(ENDORSED)
FILED
JUN 21 2013
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY MAOMI MATAU DEPUTY

Order Issued
on Submitted Matter

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, vs. CITY OF SAN JOSE, et al., Defendants. AND CONSOLIDATED ACTIONS AND RELATED CROSS-COMPLAINT.	Case No. 1-12-CV-225926 (Consolidated with 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, 1-12-CV-227864, and 1-12-CV-233660) ORDER RE: MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Defendants City of San Jose and Debra Figone, in her official capacity, have made the following motions for summary adjudication: 1) in 112CV225926 against San Jose Police Officers' Association ("SJPOA") as to the first cause of action for impairment of contract, the second cause of action for taking of private property, and the third cause of action for taking of private property without due process under the California Constitution; 2) also in 112CV225926 on each of the three causes of action in the cross-complaint for declaratory relief (that sections 1506-A, 1512-A and 1511-A of Measure B do not violate the contracts clause, the takings clause,

and the due process clause of the United States Constitution); 3) in 112CV225928 against Plaintiffs Robert Sapien, Mary Kathleen McCarthy, Thanh Ho, Randy Sekany and Ken Heredia ("Sapien Plaintiffs") as to the second cause of action for impairment of contract, the third cause of action for substantive due process, and the fourth cause of action for taking under the California Constitution; 4) in 112CV226570 against Plaintiffs Teresa Harris, Hon Reger and Moses Serrano ("Harris Plaintiffs") as to the second cause of action for impairment of contract, the third cause of action for substantive due process, and the fourth cause of action for taking under the California Constitution; 5) in 112CV226574 against John Mukhar, Dale Dapp, James Atkins, William Buffington and Kirk Pennington ("Mukhar Plaintiffs") as to the second cause of action for impairment of contract, the third cause of action for substantive due process, and the fourth cause of action for taking under the California Constitution; and 6) in 112CV227864 against American Federation of State, County and Municipal Employees Local 101 ("AFSCME") as to the first cause of action for impairment of contract, the third cause of action for taking of private property, and the fourth cause of action for taking of private property without due process under the California Constitution, and the eighth cause of action for promissory estoppel and equitable estoppel.

The matter came on for hearing before the Honorable Patricia M. Lucas on June 7, 2013, at 9:00 a.m. in Department 2. The parties presented argument, and the matter was submitted.

Requests for judicial notice are granted. The objections by SJPOA to the declaration of Alex Gurza are OVERRULED. All other evidentiary objections failed to comply with California Rules of Court, rule 3.1354, subdivision (c) and, on that basis, the Court declines to rule on those objections.

I. DEFENDANTS MAY PROPERLY MOVE FOR SUMMARY ADJUDICATION OF THE VALIDITY OF DISTINCT SECTIONS OF MEASURE B.

The Court is asked to address, as a preliminary matter, whether Defendants may properly move for summary adjudication of the issues identified given the causes of action pled in these consolidated cases. This issue concerns the concept of primary rights: "The cause of action is based on the injury to the plaintiff, and not the particular legal theory of the defendant's wrongful act." (4 Witkin, California Procedure (5th ed. 2008) Pleading, §36, p. 101.) "'As far as

its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the legal theory on which liability for that injury is premised.' [Citation.] 'The manner in which a plaintiff elects to organize his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory.' [Citation.] The violation of a single primary right still gives rise to only one 'cause of action,' even if a plaintiff seeks various forms or theories of relief. [Citation.]" (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 103 – 104.)

Sections 1506-A, 1512-A, and 1511-A of Measure B, as alleged, give rise to multiple injuries as opposed to a single injury. If the most salient characteristic of a primary right is that it is indivisible, the injuries caused by Measure B are readily divisible even though all the provisions of Measure B were enacted at the same time. Under a primary rights theory, each provision of Measure B could be alleged as a separate cause of action. Therefore, summary adjudication is available here. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848; *Hindin v. Rust* (2004) 118 Cal.App.4th 1247.)

II. DEFENDANTS HAVE NOT MET THEIR INITIAL BURDEN AS TO SJPOA AND THE SAPIEN PLAINTIFFS.

The taking and due process arguments largely rely on the same facts and legal principles as the impairment of contract argument, and are addressed together. The Sapien Plaintiffs stand in the same shoes as the SJPOA: all affected employees are members of the retirement plan for police officers and firefighters.

A. *Section 1506-A: Additional retirement contributions to amortize unfunded liabilities*

The relevant portion of section 1506-A provides that employees who do not opt into the VEP shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but not more than 50% of the costs to amortize any pension unfunded liabilities. Plaintiffs claim that section 1506-A impairs the obligation of contracts and is a taking in violation of the California Constitution.

Defendants argue that there is no contractual provision which restricts the City from requiring employees to pay for unfunded liabilities.

"The ultimate questions of whether vested contractual rights exist and whether impairments are unconstitutional present questions of law subject to independent review. The question whether there is an impairment is a mixed question of fact and law." (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129; see also *Teachers' Retirement Board v. Genest* (2007) 154 Cal.App.4th 1012, 1028.) As moving parties, Defendants bear the initial burden to make a *prima facie* showing that there are no triable issues of material fact. Since the ultimate question is one of law, Defendants bear the burden of showing, as a matter of law, that vested contractual rights do not exist and/or that any impairment is not unconstitutional. General principles of contract interpretation apply. (*Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171.)

As stated in *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 696 – 697, there must first be a valid contractual right to be impaired. (See also *San Diego City Firefighters, Local 145 v. Board of Administration* (2012) 206 Cal.App.4th 594, 606, fn. 10: "When a claim is presented under the contract clause [(U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. 1, § 9)], it must first be determined 'whether there is a valid contract to be impaired.'") Defendants contend the reservation of rights included in sections 1500 and 1503 of the City Charter precludes the creation of vested contractual rights. However, the existence of this language alone does not preclude the creation of vested contractual rights: it is a "well settled principle that: 'A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. ...' " (*International Association of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300 (*IAF*).) Although Plaintiffs rely on *Legislature v. Eu* (1991) 54 Cal.3d 492, that case involved legislation that contemplated the complete termination of the benefit scheme in question, rather than a modification or adjustment to pension rights.

Defendants argue that there is no contract restricting the City from requiring that employees pay for unfunded liabilities, and in particular relies on section 1504(b) of the Charter

and its references to current and prior service and service benefits. However, that section also states that the Council may provide by ordinance for minimum benefits, and section 3.36.1520 of the Municipal Code specifically provides that "[r]ates for current service shall not include any amount required to make up any deficit resulting from the fact that previous rates of contribution made by the city and members were inadequate to fund benefits attributable to service rendered by such members prior to the date of any change of rates...." (City's Request for Judicial Notice ("RJN"), at Ex. D.) Thus it appears that it is the obligation of the City to make up unfunded actuarially accrued liabilities ("UAAL"). Defendants have not identified any language that imposes an obligation on employees to pay for unfunded liabilities.

On a motion for summary adjudication, Defendants bear the burden of demonstrating that Plaintiffs do not have a vested contractual right. Defendants have not met their burden in that regard.

B. *Section 1512-A: 50% of retiree health care*

Section 1512-A requires that incumbents and new employees must contribute a minimum of 50% of the cost of retiree health care, including both normal cost and unfunded liabilities. Defendants argue that Plaintiffs cannot establish that they have a vested right to have the City pay for all unfunded liability related to retiree health care. In opposition, SJPOA correctly points out that this issue is not framed by the pleadings: i.e., Plaintiffs did not allege that the City was solely obligated to pay for the unfunded liability related to retiree health case. Instead, SJPOA alleges that section 1512-A impairs a vested contractual right to have a 10% cap on contributions and a right to bargain separately from the Federated City Employees Union for a low-cost plan. The City has not addressed either of these allegations.

"The pleadings serve as the 'outer measure of materiality' in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings." (Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2012) ¶10:51.1, p. 10-19 citing *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98, et al.) Consequently, Defendants are not entitled to summary adjudication with regard to section 1512-A.

C. Section 1511-A: Discontinuation of SRBR

Section 1511-A provides that the supplemental retirement benefit reserve ("SRBR") shall be discontinued and the assets returned to the appropriate trust fund. Defendants argue that, given the discretionary nature of the SRBR, plaintiffs cannot claim a ***vested*** right to receipt of the SRBR. "A benefit is deemed 'vested' when the employee acquires an irrevocable interest in the benefit. The vesting of retirement benefits must be distinguished from the 'maturing' of those benefits, which occurs after the conditions precedent to the payment of the benefits have taken place or the benefits are otherwise within the control of the employee." (*Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189, fn. 3 (*REAOC*).) "Vesting remains a matter of the parties' intent." (*REAOC*, *supra*, 52 Cal.4th at p. 1189.) "[U]nless and until vested rights to retirement ripen into vested contractual rights, the Legislature may modify conditions of employment without violating vested pension rights which have become protected under the contract clauses of the Constitutions." (*City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 490.)

Regarding the SRBR for police and firefighters, while there are specified exceptions, the plain language of the Municipal Code makes distributions mandatory. Defendants rely, in part, upon *Allen v. Board of Administration* (1983) 34 Cal.3d 114, but the *Allen* court reached its result finding no impairment of contract because: "The essential and critical factor is that ... respondents could [not] expect under the terms of their employment contract to obtain retirement allowances computed on the basis of the unique salary increase accomplished by the constitutional revision of 1966 ***which expressly negated such expectations***." In other words, the fact that the constitutional revision <u>expressly</u> excluded the former legislators is clear intent that the former legislators could not assert an impairment of a contract right. If there was an intent that SRBR cease distributions in the face of unfunded liability, it is not apparent from the face of the Charter or the Municipal Code.

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III. DEFENDANTS HAVE NOT MET THEIR INITIAL BURDEN AS TO AFSCME, THE HARRIS PLAINTIFFS AND THE MUKHAR PLAINTIFFS.

Defendants' motion as to these Plaintiffs involves some differences because these City employees are not police officers or firefighters and are members of different retirement plans subject to different provisions of the Charter and Municipal Code.

A. *Section 1506-A: Additional retirement contributions*

Defendants argue that the Charter does not assign UAAL to either of the two pension contribution categories: current service/current service benefits or prior service/prior service benefits. Therefore, it follows, Defendants argue, that the Charter does not impose all the obligation to pay UAAL on the City and cannot preclude the City from requiring employees to contribute toward UAAL. However, the language of section 3.28.710 (City's RJN, at Ex. A) suggests the contrary: that the burden of funding UAAL is on the City.

B. *Section 1512-A: Retiree health care*

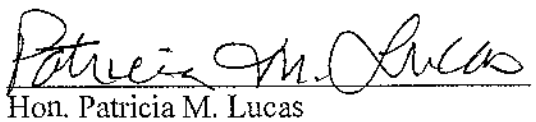
Similar to the discussion above, the allegations concerning section 1512-A are not limited to the issue of payment for unfunded liabilities, but includes other issues. (See paragraph 98 of AFSCME's First Amended Complaint.) Failing to address these other allegations, Defendants have not met their burden.

C. *Section 1511-A: SRBR*

Regarding the SRBR for other city employees, Plaintiffs are correct that the City's discretion with regard to distributions is distinct from having discretion to abolish the SRBR altogether.

For the above stated reasons, Defendants' motion for summary adjudication of issues is DENIED.

Dated: June 20, 2013



Hon. Patricia M. Lucas
Judge of the Superior Court

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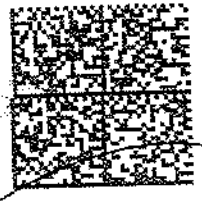

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