. at p. 22:15-16.) But that is what the City argues here. The Charter's reservation of rights clause, which operates in conjunction with the minimum benefit provisions, permits the City to adjust the contribution ratio for unfunded liabilities. (§§ 1504(b), 1505(c) [assigning no minimum contribution ratio to prior service].)

For its part, the SJPOA argues – without elaboration – that the Charter's clause "simply does not include the same power to limit benefits before retirement" as did the clause in *Walsh*. (POA Br. at p. 13 n.12.) This unsupported assertion should be disregarded. The clause in this case – "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 establish a new or different plan or plans for all or any officers or employees" – gives the Council the discretion discussed in *Walsh*, and in fact is not as limited as the language in *Walsh*. (Charter, art. XV, § 1500.)

AFSCME and the SJPOA cite *Air Cal, Inc. v. San Francisco*, 638 F.Supp. 659 (N.D. Cal. 1986), *Cont'l Ill. Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692 (9th Cir. 1983), and *Southern Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885 (9th Cir. 2003), for the proposition that reservation of rights clauses generally are not enforceable. (AFSCME Br. at pp. 14-16; SJPOA Br. at p. 17).[5] But those cases do not apply here. They involve negotiated contracts between

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[5] AFSCME also cites *Requa v. Regents of the Univ. of Cal.*, 213 Cal.App.4th 213, 231-32 (2012) to challenge the application of the reservation of rights clause here. (AFSCME Br. at pp. 14:16.) But the court in that case simply found that reservation of rights clauses contained in employee (footnote continued)

public and private entities, subject to general clauses reserving the public entity's "police powers." The courts simply held that the public entities' general regulatory authority could not be used to impose additional financial terms contrary to the "principal rights" negotiated and past practices under the contract. See, e.g., *Southern Cal. Gas, supra*, 336 F.3d at 892. In contrast, this case does not involve an attempted use of general police powers to negate negotiated central terms and past practices under an existing contract. Rather, this case is governed by *Walsh*, in which a legislatively enacted reservation of rights, in existence *before* contribution rates were set or supplemental benefits were provided, *prevents* the creation of vested rights. Moreover, even if these cases did apply, Measure B does not affect any alleged central expectation to receive pension or retiree health benefits. Instead it invokes the Charter's reservation of rights to ensure adequate funding *in order to preserve those benefits*. The cases cited by Plaintiffs are inapposite here.

2. A Reservation of Rights Clause Does Not Render a Pension System Illusory But Clarifies What Benefits Are a Matter of Discretionary Policy Instead of a Contractual Obligation.

Contrary to Plaintiffs' contentions, reservation of rights clauses serve an important purpose in public pension systems, and do not render a pension system illusory. (AFSCME Br. at pp. 15:2-13, 16:14-21.)

Reservation of rights clauses differentiate between matters of public policy, which are subject to control by the public entity, and matters of contractual obligation, which may be vested rights belonging to employees. In *REAOC*, the California Supreme Court acknowledged that legislatures, such as the San Jose City Council, exist principally to establish policy, not to enter into private contracts. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed

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handbooks issued well after the benefit was initially provided were insufficient to defeat the plaintiff's claim on demurrer: "As a court reviewing a demurrer ruling, however, we can express no definitive view as to the meaning of this language." Here, the clause is part of the 1965 Charter, enacted well before the alleged benefits at issue here, and the Court has the benefit of the record on this instant motion for summary adjudication.

would be to limit drastically the essential powers of a legislative body." *REAOC, supra,* 52 Cal.4th at 1185 (quoting *Nat. R. Passenger Corp. v. A.T.&.S.F.R. Co.*, 470 U.S. 451, 466 (1985). *REAOC*'s observation is consistent with federal reservation of rights cases: "Since the Act was designed to protect future, as well as present, generations of workers, it was inevitable that amendment of its provisions would be necessary in response to evolving social and economic conditions unforeseeable in 1935...." *Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 51 (1986).

Plaintiffs contend, that even under *Bowen*, there are limits to reservation of rights clauses, citing *Bowen*'s statement that: "Congress could not rely on that power to take away property already acquired under the operation of the charter, or to deprive the corporation of fruits actually reduced to possession of contracts lawfully made..." *Bowen, supra, 477 U.S.* at 51-53. The provisions of Measure B at issue in this motion do not come anywhere near the limits articulated in *Bowen.* Nothing in Measure B takes away *any* earned retiree pension or health benefits.

3. The Charter's Reservation Of Rights Clause Does Not Limit Benefit Changes To Increases.

Plaintiffs contend that the Charter's reservation of rights clause limits changes in retirement benefits to modifications that provide a corresponding advantage or provide benefit increases. The Charter's text and legislative history show otherwise.

a. The Text Of The Reservation Of Rights Clause Does Not Contain The Limitations Proposed By Plaintiffs.

The Charter's reservation of rights clause is broadly worded. It states that, "the Council may *at any time*, or from time to time, amend or change *any* retirement plan or plans or adopt or establish a new or different plan or plans for *all or any* officers or employees." (Charter, art. XV, § 1500 (emphasis added).) Rather than use restrictive modifiers, the clause uses the inclusive phrase "any" repeatedly. The reservation of rights clause applicable to retirement systems existing when the 1965 Charter was adopted (the current Police and Fire Plan) is even more broad, stating that "the Council shall *at all times* have the power and right to *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 . . . . " (Charter, art. XV, §1503.)

The *Sapien* plaintiffs contend: "[t]he Charter provisions allow for a change and/or substitution, but not without a reasonable comparable substitution replacement." (Sapien/Harris/Mukhar Br. at p. 7.) But neither the word "substitution" nor the phrase "without a reasonable comparable substitution replacement" appears in the clauses. The POA similarly contends that the clause is limited to increases in benefits. But again, the words "limited to increases" are not contained in these clauses either. (Charter, art. XV, §§ 1500, 1503)

b. Principles Of Statutory Construction Prohibit The Court From Adopting Plaintiffs' Proposed Limitations.

Under plaintiffs' theory, the Court would be required to add terms not present in the City Charter – terms limiting the reservation of rights to modifications with corresponding advantages or to increases in benefits. This proposed interpretation violates principles of statutory construction.

First, principles of statutory construction prohibit the addition of omitted terms. "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Cal. Code Civ. Proc. § 1858; *see also People v. Guzman*, 35 Cal.4th 577, 587 (2005) ("'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes...'") (citation omitted); *Thornton v. Cal. Unemployment Ins. Appeals Bd.*, 204 Cal.App.4th 1403, 1419 (2012) (rejecting public employee's claim that its interpretation of the statute was not fair or just, the court held its duty was "to apply the governing statutes as written to the facts of the case before us, not to rewrite the statutes to make them more just or fair in particular circumstances"); *Richardson v. San Diego*, 193 Cal.App.2d 648, 651 (1961) (applying "liberal construction" to pension plan, but declining to expand pension benefits beyond the terms of the plan, given that "'[l]iberal construction does not mean enlargement or restriction of a plain provision of a written law'") (citations omitted).

Second, based on the constitutional authority of charter cities, courts do not read limitations into a charter that are not expressly present. As explained in the City's opening brief, "Charter provisions are construed in favor of the exercise of the power over municipal affairs and 'against the existence of any limitation or restriction thereon which is not expressly stated in the charter...." *Domar Electric,* 9 Cal.4th at 171. "Thus, *'[r]estrictions on a charter city's power may not be implied.'*" *Id.* at 171, quoting *Taylor v. Crane*, 24 Cal.3d 442, 451 (1979) (emphasis added). Accord *Grimm v. City of San Diego,* 94 Cal.App.3d 33, 37-38 (1979) ("'in construing the city's charter a restriction on the exercise of municipal power may not be implied,'" and thus, "a city council's decision regarding a pension system must be upheld unless expressly prohibited by the city charter") (citation omitted).

Finally, plaintiffs' theory that the City Council could only increase benefits would render the Charter sections establishing minimum benefits unnecessary and thus mere surplusage. This is contrary to standards of statutory construction. *Atchley v. City of Fresno*, 151 Cal.App.3d 635, 648 (1984) ("A basic rule of statutory interpretation requires that courts avoid a construction which renders a part of the statute or ordinance 'surplusage.'").

c. The Legislative History Does Not Support The Limits Proposed By Plaintiffs Because the 1965 Charter Deleted Any Language That Could Possibly Be Construed To Limit Changes To Benefit Increases

The unions' argument that the reservation of rights clause restricts benefit changes to increases is belied by the legislative history. Even if the 1961 Charter could have been read to permit only benefit increases, the 1965 Charter (the current Charter) *specifically deleted* from the reservation clauses any text that could possibly be read to limit changes in retirement benefits to benefit increases.

Prior to the 1965 enactment of the current San Jose Charter, retirement benefits for members of the police and fire department were governed by Article 78a of the former Charter. (City's Request for Judicial Notice ("City's RJN"), Exh. E.) As the POA notes in its opposition, the voters amended the Charter in 1961 by adding Section 78b. (City's RJN Exh. E.) Section 78b contained the genesis of the current reservation of rights clause, providing that the Council may

amend or change the plan "for the purpose of providing benefits for members…in excess of those benefits authorized or required by the provisions of said Section 78a." *Id.* That modifying phrase – "in excess of those benefits" – no longer exists, having been specifically deleted from the 1965 Charter. As set forth above, the current Charter states: "the Council may at any time, or from time to time, amend or change any retirement plan or plans or adopt or establish a new or different plan or plans for all or any officers or employees." (Charter, art. XV, § 1500.) *See Kelly v. Methodist Hosp.*, 22 Cal.4th 1108, 1115-1116, 1121 (2000) (finding Legislature's elimination in 1977 of statutory language and rejection of proposed amendments significant in evaluating scope of religious-entity exemption for employment discrimination claims).

The 1965 Charter Committee Minutes further demonstrate that this reservation of rights clause was not intended to permit only increases. The unions argued vigorously to the committee in 1964 to include minimum benefit provisions. (City's Supp. RJN, Ex. R, U, W, S (Letters to Charter Revision Commission.) These requests came after the City Attorney informed the Charter Committee, in May 1964, that under the 1961 charter, "retirement benefits could have been reduced." (City's Supp. RJN, Exh. A (Charter Committee Minutes, May 26, 1964).) On December 8, 1964, the Charter Committee revised the proposed 1965 charter to include minimum benefits. (City's Supp. RJN, Ex. Y.) The minutes contain no discussion of the minimum benefits as functioning as an ever-increasing mandatory minimum.

Based on the Charter's text, history and principals of statutory construction, the Court cannot read the Charter as permitting only modifications with a corresponding advantage or increases in benefits.

d. The 1965 Charter's Reservation of Rights Clause Is Substantially Similar To Existing Reservation of Rights Clauses In Federal Statutes.

Plaintiffs argue that the City Council and the San Jose voters must be deemed aware of existing law at the time the 1965 charter was enacted, including the *Allen* and *Kern* line of cases. (Sapien/Harris/Mukhar Br. at pp. 7-8.) But those cases did not address reservation of rights clauses. In fact, when the 1965 Charter was enacted, the most instructive case law on reservation of authority was federal authority, which addressed reservation of rights terms strikingly similarly

to those adopted by the City's voters. *See National R. Passenger Corp.* v. *A.T.&S.F.R. Co.*, 470 U.S. 451, 467 (1985) ("Congress 'expressly reserved' its right to '*repeal, alter or amend*' the Act at any time. (citation omitted) This is hardly the language of contract");[6] *Flemming v. Nestor,* 363 U.S. 603, 610-611 (1960) ("It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it '*the right to alter, amend, or repeal any provision*' of the Act.").

Moreover, the contention that the voters are presumed to be aware of the *Allen* and *Kern* line of cases does not mean that they intended their reservation of rights to be restrictive. On the contrary, knowledge of those cases would presumably have prompted the drafters of the Charter to proceed cautiously, and to preserve maximum authority to make future adjustments.

e. The City Council Itself Placed Measure B on the Ballot, Thus Satisfying the SJPOA's Argument that The Reservation Of Rights is Limited to Council Legislation and Not Voter Initiatives.

The POA argues that the Charter's reservation of rights clause does not apply to Measure B because it permits only City Council-initiated plan changes – not voter-initiated changes. According to the POA, because the voters enacted Measure B, the instant case is governed by *Legislature v. Eu*, 54 Cal.3d 492, 529 (1991), where the Court held that a reservation of rights clause affording the "legislature" authority to limit pension benefits did not authorize a voter initiative doing so.

Here, Measure B was *not a voter initiative*, but was placed on the ballot by City Council legislative action pursuant to its state constitutional authority. (Cal. Const., Art. XI, section 3(b).) Furthermore, pursuant to its City Charter authority, the City Council has enacted ordinances implementing Measure B into both the Federated and Police and Fire Plans. (City Supp. RJN, Exh. FF [Ordinance No. 29174: "Under the City Council's authority pursuant to Article XV, Section 1500 of the City Charter, the provisions of Article XV-A are hereby implemented into the

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[6] This case was relied upon in *REAOC,* 52 Cal.4th at p. 1186.

San Jose City Code" (amending Muni. Code § 3.28.010(F))], and City Supp. RJN, Exh. GG [Ordinance No. 29198: "Under the City Council's authority pursuant to Article XV, Section 1500 of the City Charter, the provisions of Article XV-A are hereby implemented into the San Jose City Code" (amending Muni. Code § 3.32.010(b).) *Eu* is thus completely distinguishable. The Council itself placed Measure B on the ballot, and the City Council itself enacted Measure B "by ordinance."

Finally, *Eu* is distinguishable for another reason. In *Eu*, the Court found that the voter initiative's attempt to "terminate" certain pension benefits exceeded the scope of the reservation of rights clause at issue in that case. Here, the reservation of rights clause expressly reserves the authority to "amend or otherwise change" the City's retirement plans, and this is consistent with the intended effect of Measure B. Nothing in Measure B terminates pension benefits.

D. PLAINTIFFS HAVE FAILED TO SHOW HOW THE REQUIREMENT FOR ADDITIONAL CONTRIBUTIONS VIOLATES A VESTED RIGHT.

Plaintiffs rely on various authorities that have disallowed provisions that increase employee pension contributions. All of these authorities are inapposite here because they do not involve analysis of an express reservation of rights to amend the plan; unchallenged Municipal Code sections that expressly authorize "additional" contributions; union agreements and a course of conduct recognizing that contributions are negotiable; a contribution ratio (3/8) that applies to *normal cost only*, with no showing whatsoever that Measure B impacts the normal cost ratio. And none of these cases involve circumstances where pension contribution rates are treated essentially interchangeably with wages.

1. Most Plaintiffs Concede that the Charter Does Not Require The City To Pay For Pension Plan Unfunded Liabilities.

In its opening brief, the City established that the City Charter did not require the City to pay all pension plan unfunded liabilities. (City Br. at pp. 20-21.) The Charter requires that the employees and City pay pension in a ratio of 3 to 8 only for "current service or current service benefits." This is the "normal" rate of contribution. For contributions towards "prior service and prior service benefits," which include unfunded liabilities, no ratio applies and either the City or

employees may be required to make contributions. (Charter §§ 1504(b), 1504(c).)

The SJPOA concedes that the present Charter does not require the City to pay for all unfunded liabilities, based on its review of legislative history. (SJPOA Br. at pp. 21-22.) The SJPOA states: "The 1965 Charter added Section 1504(c) – which is still the version in effect today. (City RJN, Exhs. A & G.) That Charter section required an actuarially sound system, but apparently gave the Council discretion to allocate UAAL." (SJPOA Br. at pp. 21-23.) The City agrees.

The Sapien/Harris/Mukhar plaintiffs similarly admit that the Charter does not require the City to pay for all unfunded liabilities, stating in their preliminary injunction brief: "[T]he normal rate of contribution is to be in a ratio of 3 by employees to 8 by the City." (Motion for Preliminary Injunction, dated 1/31/13, at p. 5.)

Only AFSCME argues that the Charter itself precludes the City from requiring employees to contribute toward unfunded liabilities in the plans. But their argument is premised solely on provisions in the Municipal Code. Clearly, there is nothing in the San Jose Charter itself that precludes employees from contributing toward unfunded liabilities.

2. The Municipal Code Does Not Create A Vested Right That Requires The City To Pay In Perpetuity For All Pension Plan Unfunded Liabilities.

Unable to take refuge in the Charter, Plaintiffs rely on the Municipal Code.

Plaintiffs covered by the Federated Plan rely on Municipal Code definitions of employee and City contributions which state that the City's contribution rate includes "any existing deficiency in the amounts of current service contributions theretofore contributed by members and the city . . . ." (Municipal Code § 3.28.880, see also § 3.28.710.) (AFSCME Br. at pp. 26-27; Sapien/Harris/Mukhar Br. at p. 14.)

Plaintiffs covered by the Police and Fire Department Plan rely on similar Municipal Code definitions under which the City pays amounts required to make up deficiencies due to "prior service." (Municipal Code §§ 3.36.1520.A, 3.36.1550.D.) (SJPOA Br. at pp. 20-21; Sapien/Harris/Mukhar Br. at p. 14.)

But based on legislative history and the conduct of the parties, the Municipal Code is not a

barrier to employees paying for unfunded liabilities. See *REAOC*, 52 Cal.4th at 1187, 1191 (to determine whether contractual term is vested, court look to "the statutory language or circumstances accompanying its passage" to see if they "clearly evince a legislative intent to create private rights of a contractual nature").

First, when the City took on payment for unfunded liabilities, the City always did so in the context of a particular cost – not an unlimited cost. The legislative record demonstrates that in 1971, when pursuant to a union agreement, the City first began to pay all unfunded liabilities in the Police and Fire Plan, the City's valuation of the additional cost to the City was specifically identified. (City's Supp. RJN, Exh. Z [5/12/71 memo from City Manager estimating cost at 1% of payroll or approximately $100,00 annually]; Exh. AA [Resolution No. 40059, setting rates pursuant to union agreement].) Similarly, in 1979, when the Municipal Code was amended to provide for City payment of unfunded liabilities in the Police and Fire Plan, the City's percentage cost of unfunded liabilities was only 4.03% of pay for the "basic plan," 3.76% of pay for the COLA and predicted to rise only to 7.96% over time. (City's Supp. RJN, Exh. CC [8/16/78 Actuarial Report re Police and Fire Contribution Rates], City's Supp. RJN Exh. BB [Ordinance No. 19690].)

Second, there was an assumption, reflected in a 1997 public memorandum issued by the City Attorney's Office, that the Municipal Code could be amended to change the allocation of contribution rates between the City and employees. (SJPOA RJN, Exh. 19 [12/29/97 Memorandum to Police and Fire Department Plan].) The memorandum concluded: "If the Board wishes to change the . . . allocation of contribution rates between the members and the City, it would be appropriate for the Board to make such recommendation to the City Council for the matter to be referred to the meet and confer process."

Third, when the City's costs for unfunded liabilities began to skyrocket, the City and unions all assumed that the City's employees could pay additional amounts to help defray unfunded liabilities. By 2010, the City had an unfunded pension liability of $2 billion. (Gurza Decl. Exh. 1, p. 11 [Auditor's report].) As a result, in 2010 MOAs, the City and its unions agreed to employees paying additional contribution rates to offset unfunded liabilities, or to take lower

wages. (Gurza Decl., ¶¶ 24-25.) At the same time, the City amended the Municipal Code to add provisions, contested by no union, that permitted the City to require employees to make "additional" pension contributions to offset the City's pension contributions, which include unfunded liabilities. (Municipal Code §§ 3.28.755, 3.28.955 [Federated Plan], 3.36.1525C [Police and Fire Plan].) (See City's Br. at pp. 22-26.) [7]

As demonstrated below, in discussing each plaintiff's contentions, this conduct demonstrates that the parties considered employee contribution rates to be elements of compensation, which like wages, were subject to alteration based on the City's financial condition. See *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th 1215, 1223-26 (1998) (holding "the collective bargaining process properly included such terms and conditions of employment as annual leave and longevity pay benefits," even where union had relied on the prohibition on bargaining away individual statutory or constitutional rights to claim its agreement to decreased longevity benefits was meaningless).

3. The Various Arguments Made by the Plaintiffs Fail to Demonstrate the City Intended to Pay for All Unfunded Liabilities in Perpetuity.

a. The Court Must Reject AFSCME's Arguments.

AFSCME contends that the Municipal Code "may not be construed to allow retroactive imposition of contributions associated with past service" because it would "render the prohibition on requiring employees to make contributions based on plan and system experience a surplusage." (AFSCME Br. at p. 27.) To the contrary, the City ordinances are easily harmonized. Section 3.28.955 acknowledges that the "additional" contributions are for the purpose of defraying the "retirement contributions that the City would otherwise be required to make under this Part 7." And the MOAs make it clear that the City used the additional retirement contributions paid by

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[7] See also Municipal Code § 3.36.1560 [Police and Fire Plan]: "If any other contributions are required of a person or persons under provisions of this chapter, either as a condition to becoming a member of this system; or as a condition to receiving any benefit hereunder, or for any other reason the same shall be paid by such person or persons as provided by said other provisions."

employees to offset the City's retirement contributions for unfunded liability. (Gurza Decl., ¶ 27, Exhs. 11, 15, 17, 23, 25, 29 ["the amounts so contributed will be applied to reduce the contributions that the City would otherwise be required to make for the pension unfunded liability"].)

AFSCME further contends that, unlike other unions, AFSCME never agreed that its members would pay "additional" pension contributions to contribute towards the City's unfunded liabilities. (AFSCME Br. at p. 27.) It is true that AFSCME was not part of the 2010 union agreements to pay "additional" pension contributions – because its union contract was not open at that time. (Gurza Decl., ¶¶ 26, 30.) However, the following year, when the AFSCME contract came open, the City imposed a *12% wage decrease* on AFSCME for the purpose of alleviating the City's financial shortfall which included the need to pay for unfunded liabilities. (Gurza Decl., Exhs. 20, 28)

AFSCME's own expert confirms that its members are paying for pension plan unfunded liabilities through wage reductions. (See Declaration by AFSCME expert Dan Doonan , ¶40 [City asserted wage reduction was to pay for retirement costs].) AFSCME also cannot deny that the City has the authority to "impose" – in the form of a Last, Best and Final Offer – a wage reduction for the purpose of paying for the pension plan's unfunded liabilities, because that is exactly what happened. See Cal. Gov. Code § 3505.7.[8] Measure B does nothing more than what already occurred when the City imposed the salary reduction on AFSCME. As explained in the seminal case of *Seal Beach*, the City's authority is not limited to imposing terms and conditions of employment through City Council resolution. Rather, the City Council also has the authority to place a measure on the ballot.

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[8] Government Code § 3505.7 states: "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best and final offer, but shall not implement a memorandum of understanding."

> "Although the [MMBA] encourages binding agreements resulting from the parties' bargaining, the governing body of the agency … retains the ultimate power to refuse an agreement and to make its own decision. This power preserves the council's rights under [California Constitution] article XI, section 3, subdivision (b) – is may still propose a Charter amendment if the meet and confer process does not persuade it otherwise."

People ex rel. Seal Beach Police Officers Assn v. City of Seal Beach, 36 Cal.3d 591, 601 (1984).

In this case, as authorized by *Seal Beach*, the City imposed higher contribution rates for unfunded liabilities under its Charter authority by enacting Measure B.

AFSCME contends that "wage reductions and increased contributions are not interchangeable and AFSCME never treated them as such." (AFSCME Br. at p. 27) This is a conclusory statement, belied by AFSCME's own expert's declaration. His declaration demonstrates not only that both affect compensation, but also, as argued by the City, that increased employee contribution rates are *more beneficial* to employees than reductions in compensation. The declaration explains that "while pay cuts effect employees' pensionable wages, *higher contributions towards retirement benefits do not*" and "when the City cuts its employees wages, the employees draw lower levels of pension benefits based upon this smaller income." (Doonan Decl., ¶¶ 35-37 [Emphasis added].) Based on AFSCME's own admission, there is no question that Measure B's requirement for increased pension contributions is more beneficial to employees than a straight wage reduction.[9] And again, there is no question that the City has the right to impose a straight wage reduction.

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[9] AFSCME expert's opinion on the greater benefits of higher contribution rates is consistent with the position taken in 2011 by another union representative :

> "The additional retirement contribution provides two forms of relief for membership. First, the additional retirement contribution is pre-tax and this additional contribution lowers the tax burden for our members but still allows for the city to extract the full 10% total compensation reduction as directed by the City Council. Second, with the uncertainty as to what other bargaining units may or may not concede in total compensation, the specter of layoffs for our members is very real. As such, the additional employee retirement contribution that offsets the required city contribution is credited to each individual employee and upon separation from the city that contribution would leave with the employee." (Gurza decl., Exh. 35.)

4. The SJPOA's Arguments Are All Unavailing.

The SJPOA makes a slew of arguments, but none has merit.

a. The SJPOA Has Paid Towards Unfunded Liabilities Through Both Increased Contribution Rates and Lower Wages.

The SJPOA relies on *Assoc. of Blue Collar Workers v. Wills*, 187 Cal.App.3d 780, 789 (1986), for the proposition that a City ordinance that requires the City to fund unfunded liabilities creates a vested right in employees to be free from any contribution. (SJPOA Br. at p. 21.) But *Wills* does not address the situation here, where employees have agreed, and the Municipal Code has authorized, employee payments towards unfunded liabilities, through increased employee contribution rates or decreased wages.

The SJPOA downplays the fact that in 2010, the SJPOA agreed that its members would pay an additional 5.25% employee pension contribution rate to pay for unfunded liabilities. (Gurza Decl., ¶¶ 24, Exh. 29.) In 2011 and again in 2012, the SJPOA agreed that its members would take a 10% wage reduction. (Gurza Decl., ¶ 30, Exhs. 30, 31.) Based on this conduct, the City and SJPOA treated employee payments of increased pension contributions and the subsequent alternative of decreased wages as interchangeable. As demonstrated above, both are elements of "total compensation."

In response to the City's arguments, the SJPOA contends that the SJPOA never actually paid for unfunded liabilities because "their additional contributions were paid directly to their individual retirement accounts." (SJPOA Br. at pp. 24-25.) It is true that the SJPOA contributions were paid into employees' individual retirement accounts, but it is also true that these additional contributions subsidized the City's contribution rate for unfunded liabilities. In fact, SJPOA MOA expressly provided that the additional employee contributions "*will be applied to reduce the contributions that the City would otherwise be required to make for the pension unfunded liability...*" (Gurza Dec., Exh. 29 [GURZA000544].)

SJPOA's agreement is fully consistent with Measure B with respect to how employee

contributions are treated. Under Measure B, as under the MOA, the additional employee contributions are paid into their retirement accounts.[10] Under Measure B, as under the MOA, these amounts will reduce the City's pension contribution rate for unfunded liabilities.

b. Based On Historical Practices, In San Jose Pension Contribution Rates And Wages Are Both Elements Of Employee Compensation To Which There Is No Vested Right.

As an alternative argument, the SJPOA contends that if it improperly bargained away individual rights, it means only that the MOA itself was invalid. (SJPOA Br. at p. 26.) The SJPOA misstates the City's contention here. The City does not simply contend that the SJPOA's one-time agreement waived its members' rights. *Rather, the City contends that the SJPOA and the City bargained over contributions to reduce the unfunded liability because both recognized employee pension contributions as "simply terms and conditions of employment subject to negotiation in the collective bargaining process."* *San Bernardino Public Emps. Ass'n v. City of Fontana*, 67 Cal.App.4th at 1223-26. The SJPOA cannot disavow this position, solely for the purpose of invalidating Measure B. *Id.* at 1219, 1224-25 (finding longevity benefits in MOUs were not vested rights, where union had agreed to MOUs that had provisions decreasing longevity benefits but later attacked those same provisions). The indisputable fact that the SJPOA and the City negotiated and approved MOAs over contributions toward unfunded liabilities defeats any argument that the City's payment toward unfunded liabilities is a vested benefit. *REAOC*, 52 Cal.4th at 1189-91.

As in the case of AFSCME, the SJPOA's own declarants make the case for employee contribution rates and wages being interchangeable forms of compensation, but with increased contribution rates more favorable for the employees. (See Declaration of John Robb, ¶ 18

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[10] Measure B states: "The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions." (Measure B, Section 1506-A(e).)

[Describing the increased employee pension contribution rate as a reduction in "salary" and how employees benefited from increased employee pension contributions being credited to their individual retirement accounts]; Declaration of Franco Vado, ¶ 7-9 ["SJPOA agreed to the increased pension contribution because we considered it a more favorable form of concession than a wage cut" - because it would not reduce pensionable pay, adversely affect ability to qualify for loans and mortgages, and permitted return of increased pension contribution amounts upon leaving employment].)

The POA's effort to distinguish the City's authority clearly fails.[11] The POA contends that here, unlike *San Diego Police Officers Ass'n v. San Diego City Employees Retirement System*, 568 F.3d 725 (9th Cir. 2009), there was no "historic practice" of treating retirement contributions "in lieu of" salary. (SJPOA Br. at p. 27.) The evidence is to the contrary. In 2010, many unions entered into initial agreements with the City to make the increased pension contributions of approximately 10% of pay, and then for fiscal year 2011-12 and 2012-13 agreed to 10% pay cuts. (Gurza Decl., ¶ 30.) Similarly, in 2010, the SJPOA agreed to make an additional pension contribution of 5.25%, and then agreed, for fiscal years 2011-12 and 2012-13, to a wage reduction of approximately 10%. (Gurza Decl., ¶ 30, Exhs. 30, 31.) *Notably, the 10% wage reduction agreed to by the SJPOA is the same percentage other unions had agreed to pay in additional retirement contributions to pay for unfunded liabilities.* (Gurza Decl., Exhs. 11, 15, 17, 23, 25, 29.)

This record forcefully demonstrates that all parties considered the contributions to employee pensions as interchangeable with employee compensation – to which there is no vested

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[11] The POA contends that *San Diego v. Haas*, 207 Cal.App.4th 472 (2012), is inapposite because in *Haas* the employees were attempting to "imply" vested rights from the Municipal Code whereas here the vested rights are expressly set forth in the Municipal Code. (SJPOA Br. at p. 26.) Contrary to the SJPOA's contentions, the SJPOA is making the same argument made in *Haas* – contending that Municipal Code sections which granted employees certain pension benefits imply the existence of vested rights.

right.[12]

Finally, the SJPOA contends that it paid for increased contributions, and accepted a reduced salary, only by agreement, and could not be compelled to do either. (SJPOA Br. at p. 27-28.) As established earlier, the Meyers-Milias-Brown Act generally permits a city to impose terms and conditions of employment on its employees if the parties do not come to agreement. In the case of the SJPOA, the usual procedures are altered because the Charter grants the SJPOA interest arbitration. (Charter § 1111.) But this means only that in the absence of agreement, an arbitration panel has authority to decide and impose compensation issues, not that the SJPOA must agree to terms of compensation.

c. The Sapien/Harris/Mukhar Arguments Are Similarly Unavailing.

These Plaintiffs make the additional arguments that the City responsibility for unfunded liabilities has been admitted by the City Attorney and City Manager in interest arbitrations held pursuant to San Jose Charter Section 1111. (Platten Decl., Exhs. 3, 4 and 6.) (Sapien/Harris/Mukhar Br. at p. 15.) The City objects to these exhibits (see the City's Evidentiary objections) but in any event, they add nothing to the analysis.

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[12] Plaintiffs cannot dispute the longstanding principle that compensation is not vested. *Butterworth v. Boyd*, 12 Cal.2d 140, 150 (1938) (compulsory salary deductions to fund a health service system did not deny employees due process of law); *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th 1215, 1223 (1998) (employees could have no legitimate expectation that longevity-based benefits provided for in collective bargaining agreements would continue because public employees have no vested right in any particular measure of compensation or benefits); *Tirapelle v. Davis*, 20 Cal.App.4th 1317, 1332-33 (1993) (employees did not have a Constitutional due process right to a pre-deprivation adjudicatory hearing before salary reduction actions were taken because public employees have no vested rights to particular levels of compensation); *Gilmore v. Personnel Board of State*, 161 Cal.App.2d 439, 448-49 (1958) (employee did not have a vested right to any specific amount of salary and rejected his argument that a requirement to wear certain clothing that reduced his salary violated his contractual right to receive a "full salary"); *Risley v. Board of Civil Service Comm'rs*, 60 Cal.App.2d 32, 37 (1943) ("The rights to which plaintiffs would cling are created by or under the provisions of the charter and are dependent upon those provisions. They may all be lost by the repeal of the provisions or modified by an amendment to the provisions, at the will of those who determine what the charter's terms shall be.")

In their proffer, Plaintiffs present only small excerpts, taken out of context. For example, Exhibit No. 3 concerns a 1997 interest arbitration over the SJPOA's attempt to obtain increased pension benefits in very different economic times, when the City's contribution rates were extremely low. The City's comments on its obligation to support the retirement plan were in response to union arguments, that the retirement funds were so flush that City would be paying *no* pension contributions.

> "[T]hese benefit enhancements are being sought in the context of a retirement plan with a fund that enjoys a phenomenal surplus. As you will hear, the surplus is literally millions and millions of dollars. Indeed the surplus is so great that the City's contribution rate, that is the amount they pay on behalf of and supporting current and future retirees' benefits, those rates have been declining precipitously for the past decade or so to a point we can actually foresee a time in the not too distant future when the city may not have to pay any contribution rate ...." (Tran. at p. 20.)

Plaintiffs failed to include this background. This and other incomplete and misleading snippets should be rejected by the Court. These snippets have nothing to do with legislative intent, as they are not part of the record when the Municipal Code provisions at issue were enacted. *Garcia v. U.S.*, 469 U.S. 70, 76 (1984); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1081-82 (9th Cir. 1991) ("This circuit relies on official committee reports when considering legislative history, not stray comments by individuals or materials unrelated to the statutory language or the committee reports").

Plaintiffs also contend that the sections of the Municipal Code that authorize "additional" contribution rates from employees "contemplate that any further changes must go through the collective bargaining process." (Sapien/Harris/Mukhar Br. at p. 15.) But they admit, as they must, that absent agreement "the City could impose its last and best offer" thereby imposing additional contribution rates. (*Id.*) This concession reflects the reality that the City has the authority to unilaterally impose terms and conditions of employment. See Gov. Code 3505.7. And under *Seal Beach*, the City has the right to place a Charter measure on the ballot that concerns terms and conditions of employment.

Finally, plaintiffs miscomprehend the City's reliance on *International Ass'n of Firefighters v. City of San Diego*, 34 Cal.3d 292 (1983) and *Pasadena Police Officers v. City of Pasadena*, 147

Cal.App.3d 695 (1983). Plaintiffs contend that those cases are inapposite here because the retirement plans at issue in those cases permitted periodic changes in contribution rates based on actuarial studies. (Sapien/Mukhar/Harris Br. at p. 16) The City cites those cases, however, for a broader concept – a statutory scheme that includes the possibility of change does not grant vested rights. See *Firefighters, supra,* at 300-02 ("revision in the rate of contribution of employees were made pursuant to the charter and ordinances").

E. PLAINTIFFS HAVE ABSOLUTELY NO CREDIBLE ARGUMENT REGARDING MEASURE B'S CONFIRMATION OF THE ONE-TO-ONE CONTRIBUTION REQUIREMENT TOWARD RETIREE HEALTH CARE.

Employees could have no possible vested right to the City paying all unfunded liabilities for retiree healthcare. Even before the enactment of Measure B, the Municipal Code required that employees and retirees make contributions in one to one ratio towards retiree healthcare *with no requirement that the City pay for unfunded liabilities*. (Municipal Code § 3.28.385(C); § 3.36.575(D).) And in fact, historically, the rates paid by the City and employees included some amounts for unfunded liabilities. Moreover, all unions have agreed to their members paying towards unfunded liabilities, demonstrating that the parties did not consider payment to be violation of a vested right. (Gurza Decl., Exhs. 39-43.) Plaintiffs' half-hearted arguments are therefore not surprising.

1. AFSCME Cannot Prove A Vested Right To The City Paying All Unfunded Liabilities For Retiree Healthcare.

It is undisputed that AFSCME agreed to exactly what Measure B requires an obligation to pay 50% toward retiree medical contributions rates *including unfunded liabilities.* AFSCME thus attempts to distinguish its agreement with the language of Measure B, but this effort necessarily fails.

"Vested rights may not be implied . . . where they are contrary to the express term of the parties' contract." *City of San Diego v. Haas*, 207 Cal.App.4th at 495, citing *REAOC*, at 1179-1182, 1187. This is precisely the case here as the MOA memorializes a commitment to make one-to-one contributions. As a matter of law, plaintiffs cannot obtain a benefit by implication that is inconsistent with this express language.

AFSCME attempts to distinguish the case of *Sappington v. Orange County School Dist.*, 119 Cal.App.4th 949 (2004) arguing that the language in that case was "brief and unspecific." (AFSCME Br. at p. 29) To the contrary, just as in *Sappington*, there is no legislative language here that supports AFSCME's claims – that the City would pay for unfunded liabilities for retiree healthcare in perpetuity. AFSCME also contends that *Sappington* is not applicable because it "did not address or consider the retroactive imposition of additional contributions to fund previously earned benefits." (AFSCME Br. at p. 30.) AFSCME reads *Sappington* too narrowly. The case stands for the proposition that a plaintiff must identify a specific promise before the courts will find a vested right to a benefit.

Because there is nothing in the Municipal Code to support its vested rights arguments, AFSCME essentially contends that its members have a vested right based on their expectations. But under *REAOC*, expectations are not sufficient to create vested rights. *REAOC*, 52 Cal.4th at 1186-87 ("statutory language or circumstances" must "clearly . . . evince a legislative intent to create private rights of a contractual nature). In fact, *REAOC* criticized *California League of City Employee Associations v. Palos Verdes Library Dist.*, 87 Cal.App.3d 135, 140 (1978), which had found longevity benefits vested because they were "important" to employees and an "inducement" to remain employed. *REAOC*, along with other courts, criticized *California League* for "failing to focus explicitly on "the legislative body's intent to create vested rights' or the plaintiff's 'heavy burden' to demonstrate that intent." (*REAOC* at p. 1190.)

Finding no assistance in California law, AFSCME cites two United States Supreme Court decisions from the early nineteenth century concerning laws discharging debtors from liability. (AFCME Br. at p. 30.) But these cases assumed the preexistence of a binding contract, which AFSCME has not proven here.[13]

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[13] AFSCME's two contentions concerning the Municipal Code are not relevant. (AFSCME Br. at pp. 30-31) AFSCME offers no context for determining the meaning of the Municipal Code statement that; "All contributions to the medical benefits account shall be reasonable and ascertainable." (Municipal Code § 3.28.380.) And AFSCME's contention that the Retirement Board, not the City, determines retiree health contributions, is circular, because the Board divides (footnote continued)

Finally, AFSCME is wrong that only the City – and not employees – historically paid for retiree healthcare unfunded liabilities. In fact, the City and employees contributed amounts that constituted "Partial Prefunding" – which included unfunded liabilities. As explained in the July 24, 2007 memorandum (Gurza Decl., Exh. 36), "In Partial Pre-Funding some funds are being set aside to pay for future healthcare liabilities, but at a level less than Full Pre-Funding." (Gurza 000616.) The 2007 memorandum further reported that: "The City's current funding . . . can be described as partially funded" (Gurza000617; see also GURZA000630 [actuarial report describing current funding policy as higher than "pay as you go" and less than "full pre-funding"].) AFSCME did not and cannot create a material issue of disputed fact with respect to these points.

2. The SJPOA's Arguments Compel Summary Adjudication Against It With Respect to Section 1512-A.

The SJPOA concedes that it is not claiming that Section 1512-A violates a vested right to City payment of all unfunded liabilities for retiree healthcare. The SJPOA claims that its complaint raises different issues: that Measure B violates the current "contractual caps" in its MOA on retiree healthcare contributions, and that Measure B violates officers' vested right to City payment of the premium for the "lowest cost" retirement health care plan available to active Police Officers. (SJPOA Br. at p. 35.)

In light of this admission, the Court must grant summary adjudication in favor of the City and against the SJPOA on this issue under federal law. The City has a Cross-complaint that seeks a declaration that Section 1512-A does not violate the Contracts Clause, Takings Clause, and Federal Due Process Clause of the United States Constitution. (Cross-Complaint for Declaratory Relief, filed November 16, 2012, ¶¶ 29F, 30-32, 33-35 36-38.) The City's Motion for Summary Adjudication specifically seeks a declaration that Section 1512-A does not violate Plaintiffs'

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contributions between employees and the City *based on the Municipal Code.* But in any event, the Municipal Code sections cited by AFSCME do not even deal with this issue. (See Municipal Code §§3.28.380(a), (b), (c); 3.28.1995(b), cited by AFSCME Br. at p. 31.)

federal constitutional rights. (See Motion for Summary Adjudication, Nos. 5B, 6B, & 7B.) Once the City meets its initial burden of proving each element of a cause of action and that there is no defense, the burden shifts to the opposing party to show a triable issue of fact. Code Civ.P. 437c(p)(1) &(p)(2); *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 72 (1998). Since the SJPOA offers no legal or factual defense to the City's motion, the Court must grant summary adjudication to the City.

Turning to the issues that the SJPOA says *are* presented by its Complaint, the SJPOA cannot prove that the City has violated its MOA because it offers no evidence in support of it. The SJPOA's current MOA with the City expires on June 30, 2013 (Gurza Decl., Exh. 31.) and a new agreement will begin on July 1, 2013.[14] In a stipulation signed by all parties, and approved by the Court, the City agreed that agreements on retiree healthcare contributions would be honored. (City's Supp. RJN, Exh. HH ["The effective date for implementation of Section 1512-A (a) (minimum contributions towards the cost of retiree healthcare) shall occur no sooner than January 1, 2014, except that contributions towards retiree healthcare shall be subject to any existing or future union agreements, or City resolutions, authorized prior to January 1,2014, that specify employee contributions towards retiree healthcare."].) The City has no idea why the SJPOA is burdening the Court with these contentions.

The SJPOA is correct that the City's motion does not address the SJPOA's claim concerning "lowest cost plan." That issue involves a separate section of Measure B (Section 1512(c), and separate sections of the Municipal Code (Municipal Code §§ 336,1930D, 336.1940), and is therefore not relevant here. The SJPOA apparently brings it up to deflect from the contribution rate dispute. The SJPOA is wrong on this issue, in any event.[15]

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[14] The SJPOA's next MOA begins on July 1, 2013, and thus does not yet exist. The terms and conditions of that MOA are being decided through interest arbitration under which an arbitration panel will decide the POA's contribution rate based on presentation of evidence and argument by the parties. In the interest arbitration, the City took the position that the SJPOA's current MOA terms on "contractual caps" should continue.

[15] Under Municipal Code section 336.1930D, "'lowest cost medical plan' means that medical (footnote continued)

3. The Sapien/Harris/Mukhar Plaintiffs Cannot Prove A Vested Right To The City Paying All Unfunded Liabilities For Retiree Healthcare.

These plaintiffs argue that the existing agreements to pay 50% of retiree healthcare unfunded liabilities are different from Measure B's requirements, because the agreements contain the additional requirements of a 5 year phase in period and a 30 year amortization period. (Sapien/Mukhar/Harris Br. at p. 19.) In fact, in these respects, Measure B is not different. In the existing union agreements, the 5 year phase in period is about to end on July 1, 2013, imminently placing all unions at 50% of full funding. (Gurza Decl., Exhs. 39-43.) Moreover, nothing in Measure B prohibits a 30 year amortization period and plaintiffs present no evidence that the City is acting to implement a contrary period.

F. MEASURE B'S RETURN OF SRBR FUNDS TO THE GENERAL RETIREMENT FUND DOES NOT VIOLATE RULES GOVERNING PENSION TRUST ACCOUNTS OR VESTED RIGHTS

In its opening brief, the City established that SRBR distributions were discretionary, and therefore Measure B's return of the reserve to the general retirement fund did not violate any vested rights. In the alternative, the City demonstrated that the continuation of SRBR frustrated its original purpose and therefore could be discontinued under established case law.

Plaintiffs *never contested the City's suspension of SRBR payments*, which occurred every year beginning in 2010, due to the large unfunded liabilities in the general retirement fund. But Plaintiffs now assert that the City must continue the SRBR no matter what the consequences to the health of the general retirement fund. They are wrong.

Notably, the City has already implemented this section of Measure B. In late 2012 and early 2013, the City enacted two ordinances allocating the SRBR funds to the general retirement

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plan . . . [w]hich is an eligible medical plan as defined in Section 3.36.1940" and [w]hich has the lowest monthly premium of all eligible medical plans then in effect." Under section 3.36.140, an eligible medical plan is one "with which the city has entered into a contract for the provision of hospital, medical, surgical and related benefits as part of the city's benefits to city employees." As admitted in its brief, the SJPOA *is arguing for the resurrection of a Municipal Code provision eliminated in 1998.*

funds, and the two retirement boards voted to transfer the SRBR funds to the general retirement funds through accounting entries. (City's Supp. RJN, Exhs. FF & GG.)[16] At this point, plaintiffs are requesting that the Court undo this accounting transaction, thereby increasing retirement system unfunded liabilities.

1. Given The Discretion Granted By The Municipal Code, And Exercised By The City Council, Plaintiffs Cannot Prove That The City Intended To Create A Vested Right To SRBR Distributions.

a. AFSCME Fails to Prove Any Violation of Trust Fund Principles or Vested Rights.

AFSCME argues that the SRBR was a "trust fund" created for the benefit of retirees and thus cannot be discontinued without violating the California constitution. The SRBR, however, was not a separate trust fund, but was *a reserve* set up as part of the general retirement fund. Moreover, transfer of the funds to the general retirement fund, where the funds continue to be held for the benefit of retirees, could not possibly violate the California constitution. *Claypool v. Wilson*, 4 Cal.App.4th 646, 674 (1992) (using former supplemental COLA funds to reduce employer contributions to PERS did not violate the California Constitution, article XVI, section 17, where the funds "continue to be 'held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system'"), quoting Cal. Const., art. XVI, § 17.

AFSCME cites out of state authority for the proposition that it violates the rights of retirement system members' rights to transfer assets from one retirement fund to the other. But these cases are inapposite because Measure B indisputably does not send the SRBR funds out of the system. For example, *Association of State Prosecutors v. Milwaukee County*, 199 Wis.2d 549, 564 (1996), involved a transfer from a *County* retirement system to a *State* Retirement System (to

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[16] The transfers increased the assets of the general retirement funds reducing the retirement systems' unfunded liabilities, and consequently reducing the City's 2013-2014 contribution to the retirement systems by $17 million. (City Manager February 2013 Budget Report at p. 18 (available at sanjoseca.gov/DocumentCenter/View/1833.)

accompany members moving to the state system), which thus depleted the assets of the County System.[17] Here, in contrast, the SRBR funds remain in the retirement system to the benefit of the members and beneficiaries of the retirement system.

AFSCME disputes the City's contentions that the discretionary nature of the SRBR precludes the creation of a vested right. But in so doing, AFSCME seeks to reverse the applicable burden of proof, given that there is nothing in the language in the Municipal Code that *supports* its claim of a vested right. See *REAOC v. County of Orange*, 52 Cal.4th at 1190 (plaintiffs have "heavy burden" of showing legislative intent to create a vested right). In fact, the Council discretion to authorize a distribution "if any" indicates that the Council did not intend to "suspend legislative control" over the SRBR. See *REAOC*, 52 Cal.4th at 1186, citing *Claypool*, 4 Cal.App.4th at 670; *Doyle v. City of Medford*, 606 F.3d 667, 675 (9th Cir. 2010) (no property interest when city retains discretion). Moreover, the Council confirmed its retention of legislative control by declining to authorize any SRBR distributions from 1986 to 1999 and from 2010 to the present. (RJN, Exhs. L (Resolution No. 75635), M (Resolution No. 76204).)

AFSCME also asserts that the legislation at issue in *Genest*, 154 Cal.App.4th 1012 (2007), where the court found a vested right, is the same as Municipal Code section 3.28.340(b)(2)(a) in this case. However, the legislation at issue in *Teachers' Retirement Board* stated explicitly the legislative "*intent*" to "*establish the supplemental payments ... as vested benefits ...*" *Id.*, 154 Cal.App.4th at 1022, (emphasis in original). San Jose Municipal Code section 3.28.340(b)(2)(a) does not have such express language, nor do the other provisions AFSCME cites as mandating SRBR. (See AFSCME Br. at 31, quoting Muni. Code § 3.28.340(E)(2).)

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[17] Similarly, *People ex rel. Sklodowsky v. State*, 162 Ill.2d 117, 151 (1994), addressed a transfer out of the state's pension funds into the state's general reserve funds. *Sgaglione v. Levitt*, 37 N.Y.2d 507, 512 (1975), addressed a legal mandate that the administrator of the retirement system use retirement system funds to purchase state issued bonds. *McCall v. State*, 640 N.Y.S.2d 347, (1996), addressed a legal requirement that the public employers be given a credit back for contributions to pension funds.

b. The SJPOA Cannot Prove A Vested Right To The SRBR.

The SJPOA agrees that the City Council maintained discretion over the SRBR payments under the Federated Plan, but argues that SRBR distributions are vested under the Police and Fire Plan. (SJPOA Opp. at pp. 31, 32.) The SJPOA relies on the term "shall" in the Municipal Code, but use of the term "shall" does not invariably grant a vested right. See *REAOC*, 52 Cal.4th at 1190 (noting the legislative policy at issue in *Sappington* contained the word "shall," but the court did not find a vested right in that case), citing *Sappington*, 119 Cal.App.4th at 954.

In *County of San Diego v. State*, for example, the constitutional provision at issue, Article XIIIB, section 6(a), provided, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State *shall* provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service...." *County of San Diego v. State*, 164 Cal.App.4th 580, 588(2008) (emphasis added). Despite the use of the word "shall," the court rejected the counties' contractual impairment claims for reimbursement. *Id.* at 603-604. Thus, the court was still required to perform the analysis described later in *REAOC* for determining whether statutory – or in that case constitutional – provisions provided rights protected by the Contracts Clause.

Interpreting the word "shall" as creating a vested right in all instances would negate the presumption against implying vested rights into statutory schemes, given that many statutes and ordinances contain the word "shall." *REAOC*, 52 Cal.4th at 1185-1186 ("'to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body'").

Given the Council's reservation of discretion over SRBR distributions, the SJPOA cannot show a vested right. *Doyle,* 606 F.3d at 675 (no property interest under due process analysis when city retains any amount of discretion); *REAOC*, 52 Cal.4th at 1191 ("as with any contractual obligation that would bind one party for a period extending far beyond the term of the contract of employment, implied rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence").

c. The *Sapien/Harris/Mukhar* Plaintiffs Make No New Arguments.

These Plaintiffs make no materially different arguments. They did not and cannot overcome the City's baseline argument – that the SRBR has always been treated as a discretionary fund, and it therefore cannot be construed to be a vested right.

2. Plaintiffs Have Not Overcome the Irrational Outcome of SRBR

Plaintiffs have not disputed that the original purpose of the SRBR was for retirees to share in the fruits of a successful retirement fund, but that it now has the unintended effect of siphoning money away from the trust at a time when the plans are grossly underfunded.

Contrary to AFSCME's arguments, *Teachers' Retirement Bd. v. Genest*, 154 Cal.App.4th 1012 (2007), is not controlling here, and in fact supports the City. First, unlike here, *Genest* involved the express grant of a "vested" right to a funding stream; here, there is no express grant of a vested right. (*Genest* at p. 1022.) [18] Second, the text quoted by AFSCME demonstrates that *Genest* involved a much narrower issue, not present here. In response to contentions that a dedicated funding stream conferred a "windfall" on beneficiaries of supplemental payments, *Genest* stated the obvious: the "windfall" issue was not even present because the change in funding did "not change the amount of . . . supplemental benefits" or "the manner in which they were calculated." (Id. at p. 36.) *Genest* actually supports the City, because here Measure B addresses *both* the funding stream and the supplemental benefits – which the City has shown to cause an unforeseen increase in the City's pension fund unfunded liabilities.

SJPOA begins with a concession: "At most the City's reasoning may have justified amending the SRBR to limit distributions to such situations [existence of unfunded liabilities] but

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[18] In Genest, the statute stated: "*It is the intent of the Legislature in enacting this section to establish the supplemental payments pursuant to Section 24415 as vested benefits pursuant to a contractually enforceable promise to make annual contributions from the General Fund to the [SBMA] in the Teachers' Retirement Fund in order to provide a continuous annual source of revenue for the purposes of making the supplemental payments* under Section 24415." *Genest*, 154 Cal.App.4th at 1022, quoting Cal. Ed. Code, § 22954, emphasis in original.

it does not allow the City to abolish the SRBR ...." (SJPOA Br. at p. 33, see also p. 34 ["*Allen*, Lyon and *Walsh* might justify the City's modification of the SRBR to allow distributions only when there is no retirement UAAL"].) But contrary to the SJPOA's arguments, the unintended consequences of the SRBR cannot be remedied simply by limiting the circumstances under which distributions are made. The fundamental problem is the impact of yearly withdrawals from the general retirement funds to fund the SRBR. As long as SRBR exists, in years where there are "excess earnings" it will siphon funds from the retirement funds, thereby increasing their unfunded liabilities. (Gurza Decl., Exhs. 44-45.) Simply limiting distributions from the SRBR does not solve that problem.

The issue of whether SRBR provides a "windfall" is not dispositive under controlling authorities. The point is that the vested rights doctrine does not protect "unforeseen...burdens on a contracting party" with "no relation to the fundamental theory and objective" of the retirement plan. *Allen v. Bd. Of Admin. Of the Public Employees' Ret. System,* 34 Cal.3d 114, 120-123 (1983). There is no question on this record that the SRBR created an unforeseen burden – exacerbating the City's unfunded liabilities.

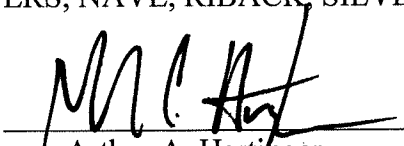
III. CONCLUSION

The stakes are enormous in this case. When fully implemented Measure B may produce up to $70 million in savings annually, thus preserving the City's ability to deliver essential services to San Jose residents. Measure B takes *nothing away that has been earned,* but is focused on prospective adjustments to ensure the plans are returned to a sustainable footing.

The Court is urged to grant summary adjudication on the three issues presented in the instant motion. The motion is fully supportable and it should be granted.

DATED: May 24, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 

Arthur A. Hartinger
Linda M. Ross
Jennifer L. Nock
Michael C. Hughes
Attorneys for Defendant and Cross-Plaintiff
City of San Jose