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

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

13 **AT SAN JOSE**

14 SAN JOSE POLICE OFFICERS'
15 ASSOCIATION,

16 Plaintiff,

17 v.

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

23 Defendants.

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

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

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

**PLAINTIFF AND CROSS-DEFENDANT
AFSCME LOCAL 101'S RESPONSE TO
DEFENDANT AND CROSS-PLAINTIFF
CITY OF SAN JOSÉ'S OBJECTIONS TO
EVIDENCE IN SUPPORT OF OPPOSITION
TO MOTION FOR SUMMARY
ADJUDICATION**

Hearing Date: June 7, 2013
Hearing Time: 9:00 a.m.
Courtroom: 2
Judge: Hon. Patricia Lucas
Complaint Filed: July 5, 2012
Trial Date: July 22, 2013

29 AND RELATED CROSS-COMPLAINT AND
30 CONSOLIDATED ACTIONS

1 Plaintiff AFSCME Local 101 responds to Defendant City of San José's Objections to
2 Evidence as follows:

3 **OBJECTION NUMBER 1:**

4 Defendant objected to Exhibit 4 [Memorandum dated February 7, 2008, from Jones Day to
5 the City of San José] to the Declaration of Charles Allen:

6 Defendant objected to the exhibit alleging that it was irrelevant and unduly prejudicial (Evid.
7 Code 352), constituted inadmissible opinion testimony (Evid. Code 800) and inadmissible hearsay
8 (Evid. Code 1200), and contained an inadmissible legal conclusion. (*Morrow v. Los Angeles Unified*
9 *School Distr.*, 149 Cal.App.4th 1424, 1444-435 (2007).

10 **RESPONSE TO OBJECTION NUMBER 1:**

11 Plaintiff's objection on the basis of relevance is meritless. Courts recognize that changing
12 contribution levels towards a retirement plan directly affects the level of benefits employees may
13 receive and "constitutes a substantial increase in the cost of pension protection to the employee...."
14 (See *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.) Therefore, the two are interrelated.
15 Furthermore, the City contended that its employees did not enjoy vested rights in the pension and
16 health benefits that are subject of its Motion in the first place. (See, e.g., Motion, pp. 14: 24, 16:14-
17 16, 16:19-20.) This memorandum refutes these arguments by demonstrating that City employees
18 were considered vested in their benefits and, therefore, their contribution levels. Therefore, this
19 evidence is highly relevant because it refutes Defendant's primary contention that Federated
20 employees were not vested in their benefits.

21 The City incorrectly argues that the memorandum is hearsay because it "is not the product of
22 any employee or official of the City of San José and thus cannot be viewed in any way as an
23 admission by the City." The document itself can constitute an official or business record (Evid. Code
24 §§ 1271, 1280) and the subject statements within are adoptive admissions (Evid. Code § 1221). In a
25 memorandum to City employees and retirees, City Manager Debra Figone--indisputably an agent of
26 the City--stated that "retiree healthcare benefits can be considered 'vested' similar to the pension
27 benefit itself." (Decl. of Charles Allen, Exh. 3, p. 2.) Her statement was based on the memorandum
28

1 that is subject to this objection; this is a fact that the City acknowledged in its second objection to
2 Plaintiff's evidence.

3 Furthermore, the statements within the memorandum did not constitute impermissible legal
4 conclusions because they were prepared by attorney in their official capacity as legal consultants to
5 the City. The statements constituted expert witness opinions that said attorneys were qualified to
6 furnish. (See *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432.)

7 **OBJECTION NUMBER 2:**

8 Defendant objected to Exhibit 3 [Memorandum dated March 4, 2008, from City Manager
9 Debra Figone to City employees and retirees] to the Declaration of Charles Allen:

10 Defendant objected to the exhibit alleging that it was irrelevant and unduly prejudicial (Evid.
11 Code 352), constituted inadmissible opinion testimony (Evid. Code 800) and inadmissible hearsay
12 (Evid. Code 1200), and contained an inadmissible legal conclusion. (*Morrow v. Los Angeles Unified*
13 *School Distr.*, 149 Cal.App.4th 1424, 1444-435 (2007).

14 **RESPONSE TO OBJECTION NUMBER 2:**

15 As described above, Plaintiff's objection on the basis of relevance is meritless. Courts
16 recognize that changing contribution levels towards a retirement plan directly affects the level of
17 benefits employees may receive and "constitutes a substantial increase in the cost of pension
18 protection to the employee...." (See *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.)
19 Therefore, the two are interrelated. Furthermore, the City contended that its employees did not enjoy
20 vested rights in the pension and health benefits that are subject of its Motion in the first place. (See,
21 e.g., Motion, pp. 14: 24, 16:14-16, 16:19-20.) This memorandum refutes these arguments by
22 demonstrating that City employees were considered vested in their benefits and, therefore, their
23 contribution levels. Therefore, this evidence is highly relevant because it refutes Defendant's
24 primary contention that Federated employees were not vested in their benefits.

25 The City incorrectly argues that the memorandum is hearsay because it "is not the product of
26 any employee or official of the City of San José and thus cannot be viewed in any way as an
27 admission by the City." Both the initial Jones Day legal memorandum as well as the memorandum
28 of Debra Figone subject to this instant objection can be considered business or official records.

1 (Evid. Code §§ 1271, 1280.) The statements within Ms. Figone's memorandum with respect to the
2 Jones Day memorandum are authorized party admissions (Evid. Code §§ 1220, 1222), since she was
3 the City Manager, and the statements within the Jones Day memorandum were adoptive admissions
4 (Evid. Code § 1221) as previously discussed. Although the City claims that Ms. Figone's
5 memorandum "merely reported on advice given to the City," it fails to point to any language
6 supporting such a conclusion; as her statement reads, it appears as though the City adopted the
7 position taken by Jones Day.

8 Finally, the memorandum does not contain impermissible opinion testimony or legal
9 conclusions because it was based upon the expert legal conclusions reached to by Jones Day.

10 **OBJECTION NUMBER 3:**

11 Defendant objected to Exhibits 5, 6, 7, and 8 [Handbooks for Sept. 1990, Fall 1995, Fall
12 1997, and year 2000] to the Declaration of Charles Allen ("Declaration") and the following statement
13 within paragraph 26 of the Declaration: "[T]he handbooks refer to Municipal Code sect. 3.28.710,
14 which states that employers are responsible for paying unfunded liabilities."

15 Defendant objected to the exhibit alleging that it was irrelevant (Evid. Code 352), constituted
16 an inadmissible opinion testimony (Evid. Code 800) and inadmissible hearsay (Evid. Code 1200),
17 and contained an inadmissible legal conclusion. (*Morrow v. Los Angeles Unified School Distr.*, 149
18 Cal.App.4th 1424, 1444-435 (2007).

19 **RESPONSE TO OBJECTION NUMBER 3:**

20 *The Exhibits:* Plaintiff cited these exhibits primarily to show: (1) that the City, through its
21 retirement handbooks, promised employees that they were not responsible for paying the unfunded
22 liabilities of their retirement plans and (2) how the City defined "current service" and "prior service"
23 with respect to the Federated System. The handbooks are highly relevant because the City, in its
24 points and authorities in support of its Motion for Summary Adjudication ("Motion"), avers that its
25 employees did not enjoy a vested right in the retirement benefits that were subject of its Motion (see,
26 e.g., Motion, pp. 14: 24, 16:14-16, 16:19-20). The retirement handbooks, and the disputed statement
27 within Mr. Allen's declaration, refute this contention.
28

1 The exhibits are further relevant because the City argues that Section 1505(c) of the City
2 Charter did not foreclose the City from requiring its employees to shoulder the Federated System's
3 unfunded liabilities because of the way the terms "current service or current service benefits" and
4 "prior service and prior service benefits" were defined. (Motion, pp. 20-21.) However, the retirement
5 handbooks demonstrate that the way the City actually defined the aforementioned terms did, in fact,
6 foreclose passing its unfunded liabilities to its employees.

7 The Retirement Handbooks were prepared by the City of San José's Department of
8 Retirement Services, a department of the City. (See, e.g., Decl. of Charles Allen, Exh. 5, pp. 1-2.).
9 Therefore, the handbooks do not constitute hearsay because they were business and official records.
10 (Evid. Code §§ 1271, 1280.) Furthermore, the statements within them qualified as authorized party
11 admissions. (Evid. Code §§ 1220, 1222.) The relevant statements within the retirement handbooks
12 constituted admissions by the City that its employees enjoyed vested rights in their benefits and that
13 they were not required to contribute towards the unfunded liabilities.

14 *The Statement with Respect to MuniCode Sect. 3.28.710:* Defendant is flat-out wrong in
15 averring that the handbooks did not refer to Section 3.28.710 and that they do not specifically state
16 that "employees are not responsible for paying unfunded liabilities." Each retirement handbook
17 specifically stated, "Complete details of the [Federated] retirement system can be found in Chapters
18 3.28, 3.43, and 3.44 of the San José Municipal Code.... **Code references are made at the end of**
19 **appropriate passages.**" (See, e.g., Decl. of Charles Allen, Exh. 5, p. 1 (emphasis added).) They
20 further state, in relevant part: "The contribution ratio for the normal costs of the plan is eight to three
21 Other contributions, such as contributions attributable to ... prior service, ... have their own
22 contribution ratios.
23 [SJMC 3.28.700-720 & 3.28.860]." (See, e.g., Decl. of Charles Allen, ¶ 26, Exh. 5.) Section
24 3.28.710 falls within the range of "SJMC 3.28.700-720," to which the retirement handbooks
25 specifically refer.

26 Section 3.28.710 states if Federated System members are required to contribute pursuant to a
27 new or amended normal contribution rate, the new or amended contribution rate will not impose upon
28 plan members responsibility for financing any liabilities resulting from "amendments hereafter

1 made to this system or as a result of experience under this system” (City’s RJN C.) This
2 included unfunded liabilities.

3 Furthermore, Mr. Allen’s statement did not constitute an “inadmissible opinion” because it
4 merely restated what was made explicit in the retirement handbook to which Mr. Allen’s declaration
5 referred. It also did not constitute an inadmissible legal conclusion because it did not apply the law to
6 a particular set of facts. Again, Mr. Allen merely restated what the retirement handbooks make
7 explicit by incorporating the relevant San José Municipal Code provisions.

8 Therefore, the City’s objections are misplaced.

9 **OBJECTION NUMBER 4:**

10 Defendant objected to Exhibit 5 [1990 Retirement Handbook] to the Declaration of Charles
11 Allen and the following statement describing Exhibit 5: “[T]he Sept. 1990 handbook, attached as
12 Exhibit 5, contained a section entitled ‘vesting (p.19) It stated: ‘To be ‘vested’ literally means to be
13 entitled to a future benefit. You become vested in the retirement system after five (5) years of
14 membership.’”

15 Defendant objected to the exhibit alleging that it was irrelevant (Evid. Code 352), constituted
16 inadmissible opinion testimony (Evid. Code 800) and inadmissible hearsay (Evid. Code 1200), and
17 contained an inadmissible legal conclusion. (*Morrow v. Los Angeles Unified School Distr.*, 149
18 Cal.App.4th 1424, 1444-435 (2007).

19 **RESPONSE TO OBJECTION NUMBER 4:**

20 Defendant’s objection is nothing more than a red herring. Plaintiff did not present this
21 evidence to demonstrate “when an employee becomes vested and what pension benefits are provided
22 to retirees....” Rather, Plaintiff introduced the evidence to refute the City’s contention that its
23 employees did not enjoy vested rights to the benefits that are subject of its Motion in the first place.
24 (See, e.g., Motion, pp. 14: 24, 16:14-16, 16:19-20.) The retirement handbooks refute this argument
25 by demonstrating that City employees were considered vested in their benefits after a specific period.
26 Therefore, this evidence is highly relevant because it counters Defendant’s primary contention that
27 Federated employees were not vested in their benefits.

1 Even if Defendant had argued that its employees were not vested in a particular contribution
2 level (rather than arguing that they were not vested in their pensions at all), this evidence was still
3 admissible. Once vested, any modifications to their retirement benefits by the City--including
4 changes in contribution levels--had to be reasonable, meaning that "alterations of [their retirement]
5 rights must bear some material relation to the theory of a pension system and its successful operation,
6 and changes in a pension plan which result in disadvantage to employees should be accompanied by
7 comparable new advantages." (*Allen, supra*, 45 Cal.2d at 131.) The City's Motion did not even
8 attempt to establish the reasonableness of its modifications. Therefore, any evidence demonstrating
9 that Federated employees were vested in their retirement benefits was highly relevant to the issue of
10 whether the City violated their Constitutional rights through Measure B.

11 Again, the Retirement Handbooks were prepared by the City of San José's Department of
12 Retirement Services, a department of the City. (See, e.g., Decl. of Charles Allen, Exh. 5, pp. 1-2.).
13 Therefore, the handbooks did not constitute hearsay because they were business and official records.
14 (Evid. Code §§ 1271, 1280.) Furthermore, the statements within them qualified as authorized and
15 party admissions. (Evid. Code §§ 1220, 1222.) The disputed statement constituted an admission by
16 the City that its employees enjoyed vested rights in their benefits and that they were not required to
17 contribute towards the unfunded liabilities.

18 Furthermore, Mr. Allen's statement did not constitute an "inadmissible opinion" because it
19 merely restated what was made explicit in the retirement handbook to which Mr. Allen's declaration
20 referred. It also did not constitute an inadmissible legal conclusion because it did not apply the law to
21 a particular set of facts. Again, Mr. Allen merely restated what the retirement handbooks made
22 explicit by incorporating the relevant San José Municipal Code provisions.

23 Therefore, the City's objections are misplaced.

24 **OBJECTION NUMBER 5:**

25 Defendant objected to paragraphs 17-20 (contract and retirement bargaining), 43-55 (effect of
26 a declining payroll), 56-64 (true state of Federated Pension Plan), 65-70 (COLA), and 91-96 (City's
27 true economic state): Exhibits 5, 6, 7, and 8 [Handbooks for Sept. 1990, Fall 1995, Fall 1997, and
28 year 2000] to the Declaration of Dan Doonan ("Declaration").

1 Defendant objected to the exhibit alleging that its probative value was outweighed by undue
2 consumption of time or prejudice (Evid. Code § 352) and constituted an inadmissible opinion
3 testimony (Evid. Code § 800) and inadmissible hearsay (Evid. Code 1200)).

4 **RESPONSE TO OBJECTION NUMBER 5:**

5 The paragraphs and topics identified are directly relevant to this Motion, because they address
6 issues directly discussed by the City in its points and authorities, the Declaration of Alex Gurza, and
7 exhibits introduced through Mr. Gurza's declaration. Since the City discusses contract and retirement
8 bargaining throughout its papers (see, e.g., Gurza Decl., ¶¶ 11, 15-31, 37-40, 42-44, 55; Gurza Decl.,
9 Exh. 1; Motion, pp. 6:4-10, 22-24, 25, 29-31), paragraphs 17-20 are relevant. Paragraphs 55-64,
10 discussing the "True State of the Federated Pension Plans," and 91-96, discussing the "City's True
11 Economic State," are highly relevant because the City attempts to portray its fiscal state and the state
12 of the Federated System in the direst of lights (Motion, pp. 5, 6-7) while ignoring several key points
13 put forth in Mr. Doonan's declaration. Paragraphs 43-55, related to the "Effect of a Declining
14 Payroll," are relevant to put into perspective the City's claim that its contribution rates as a
15 percentage of payroll are skyrocketing. (Motion, pp. 6-7.) Finally, paragraphs 65-70, related to the
16 "Cost of Living Adjustment," are directed towards refuting Defendant's unsubstantiated claim that
17 "[r]etirement benefits have dramatically increased over time." (Motion, p. 5:17 (citing Decl. of Alex
18 Gurza, Exh. 1, pp. 12-14).)

19 Furthermore, the City introduced many of these topics addressed within the exhibits through
20 Alex Gurza's declaration. (See, e.g., Gurza Decl., Exhs. 1, 58.) Therefore, they are all relevant to this
21 motion, and Defendant failed to demonstrate that their probative value is *substantially* outweighed by
22 any prejudicial effect or undue consumption of time (see Evid. Code § 352).

23 Defendant's objection to this evidence as inadmissible opinion testimony by a lay witness
24 (Evid. Code § 800) is misplaced, because Mr. Doonan testified as an expert witness (Doonan Decl.
25 ¶¶ 1-8), and he is qualified to render such testimony: (a) the subject matter of the evidence is
26 sufficiently beyond common experience and (2) he may render an expert opinion based upon the
27 information available to him. (Evid. Code § 801.) The City did not object to Mr. Doonan's
28 qualification as an expert witness.

1 Finally, the hearsay rule does not bar admission of any of these statements within Mr.
2 Doonan's declaration. First, some of the paragraphs objected to constitute Mr. Doonan's own
3 personal observations rather than "statements" made by third parties; those paragraphs do not
4 constitute hearsay statements. Second, most of the documents he relied upon in reaching his expert
5 opinions were documents produced by the City or its agents (including auditors), and several of them
6 were introduced into evidence through the Declaration of Alex Gurza (see, e.g., Gurza Decl., Exhs. 1,
7 58). The City waived its right to object to documents it introduced into evidence itself.

8 Furthermore, these documents do not constitute hearsay because they are business or official
9 records (Evid. Code §§ 1271, 1280), and the statements within them qualify as authorized party
10 admissions (Evid. Code §§ 1220, 1222). Also, to the extent that the City submitted auditors' reports
11 and/or financial statements for certain years but not for other years relevant to this motion,
12 introduction of such auditors' reports/financial statements is permissible under the completeness
13 doctrine. (See Evid. Code § 356.)

14 Any other documents prepared by a state agency or reputable financial institution is properly
15 admissible as an official record or business record. (Evid. Code §§ 1271, 1280.) Even if the
16 aforementioned documents were hearsay without exception, Mr. Doonan's opinions are admissible
17 because an expert's opinion may be based on inadmissible evidence. (Evid. Code § 801(b).) Mr.
18 Doonan's expert opinions based upon these reports were proper.

19 Therefore, the City's objections are misplaced.

20 Dated: June 4, 2013

BEESON, TAYER & BODINE, APC

21
22 By: 

23 TEAGUE P. PATERSON
24 VISHTASP M. SOROUSHIAN
25 Attorneys for Plaintiff AFSCME LOCAL 101
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STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing document:

**PLAINTIFF AND CROSS-DEFENDANT AFSCME LOCAL 101'S
RESPONSE TO DEFENDANT AND CROSS-PLAINTIFF CITY OF
SAN JOSÉ'S OBJECTIONS TO EVIDENCE IN SUPPORT OF OPPOSITION
TO MOTION FOR SUMMARY ADJUDICATION**

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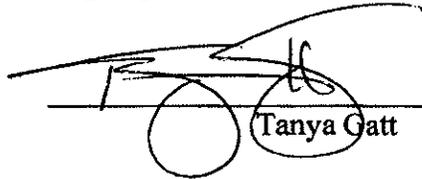
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*Attorneys for Defendants, THE CITY OF SAN
JOSE AND DEBRA FIGONE*

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<p>Greg McLean Adam, Esq. Jonathan Yank, Esq. Gonzalo C. Martinez, Esq. Amber L. West, Esq. CARROLL, BURDICK & McDONOUGH LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104</p> <p><i>Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOCIATION (Santa Clara Superior Court Case No. 112CV225926)</i></p>	<p>Harvey L. Leiderman, Esq. REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105</p> <p><i>Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926)</i> AND <i>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928)</i> AND <i>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV22574)</i> AND <i>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)</i></p>
<p>John McBride, Esq. Christopher E. Platten, Esq. Mark S. Renner, Esq. WYLIE, McBRIDE, PLATTEN & RENNEN 2125 Canoas Garden Avenue, Suite 120 San Jose, CA 95125</p> <p><i>Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY McCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112-CV-225928)</i> AND <i>Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112-CV-226574)</i> AND <i>Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112-CV-226570)</i></p>	<p>Stephen H. Silver, Esq. Richard A. Levine, Esq. Jacob A. Kalinski, Esq. SILVER, HADDEN, SILVER, WEXLER & LEVINE 1428 Second Street, Suite 200 Santa Monica, CA 90401-2367</p> <p><i>Attorneys for Plaintiffs, SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT and ROSALINDA NAVARRO (Santa Clara Superior Court Case No. 112CV233660)</i></p>

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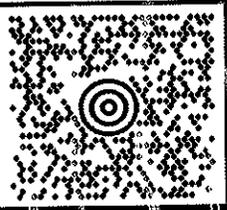
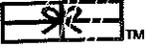
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