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9 Attorneys for Plaintiff
City of San Jose

10 **IN THE SUPERIOR COURT FOR THE**
11 **COUNTY OF SANTA CLARA**

12 SAN JOSE POLICE OFFICERS
ASSOCIATION,
13 Plaintiff,
14 v.
15 CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE AND
16 FIRE RETIREMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 inclusive,
17 Defendants.

19 AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS
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Case No. 1-12-CV-225926
[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864]

**DECLARATION OF ARTHUR A.
HARTINGER IN SUPPORT OF
DEFENDANT CITY OF SAN JOSE'S
MOTIONS IN LIMINE**

Date: July 12, 2013
Time: 9:00 a.m.
Dept.: 2

Complaint Filed: June 6, 2012
Trial Date: July 22, 2013

(ENDORSED)
FILED
JUN 27 2013
GAVIN M. YAMASAKI
Deputy Clerk
Superior Court for County of Santa Clara
BY _____ DEPUTY

BY FAX

1 I, Arthur A. Hartinger, declare:

2 1. I am one of the trial attorneys for the City of San Jose in the above-captioned
3 matter. I make this declaration in connection with and to support the City's motions *in limine*.
4 The following facts are within my personal knowledge and, if called upon as a witness, I could
5 and would testify competently with respect thereto.

6 2. A true and correct copy of "Measure B" – the legislation at issue in this case which
7 was enacted in the June 2010 election – is attached hereto as Exhibit 1.

8 3. A CBS web print out entitled "Unions Accuse San Jose Mayor of Exaggerating
9 Pension Costs" is attached hereto as Exhibit 2. According to the article, the unions filed an ethics
10 complaint against the Mayor.

11 4. Attached hereto as Exhibit 3 is a true and correct copy of an August 2012 report
12 issued by the California State Auditor.

13 5. Attached hereto as Exhibit 4 is a true and correct copy, taken from the website, of
14 Mayor Reed's response to the State Auditor report.

15 6. It is my understanding that the Retirees Association originally named Susan
16 Devencenzi as a trial witness. However, the Association and the City have agreed that the City
17 will not depose Devencenzi, and she will not be called as a witness. I believe this agreement is
18 being finalized.

19 7. A true and correct copy of a memorandum from Debra Figone to "All City
20 Employees" dated March 4, 2008 is attached as Exhibit 5.

21 8. A true and correct copy of a chart listing other legal challenges involving Measure
22 B, provided by another law firm handling them (Renne Sloan), is attached hereto as Exhibit 6.

23 9. A true and correct copy of deposition excerpts from the depositions of plaintiffs
24 Teresa Harris; Robert Sapien; and John Mukhar is attached hereto as Exhibit 7. Copies of my
25 follow up letter to counsel for these plaintiffs, and his response, is attached hereto as Exhibit 8. On
26 June 24, 2013, I took the deposition of Charles Allen. Mr. Allen was designated as the person
27 most knowledgeable under the Code of Civil Procedure with respect to his understanding of the
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1 basis for AFSCME's claims in its lawsuit. Mr. Allen was instructed not to answer at various
2 points during the deposition. I do not yet have the transcript, but will file the relevant parts of the
3 transcript related to the City's motions in limine as soon as possible.

4 10. I have reviewed a video news segment that the *Sapien* plaintiffs seek to introduce
5 into evidence. This contains commentary by the reporter, Robert Sapien, and San Jose City
6 Councilmember Sam Liccardo.

7 11. Attached hereto as Exhibit 9 is a true and correct copy of the list of exhibits served
8 by the *SJPOA* in this case.

9 12. Attached hereto as Exhibit 10 is a true and correct copy of the list of exhibits
10 served by the *Sapien* plaintiffs in this case.

11 I declare under penalty of perjury that the foregoing is true and correct to the best of my
12 knowledge.

13 Executed this 27th day of June 2013 at Oakland, California.

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15 _____
16 Arthur A. Hartinger
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On June 27, 2013, I served true copies of the following documents described as **DECLARATION OF ARTHUR A. HARTINGER ISO CITY OF SAN JOSE'S MOTIONS IN LIMINE** on the interested parties in this action as follows:

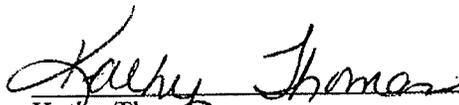
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address kthomas@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on June 27, 2013, at Oakland, California.


Kathy Thomas

SERVICE LIST

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<p>John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125 Telephone: 408-979-2920 Fax: 408-989-0932 <u>E-Mail:</u> jmcbride@wmpirlaw.com cplatten@wmpirlaw.com mrenner@wmpirlaw.com</p>	<p>Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928)</p> <p>AND</p> <p>Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574)</p> <p>AND</p> <p>Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)</p>
<p>Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton Amber L. West CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 Telephone: 415-989-5900 Fax: 415-989-0932 <u>E-Mail:</u> gadam@cbmlaw.com jyank@cbmlaw.com gmartinez@cbmlaw.com jstoughton@cbmlaw.com awest@cbmlaw.com</p>	<p>Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)</p>
<p>Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4050 Telephone: 510-625-9700 Fax: 510-625-8275 <u>E-Mail:</u> tpaterson@beesontayer.com; vsoroushian@beesontayer.com;</p>	<p>Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)</p>

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<p>Harvey L. Leiderman Jeffrey R. Rieger REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Telephone: 415-659-5914 Fax: 415-391-8269 E-Mail: hleiderman@reedsmith.com; jreiger@reedsmith.com</p>	<p>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)</p> <p>AND</p> <p>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)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)</p>
<p>Stephen H. Silver, Esq. Richard A. Levine, Esq. Jacob A. Kalinski, Esq. Silver, Hadden, Silver, Wexler & Levine 1428 Second Street, Suite 200 P.O. Box 2161 Santa Monica, California 90401</p>	<p>Attorneys for Plaintiffs/Petitioners 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. 1-12-cv-233660)</p>

2100553.1

EXHIBIT 1

FULL TEXT OF MEASURE B

**ARTICLE XV-A
RETIREMENT**

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as:
"The Sustainable Retirement Benefits and Compensation Act."

Section 1501-A: FINDINGS

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits – primarily health benefits – are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

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Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

Section 1502-A: INTENT

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

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

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

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

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

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

Section 1503-A. Act Supersedes All Conflicting Provisions

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

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Section 1504-A. Reservation of Voter Authority

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

Section 1505-A. Reservation of Rights to City Council

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

Section 1506-A. Current Employees

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees 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 no more than 50% of the costs to

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amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) 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.

Section 1507-A: One Time Voluntary Election Program ("VEP")

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

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IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

- (i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.
- (ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.
- (iii) The current age of eligibility for service retirement under the existing plan as approved by the City

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Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

- (iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.
- (v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.
- (vi) "Final compensation" shall mean the average annual pensionable pay of the highest three consecutive years of service.
- (vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

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worked (including paid leave, but not including overtime).

(c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.

(d) VEP Survivorship Benefits.

(i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.

(ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.

(e) VEP Disability Retirement Benefits.

(i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

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- (ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

Section 1508-A: Future Employees – Limitation on Retirement Benefits – Tier 2

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

- (a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

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the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose - San Francisco - Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

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(f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).

(g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

Section 1509-A: Disability Retirements

(a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

(b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:

(i) An employee cannot do work that they did before; and

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(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.

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**Section 1510-A: Emergency Measures to Contain Retiree
Cost of Living Adjustments**

If the City Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees the City may adopt the following emergency measures, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(a) Cost of living adjustments ("COLAs") shall be temporarily suspended for all retirees in whole or in part for up to five years. The City Council shall restore COLAs prospectively (in whole or in part), if it determines that the fiscal emergency has eased sufficiently to permit the City to provide essential services protecting the health and well-being of City residents while paying the cost of such COLAs.

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

Section 1511-A: Supplemental Payments to Retirees

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets:

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Section 1512-A: Retiree Healthcare

- (a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.
- (b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.
- (c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)

- (a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.
- (b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

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through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

(c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:

- (i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and
- (ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.

(d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:

- (i) the funding objectives and actuarial assumptions of the plans; and
- (ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

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Section 1514-A: Savings

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

Section 1515-A: Severability

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

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(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

ADOPTED this 6th day of March, 2012, by the following vote:

AYES: CONSTANT, HERRERA, LICCARDO, NGUYEN,
OLIVERIO, PYLE, ROCHA; REED.

NOES: CAMPOS, CHU, KALRA.

ABSENT: NONE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST:

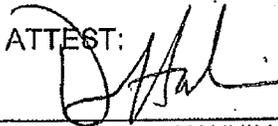

DENNIS D. HAWKINS, CMC
City Clerk

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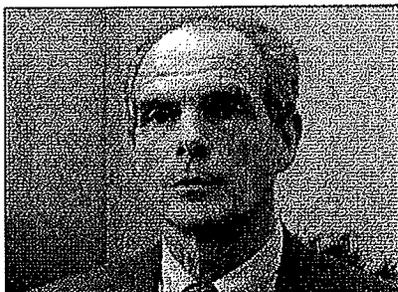
LATEST NEWS

Unions Accuse San Jose Mayor Of Exaggerating Pension Costs

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San Jose Mayor Chuck Reed (CBS)

SAN JOSE (CBS SF) — San Jose's elected officials are being accused of exaggerating projected retirement costs in an ethics complaint filed by three unions Thursday.

The complaint, filed with the city's elections commission, alleges that Mayor Chuck Reed, the city's retirement services director Russell Crosby, and former retirement services employee Michael Moshle misled the public about the five-year projections for employee contributions to retirement plans.

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The three are accused of propagating to the city council and the public "knowingly false, misleading and deceptive fiscal year 2015-2016 city pension contribution cost of \$650 million," according to the complaint.

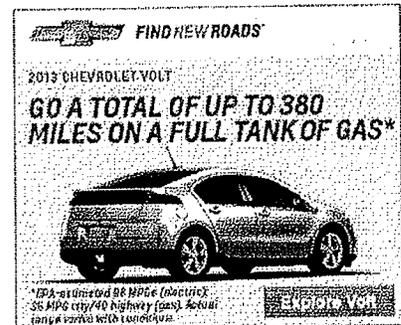
It was an estimate that Crosby conjured off-handedly at a Feb. 14, 2011 budget meeting and one that Reed ran with despite being informed that the figure was not actuarially accurate, alleges the complaint.

Last year, the council considered declaring a fiscal emergency and in December, voted to place a pension reform measure on the June ballot on the premise that skyrocketing retirement costs are resulting in service reductions and layoffs of hundreds of workers, including police officers and firefighters.

The three unions—the San Jose Police Officers' Association, San Jose Firefighters Local 230, and the International Federation of Professional and Technical Engineers Local 21 — held a news conference Thursday afternoon to discuss the complaint.



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Firefighters union president Robert Sapien and Jim Unland, president of the police union, said they want an independent investigation into the complaint.

"We have members who have lost homes, got laid off... to think that any of this was driven by misinformation is frightening," Sapien said.

Sam Liccardo, one of six council members who voted in favor of the controversial ballot measure, denied that the city has relied on the \$650 million dollar estimate and dismissed the claim as a "straw man" argument.

"The \$650 million figure was never a basis of decision-making by anybody on this council, and to my knowledge never formed the basis of any offer at the negotiating table with the unions," Liccardo said.

San Jose has billions of dollars in unfunded liabilities for retirement benefits. The city's annual retirement costs have increased from \$63 million in 2000 to \$250 million this year.

Reed's proposal calls for setting limits on retirement benefits for new employees and retirees, but the ballot measure would not reduce payments to current retirees or cut accrued benefits that employees have earned for the past five years of service.

The latest version of the ballot measure includes reforms such as placing new employees into a lower-cost, hybrid retirement plan and giving current employees the option to either keep their current retirement plan by paying a larger share of the cost or switching to a lower-cost plan.

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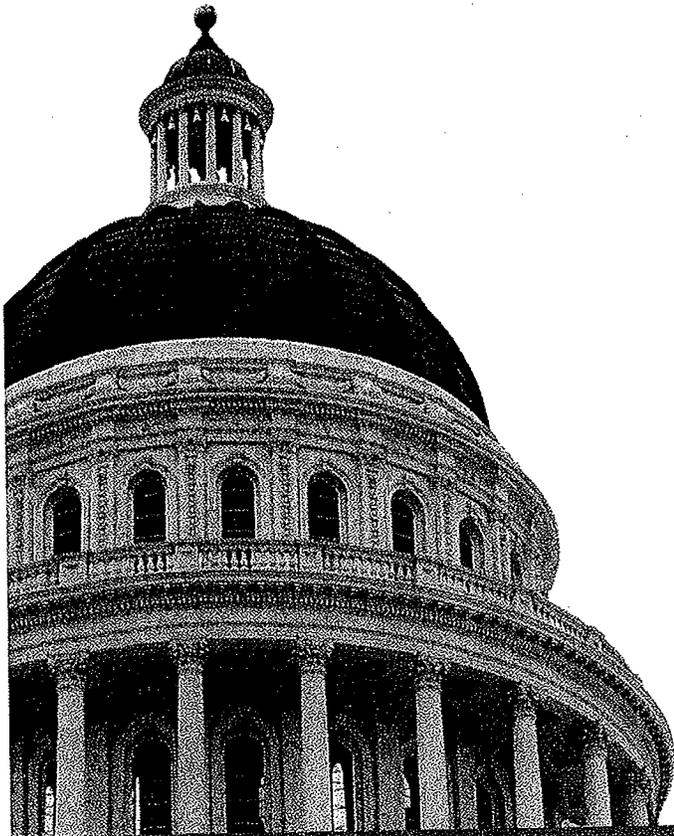
EXHIBIT 3

CALIFORNIA STATE AUDITOR

City of San José

Some Retirement Cost Projections Were
Unsupported Although Rising Retirement Costs
Have Led to Reduced City Services

August 2012 Report 2012-106



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Elaine M. Howle
State Auditor
Doug Cordner
Chief Deputy

CALIFORNIA STATE AUDITOR

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August 21, 2012

2012-106

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the California State Auditor presents this audit report concerning the City of San José's (San José) operating budget and current and future retirement obligations.

This report concludes that during fiscal years 2009-10 through 2011-12, San José experienced financial challenges as its budgeted revenues declined and retirement costs—consisting of pension and postemployment health benefits—increased. Although we believe that San José's financial challenges are real, we found that some of the retirement cost projections reported in San José's official documents in 2011 were not supported by accepted actuarial methodologies, nor were the underlying assumptions vetted and approved by the boards of San José's two retirement plans. For example, in supporting the need to reduce retirement benefits, the mayor and certain city council members referred to a projection that the city's annual retirement costs could increase to \$650 million by fiscal year 2015-16, a projection that our actuarial consultant determined was unsupported and likely overstated when assumptions approved by the boards of the two retirement plans are considered. Although we have concerns with some of San José's projected retirement costs for future years, its actual retirement costs increased significantly from fiscal years 2009-10 through 2011-12. These increased costs appear to have crowded out some of the funding previously available for non-public safety services, such as parks and libraries.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

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Summary

Results in Brief

During fiscal years 2009–10 through 2011–12, the City of San José (San José), the State's third most populous city, experienced financial challenges as its budgeted revenues declined and retirement costs—consisting of pension and postemployment health benefits—increased. Although we believe that San José's financial challenges are real, we found that some of the retirement cost projections reported in the city's official documents in 2011 were not supported by accepted actuarial methodologies, nor were the underlying assumptions vetted and approved by the boards of administration of the city's two retirement plans—the Federated City Employees' Retirement System (federated plan) and the Police and Fire Department Retirement Plan (police and fire plan).

For example, San José used one inadequately supported projection that its annual contributions toward retirement costs would increase to \$400.7 million by fiscal year 2015–16 in three bond statement documents that disclosed its financial condition to potential creditors. In addition, in supporting the need to reduce retirement benefits, the mayor and certain city council members referred to a projection that the city's annual retirement costs could increase to \$650 million by fiscal year 2015–16, a projection that our actuarial consultant determined was unsupported and likely overstated, when assumptions approved by the boards of the two retirement plans are considered. Using the most recent assumptions approved by the two boards, the boards' actuary projected that the city's fiscal year 2015–16 retirement contribution would be \$320.1 million, which is less than half of the unsupported \$650 million projection. Further, in June 2012, city voters approved a measure that, if it survives pending legal challenges, would authorize reduced future pension benefits for current city employees who do not increase their retirement contributions. The measure also requires San José to adopt new retirement plans for new city employees, and it limits the benefits that can be offered under the plans. Reporting multiple retirement cost projections in a short period may have caused confusion among the city's stakeholders attempting to make informed decisions. For instance, it is unclear which retirement cost projection the voters relied on, if any, when they voted for these changes.

Although we have concerns with some of San José's projected retirement costs for future years, the city's actual retirement costs increased significantly from fiscal years 2009–10 through 2011–12. For example, during this period, San José's annual pension costs doubled, driven in part by investment losses experienced by its two retirement plans. Moreover, primarily because of differences

Audit Highlights . . .

Our audit of the City of San José's retirement costs highlighted the following:

- » *Some of the retirement cost projections reported in the city's official documents in 2011 were not supported by accepted actuarial methodologies.*
 - *Three bond statement documents that disclosed its financial condition to potential creditors used an inadequately supported projection that its annual contributions toward retirement costs would increase to \$400.7 million by fiscal year 2015–16.*
 - *A projection that the city's annual retirement costs could increase to \$650 million by fiscal year 2015–16 was unsupported and likely overstated.*
 - *The actuary for the boards of the two retirement plans projected that the city's fiscal year 2015–16 retirement contribution would be \$320.1 million.*
- » *The city's actual retirement costs increased significantly from fiscal years 2009–10 through 2011–12, causing annual pension costs to double.*
- » *Costs related to postemployment health benefits for retirees enrolled in both plans rose by approximately 66 percent over the last four fiscal years.*
- » *As a result of the significant growth in costs related to police and fire retirement benefits from fiscal years 2009–10 through 2011–12, budgeted general fund public safety expenditures increased, even though the average number of actual filled full-time equivalent positions in this area declined by 382.*

in the way the two retirement plans spread their actuarial losses over time, annual pension costs associated with the police and fire plan increased significantly more than the costs of the federated plan. Further, the city's actuarially determined costs related to postemployment health benefits for retirees enrolled in both plans rose by approximately 66 percent over the last four fiscal years. As of fiscal year 2010-11, San José's unfunded obligations for both plans' pension and postemployment health benefits were \$1.5 billion and \$2 billion, respectively.

These rising retirement costs and declining budgeted revenues have created budgetary challenges for San José. For example, as a result of the significant growth in costs related to police and fire retirement benefits from fiscal years 2009-10 through 2011-12, budgeted general fund public safety expenditures increased, even though the average number of filled full-time equivalent positions in this area declined by 382. Thus, San José may be providing reduced services at an increased cost. Moreover, these increased costs appear to have crowded out some of the funding previously available for services other than public safety, such as parks and libraries.

Recommendations

To ensure that stakeholders receive consistent and reliable information, San José should report the official retirement cost projections that were developed using the assumptions approved by the two retirement plan boards (boards). If San José does not use the official retirement cost projections, it should develop projections that are supported by accepted actuarial methodologies, report this information in the correct context, and disclose significant assumptions that differ from those in the boards' retirement cost projections.

Agency Comments

Although San José agreed with our recommendation, it disagreed with how we characterized some of our conclusions.

Introduction

Background

With a population of almost 1 million, the City of San José (San José) is the third most populous city in the State, based on the California Department of Finance's January 2012 population estimates. San José provides a range of municipal services, including police and fire protection, sanitation services, environmental management, maintenance of streets and infrastructure, and administration of the library, recreational, and cultural facilities.

San José is a charter city that operates under a council-manager form of government. The mayor and city council are responsible for adopting and establishing policies in the form of ordinances, motions, and resolutions. The city council consists of the mayor and 10 council members, each of whom represents a city district. The mayor and city council members are elected to four-year terms and are limited to two consecutive terms. Under San José's charter, the city has a city manager who is appointed by the city council, serves as the city's chief administrative officer, and generally directs and supervises the administration of all city departments, offices, and agencies.

For budgetary purposes, San José groups its operations into four functional areas, as described in the text box. For fiscal year 2011–12, the city adopted a budget of approximately \$2.8 billion, including a total general fund budget of approximately \$906 million. That budget includes funding for approximately 5,400 budgeted full-time equivalent positions.

City of San José's Functional Areas for Budgetary Purposes

Capital maintenance departments: Provide for the construction and maintenance of the City of San José's (San José) infrastructure by the transportation and public works departments.

Community services departments: Provide for programs that affect citizens on a daily basis, such as airport and environmental services; parks; libraries; and planning, building, and code enforcement.

General government departments: Provide for the overall management and administrative function of San José, including human resources, finance, information technology, city manager, mayor, city council, city auditor, and city clerk.

Public safety departments: Provide for the safety of the public through crime and fire prevention and suppression efforts of the police and fire departments.

Sources: City of San José's adopted budgets for fiscal years 2009–10 through 2011–12.

San José's Retirement Plans

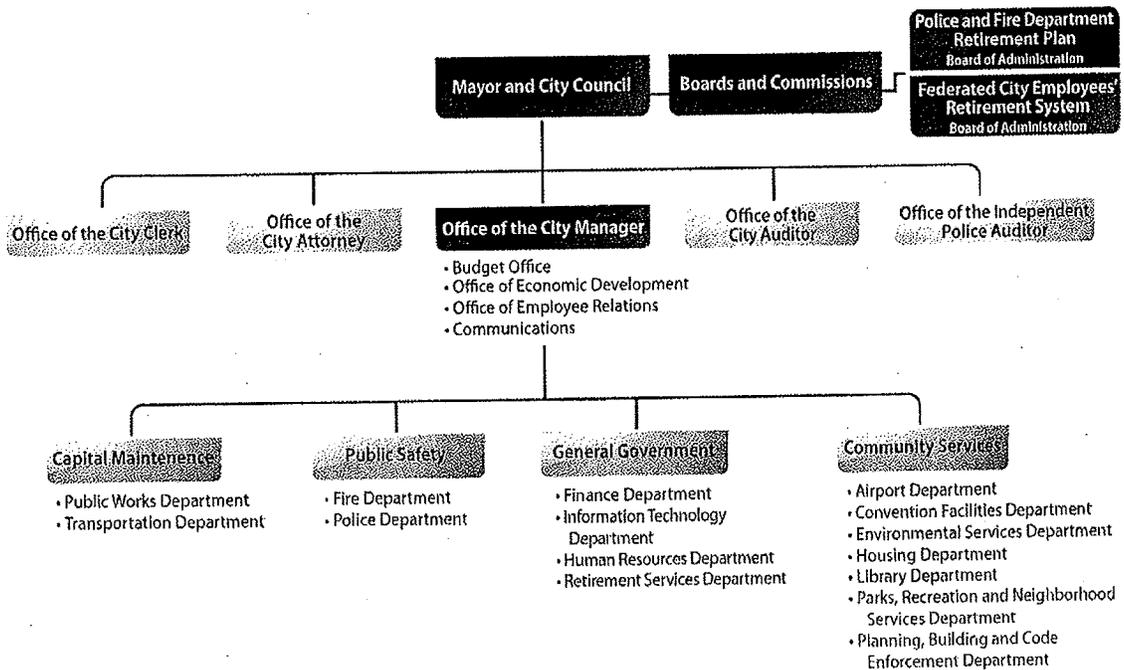
The boards of administration (boards) of the Federated City Employees' Retirement System (federated plan) and of the Police and Fire Department Retirement Plan (police and fire plan) administer the city's two retirement plans. Full-time employees who work for the city are generally covered under one of these plans. The mayor and city council members do not participate in the city's retirement plans; instead, they are eligible to participate in the California Public Employees' Retirement System. In addition, San José's part-time employees are generally not eligible to

participate in the city's retirement plans. As of May 2012, a total of 4,805 city employees were participating in either the federated plan or the police and fire plan.

The police and fire plan is administered by a nine-member board composed of two city employees who are members of the police and fire plan, two retired plan members, and five public members. The federated plan is administered by a seven-member board composed of two city employees who are members of the federated plan, one retired plan member, and four public members. The members of each board are appointed by the city council to four-year terms, but one of the public members of each board must first be recommended by the other current board members before being appointed by the city council. The public members of each board must have at least 12 years of experience relevant to the administration of a public retirement plan, such as investment management experience, and may not be current or former city employees or officers and may not be participating or receiving benefits under either plan. Under the state constitution, the boards have fiduciary responsibility for the assets of each plan and the responsibility to administer the plans to assure prompt delivery of benefits and services. The city's municipal code imposes specific duties on each board, which include considering requests for retirement and administering and investing plan funds.

The day-to-day operations of both retirement plans are administered by a city department. Specifically, San José's municipal code requires the director of the city's Department of Retirement Services (Retirement Services) to provide staff services to the retirement boards, to maintain the records of each plan, and to serve as each board's secretary. The director of Retirement Services supervises the investments of each plan's assets; administers retirement benefits; and analyzes, develops, and recommends policy for the boards. Retirement Services also assists the boards in selecting actuaries for their plans. Retirement Services' administrative costs are paid by the retirement funds. Although the director of Retirement Services has various duties in the operations of the two retirement plans, he is appointed by and reports directly to the city manager; and the operating budget of Retirement Services is approved by the city council. Figure 1 shows the organization chart of San José.

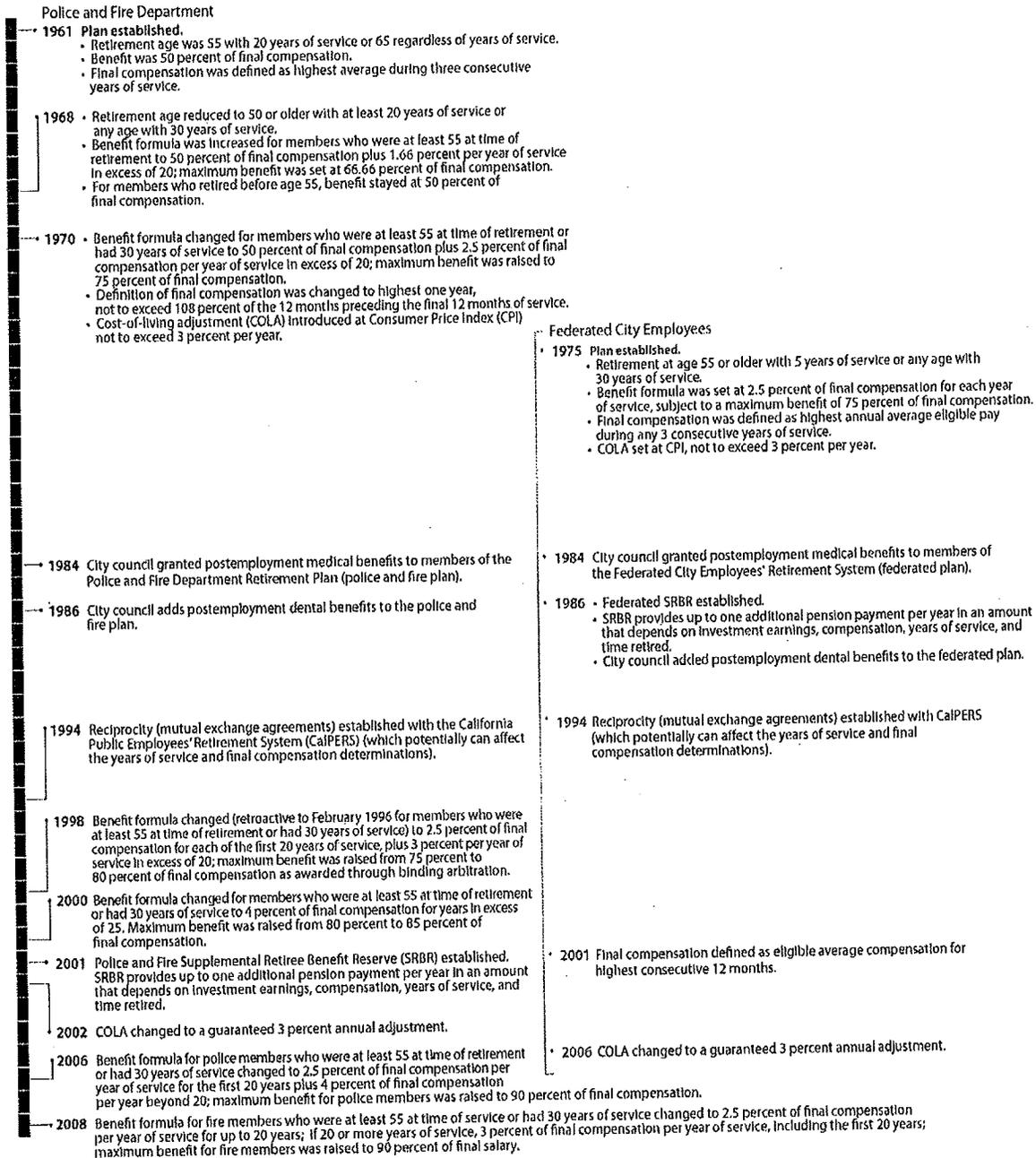
Figure 1
City of San José's Organization Chart



Sources: City of San José's Web site, 2011-12 Adopted Operating Budget; San José Code of Ordinances Title 2 Administration.

The city offers an array of retirement benefits to its employees, including pension and postemployment health benefits for retirees. However, city employees do not participate in the federal Social Security program while employed by the city and do not earn credit for Social Security benefits, since San José opted not to participate in this program. Both pension plans use investment income and employer and employee contributions to provide eligible retirees with a defined-benefit pension based on their age, years of service, and final compensation. Employees covered by the federated plan and the police and fire plan have historically contributed roughly 4 percent and 9 percent, respectively, of their pay to their pension plans, as determined by the boards' actuaries. The plans also provide postemployment health benefits, survivor benefits, and disability benefits to qualified members and their beneficiaries. Figure 2 on the following page shows the history of San José's employee retirement benefits.

Figure 2
History of the City of San José's Retirement Plan Benefits



Source: City of San José City Auditor's Report, *Pension Sustainability: Rising Pension Costs Threaten the City's Ability to Maintain Service Levels—Alternatives for a Sustainable Future*, September 2010, Report Number 10-10.

In June 2012 San José voters passed a measure that will generally authorize limits on pension benefits for new city employees and authorize reduced future benefits for current city employees who do not increase their retirement contributions. Specifically, as shown in Table 1 on the following page, the measure amends the city's charter to require the city council to adopt ordinances to place all new employees into new retirement plans with limits on the benefits.¹ Current retirement ages differ based on years of service, and the minimum retirement ages currently are 50 for public safety employees and 55 for other city employees; there is currently no minimum age requirement in either plan for employees with 30 years of service. The minimum retirement age for new employees under the new plan will increase to 60 with 10 years of service for public safety employees, and 65 with five years of service for other city employees. The accrual² rate for benefits will decrease to 2 percent per year of service, with a cap of 65 percent; currently the rate varies between 2.5 percent and 4 percent per year, depending on the plan and years of service, and is capped at 90 percent of final compensation for public safety employees and 75 percent for other city employees. The final compensation will be redefined from the single highest year to an average of the highest three consecutive years using only base pay. Annual cost-of-living adjustments (COLAs) for retirees would be decreased from 3 percent to 1.5 percent or the percentage increase in the Consumer Price Index, whichever is lower.

Current employees will have two options once the city implements the measure. They may voluntarily opt in to receive reduced retirement benefits. These reduced benefits will include an increase in the minimum retirement age to 57 with 20 years of service for public safety employees and to 62 with five years of service for other city employees. Accrual rates will decrease to 2 percent per year for future years of service, while final compensation and COLA adjustments will be changed as described in the previous paragraph. To keep their current retirement benefits, current employees will experience increases in existing employee retirement contributions in increments of 4 percent of pay per year to a maximum of 16 percent annually; these increases will apply even if the city does not implement the opt-in program. The measure also allows the city council to suspend COLAs for five years during a fiscal and service-level emergency, and it prohibits increases in retirement benefits without voter approval. In addition, the measure requires current and new employees to contribute a minimum of half the cost of postemployment health benefit costs, and modifies the process by which the city will determine disability.

¹ While the measure authorizes San José to adopt either a defined-benefit plan or a hybrid plan for new employees, the limits described in this paragraph would apply to defined-benefit plans for new employees.

² The rate at which pension benefits build up as member service is completed in a defined benefit plan.

Table 1
Comparison of Benefits for the City of San José's Two Retirement Plans, Before and After the Changes Adopted in June 2012

Highlights of Ballot Measure B—Federated City Employees' Retirement System

	CURRENT EMPLOYEES (TIER 1)	CURRENT EMPLOYEES' VOLUNTARY ELECTION PROGRAM (VEP)	NEW EMPLOYEES DEFINED BENEFIT PLAN (TIER 2) *
Maximum benefit	75 percent of final compensation	75 percent of final compensation	65 percent of final compensation
Accrual rate	2.5 percent per year	2 percent per year (future years only)	2 percent per year
Retirement age	• Age 55 with 5 years of service • Any age with 30 years of service	• Age 62 with 5 years of service (phased in over 14 years) • 30 years at any age; years to increase by 6 months annually beginning 7/1/17	Age 65 with 5 years of service
Final compensation calculation	Highest 1 year	Average of highest 3 consecutive years	Average of highest 3 consecutive years
Cost-of-living adjustment (COLA)	3 percent	1.5 percent or consumer price index (CPI), whichever is lower	1.5 percent or CPI, whichever is lower
Cost sharing	Effective June 2013, current employees will gradually increase their retirement contributions up to a maximum of 16 percent of pay in 4 percent annual increments, but will contribute no more than half of the cost to pay the unfunded liability. This is in addition to their current retirement contributions. This will occur if either the VEP is not enacted or the employee does not opt-in to the VEP.	For employees who elect to opt-in to the lower level of benefits, the city will continue to contribute 73 percent of the current year cost and will contribute the entire cost to pay the unfunded liability. Employees will continue to contribute 27 percent of the current year cost.	Costs will be shared 50 percent/50 percent between the city and employees.

Highlights of Ballot Measure B—Police and Fire Department Retirement Plan

	TIER 1	CURRENT EMPLOYEES' VEP	TIER 2*
Maximum benefit	85 percent to 90 percent of final compensation	90 percent of final compensation	65 percent of final compensation
Accrual rate	2.5 percent to 4 percent depending on years of service	2 percent per year (future years only)	2 percent per year
Retirement age	• Age 50 with 25 years of service • Age 55 with 20 years of service • Any age with 30 years of service	• Age 57 with 20 years of service (phased in over 14 years) • 30 years at any age; years to increase by 6 months annually beginning 7/1/17	Age 60 with 10 years of service
Final compensation calculation	Highest 1 year	Average of highest 3 consecutive years	Average of highest 3 consecutive years
COLA	3 percent	1.5 percent or CPI, whichever is lower	1.5 percent or CPI, whichever is lower
Cost sharing	Effective June 2013 current employees will gradually increase their retirement contribution up to a maximum of 16 percent of pay in 4 percent annual increments, but will contribute no more than half of the cost to pay the unfunded liability. This is in addition to their current retirement contributions. This will occur if either the VEP is not enacted or the employee does not opt-in to the VEP.	For employees who elect to opt-in to the lower level of benefits, the city will continue to contribute 73 percent of the current year cost and will contribute the entire cost to pay the unfunded liability. Employees will continue to contribute 27 percent of the current year cost.	Costs will be shared 50 percent/50 percent between the city and employees.

MISCELLANEOUS PROVISIONS

- If the City of San José (San José) council declares a fiscal and service-level emergency, it will have the ability to suspend the COLA for up to 5 years.
- Current and new employees contribute a minimum of 50 percent of the cost of postemployment health benefits.
- Bonus pension checks from the Supplemental Retiree Benefit Reserve would be discontinued.
- San José would be prohibited from increasing retirement benefits without voter approval.

Sources: San José City Charter, Article XV-A (added by Measure B, June 5, 2012), San José's Mayor's Office, revised recommended ballot measure, 2010–11 Comprehensive Annual Financial Report (CAFR) for San José's Federated City Employees' Retirement System, and 2010–11 CAFR for San José's Police and Fire Department Retirement Plan.

Note: This table is a summary and does not include survivorship and disability benefits.

* While Measure B authorized either defined benefit plans or hybrid plans, the provisions shown are Measure B's requirements for defined benefit plans.

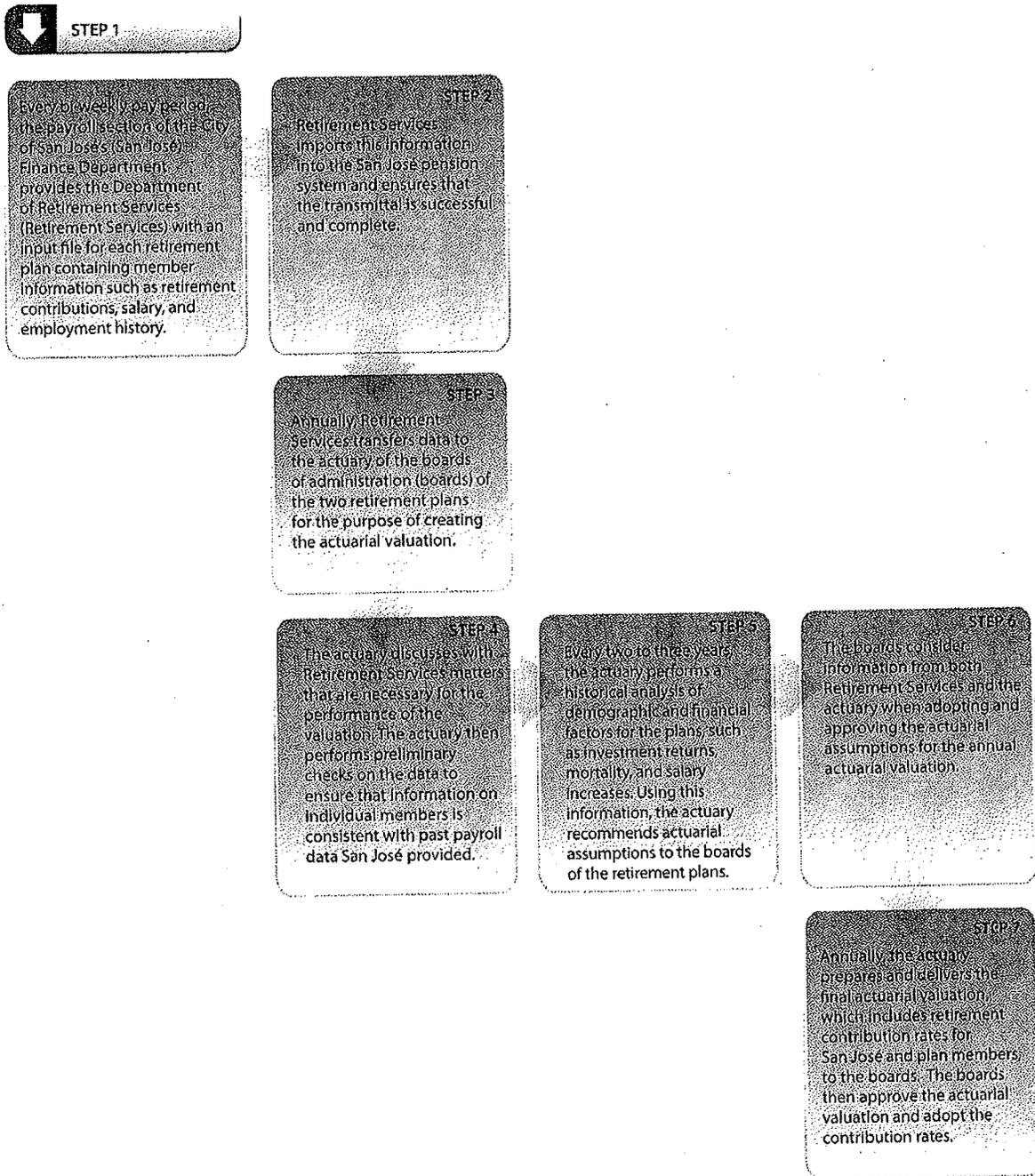
According to the city attorney, many of the provisions of the measure will require adoption of city ordinances to become effective. He also stated that San José plans to adopt an ordinance to establish a new tier with limited benefits for new non-public safety employees in August 2012. Public safety employees have the right to binding arbitration and thus the city expects to adopt limited benefits for new public safety employees no earlier than January 2013. Finally, pending Internal Revenue Service approval and the outcome of several legal challenges to the measure, San José is planning on implementing the pension changes shown in Table 1 for current employees by June 2013.

San José's Process for Calculating Its Official Retirement Costs

San José's municipal code requires an actuarial valuation of its retirement assets and liabilities every five years. According to the city's audited financial statements, it had been the policy of the two boards to obtain actuarial valuations every two years; however, the boards opted to have a valuation completed annually beginning June 30, 2010. The boards' actuary is required to include an analysis of the mortality, service, and compensation experience of members and persons receiving benefits and an actuarial valuation of the assets and liabilities of the plans. The boards use the valuations to determine the retirement contribution rates of their respective plan members and the city.

Figure 3 on the following page illustrates the process the boards use to determine those retirement contribution rates. As shown in the figure, the process begins with the city providing Retirement Services with payroll data, which are then forwarded to the boards' actuary. Our actuarial consultant determined that the valuation process, including the collection and review of data used by the boards' actuary, appears sound and does not vary from generally accepted actuarial standards. Further, our actuarial consultant found that the interaction of the city, the boards, and the boards' actuary appear appropriate for their roles in the production of the valuations. The actuary uses these data to analyze demographic and economic information and then forwards the results of its analysis to the boards so that they can determine which actuarial assumptions to adopt for their respective retirement plans.

Figure 3
Flow Chart for Actuarial Valuation Process



Sources: Interviews with Retirement Services' staff, contracts between the boards of the Federated City Employees' Retirement System (federated) and of the Police and Fire Department Retirement Plan (police and fire) and actuary, federated and police and fire boards' meeting minutes and agendas, and San José's City Auditor Report #09-10 *Audit of Pensionable Earnings and Time Reporting*.

For the city, there are no statutorily required minimum contributions to fund either the pension or postemployment health benefit plans. However, the Governmental Accounting Standards Board sets standards for the manner in which U.S. state and local governments should account for pension and postemployment health benefits in their financial statements. The *annual required contribution* is the amount the city reports in its financial statements as the cost for those benefits. San José has had a long-standing practice of making cash contributions to its pension plans in an amount equal to the full annual required contribution. The city and employees have also been making contributions towards funding postemployment health benefits for active employees and retirees, however, at a level less than the full annual required contribution.

To determine San José's annual required contribution, the boards' actuary first calculates the present value of all benefits the plans are expected to pay for current and former employees. The portion of this amount attributable to past years of service is the *accrued liability*. The actuary then compares this monetary obligation to the plans' assets in order to arrive at the *unfunded actuarial accrued liability*, the amount of the accrued liability that exceeds the plans' assets. Although the city could pay the unfunded actuarial accrued liability associated with the two plans in one year, the liability is generally spread, or amortized, over a longer period, such as 15 to 30 years, thus smoothing the year-to-year volatility. The annual required contribution is made up of the sum of this amortization payment and the value of the benefits that will be earned in the current year, known as the *normal cost*.

Each year a plan will incur gains or losses when the actual experience of the plan differs from the actuarial assumptions. These gains or losses arise from such items as salary increases, terminations, retirements, and investment returns. To the extent that the actual experience differs from the actuarial assumptions, it will add to or subtract from the unfunded liability; over time, these gains and losses are expected to offset each other. Periodically, the boards' actuary will review the experience and may make adjustments to its expectations. When this occurs, the boards and their actuary will agree to change some of the assumptions used in calculating the liabilities to better reflect expected experience. Changes in plan assumptions, such as the assumed rate of return on investment used to calculate liabilities, will also change the unfunded liabilities. All else being equal, a higher assumed return on investment will decrease liabilities while a lower assumed investment return will increase liabilities.

Scope and Methodology

The Joint Legislative Audit Committee (audit committee) directed the California State Auditor to perform an audit of San José's operating budget and current and future pension obligations. The audit analysis that the audit committee approved contained nine objectives. Table 2 lists these objectives and methods we used to address them.

Table 2
Methods of Addressing Audit Objectives

AUDIT OBJECTIVE	METHODS
1 Review and evaluate the laws, rules, and regulations significant to the audit objectives.	Obtained and reviewed relevant laws, regulations and ordinances, and worked with our legal counsel as necessary to apply the criteria to the remaining audit objectives. In addition, we obtained necessary background information for the report.
2 Identify the City of San José's (San José) operating budget, including revenues and expenditures for fiscal years 2009-10 through 2011-12.	Obtained and reviewed operating budget documents for fiscal years 2009-10 through 2011-12.
3 For fiscal years 2009-10 through 2011-12, identify San José's required and actual pension contributions, as well as employees' actual contributions.	<ul style="list-style-type: none"> • Obtained the comprehensive annual financial reports (CAFRs) for the city and its two retirement plans, and verified that the CAFRs were independently audited by a licensed public accounting firm. • Analyzed trends in the city's required and actual pension and other postemployment health benefit contributions, actual employee contributions, and unfunded actuarial accrued liabilities. Our actuarial consultant also reviewed actuarial valuations to gain an understanding of the reasons for significant changes in these areas during the period under review. In addition, our actuarial consultant validated that adequate documentation in these areas existed to support actuarial assumptions used in calculating actual contributions.
4 Identify the source of the pension cost projections and the amounts San José is reporting as its official projections for its pension contribution obligation for fiscal years 2011-12 through 2015-16. Determine whether these projections included all relevant factors and were established using actuarial industry standards and guidelines.	<ul style="list-style-type: none"> • Interviewed San José staff and retirement board chairs to identify the projections that were based on the actuarial assumptions approved by the retirement boards, and obtained San José's retirement cost projections for fiscal years 2012-13 through 2016-17. • Our actuarial consultant reviewed underlying valuation reports and experience studies, and interviewed the boards' actuary and city staff to determine if the factors and assumptions and the resulting retirement cost projections used by the city are congruent with actuarial standards and guidelines.
5 Identify the sources of any other pension cost projections and the amounts San José officials have reported in various correspondence and media outlets as the city's pension contribution obligation for future fiscal years. Determine the reasons for the difference between these different pension contribution amounts and the amounts identified in audit objective 4 above.	<ul style="list-style-type: none"> • Researched retirement cost projections published by San José and media outlets, including the amounts specified in the audit request, and agreed on an inventory of these projections. • Interviewed chairs of the two retirement boards, the director of the Department of Retirement Services (Retirement Services), and other city officials to obtain the rationale, support, and source of these projections, as well as how they were used by the city. • Determined the reasons for the differences among the different projections. Our actuarial consultant determined whether these projections were adequately documented and prepared in accordance with actuarial standards.

AUDIT OBJECTIVE	METHODS
<p>6 Determine whether San José and the retirement plan boards followed applicable laws, rules, and regulations related to their involvement in actuarial reviews and when reporting San José's projected pension liabilities.</p>	<ul style="list-style-type: none"> Reviewed the actuary's contracts with the two retirement boards, and interviewed Retirement Services staff and the chairs of both boards to determine the boards' process for approving actuarial assumptions. We determined and characterized the nature of the relationship between the boards, the city, and the boards' current actuary, which includes the flow of information from the city to the boards' actuary. Our actuarial consultant determined whether the valuation process, including the collection and review of data used by the boards' actuary appear sound and comply with generally accepted actuarial standards. Further, our actuarial consultant determined whether the interaction of the city, the boards, and the boards' actuary were appropriate for their roles in the production of the valuation. Our legal counsel reviewed relevant city and state laws, including the Political Reform Act and relevant city policies. Our legal counsel also reviewed pending litigation and complaints related to the city's retirement projections. We decided not to report on matters where there was pending litigation or complaints. We found that the boards' current contracted actuary billed the police and fire board for 1.5 hours of work performed on July 29, August 1, and August 10, 2011, by a former city employee who currently works for the actuary. This work may have related to a project he worked on while previously employed by the city. This is a potential violation of San José's revolving door ordinance. Although the city granted a waiver of its revolving door ordinance to the former employee, it was granted on August 29, 2011, which was after the billing for the work. Therefore, we referred the matter mentioned above to the city attorney for further investigation.
<p>7 Determine the major factors that contributed to San José's need to reduce its expenditures for fiscal years 2009-10 through 2011-12. Determine whether these factors were reasonable and if San José had sufficient evidence to support the reductions.</p>	<ul style="list-style-type: none"> Obtained and reviewed relevant budget documents and CAFRs, and interviewed the city budget director to obtain information on factors taken into consideration when preparing the budget. Identified the functional areas where San José significantly reduced budgetary expenditures. Obtained San José's explanation for the factors that caused it to reduce expenditures and compared these factors to budgetary support, and information in San José's CAFRs. Evaluated the relationships between budgeted revenues, budgeted expenditures, average actual filled full-time equivalent positions (FTE positions), and retirement costs.
<p>8 For fiscal years 2009-10 through 2011-12, determine the number of positions eliminated as well as the operational areas from which they were eliminated.</p>	<p>Analyzed the reductions in the number of FTE positions by functional area.</p>
<p>9 Review and assess any other issues that are significant to San José's operating budget and its current and future pension obligations.</p>	<p>Reviewed and summarized San José's June 5, 2012, ballot measure on pension benefits (Measure B), that the city's voters approved.</p>

Source: California State Auditor's analysis of the Joint Legislative Audit Committee audit request number 2012-106 and the analysis of information and documentation identified in the table column titled *Methods*.

Assessment of Data Reliability

In performing this audit, we relied upon an electronic data file extracted from the information system listed in Table 3. The U.S. Government Accountability Office, whose standards we follow, requires us to assess the sufficiency and appropriateness of computer-processed information. The table below shows the results of this analysis.

Table 3
Methods to Assess Data Reliability

INFORMATION SYSTEM	PURPOSES	METHODS AND RESULTS	CONCLUSION
City of San José's (San José) PeopleSoft human resources Information system (human resources data). Data as of May 2012.	<ul style="list-style-type: none"> • To identify San José's average actual number of filled full-time equivalent positions (FTE positions) and employees by functional area from July 2009 through May 2012.* • To identify the number of San José employees and those who participated in the Federated City Employees' Retirement System and the Police and Fire Department Retirement Plan as of May 2012. 	We performed data set verification procedures and electronic testing on key data elements and did not identify any issues. We did not perform accuracy and completeness testing of San José's human resources data because it is used as corroborating evidence and is not the sole support for any finding, recommendation or conclusion for the audit. It is likely a one-time review of a local entity and therefore did not warrant the same level of resource investment as a state agency whose system produces data that may be used during numerous future audit engagements.	Undetermined reliability for the purposes of this audit. Nevertheless, we present these data, as they represent the best available data source of this information.

Sources: California State Auditor's analysis of various documents, interviews, and data obtained from San José's human resources data.

* As shown in Figure 8 on page 32, the number of FTE positions calculated is the average for the period.

Audit Results

Some of the City of San José's Projected Retirement Costs Were Unsupported

In 2011 the City of San José (San José) reported multiple projections of its future contributions towards the costs of its retirement plans, some of which were based on assumptions that had not been approved by the boards of administration (boards) of its two independent retirement plans and that were not supported by documentation required by accepted actuarial standards. San José released these retirement cost projections to various stakeholders and used these estimates for purposes such as budgetary forecasting and to disclose its projected contributions toward its retirement costs in official bond statements.

In January 2011 city administrators made a public presentation on retirement reform to the city council, which included projections that estimated that the city's annual contributions toward retirement costs would increase to \$400.7 million by fiscal year 2015-16. This same projection was also referenced in disclosures contained in the official bond statements of San José's Financing Authority issued in March 2011, and in San José's official bond statements issued in March and July 2011. As shown in Table 4 on the following page, this projection also appeared in several documents that were used to communicate city officials' concerns over rising retirement costs. For example, San José's mayor mentioned this figure in his State of the City address in February 2011 and in his March 2011 budget message for fiscal year 2011-12.

However, the two boards' actuary had not prepared this projection nor had the boards approved the underlying assumptions associated with it. Further, the projection was not adequately supported. Rather, a staff actuary employed by the Department of Retirement Services (Retirement Services) developed this projection and provided it to the city manager's budget office for budgetary forecasting purposes. According to the director of Retirement Services, the staff actuary developed the projection using an actuarial model that had been verified against models used by the boards' current and former outside actuaries based on payroll data as of June 30, 2010. He also indicated that this projection considered the impact of layoffs that occurred in July 2010 and an assumption of across-the-board salary reductions. However, in support of this projection, San José officials were only able to provide us with spreadsheets that our actuarial consultant determined were not appropriate documentation of the assumptions, data, and methodology and that did not include any information as to how this projection should be used. Without such evidence, our actuarial consultant could not be assured that San José calculated and used this projection appropriately. Although this projection was not adequately documented, a subsequent July 2011 projection yielded similar results, as we discuss later.

Table 4
Cost Projections Related to the City of San José's Pension and Postemployment Health Benefits
Fiscal Years 2011-12 Through 2016-17
(In Millions)

	JANUARY 2011	FEBRUARY 2011	JUNE 2011	JULY 2011	FEBRUARY 2012	
Fiscal Year	2011-12	\$256.2	NA	NA	\$262.1	NA
	2012-13	310.5	NA	NA	323.4	\$251.2
	2013-14	360.2	NA	NA	380.4	298.8
	2014-15	388.9	NA	NA	410.1	319.0
	2015-16	400.7	\$650.0	\$575.0	431.5	320.1
	2016-17	NA	NA	NA	NA	325.0
Source of projection	Department of Retirement Services (Retirement Services) staff actuary	Director of Retirement Services	Retirement Services' staff actuary	The retirement board's external actuary	The retirement board's external actuary	
Did retirement boards approve actuarial assumptions used to calculate these projections?	No	No	No	No	Yes	
Meets actuarial standards?	No—the City of San José (San José) was unable to provide appropriate documentation of the assumptions, data, or methodology used to calculate these projections.	No—San José was unable to provide support for this projection.	No—San José was unable to provide appropriate documentation of the assumptions, data, or methodology used to calculate this projection.	Yes	Yes	
Primary purpose	Budgetary forecasting.	The mayor used this estimate to call attention to rising retirement costs.	Internal retirement cost projection.	To provide an independent review of the January 2011 projection that was previously prepared by Retirement Services' staff actuary.	Budgetary projections based on the June 30, 2011, actuarial valuations.	
Documents that included these projections	<ul style="list-style-type: none"> 2011-12 City Manager's Budget Request & 2012-2016 Five-year Forecast and Revenue Projections for the General Fund and Capital Improvement Program issued in February 2011 Mayor's February 2011 State of the City address February 2011 public budget study session Mayor's March 2011 budget message for fiscal year 2011-12 May 2011 public retirement reform city council budget study session City manager's May 2011 Fiscal Reform Plan Official bond statements issued in March 2011 and July 2011 	<ul style="list-style-type: none"> Mayor's April 2011 press release Mayor's May 2011 press release May 2011 fiscal reform memo signed by the mayor, vice mayor, and two council members Mayor's June 2011 budget message for fiscal year 2011-12 August 2011 Stanford Institute for Economic Policy Research public meeting News media outlets 	<ul style="list-style-type: none"> June 2011 e-mail from the director of Retirement Services to a staff actuary that entered the public domain when it was obtained by an NBC Bay Area news outlet. We did not find any official documents that included this figure. 	<ul style="list-style-type: none"> August 2011 Stanford Institute for Economic Policy Research public meeting October 2011 labor negotiations update presentation to the city council November 2011 Fiscal and Service Level Emergency Report Official bond statement issued in December 2011 	<ul style="list-style-type: none"> 2012-13 City Manager's Budget Request & 2013-2017 Five-year Forecast and Revenue Projections for the General Fund and Capital Improvement Program issued in February 2012 Mayor's March 2012 budget message for fiscal year 2012-13 March 2012 city council session on future retirement costs 	

Sources: San José's actuarial reports, official bond statements, budget documents, press releases, meeting minutes, and news media outlets.

NA = Not Applicable.

In February 2011 the mayor, the director of Retirement Services, the staff actuary of Retirement Services, the city manager, and a deputy city manager attended a city council budget study session. During the meeting, a city council member asked a variety of questions regarding retirement costs. At one point in the meeting, the director of Retirement Services stated:

“The benefits are going to be whatever the benefits are, but in order to fund them and accurately project for them, to actually project forward how much it’s all going to cost, we need to fix all of these things inside the valuations that we already know about, and we’re nowhere near fixing those. If you fixed all of that, you’re looking at probably another \$250 million above your \$400 million. So the \$400 [million] is really just a basic starting point that recognizes the losses that have occurred and doesn’t really fix anything going forward.”

In the months following the director of Retirement Services’ comment that retirement costs could increase by \$250 million above the original \$400.7 million projection, to call attention to rising retirement costs the mayor’s office reported in official city documents, in press releases, during a public presentation, and to news outlets that the city’s annual retirement costs could reach \$650 million. For example, this figure appeared in a May 2011 fiscal reform memo signed by the mayor, vice mayor, and two council members, and in the mayor’s June 2011 budget message for fiscal year 2011–12. When we asked the director of Retirement Services where the \$650 million projection came from, he stated that it was just an estimate “off the top of his head” that he provided in response to a question during the February 2011 budget study session. He also told us that after he became aware that the mayor was using this figure in public communications, he had his staff actuary verbally inform the mayor’s office that this was not an official projection and that there was no documented support for this estimate. On February 9, 2012, the city manager wrote a letter to the mayor and city council to respond to information in an NBC Bay Area news story that aired the day before about San José’s retirement cost estimates. In the letter, the city manager clarified that the \$650 million annual retirement cost figure was simply an estimate and was never intended to be used as a formal projection.

According to the director of Retirement Services, San José’s former director of the Finance Department (finance) began to question the reliability of the \$400.7 million cost projection after the mayor reported that the city’s annual retirement contributions could reach \$650 million. However, according to the current acting director of finance, this was part of the city’s normal process of ensuring that a factual discussion of the city’s two retirement plans is included in official bond statements. In June 2011 the

To call attention to rising retirement costs the mayor’s office reported in official city documents, in press releases, during a public presentation, and to news outlets that the city’s annual retirement costs could reach \$650 million.

director of Retirement Services emailed the staff actuary to ask for a copy of the spreadsheet that calculated the \$400.7 projection. In the email, the director of Retirement Services noted that the spreadsheet indicated that "with fixing demographics and other issues," the city's annual retirement contributions could reach \$575 million; he went on to state that the city's finance staff challenged the \$400.7 million projection after they heard that there was no backup for the \$650 million figure. The \$575 million annual retirement cost projection that the director of Retirement Services mentioned became public when a media outlet obtained the email.

The director of Retirement Services explained to us that the \$575 million projection was one of many calculated by the staff actuary before and after the mayor reported the \$650 million figure to news outlets. He added that the \$575 million projection represents one scenario of how high the city's retirement contributions could be if the actuarial assumptions were more conservative and were based on recent actual experience. However, in support of this projection, San José officials again were only able to provide us with spreadsheets that our actuarial consultant determined were not appropriate documentation of the assumptions, data, and methodology used to calculate this projection. Without such evidence, our actuarial consultant could not be assured that this projection had been calculated appropriately. The director of Retirement Services asserted that the \$575 million figure was not used in any official city documents, and we did not find any official city documents that included this figure.

On June 30, 2011, Retirement Services requested that the external actuary shared by the two boards perform an independent review of the previously mentioned \$400.7 million projection prepared by the staff actuary of Retirement Services, and instructed the boards' actuary to use the specific rules or assumptions that were used to calculate this amount. According to this actuary, Retirement Services was requesting the boards' actuary to check the math in the \$400.7 million projection to see if it would arrive at the same amount. The boards' actuary concluded that the specified assumptions, including assumed net investment rates of return for the Police and Fire Department Retirement Plan (police and fire plan) and the Federated City Employees' Retirement System (federated plan) of 7.5 percent and 7.75 percent, respectively, were reasonable. In July 2011 the boards' actuary completed this exercise and projected that the city's contribution towards its employees' retirement costs would reach \$431.5 million in fiscal year 2015-16, a figure relatively close to the initial \$400.7 million estimate. Our actuarial consultant determined that the \$431.5 million projection was calculated in accordance with generally accepted actuarial standards. However, it is important to note that even though plan assets were used to pay for this projection the two boards did not request it nor did they approve the assumptions used in its development. The use of retirement plan assets to pay for this projection is the subject of a current lawsuit filed by retirement plan members.

In July 2011 the boards' actuary completed this exercise and projected that the city's contribution towards its employees' retirement costs would reach \$431.5 million in fiscal year 2015-16.

Although the \$431.5 million retirement cost projection was relatively close to the \$400.7 million retirement cost projection, the data San José provided to the boards' actuary did not include information on pay cuts and reductions in the workforce that occurred in fiscal year 2010-11. According to the director of Retirement Services, these data were not available until after the boards' actuary completed the projection. The city subsequently used the \$431.5 million projection in various documents, including an official bond statement issued in December 2011 and its November 2011 *Fiscal and Service Level Emergency Report*. The stated purpose of this report was to address projected budget shortfalls, primarily caused by rising retirement costs, by declaring a fiscal emergency that the city asserted would allow it to modify its pension benefits in accordance with its charter. To call attention to these rising retirement costs, San José referred to the \$431.5 million retirement cost projection for fiscal year 2015-16 in the report. However, San José indicated in this report and the official bond statement that this estimate may show some improvement, considering the pay cuts and reductions in the workforce that occurred in fiscal year 2010-11.

In addition, on December 1, 2011, the mayor and several council members recommended that the city council defer their consideration of declaring a fiscal and service level emergency until after the boards' actuary updated its retirement cost projections. On December 6, 2011, the city council voted to defer such consideration to an undetermined date. On that same day, the city council voted to place a retirement reform measure on the June 5, 2012, ballot.

Finally, in February 2012, the boards' actuary produced an updated five-year retirement cost projection based on its recently completed June 30, 2011, valuations. This projection reflected the most recent assumptions approved by the boards, such as a 7.5 percent assumed investment rate of return for both the police and fire and federated pension plans. The projection also factors in the salary and staff reductions that occurred during fiscal year 2010-11, which reduced payroll costs by approximately 24 percent. The boards' actuary estimated that the city's annual contribution towards its employees' retirement costs would be \$320.1 million by fiscal year 2015-16. Our actuarial consultant determined that this projection was calculated in accordance with generally accepted actuarial standards. Although still a significant number, the February 2012 projection of the city's future contributions towards retirement costs was significantly lower than all of the previously discussed projections as shown in Table 4 on page 16. For example, the projection by the boards' actuary of the city's fiscal year 2015-16 retirement contribution of \$320.1 million was less than half of the \$650 million estimate for the same period that the mayor had used to draw attention to rising retirement costs.

On December 1, 2011, the mayor and several council members recommended that the city council defer their consideration of declaring a fiscal and service level emergency until after the boards' actuary updated its retirement cost projections.

Reporting multiple retirement cost projections in a short period may have caused confusion among the city's stakeholders attempting to make informed decisions. For instance, as we indicated in the Introduction, in June 2012 the city's voters approved significant changes to its pension plans. However, it is unclear which retirement cost projection the voters relied on, if any, when they voted for these changes.

San José's Retirement Costs Have Been Increasing Dramatically

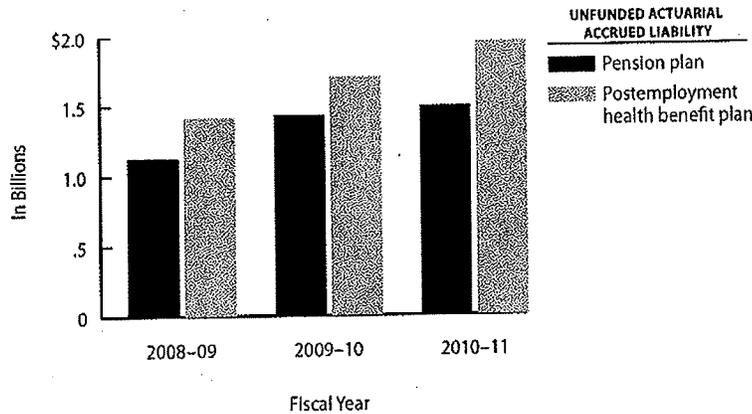
Since fiscal year 2006-07 San José's retirement contributions have been increasing. Over the same period, the funded status of the retirement plans has deteriorated, despite the increased contributions. Unfunded retirement obligations result when the value of the plans' assets are not large enough to cover the value of projected pension and postemployment health benefits. Economic losses in retirement plan assets, such as the \$1 billion two year investment loss San José experienced in fiscal years 2007-08 and 2008-09, contribute to the growth of unfunded retirement obligations, as can changes in benefits and assumptions and differences between actuarial assumptions and actual results.

As shown in Figure 4, San José's cumulative unfunded liability for its pension plans increased from \$1.12 billion in fiscal year 2008-09 to \$1.49 billion in fiscal year 2010-11, an increase of 33 percent. Similarly, its cumulative unfunded liability for postemployment health benefits increased from \$1.42 billion in fiscal year 2008-09 to \$1.95 billion in fiscal year 2010-11, an increase of 38 percent. At June 30, 2011, the combined \$3.4 billion in unfunded retirement liabilities represents more than 8.2 times the city's eligible annual payroll.

At June 30, 2011, the combined \$3.4 billion in unfunded retirement liabilities represents more than 8.2 times the city's eligible annual payroll.

There are many reasons why the \$3.4 billion unfunded liability exists. According to our actuarial consultant, benefit accruals, changes in assumptions and methods used to calculate liabilities, and benefit improvements can increase liabilities over the years. At the same time, unless assets increase at the same pace—via contributions or investment returns—a shortfall will result. During the period of our review, major factors contributing to the increase in unfunded liabilities included investment losses and assumption changes made by the retirement boards to better reflect future expected experience. For example, for fiscal years 2007-08 through 2010-11, investment performance on pension assets, on average, was significantly below the assumed returns. In apparent response to this, the retirement boards reduced their assumptions of future investment returns, which contributed to the increase in the city's unfunded liabilities.

Figure 4
Unfunded Actuarial Accrued Liability for the City of San José's Pension and Postemployment Health Benefit Plans
Fiscal Years 2008-09 through 2010-11



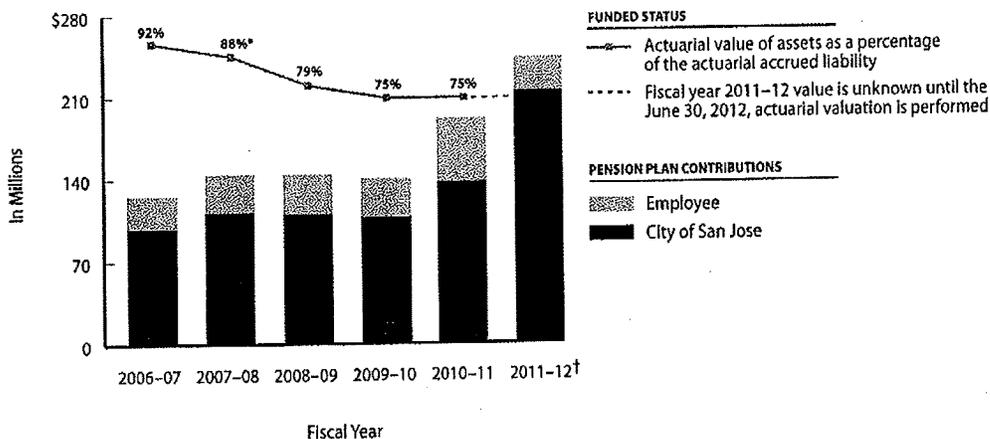
Sources: City of San José's comprehensive annual financial reports and actuarial valuations.
Note: Includes Federated City Employees' Retirement System and Police and Fire Department Retirement Plan.

The City's Costs for Pension Benefits Have Increased Significantly

San José's cumulative unfunded liability for its pensions alone (excluding postemployment health benefits) increased from \$1.12 billion in fiscal year 2008-09 to \$1.49 billion in fiscal year 2010-11. In fiscal year 2010-11, the city's pension plans had accumulated liabilities of \$6 billion, but they had only \$4.5 billion in assets. The resulting \$1.5 billion unfunded liability equates to a funding status of 75 percent, as shown in Figure 5 on the following page. As a basis for comparison, the *Pew Center on the States Issue Brief* on public sector retirement benefit funding released in June 2012, for fiscal year 2009-10, noted that the State had a funding status of 78 percent for its pensions. As mentioned in the Introduction, financial reporting standards require the disclosure of actuarially determined annual required contributions. For the years that we reviewed, fiscal years 2006-07 through 2010-11, San José contributed the full amount of these costs to its pension plans. Although these contributions were relatively level through fiscal year 2009-10, San José has experienced significant contribution increases since then. Specifically, its pension contributions doubled from \$107 million in fiscal year 2009-10 to an estimated \$214 million in fiscal year 2011-12. Employee pension contributions increased from \$33 million in fiscal year 2009-10 to \$54 million in fiscal year 2010-11 but then declined to an estimated \$29 million in fiscal year 2011-12, likely due to lower payroll costs stemming

from wage reductions and position eliminations. However, as shown in Figure 5, increased contributions in the aggregate have not been enough to improve the funded status of the plans.

Figure 5
Contributions and Funding Status for the City of San José's Pension Plans
Fiscal years 2006-07 Through 2011-12



Sources: City of San José's (San José) comprehensive annual financial reports, actuarial valuations, and certain estimates provided by San José's Department of Retirement Services.

Note: Includes Federated City Employees' Retirement System and Police and Fire Department Retirement plans.

* An actuarial valuation was not performed as of June 30, 2008; consequently, our actuarial consultant estimated the funded status for fiscal year 2007-08 using the June 30, 2007 and June 30, 2009 valuations.

† San José and employee contributions shown for fiscal year 2011-12 are unaudited estimates.

According to our actuarial consultant, funded status is a measure of a plan's status at a single point in time, so this ratio should be reviewed over time. Funded status may vary from one year to the next because of external events such as the overall economy. Higher funded ratios are to be expected following periods of strong economic growth and strong investment returns, and lower funded ratios are to be expected after years of poor investment returns such as the recent downturn beginning in fiscal year 2007-08. According to the Pension Committee of the American Academy of Actuaries, no single level of funding should be identified as a defining line between a "healthy" and an "unhealthy" pension plan. Notwithstanding, for public pension plans only, Fitch Ratings stated in its February 17, 2011 report, *Enhancing the Analysis of U.S. State and Local Government Pension Obligations*, that it generally considers a funded ratio of 70 percent or above to be adequate and less than 60 percent to be weak, while noting that the funded ratio is one of many factors that it considers when it analyzes pension obligations.

Two significant factors contributed to the decline in the funded status of the San José retirement plans. First was the significant two year investment losses the plans suffered in fiscal years 2007–08 and 2008–09; pension plan assets alone lost nearly \$979 million during this period. Second there was also a decrease in the assumed investment return and other changes in assumptions. As explained earlier, experience losses, such as investment losses, arise from differences between assumptions about future performance and the actual experience of a retirement plan.

Pension plan assets alone lost nearly \$979 million during this period and there was also a decrease in the assumed investment return and other changes in assumptions.

Because short-term deviations from assumptions are expected, the retirement plans apply two smoothing processes to help reduce year-to-year volatility in contribution rates. According to our actuarial consultant, both are common and are generally accepted actuarial practice. First, rather than using the market value of a fund's assets to determine annual required contributions to a plan, an actuarial value of assets is used, which smoothes investment returns over a five-year period. For example, if a plan experienced a \$500 million investment loss in fiscal year 2008–09, only 20 percent, or \$100 million of that loss, would be reflected in the actuarial value of assets as of June 30, 2009. Each year thereafter, another 20 percent, or \$100 million of the original loss, would be reflected, so that the full \$500 million loss would not be fully reflected in the actuarial value of assets used in the annual required contribution calculation for five years.

Second, any changes in a plan's unfunded liability are amortized, or spread, over an extended period of time (16 years for the police and fire plan and 20 years for the federated plan³). Using the example above, each additional \$100 million in investment loss that is recognized would be converted to a 16- or 20-year payment (similar to a mortgage) and added to each year's annual required contribution. Finally, there is a one-year lag between the date of the actuarial valuation and the time when the resulting annual required contribution is applied. For example, the annual required contribution calculated based on the June 30, 2010 valuation, was not applied until fiscal year 2011–12.

For these reasons, the investment losses that occurred in fiscal year 2008–09 did not affect annual required contributions until fiscal year 2010–11. In addition, their full impact will not be reflected for a few more years. Table 5 on the following page shows the factors that caused San José's costs for the federated and police and fire pension plans to increase from fiscal years 2009–10 through 2011–12.

San José's pension costs for employees covered by its police and fire plan increased much more significantly than did its costs for employees covered by the federated plan, partly because the police

³ Until fiscal year 2010–11, the federated plan spread gains and losses over 30 years.

and fire plan spreads each annual loss or gain over 16 years compared to 20 years for the federated plan. As a result, experience losses, like the \$979 million investment loss the pension plans recently experienced, have a relatively larger impact on the annual required contribution of the police and fire plan. In addition, the boards' actuary calculates the city's contribution rates for the two pension plans as a percentage of expected payroll. However, as the city's payroll changes from year to year, the amounts of its annual required contributions will also vary. As shown in Table 5, the city's required contributions to the federated plan and the police and fire plan increased by \$8.8 million and \$13.8 million, respectively, because the city's payroll experience was higher than expected, thereby increasing the amount of contributions.

Table 5
Factors That Caused the City of San José's Pension Costs to Increase From Fiscal Year 2009–10 to 2011–12
(In Millions)

	FEDERATED	POLICE AND FIRE	TOTALS
City's Pension Costs in Fiscal Year 2009–10	\$54.6	\$52.3	\$106.9
Increases Due to Experience			
Investment losses	\$12.4	\$21.8	\$34.2
Demographic losses*	2.0	4.0	6.0
Payroll†	8.8	13.8	22.6
Other	4.2	6.9	11.1
Subtotals	\$27.4	\$46.5	\$73.9
Increases Due to Assumption Changes			
Lower assumed rate of return and other economic assumption changes	\$1.8	\$12.1	\$13.9
Demographics and other‡	3.1	18.3	19.4
Subtotals	\$4.9	\$28.4	\$33.3
Total Changes	\$32.3	\$74.9	\$107.2
City's Pension Costs in Fiscal Year 2011–12	\$86.9	\$127.2	\$214.1

Source: Our actuarial consultant's analysis of underlying actuarial valuations.

* Differences between demographic assumptions and actual experience generate gains or losses that will increase or decrease the City of San José's (San José) annual required contributions. Demographic assumptions include assumptions related to rates of retirement, disability, termination, and mortality.

† The boards' actuary calculates San José's contribution rates for the two pension plans as a percentage of expected payroll. As the city's payroll changes from year to year, the amount of its annual required contribution will also vary.

‡ Changes in demographic assumptions can increase or decrease San José's annual required contributions.

Changes in the assumptions also account for a large portion of the contribution increases for the police and fire plan. A decrease in the assumption regarding the investment rate of return can have a very large impact on the funded status of the plan and the resulting contribution. The investment return assumption for the police and fire plan was lowered from 8 percent to 7.75 percent for the June 30, 2010, actuarial valuation, which increased the amount of the city's required contribution by \$12 million. It was then lowered to 7.5 percent for the June 30, 2011 actuarial valuation for both the federated and police and fire plans. However, because of the lag between the valuations and the time it takes to affect contributions, this latest decrease in the investment return assumption will first affect contributions in fiscal year 2012-13 and is therefore not reflected in Table 5.

San José's required contributions for the police and fire plan also increased by another \$16 million due to other demographic assumption changes made as a result of the analysis of the plan's actual experience by the boards' actuary, according to our actuarial consultant. Among those changes were a slight improvement in mortality assumptions (reflecting the fact that people are expected to live longer, which increases liabilities and annual required contributions), a lowering of the retirement assumption for police to earlier retirement ages, and changes to termination and disability rates.

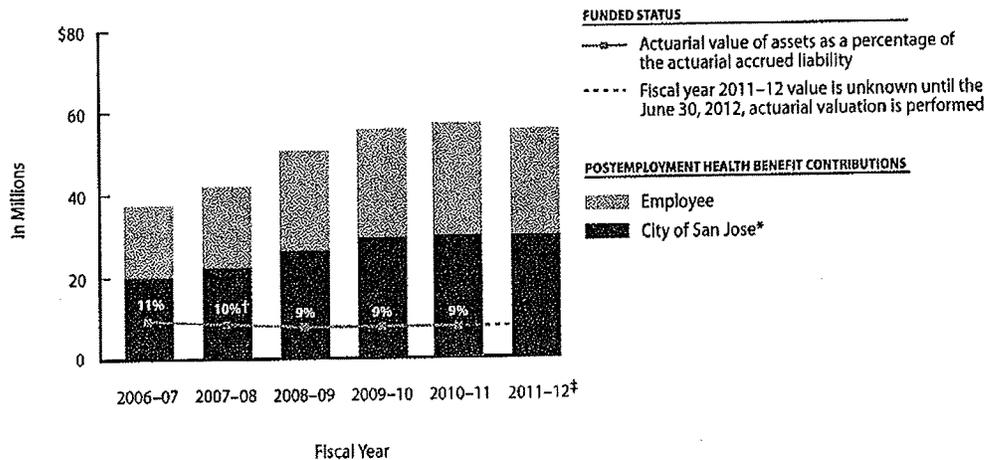
San José's required contributions for the police and fire plan increased by another \$16 million due to other demographic assumption changes made as a result of the analysis of the plan's actual experience by the boards' actuary.

The City's Costs for Postemployment Health Benefits Are Also Increasing Significantly

San José's annual required contributions for its employees' postemployment health benefits have also been rising rapidly. The city's annual required contributions for retirement health benefits increased from \$80 million in fiscal year 2008-09 to an estimated \$133 million in fiscal year 2011-12. However, San José only contributed 33 percent of these postemployment health benefit costs in fiscal year 2008-09, declining to an estimated 22 percent in fiscal year 2011-12. Specifically, the city paid an estimated \$30 million of its annual required contribution of \$133 million, or 22 percent, in fiscal year 2011-12.⁴ The city's annual postemployment health benefit contribution is similar to that of the state. According to the *Pew Center on the States Issue Brief* released in June 2012, for fiscal year 2009-10, the State contributed only 29 percent of the amount necessary to fund retiree health benefits. In part because San José has only partially paid its annual required contributions, the funded status of its postemployment health benefit plans has hovered around only 10 percent for the last five fiscal years, as shown in Figure 6 on the following page.

⁴ This amount does not include any implicit rate subsidy, which refers to the additional cost of including retired employees in the same health insurance plan used by current employees. These costs were unavailable for some of the periods under our review and were excluded to enhance comparability.

Figure 6
Contributions and Funding Status for the City of San José's Postemployment Health Benefit Plans



Sources: City of San José's (San José) comprehensive annual financial reports, actuarial valuations, and certain estimates provided by San José's Department of Retirement Services.

Note: Includes Federated City Employees' Retirement System and Police and Fire Department Retirement Plan.

* The amounts shown do not include any implicit rate subsidy, which refers to the additional cost of including retired employees in the same health insurance plan used by current employees. These costs were unavailable for fiscal years 2006-07 and 2007-08 and were excluded from subsequent years to enhance comparability.

† An actuarial valuation was not performed as of June 30, 2008; consequently, our actuarial consultant estimated the funded status for fiscal year 2007-08 using the June 30, 2007 and June 30, 2009 valuations.

‡ San José and employee contributions shown for fiscal year 2011-12 are unaudited estimates.

Under San José's collective bargaining agreements, city contribution rates to the postemployment health benefit plans were previously capped at a level below the amount needed to fully fund the annual required contributions. However, San José has reached general agreements with various bargaining groups to begin contributing 100 percent of its actuarially determined annual retirement health care costs after a five-year phase-in period subject to certain limitations. This five-year phase-in began in fiscal year 2009-10 for members of the federated retiree health care plan. The phase-in period for the police and fire plan's police members began in fiscal year 2009-10, while the phase-in for fire members began in fiscal year 2011-12.

Increases in annual required contributions for postemployment health benefits are a direct result of the rising unfunded liability. Between June 30, 2009 and June 30, 2011, the unfunded liability related to the city's postemployment health benefits rose from over \$1.4 billion to nearly \$2 billion, an increase of roughly 38 percent. Table 6 illustrates the main factors contributing to this increase. Other than interest on the unfunded liability, several assumption changes contributed heavily to the increase. For the federated plan, assumption changes contributed to a \$198 million increase in the unfunded liability from fiscal years 2008-09 through 2010-11. Of the \$198 million, \$82 million can be attributed to lowering the assumed rate of return, or the discount rate, used to measure the liabilities; and another \$31 million is due to the impact of changes in projected health

care costs. Finally, as a result of the analysis by the boards' actuary of the federated plan's demographic experience, significant changes were made to demographic assumptions, resulting in an increase in the unfunded liability of more than \$85 million. According to our actuarial consultant, key changes to those demographic assumptions included earlier assumed retirement ages for employees with at least 30 years of service, improvements in mortality assumptions reflecting that participants are expected to live longer, higher family coverage percentages, as well as changes to withdrawal and disability rates.

Table 6
Factors That Caused the City of San José's Postemployment Health Benefits Unfunded Actuarial Accrued Liability to Increase From Fiscal Years 2008-09 to 2010-11
(In Millions)

	FEDERATED	POLICE AND FIRE	TOTALS
Postemployment Health Benefits Unfunded Liability as of June 30, 2009	\$710.9	\$706.0	\$1,416.9
Expected Changes			
Deficit payments*	\$(25.5)	\$1.8	\$(23.7)
Interest on unfunded liability†	101.8	106.1	207.9
Subtotals	\$76.3	\$107.9	\$184.2
Changes Due to Experience			
Investment losses and (gains)	\$(24.5)	\$2.4	\$(22.1)
Demographic losses‡	49.3	5.3	54.6
Subtotals	\$24.8	\$7.7	\$32.5
Changes Due to Assumptions			
Projected health care costs	\$30.6	\$(40.5)	\$(9.7)
Lower assumed rate of return (i.e., discount rate)	81.7	138.6	220.5
Demographics§	85.6	22.9	108.5
Subtotals	\$197.9	\$121.4	\$319.3
Total Changes	\$299.0	\$237.0	\$536.0
Postemployment Health Benefits Unfunded Liability as of June 30, 2011	\$1,009.9	\$943.0	\$1,952.9

Source: Our actuarial consultant's analysis of underlying actuarial valuations.

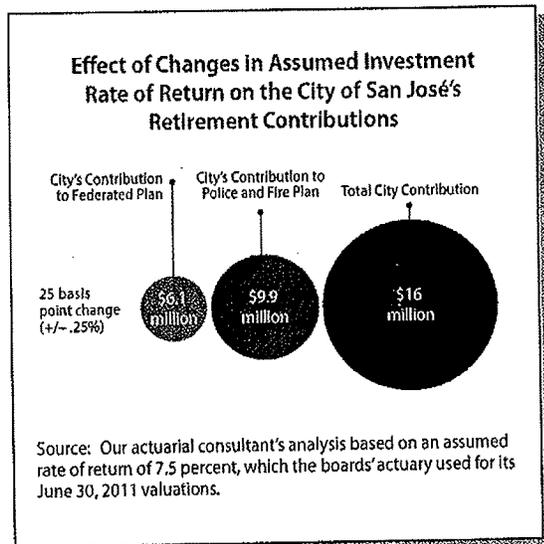
* When the City of San José's (San José) contributions to its postemployment health benefits plans exceed the normal cost, or value of the benefits earned during the year, the excess contributions go towards reducing the deficit (i.e., unfunded liability). However, when the city's contributions are less than the normal cost, the deficit or unfunded liability increases.

† Interest on the unfunded liability represents the change in the unfunded liability due to the passage of time. Interest on the unfunded liability for the period is calculated using the assumed investment rate of return.

‡ Differences between demographic assumptions and actual experience generate gains or losses, which will decrease or increase the unfunded liabilities of San José's postemployment health benefit plans. Demographic assumptions include assumptions related to rates of retirement, disability, termination, and mortality.

§ Changes in demographic assumptions can increase or decrease the unfunded liabilities of San José's postemployment health benefit plans.

For the police and fire plan, assumption changes contributed to \$121 million of the unfunded liability increase. While the change in the assumed rate of return, or discount rate, increased the unfunded liability by nearly \$139 million, this increase was partially offset by lower projected health care costs reducing the unfunded liability by about \$40 million. Finally, changes in other demographic assumptions made to tie assumptions to actual police and fire plan experience, increased the unfunded liability by \$23 million. According to our actuarial consultant, key changes to demographic assumptions included earlier assumed retirement ages for certain employee groups, updated family coverage percentages, as well as changes to withdrawal and disability rates.



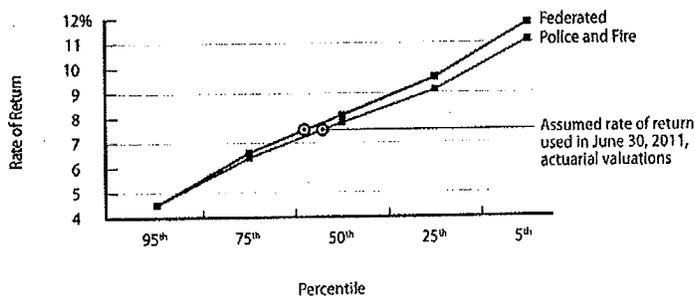
Lower Assumed Rates of Investment Return Decrease Actuarial Losses, However, Overly Conservative Rates Increase Contributions

Of all assumptions used in calculating retirement plan contributions, the assumed rate of return on assets is one of the most impactful and most debated. The experience analysis reports for San José's retirement plans released in 2011 by the boards' actuary provide the estimated effect on contributions of a 0.25 percent change in the assumed rate of investment return. The effect of a 0.25 percent change on city contributions, assuming all other assumptions remain unchanged, is shown in the text box.

As the assumed rate of return is reduced, the amount that San José has to contribute to its retirement plans increases. For example, if the assumed rate of return is decreased from 7.5 to 7.25 percent, the city's annual contributions would increase by a combined \$16 million. However, the sensitivity of contributions to changes in the assumed rate of return is not linear; the farther away from the starting point, the less accurate this projection becomes. As discussed earlier, in February 2012, the boards' actuary projected that San José's annual contribution toward its employees' retirement costs would be \$320.1 million by fiscal year 2015-16, assuming a 7.5 percent investment rate of return. Although a variety of factors can impact the magnitude of a cost projection, the rate of return is a significant driver. For example, according to our actuarial consultant, San José would have to use an investment rate of return assumption of less than 3.5 percent, all other assumptions remaining unchanged, to achieve the \$650 million estimate that the mayor used to draw attention to rising retirement costs.

The appropriate assumption for investment returns is often debated. In addition, the federated and police and fire pension plans are invested differently, so any assumption would need to be plan-specific. Figure 7 shows the estimated probability of achieving different rates of return over the long term based on the plans' actual asset allocations as of June 30, 2011.

Figure 7
Estimated Probability of Achieving Expected Returns Over 30 Years



Source: Our actuarial consultant, based on its expected return estimation tool, and using its capital market assumptions as of the second quarter of 2011 which are appropriate to compare to the City of San José's 2011 valuation cycle; the most recent set of valuations at the time of this review. Results are net of investment fees for a generally passive investment strategy.

As of the June 30, 2011, actuarial valuations, both pension plans use a 7.5 percent assumed rate of return, which our actuarial consultant determined has a probability of being met 55 percent of the time for the police and fire plan and 60 percent of the time for the federated plan. As illustrated in Figure 7, decreasing the assumed rate of return increases the probability of actually achieving the rate. For example, if the federated and police and fire plan boards reduced the assumed rates of return to 6.6 percent, and 6.4 percent, respectively, their probability of achieving those returns would increase to 75 percent over a 30-year period. Although using a lower investment return assumption is a more conservative approach that will reduce occurrences of actuarial losses, overly conservative rates could drive up contributions unnecessarily.

Increasing Retirement Costs Have Created Budgetary Challenges for San José

Rising retirement costs have undoubtedly created budgetary challenges for San José. As we discussed previously, San José's contributions towards its retirement costs rose from \$136 million to an estimated \$244 million from fiscal year 2009-10 to 2011-12.

San José reduced its budgeted salaries for the police and fire departments by \$76 million through a combination of wage reductions and eliminating FTE positions.

a \$108 million increase that was primarily driven by higher costs of retirement benefits in the police and fire plan. During this same period, budgeted public safety expenditures for the city's general fund rose by \$6 million, from \$451 million to \$457 million, despite reductions in the number of average actual filled full-time equivalent positions (FTE positions) for public safety.

From fiscal year 2009–10 to 2011–12 San José reduced its budgeted salaries for the police and fire departments by \$76 million through a combination of wage reductions and eliminating FTE positions. We noted that actual staffing reductions were in line with the budget reductions. Specifically, the city's number of actual filled FTE positions for public safety declined from 2,548 to 2,166⁵. However, during this period, San José's actual retirement cost contributions for the police and fire plan increased by \$76 million. Thus, the savings San José generated by reducing wages and its public safety workforce merely served to offset the increase in its retirement costs. Consequently, San José may be providing reduced public safety services at an overall increased cost to the general fund. As we discussed previously, the city's retirement contributions would be even greater if it made the full actuarially determined annual required contributions for its postemployment health benefits.

Despite net increases in general fund public safety budgeted expenditures as shown in Table 7, San José's overall budgeted expenditures decreased from \$3 billion in fiscal year 2009–10 to \$2.8 billion in fiscal year 2011–12. The city's charter requires it to adopt a balanced budget each fiscal year, aligning expenditures with anticipated revenues and existing fund balances. Because overall budgeted city revenues declined slightly during this period San José had to offset expected expenditure increases in certain areas with decreases in other areas when preparing budgets. As shown in the table, the city reduced budgeted expenditures in all general fund functional areas except public safety. At the same time, San José's number of actual filled FTE positions across all functional areas declined, as shown in Figure 8 on page 32.

San José made its most significant reductions in general fund budgeted expenditures in the functional area of community services, which includes funding for parks and recreation and libraries. It appears that increases in retirement costs related to federated plan benefits, which cover non-public safety employees, contributed to cuts in these areas but not to the extent that police and fire plan retirement costs affected public safety expenditures. For example, although San José's contributions toward federated plan retirement costs increased by more than \$31 million from

⁵ As shown in Figure 8 on page 32, the number of FTE positions calculated is the average for the period.

fiscal years 2009–10 through 2011–12, the city reduced its budgeted non-public safety salaries for all funds by \$77 million during this same time period. It achieved this reduction through a combination of wage cuts and eliminating FTE positions, prompting a decline in its non-public safety FTE positions from 3,590 to 2,784.⁶

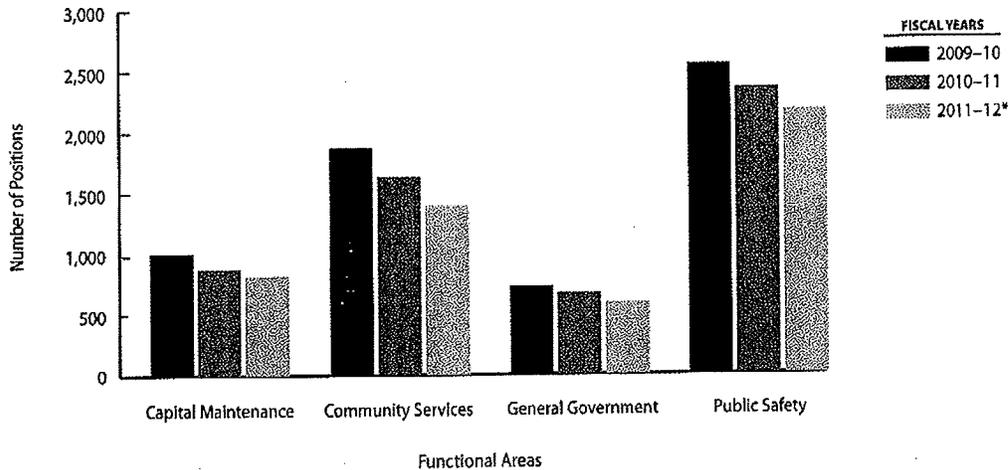
Table 7
The City of San José's Adopted Operating Budget by Fund Type
Fiscal Years 2008–09 Through 2011–12

REVENUES AND SOURCES OF FUNDS	2008-09	2009-10	2010-11	2011-12
City's General fund	\$1,049,778,030	\$983,875,351	\$954,094,629	\$906,458,009
Enterprise funds	814,223,161	746,740,604	728,811,366	749,813,418
Trust and agency funds	2,079,300	1,713,788	2,089,916	2,062,329
Special revenue funds	836,696,037	752,158,446	655,534,497	659,391,194
Capital improvement program funds	1,193,672,000	1,035,245,995	918,494,005	1,064,883,461
Subtotals, Revenues and Sources of Funds	3,896,448,528	3,519,734,184	3,259,024,413	3,382,608,411
Less transfers, loans, and contributions between funds	(618,551,959)	(552,768,986)	(541,285,794)	(538,697,847)
Net Totals, Revenues and Sources of Funds	\$3,277,896,569	\$2,966,965,198	\$2,717,738,619	\$2,843,910,564
EXPENDITURES AND USES OF FUNDS				
General fund				
General government	\$87,620,735	\$85,065,887	\$78,446,178	\$74,067,288
Capital maintenance	67,681,518	64,763,645	58,913,105	51,008,922
Community services	126,204,940	115,275,823	110,078,492	96,086,190
Total non-public safety	281,507,193	265,104,955	247,437,775	221,162,400
Public safety	439,890,753	451,257,380	450,831,081	456,959,754
Total departmental	721,397,946	716,362,335	698,268,856	678,122,154
Nondepartmental	328,380,084	267,513,016	255,825,773	226,335,855
Total General Fund	\$1,049,778,030	\$983,875,351	\$954,094,629	\$906,458,009
Enterprise funds	814,223,161	746,740,604	728,811,366	749,813,418
Trust and agency funds	2,079,300	1,713,788	2,089,916	2,062,329
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Less transfers, loans, and contributions between funds	(618,551,959)	(552,768,986)	(541,285,794)	(538,697,847)
Net Totals, Expenditures and Uses of Funds	\$3,277,896,569	\$2,966,965,198	\$2,717,738,619	\$2,843,910,564

Sources: City of San José's adopted operating budgets.

⁶ As shown in Figure 8 on page 32, the number of FTE positions calculated is the average for the period.

Figure 8
City of San José's Average Actual Filled Full-Time Equivalent Positions
Fiscal Years 2009-10 Through 2011-12



Source: California State Auditor's analysis of data obtained from the City of San José's PeopleSoft human resources Information system (human resources data).

Note: We excluded employees whose human resources data did not include a standard number of hours for which they are expected to work in a week.

* Fiscal year 2011-12 human resources data includes transactions from July 2011 through May 2012.

It appears that increases in police and fire retirement costs have contributed to a decrease in the funds available for non-public safety areas. As San José's budgeted departmental general fund expenditures decreased 5 percent from \$716 million to \$678 million—or \$38 million—from fiscal years 2009-10 through 2011-12, non-public safety general fund budgeted spending decreased 17 percent from \$265 million to \$221 million—or \$44 million, while budgeted public safety spending, which includes the city's contributions towards police and fire retirement costs, increased \$6 million from \$451 million to \$457 million during the same period. Consequently, budgeted public safety spending as a percentage of budgeted general fund departmental expenditures increased from 63 percent to 67 percent while budgeted non-public safety spending as a percentage of budgeted general fund departmental expenditures decreased by 4 percent. We noted San José's actual general fund expenditures⁷ were roughly in line with budgeted general fund expenditures. The city's most significant budgeted general fund reductions in non-public safety have been in the community services area of parks and recreation

⁷ Actual general fund expenditures refer to audited Comprehensive Annual Financial Report (CAFR) figures for fiscal years 2008-09 through 2010-11. Fiscal year 2011-12 CAFR figures were unavailable at the time of this report.

and libraries. For example, the city completed construction of several libraries and community centers. However, according to the city manager's fiscal year 2011-12 adopted budget message, the city delayed the opening of several facilities to defer associated general fund maintenance and operating costs, generating a net cost avoidance of approximately \$6.3 million. In addition to deferred openings, from fiscal year 2009-10 through 2011-12, the city also reduced the general fund budget for parks and recreation and library services by \$20 million through a combination of reducing FTE positions and services.

Recommendations

To ensure that stakeholders receive consistent and reliable information, San José should report the official retirement cost projections that were developed using the assumptions approved by the boards of the two retirement plans. If the city does not use the official retirement cost projections, it should develop projections that are supported by accepted actuarial methodologies, report this information in the correct context, and disclose significant assumptions that differ from those in the boards' retirement cost projections.

We conducted this audit under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the scope section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

Date: August 21, 2012

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For questions regarding the contents of this report, please contact
Margarita Fernández, Chief of Public Affairs, at 916.445.0255

(Agency comments provided as text only.)

August 8, 2012

City of San José
Office of the City Manager
200 East Santa Clara Street
San José, CA 95113

Elaine M. Howle*
California State Auditor
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Re: City of San José Response to State Audit

Dear Ms. Howle:

The purpose of this letter is to respond to the audit of the City of San José completed by the California State Auditor as requested by the Joint Legislative Audit Committee (JLAC).

We appreciate the State Auditor's confirmation of the serious long-term fiscal challenges that the City faces, especially as they relate to growth in retirement costs. Your audit team clearly recognized that our ongoing budget situation, including actual retirement costs, were the direct cause of the significant layoffs and cost reductions that the City had to make over the past several years to ensure fiscal stability.

Over the past decade, the City of San Jose has addressed General Fund budget shortfalls totaling \$680 million and eliminated over 2,000 positions (all funds), with staffing now at 1988-1989 levels when our population was 20% less than it is now. These reductions have come at a significant price to both our community and to our employees: deep service reductions affecting the residents of our community; employee layoffs and demotions; large reductions in employee total compensation; and an increasing backlog of unmet and deferred infrastructure and maintenance needs.

Over this same ten-year period, our retirement costs have increased from \$73 million annually to \$245 million annually, an overall increase of 236%. These costs currently are approximately 23% of the City's 2012-2013 General Fund Base Budget. These are not projections; these are actual costs that affect our current budget.

The City agrees with the State Audit's recommendation, which is to report official retirement cost projections that are developed using the assumptions approved by the City's two retirement plan boards. The City already does this, and it intends to continue this practice. The retirement cost projections used in our most recent five-year budget forecast were developed by Cheiron, the actuary used by both boards. Cheiron also developed the \$431 million estimate for projected retirement costs in Fiscal Year 2015-2016. In addition, we agree with the State Audit recommendation that if we do not use the official retirement cost projections, the City should develop projections that are supported by accepted actuarial methodologies; report this information in the correct context; and disclose significant assumptions that differ from the boards' retirement cost projections.

①

* California State Auditor's comments begin on page 39.

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August 8, 2012
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As we indicated prior to this audit being authorized by JLAC, extensive resources were already available to provide answers to the questions that the State Auditor was asked to pursue by the Committee. The City's financial situation and pension cost issues have been thoroughly audited and studied by a variety of sources, including independent auditors and actuaries. I have attached our letter to the Joint Legislative Audit Committee dated March 6, 2012, that lists these resources (Attachment A). Given what has already been undertaken to audit and review the City's financial situation, including retirement costs, we found that the information contained in the State Audit was useful as a summary of our current situation. The summary of our current situation is consistent with what the City has already known and shared with our community, the news media, our employees and the Committee.

It is important for all stakeholders to understand that inherent in a defined benefit retirement program is the variability and uncertainty in the costs, both from year-to-year and for projecting into the future. It is important to note that the San José Police and Fire Department Retirement Plan's actuary has advised that because the plan is significantly leveraged, it experiences a much greater volatility in costs compared to other plans. Because of this volatility, it is important that we make regular projections about costs for planning and budgeting. The City is well aware of this caution that projections are subject to change, and they are not guarantees of what the future might hold.

What is unassailable are the dramatic increases that we have experienced. During a City Council budget study session on February 13, 2012, we showed the attached slide (Attachment B) of a projection of retirement costs done in 2001 by William M. Mercer, Inc., the former actuary for both San José retirement boards. This slide shows that the City's retirement costs have become even worse than the "worse case scenario" projected by Mercer more than a decade ago, underscoring both the hazards of relying on long-term projections and the critical importance to update them frequently.

Unlike most California public agencies, the City recognized early that its retirement costs were unsustainable and began the difficult efforts to find fair, practical, and long-term solutions. We take pride in that we are addressing this issue now, before it becomes too late, because of the dire potential consequences for employees, retirees, our community, and our ability to manage our finances. Unfortunately, several California cities have declared bankruptcy recently. Our goal is to avoid that path; rather, the City of San Jose is taking prudent steps to ensure that we will remain fiscally stable, able to provide essential public services and pay for retirement benefits to our employees.

To this end, the City Council unanimously directed the City Manager in March 2011 to develop a Fiscal Reform Plan to achieve \$216 million per year of cost reductions and/or new revenues for the General Fund that will allow us to restore services such as police, fire, libraries, and community centers to the levels of January 1, 2011 and to open the libraries, community centers, and fire stations built or under construction, and the police substation within five years.

In May 2011, the City Council approved the Fiscal Reform Plan that aimed at saving \$216 million in the General Fund over the coming five years and maintaining retirement costs at the Fiscal Year 2010-2011 levels. In addition, Council directed the City Manager to develop a proposed ballot measure regarding pension modification. This measure would: set parameters for a new tier of retirement benefits for new employees; develop a voluntary opt-in program with a lower level of benefits for current employees; provide employee contributions towards the unfunded liability if an employee chooses to remain in

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the current and more expensive plan; and require the vote of the people to enhance retirement benefits in the future. The ballot measure was developed over the following nine months and became Measure B on the June 5, 2012, ballot. It was passed overwhelmingly by San José voters.

Although the City agrees with the overall State Audit recommendation, there are a few points and clarifications we would like to make about information contained in the report.

- The Audit speculates about what voters did or did not know regarding retirement cost projections when they approved Measure B. However, the audit did not present any campaign material that referenced or used any cost projections, and the report did not cite any evidence about speculative voter confusion. It is important to note that Measure B was not premised on any specific cost projection. ③
- In early 2011, a staff professional actuary in the San José Department of Retirement Services developed a projection of future retirement costs to be used in the City's five year budget forecast. This projected that retirement costs could reach \$400.7 million in Fiscal Year 2015-2016. Although the audit characterizes this projection as "unsupported," the City disagrees and believes this projection was done by a qualified staff actuary. During the normal course of business, the City's professional staff makes financial projections for many purposes, including revenue projections and budgetary planning. The Boards' actuary, Cheiron, later reviewed the figures and estimated the Fiscal Year 2015-2016 costs at \$431 million. Furthermore, the San Jose Police Officers' Association also had its actuary validate the staff's projections independently (Attachment C). ④
- The Audit mentions five different retirement cost "projections" and refers to them as if they are all for the same purpose and had the same official standing. References to the \$650 million and \$575 million "what if" scenarios as "projections," with the same stature as the official projections that the City did use, is a mischaracterization. ⑤
 - In 2011, the City's professional actuary on staff prepared another internal "what if" scenario that estimated that potential retirement cost in FY 2015-16 could reach \$575 million. The City did not use this scenario for either budgetary planning or labor negotiations, and it was never publicly issued. This scenario entered public discussion only after staff internal emails were obtained by news media following a Public Records Act request in February 2012. ⑤
 - Earlier this year a local television news report suggested that the City had based its concerns about growing retirement costs on a "projection" of \$650 million in 2015-16. This scenario was never developed as an official projection; it was only offered during a discussion about how high retirement costs could go at a Council study session in February 2011. Because of the news attention given to this scenario a full year later in February 2012, the City Manager issued a memo to Council that explained that the City Administration never used this verbal scenario for any labor negotiations or budgetary purposes (Attachment D). ⑥
- In addition, the City does not agree with the audit's conclusion that its projections were "likely overstated." The \$400 million budgetary forecast in early 2011 was less than \$431 million reported by an updated actuarial projection made later in 2012. The City's current actuarial projection of \$320 million, approved by the two boards in early 2012, for the first time officially reflected the impacts of the devastating layoffs and salary reductions in June 2010 and June 2011 that combined to reduce overall payroll by 24%. ⑦

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We believe it is important to note that the various projections and scenarios that the State Audit reviewed in its report evolved over a nearly two-year period. For this reason we appreciate the Santa Clara County Grand Jury's recognition of the importance of considering various scenarios in the overall context of the budgetary challenges posed by growing pension costs. In May 2012, the Grand Jury released a report titled "An Analysis of Pension and Other Post Employment Benefits," (http://www.sccourt.org/court_divisions/civil/cgj/2012/pension.pdf). The Grand Jury stated:

⑧ *The \$650M per year cost estimate is not a worst case number. Pension experts the Grand Jury interviewed stated that other actuarial assumption changes, within reason and easily justified, would result in ARC costs even higher than \$650M per year. The Grand Jury understands that exploring these actuarial assumptions is justified. They help bring attention to the severity of the Benefits crisis and abate the trend of pushing financial problems to future generations of taxpayers.*

Due to the significant cost increases in retirement and the City's diligence in budgetary forecasting and planning, the City of San Jose has been in the forefront of public agencies in addressing the dramatic increases in retirement costs. This year the City of San Jose is actually paying 23% of our General Fund Base Budget to fund retirement benefits and we have been studying and understanding our potential future costs. We are addressing the impact of these costs through an on-going implementation of our Fiscal Reform Plan and the resulting pension modification ballot measure. We cannot afford not to act: without changes the City would continue down the unsustainable path of cutting services and laying off employees to pay for retirement costs.

We appreciate the review of the City's finances and retirement projections and validation of the City's fiscal challenges. We hope that the State and the Joint Legislative Audit Committee can join us in our strong confidence that the City of San Jose is addressing its own fiscal situation appropriately, prudently, and professionally as a model for other agencies in California.

Sincerely,

(Signed by: Debra Figone)

Debra Figone
City Manager

Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE CITY OF SAN JOSÉ

To provide clarity and perspective, we are commenting on the response to our audit report from the City of San José (San José). The numbers below correspond to the numbers we placed in the margin of San José's response.

We agree that the retirement cost projections that San José used in its most recent five-year budget forecast were developed by the actuary used by the boards of administration (boards) of the Federated City Employees' Retirement System and the Police and Fire Department Retirement Plan using assumptions approved by both boards. However, San José has not always done this. For example, as shown in Table 4 on page 16, San José used retirement cost projections developed by its internal staff actuary in January 2011 in its previous five-year forecast (i.e., fiscal years 2011–12 through 2015–16) and various other official documents. As we state on page 15 of our report, this retirement cost projection was inadequately supported and the underlying assumptions were not approved by the boards.

①

San José included in its response four other documents that we have not included in our report. One of these documents ("Attachment A") is a letter that the city manager sent to the chair of the Joint Legislative Audit Committee in March 2012 that contained information regarding San José's finances and retirement costs. The other three documents ("Attachments B-D") were various materials that San José had already provided to us during our audit. These documents can be obtained by contacting the California State Auditor's office.

②

As illustrated in Table 4 on page 16 of our report, San José reported multiple retirement cost projections in the year and a half leading up to the June 2012 election. As we state on page 20, we believe that reporting multiple retirement cost projections in this short period of time may have caused confusion among the city's stakeholders attempting to make informed decisions. As a result, it is unclear which retirement cost projection the voters relied on, if any, when they voted for the measure concerning the city's pension plans.

③

As we state on page 15, the \$400.7 million retirement cost projection for fiscal year 2015–16 that San José's internal staff actuary developed was not adequately supported. Specifically, San José officials were only able to provide us with spreadsheets that our actuarial consultant determined were not appropriate documentation of the assumptions, data, and methodology and that did not include any information as to how this projection should

④

be used. Without such evidence, our actuarial consultant could not be assured that San José calculated and used this projection appropriately. Moreover, we acknowledge that, although this projection was not adequately documented, a July 2011 projection prepared by the boards' actuary yielded similar results.

- ⑤ We did not mischaracterize San José's use of the \$575 million retirement cost projection. We state on pages 17 and 18 of our report that the source of this figure was an email from the director of San José's Department of Retirement Services to a staff actuary. We also include the director's explanation that the \$575 million projection was one scenario of how high the city's retirement contributions could be if the actuarial assumptions were more conservative and were based on recent actual experience. We also acknowledge on page 18 of our report and in Table 4 on page 16, that this projection became public when the director's email was obtained by an NBC Bay Area news outlet, and that we did not find any official city documents that included this figure.
- ⑥ We did not mischaracterize San José's use of the \$650 million retirement cost projection. Further, we disagree with San José's assertion that it only used the \$650 million retirement cost projection during a discussion about how high retirement costs could go at a city council budget study session in February 2011. As we state on page 17, the mayor's office reported in official city documents, in press releases, during a public presentation, and to news outlets that the city's annual retirement costs could reach \$650 million.
- ⑦ San José's response is incorrect in suggesting that we characterized the \$400 million projection as "likely overstated." Instead, as indicated previously in rebuttal point 4, we found that the \$400.7 million retirement cost projection that was developed by San José's internal staff actuary was not adequately supported. However, as we state on page 1 of our report, we do believe that the \$650 million retirement cost projection was unsupported and "likely overstated."
- ⑧ As we indicate in rebuttal point 7 above, we believe that the \$650 million retirement cost projection was unsupported and likely overstated.

cc: Members of the Legislature
Office of the Lieutenant Governor
Little Hoover Commission
Department of Finance
Attorney General
State Controller
State Treasurer
Legislative Analyst
Senate Office of Research
California Research Bureau
Capitol Press

EXHIBIT 4

Statement from Mayor Reed regarding State Audit on San Jose's Retirement Costs

San Jose, Calif. - The California State Auditor has released a report regarding the City of San Jose's retirement costs.

The City of San Jose's official response to the California State Auditor is available here: <http://www.sanjoseca.gov/mayor/goals/budget/pdf/CityResponseStateAudit.pdf>

Below is a statement regarding the state audit from Mayor Reed:

The state auditor has confirmed what San Jose residents know from experience: San Jose is facing real financial challenges and increasing retirement costs have forced us to make significant cuts to core city services.

For example, the state auditor noted that the annual retirement costs for the police and fire department plan have grown by \$76 million since FY 2009-2010, and during that same period, we've been forced to eliminate approximately 380 public safety positions.

These skyrocketing costs and the loss of services were the main reasons why nearly 70% of San Jose voters approved the pension reforms included in Measure B this past June. Once implemented, Measure B will generate significant savings to restore critical city services, and my highest priority for these savings is to restore staffing in the police department.

I appreciate the auditor's recommendations for clearly reporting retirement cost information. In fact, the City of San Jose already does this and will continue to do so for both official projections and any estimates developed by its professional staff.

As city leaders, we must be cognizant of pessimistic and worst-case scenarios, and numerous outside experts have agreed that our retirement costs could grow hundreds of millions of dollars higher than projected if things get worse. [see below]

Outside Reports Analyzing Potential Retirement Cost Scenarios for San Jose:

Santa Clara County Civil Grand Jury: In its report, *An Analysis of Pension and Other Post Employment Benefits*, the Civil Grand Jury stated:

"Pension experts the Grand Jury interviewed stated that other actuarial assumption changes, within reason and easily justified, would result in ARC [annual required contribution] costs even higher than \$650M per year. The Grand Jury understands that exploring these actuarial assumptions is justified. They help bring attention to the severity of the Benefits crisis and abate the trend of pushing financial problems to future generations of taxpayers." (p. 24)

Report: http://www.scscourt.org/court_divisions/civil/cgj/2012/pension.pdf

Bartel Associates, LLC: In response to a request made by the city's Rules and Open Government Committee, the city's outside actuary ran calculations which showed that the city's retirement costs could be hundreds-of-millions of dollars higher than currently projected under

various pessimistic scenarios:

Bartel Associates' presentation during a March 29, 2012 study session: <http://www.sanjoseca.gov/mayor/goals/budget/pdf/retirementpresentation.pdf> (pp. 8-9)

Link to video of the Study Session: http://sanjose.granicus.com/MediaPlayer.php?view_id=22&clip_id=5660

· **Stanford Institute for Economic Policy Research:** Stanford researchers analyzed how using more realistic investment return assumptions could significantly increase the City of San Jose's retirement contributions:

- *Shrinking Services: Public Pension Costs and their Impacts on San Jose* http://siepr.stanford.edu/system/files/shared/pubs/Nation_public_pension_si.pdf (p. 19)
- *More Pension Math:* <http://www.cacs.org/images/dynamic/articleAttachments/7.pdf> (p. 47)

Note: SIEPR's reports analyze pension costs only (they do not factor in the significant costs for retiree healthcare benefits)

EXHIBIT 5



Memorandum

TO: All City Employees and Retirees **FROM:** Debra Figone
SUBJECT: Retiree Healthcare Developments **DATE:** March 4, 2008

Process Update

In December of last year, I sent out an informational memorandum to all City employees and retirees on the subject of retiree healthcare. The memo discussed key background information related to retiree health issues, the City Council's direction to develop a process to address retiree healthcare, and the process by which we proposed to gather input from all stakeholders. In light of new information, this memo serves as a brief update on the efforts put forth thus far on this important issue.

As a reminder, on August 28, 2007, the City Council directed staff to:

1. Engage stakeholders in identifying strategies and alternatives to address our unfunded liability for retiree healthcare. Stakeholders will include, at a minimum, employees, City Labor Alliance, Executive Management Forum, retiree associations, retirement boards, and South Bay Labor Council.
2. Continue to survey how other cities and counties are addressing their unfunded liabilities.
3. Engage experts, identified by the Administration and stakeholders, as necessary to evaluate strategies and approaches that are identified by stakeholders or have been implemented in other cities or counties.
4. Study how pre-full funding of benefits can be accomplished through a phased approach.

The first two items listed above are nearing completion as the facilitations and survey have been successfully executed by City staff in coordination with three consultants. Starting in December of 2007, our consultants have engaged the identified stakeholders to solicit their input and capture their ideas. A report summarizing all stakeholder feedback sessions, along with a survey of other organizations who are exploring ways to comply with GASB regulations will be completed in March. As an additional resource for all stakeholder groups, a website has been created to provide relevant background information as well as the most up-to-date documentation produced from each meeting. The website can be viewed at:
www.sanjoseca.gov/retireehealthcare.

Vested Benefit

In addition, the City Council requested additional information regarding the legal issues related to changing retiree healthcare benefits. In San José, retiree healthcare benefits are in the Municipal Code as part of the City's retirement plans. Because San José's retiree healthcare benefits are part of the City's retirement plans, the retiree healthcare benefit can be considered a "vested" benefit similar to the pension benefit itself. Based on this, we will not be recommending changes to retiree healthcare benefits (as specified in the Municipal Code) for current employees or current retirees at this time.

Although this information may help address the existing concerns about the possibility that the level of benefit (100% of the lowest cost plan for single or family coverage) would be changed for current employees and/or current retirees, there remains a very significant challenge in funding the benefit. The unfunded liability is currently between \$1.2 and \$1.65 billion, and we will continue to face the challenge of paying the long-term costs of providing these retiree healthcare benefits. The City and employees covered by the current benefit share an interest in addressing the costs of retiree healthcare benefits for many reasons, including that the Municipal Code specifies that the costs are shared between the City and employees.

Per the Municipal Code, cost-sharing for retiree medical insurance is split 50/50 between the City and employees. (For retiree dental insurance, the costs are shared between the City and employees at a ratio of eight to three.) In addition to funding the costs of the benefit for current employees and current retirees, we must continue to work together on other solutions to mitigate the significant cost of healthcare, including wellness programs and plan design changes.

I encourage you to continue participating in this process as we move forward. As requested by the City Council, staff will conduct further research and compile the information into a report which will offer ways to accomplish full pre-funding of benefits through a phased approach. It is imperative that the City of San José continue to learn and engage in solutions towards funding this significant liability.

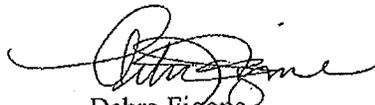

Debra Figone
City Manager

EXHIBIT 6

**San Jose Pending Matters
As of June 24, 2013**

ACTIVE MATTERS

Matter	UPC No./Case No.	Reference
AFSCME - PERB	SF-CE-837M	Alleged bad faith bargaining and unilateral implementation.
Operating Engineers Local 3 - PERB	SF-CE-900M	Alleged bad faith bargaining and unilateral implementation; bargaining over retirement and pension reform measures.
AFSCME - PERB	SF-CE-924M	Alleged bad faith bargaining over ballot measures on pension reform; information requests; unilateral imposition of pension side letter; and proposed illegal changes to pension.
SJPOA Petition to Compel Interest Arbitration - Litigation	Case No. 1-12-CV-220146	SJPOA filed a petition to compel interest arbitration over the pension measure citing City Charter section 1111.
SJPOA Interest Arbitration		Interest arbitration on successor MOA pursuant to Charter Section 1111
SJPOA Petition for Writ of Mandamus - Litigation	Case No. 1-12-CV-220795	SJPOA filed an application for a petition for writ of mandate and complaint for declaratory and injunctive relief for failure to meet and confer in good faith re: the pension measure.
IAFF - PERB	SF-CE-941	Alleged failure to meet and confer over implementation of Fire Fighters Procedural Bill of Rights.
AFSCME - PERB	SF-CE-945	Alleged bad faith bargaining over sick leave payout; retaliation for filing unfair practice charges.
IAFF - PERB	SF-CE-969M	Alleged bad faith bargaining over proposed pension ballot measure.
SJPOA Application to Sue/Complaint in Quo Warranto - Litigation		Alleged bad faith bargaining over proposed pension ballot measure.
AFSCME - PERB	SF-CE-972M	Amendment to Ordinance modifying trust for retiree health care contributions.
IAFF - Retiree Health Care Grievance/Request for Immediate Arbitration		Retirees' "high deductible" plan subject to bargaining.

San Jose Pending Matters
As of June 24, 2013

Matter	UPC No./Case No.	Reference
IFPTE - Charter Amendment re: Pensions	SF-CE-996M	Alleged bad faith bargaining over ballot measures on pension reform.
IAFF - Petition to Compel Arbitration over second tier	12-CV-237635	Petition to compel arbitration over second tier retirement benefits

**San Jose Pending Matters
As of June 24, 2013**

INACTIVE or CLOSED MATTERS

Matter	UPC No./Case No.	Reference
Operating Engineers Local 3	SF-CE-744M	Alleged failure to meet and confer in good faith.
AFSCME Grievance Arbitration	N/A	Grievance arbitration re: "premature" implementation of terms and conditions following unilateral implementation (salary, disability leave supplement, overtime, and health care benefits).
SJPOA Immediate Arbitration - Litigation	Case No. 1-12-CV-220800	SJPOA moved for immediate arbitration of the pension measure citing violation of the current MOA.
McDonough v. San Jose		Lawsuit to modify the wording of the pension measure.

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EXHIBIT 7

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

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SAN JOSE POLICE OFFICERS' ASSOCIATION,
Plaintiff,

COPY

vs.

No. 1-12-CV-225928

CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE AND
FIRE DEPARTMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 INCLUSIVE,
Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS

DEPOSITION OF TERESA HARRIS

Taken before EARLY LANGLEY, RSA, RMR

CSR No. 3537

May 16, 2013

Aiken Welch Court Reporters
One Kaiser Plaza, Suite 505
Oakland, California 94612
(510) 451-1580/(877) 451-1580
Fax: (510) 451-3797
www.aikenwelch.com

1 intent that the voters adopted in connection with
2 Measure B stating that "This act is not intended to
3 deprive any current or former employees of benefits
4 earned and accrued for prior service as of the time of
5 the act's effective date."

6 Do you know whether Measure B deprives you of
7 any benefits earned and accrued for prior service?

8 MR. PLATTEN: Objection. Question calls for a
9 legal conclusion. It's an improper question pursuant
10 to the Rifkind decision.

11 I'll instruct the witness not to answer.

12 BY MR. HARTINGER:

13 Q. Have you made any effort to determine how
14 Measure B would or would not deprive you of benefits
15 earned and accrued for prior service?

16 MR. PLATTEN: Other than this lawsuit? Is that
17 what you're asking?

18 MR. HARTINGER: No. I'm asking you. I'm not
19 making any conditions on the question.

20 MR. PLATTEN: In that case I will object on the
21 grounds of Rifkind and instruct the witness not to
22 answer.

23 BY MR. HARTINGER:

24 Q. Then I'll now limit it to the way that your
25 counsel wants me to limit it, and that is, other than

1 this lawsuit, have you made any effort to determine how
2 Measure B would or would not deprive you of benefits
3 earned and accrued for prior service?

4 MR. PLATTEN: Let me object to the question on
5 the grounds of attorney/client communication privilege
6 and the attorney work product privilege.

7 If you can answer the question.

8 I'm sorry. You have to answer audibly.

9 THE WITNESS: Oh, I have to answer.

10 MR. PLATTEN: Yes. Just you just have to
11 answer audibly.

12 THE WITNESS: No.

13 BY MR. HARTINGER:

14 Q. As you sit here now, do you have any
15 understanding of whether Measure B would deprive you of
16 benefits earned and accrued for prior service?

17 MR. PLATTEN: Objection under Rifkind.

18 Instruct the witness not to answer.

19 BY MR. HARTINGER:

20 Q. What's your understanding of the provisions of
21 Measure B affecting the cost of living adjustment
22 otherwise known as the COLA?

23 A. What is my understanding of how the cost of
24 living would be affected?

25 Q. Right.

1 A. By Measure B?

2 Q. Yes.

3 A. Oh, I don't know.

4 Q. Okay.

5 MR. HARTINGER: I'm going to ask this be marked
6 as defendant's next in order, please.

7 (Defendants' Exhibit 10 marked
8 for Identification.)

9 BY MR. HARTINGER:

10 Q. So showing you what's been marked as
11 Defendant's Exhibit 10, do you recognize this document?

12 A. Yes.

13 Q. And go to the last page.

14 Is that your signature verifying under penalty
15 of perjury that the answers are true and correct?

16 A. Yes.

17 Q. So I take it you read and approved of the
18 response; correct?

19 A. Yes.

20 Q. And did you understand it at the time that you
21 signed it?

22 A. Yes.

23 Q. So if I could take you to Interrogatory No. 1
24 asking you to list every contract that you contend was
25 impaired by Measure B, and there's a list of things.

1 Do you have any understanding of what those
2 impairments refer to?

3 MR. PLATTEN: I'm sorry. I missed part of the
4 question.

5 Could I have it read back, Madam Reporter.

6 MR. HARTINGER: Actually, I don't like the
7 question. I'm going to restate it.

8 MR. PLATTEN: Even better.

9 BY MR. HARTINGER:

10 Q. Interrogatory No. 1, there's an answer there.

11 Did you understand your answer when you
12 verified it under penalty of perjury?

13 A. Yes.

14 Q. Okay. So you understand the basis for the
15 answer?

16 A. I understand the basis?

17 Q. Yes.

18 A. Yes.

19 Q. Okay. And do you have an understanding as to
20 what those rights are that you held that you believe
21 Measure B impaired?

22 MR. PLATTEN: Objection. The question violates
23 the Rifkind rule.

24 Instruct the witness not to answer.

25 BY MR. HARTINGER:

1 Q. So if I take you to -- let me ask you.
2 Do you understand the concept of normal cost as
3 applied to evaluating a pension plan?

4 MR. PLATTEN: Objection. Ambiguous.

5 THE WITNESS: No.

6 BY MR. HARTINGER:

7 Q. Have you ever heard that phrase "normal cost"?

8 A. Yes.

9 Q. Do you know what that means?

10 A. Average cost.

11 Q. Have you, if you take a look at your answer on
12 page 2, it's subparagraph E at lines 19 through 20,
13 there's a reference to a right to have contributions
14 paid by plan members for retirement pensions set at
15 3/11ths of the actuarially determined contribution.

16 What's the source of that right?

17 MR. PLATTEN: Objection. Under the Rifkind
18 rule, improper question.

19 Instruct the witness not to answer.

20 It might be easier, Art, if we just have a
21 stipulation between us, any questions going to the
22 responses to the interrogatories, I'm going to make the
23 same objection and the same instruction. You've
24 preserved that in the Sapien deposition and in the
25 Mukhar deposition. Why don't we deal with it that way?

1 MR. HARTINGER: I think that's a fair way to
2 proceed efficiently. Let me ask a few more questions,
3 to make sure the record's straight.

4 MR. PLATTEN: Go ahead.

5 BY MR. HARTINGER:

6 Q. Do you understand that the 3/11ths as
7 referenced in -- on line 20 on page 2 refers to normal
8 cost?

9 MR. PLATTEN: Same objection. Same
10 instruction.

11 BY MR. HARTINGER:

12 Q. Going to line 23 referencing unfunded
13 liabilities of the retiree medical benefits. Can you
14 describe what unfunded liabilities of the retiree
15 medical benefits you're referring to?

16 MR. PLATTEN: Same objection, same instruction.

17 MR. HARTINGER: I think that's pretty clear. I
18 ask any question about any of this and it's an
19 instruction along those lines.

20 MR. PLATTEN: That's how we read Rifkind.

21 BY MR. HARTINGER:

22 Q. So let's move on to Interrogatory No. 2.

23 And there are a number of different documents
24 that are listed here, and let me just ask you: On
25 the -- I'll take this by, starting at page 3 line 7

1 where it's A and then it goes down on line 9B and then
2 line 10C. I'm going to use the letters if that's okay.
3 Are you with me?

4 A. Yes.

5 Q. Referencing the documents that are at A, that
6 is the municipal code chapters, et cetera, have you
7 read any of those?

8 A. I can't remember offhand.

9 Q. What about the B, the report of the City
10 auditor, have you read that?

11 A. No.

12 Q. And C, the opening brief, have you read that?

13 A. Arbitration of police and fire?

14 Q. Correct.

15 A. No.

16 Q. What about the next document, the reply brief
17 re police and fire retirement?

18 A. No.

19 Q. And the -- in E, the opening brief re cost of
20 retroactive funding, have you read that?

21 A. No.

22 Q. And the next one is the brief of the national
23 conference on public employee retirement systems.

24 Have you read that?

25 A. No.

1 Q. And look -- and referencing A through F, do you
2 know what any of those documents contain other than
3 what you may have learned through counsel?

4 A. Most of them I wasn't even working at the City.

5 Q. Okay. So the answer is no?

6 A. No.

7 Q. In looking at G, the decision of John Kagel,
8 have you ever read that or been informed what it
9 contains?

10 A. No.

11 Q. And the testimony of Alex Gurza before the
12 Jerilou Cossack, do you know what that is?

13 A. No.

14 Q. And the Leslie White memo to Robert Osby, do
15 you know what that is?

16 A. No.

17 Q. And J, same question, memo to all City
18 employees?

19 A. I remember that one, but I don't remember what
20 it said.

21 Q. And what about K, the decision of Bonnie Bogue?

22 A. No.

23 Q. You haven't read that and don't know what it
24 is; correct?

25 A. Correct.

1 Q. If you go to page 4, line L, the statement of
2 George Rios, have you read that or know what it is?

3 A. No.

4 Q. And M through R appear to be handbook and fact
5 sheet references to the federated system.

6 Have you read any of that?

7 A. No.

8 Q. Going back to page 3, can you explain how any
9 of these materials listed A through R constitute some
10 evidence or -- let's use the word "evidence," I guess,
11 of the contract?

12 MR. PLATTEN: Again, objection. Calls for a
13 legal conclusion. Improper question, Rifkind decision.
14 Instruct the witness not to answer.

15 MR. HARTINGER: And that would be with respect
16 to all of the documents so I don't need to go through
17 them again.

18 MR. PLATTEN: You don't need to go through
19 them.

20 MR. HARTINGER: Okay.
21 (Defendants' Exhibit 11 marked
22 for Identification.)

23 MR. PLATTEN: May we go off the record for a
24 moment, please, Art.

25 MR. HARTINGER: Yeah.

1 MR. PLATTEN: Off the record.

2 (Off the record.)

3 (Defendants' Exhibit 12 marked

4 for Identification.)

5 BY MR. HARTINGER:

6 Q. Okay. The court reporter has marked as
7 Exhibit 12 a verification which I understand to be your
8 verification verifying under penalty of perjury the
9 accuracy of your answers to the supplemental
10 interrogatories marked as Exhibit 11; is that correct?

11 A. Yes.

12 Q. Okay. So if I take you to Exhibit 11, and
13 counsel has offered to speed this along with a
14 stipulation. I just need to -- I think that's an
15 efficient way to go, but let me ask a couple of
16 questions here to see where we're going to go.

17 A. Okay.

18 Q. I take it you read these answers and believe
19 them all to be true; correct?

20 A. Yes.

21 Q. And did you understand the basis for your
22 answers?

23 A. Yes.

24 Q. So how do you -- how would you characterize
25 your right to retiree healthcare benefits?

1 A. How would I characterize my right to retiree
2 benefits?

3 Q. Right.

4 MR. PLATTEN: Let me interpose the question as
5 seeking a contention interrogatory, and on that basis,
6 I will object under the Rifkind decision and instruct
7 the witness not to answer.

8 BY MR. HARTINGER:

9 Q. Looking at your answers on page 2 of Exhibit 11
10 concerning impairment of certain vested rights, you
11 listed four additional items.

12 Are you able to describe the basis of your
13 statements made there in the interrogatories?

14 MR. PLATTEN: Same objection. Same
15 instruction.

16 MR. HARTINGER: An instruction not to answer?

17 MR. PLATTEN: Correct. Based on Rifkind.

18 BY MR. HARTINGER:

19 Q. How do you believe you've been subject to any
20 coercion to reduce or eliminate any pension benefits
21 you hold?

22 MR. PLATTEN: Same instructions. Same
23 objection.

24 MR. HARTINGER: So the stipulation would be if
25 I asked any questions about the basis or circumstances

1 or understanding of any of the answers to Interrogatory
2 No. 1, there will be an instruction not to answer?

3 MR. PLATTEN: Correct. With respect to any of
4 the interrogatories.

5 MR. HARTINGER: Any of the interrogatory
6 answers in the supplemental interrogatories listed on
7 Exhibit 11?

8 MR. PLATTEN: Correct.

9 MR. HARTINGER: All right.

10 BY MR. HARTINGER:

11 Q. Ms. Harris, were you involved, and I think your
12 answer is -- I just want to confirm, that you were not
13 involved in the negotiations that led to an impasse
14 where the council implemented last best and final terms
15 for the fiscal year '11-'12?

16 A. I was not involved.

17 Q. Saves some paper.

18 A. Yeah. I was afraid of that one. That one was
19 a big one.

20 Q. Do you know anything about the supplemental
21 retiree benefit reserves?

22 A. Yes, I know some.

23 Q. And what do you know?

24 A. It's our retirement funding. That's about all
25 I know.

1 Q. Have you ever made an inquiry?

2 A. No.

3 Q. Have you ever objected to anyone concerning the
4 agreement that was made by OE3 as reflected in
5 Exhibit 13?

6 MR. PLATTEN: Let me interpose an objection.
7 To the extent that that question calls for information
8 that you may have discussed with an attorney or in the
9 context of a union meeting, I instruct you not to
10 answer. In any other context, you may answer.

11 THE WITNESS: So ask the question again.

12 BY MR. HARTINGER:

13 Q. Yes. Have you ever objected to anyone
14 concerning the agreement that was made by OE3 as
15 reflected in Exhibit 13?

16 A. No.

17 Q. Take that answer. Your counsel is instructing
18 you not to answer with respect to certain sources.

19 A. Right. Not offhand.

20 Q. Okay. Do you know whether OE3 had the
21 authority to agree -- to have the authority that --
22 strike that.

23 Do you know whether OE3 had the authority to
24 agree that the SRBR would be eliminated and set aside?

25 MR. PLATTEN: Objection. The question calls

1 for legal conclusion and it's an improper contention
2 interrogatory under the Rifkind rule.

3 I instruct the witness not to answer.

4 BY MR. HARTINGER:

5 Q. Okay. If I could have this marked as
6 defendant's next in order.

7 (Defendants' Exhibit 14 marked
8 for Identification.)

9 BY MR. HARTINGER:

10 Q. So marked as Exhibit 14 is a two-page document
11 entitled "Summary of the Principal Provisions of the
12 Federated City Employees Retirement System," Bates
13 HAR 33 and 34.

14 Have you seen these before, Ms. Harris?

15 A. No.

16 Q. Okay.

17 MR. HARTINGER: If I could have this marked as
18 defendant's next in order.

19 (Defendants' Exhibit 15 marked
20 for Identification.)

21 BY MR. HARTINGER:

22 Q. And Exhibit 15 is Bates HAR 3, Special Notice
23 to Members of the Federated Retirement System.

24 Have you seen this document before, Ms. Harris?

25 A. No.

1 BY MR. HARTINGER:

2 Q. Exhibit 17 is Bates HAR 191 through 196,
3 ordinance number -- it's entitled "Ordinance
4 No. 28752."

5 Have you seen this document before, Ms. Harris?

6 A. No.

7 Q. Did you ever learn that the municipal code had
8 been amended to provide that members of the system
9 shall make such, quote, additional retirement
10 contributions, close quote, as may be required by
11 resolution?

12 A. No.

13 Q. Does this cause you any concern reading it now
14 that the municipal code contains this provision?

15 MR. PLATTEN: Objection. The question is
16 argumentative.

17 THE WITNESS: Do I have concern?

18 BY MR. HARTINGER:

19 Q. Yes.

20 A. Yes.

21 Q. What's the concern?

22 MR. PLATTEN: Objection. The question is
23 argumentative.

24 To the extent it calls for a legal conclusion
25 it's an improper contention interrogatory and I'll

1 instruct the witness not to answer.

2 BY MR. HARTINGER:

3 Q. Okay. So I'm not going -- I can't conclude the
4 deposition because we have some disputes going on, as
5 you can tell.

6 But I'm going to suspend the deposition and I
7 want to thank you for coming and it was a pleasure to
8 meet you.

9 THE WITNESS: Nice to meet you. Thank you.
10 (Whereupon, the deposition was
11 concluded at 10:57 a.m.)

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

---o0o---

SAN JOSE POLICE OFFICERS' ASSOCIATION,
Plaintiff,

COPY

vs. No. 1-12-CV-225926

CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE AND
FIRE DEPARTMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 INCLUSIVE,
Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS

DEPOSITION OF JOHN MUKHAR

Taken before EARLY LANGLEY, RSA, RMR

CSR No. 3537

May 15, 2013

Aiken Welch Court Reporters
One Kaiser Plaza, Suite 505
Oakland, California 94612
(510) 451-1580/(877) 451-1580
Fax: (510) 451-3797
www.aikenwelch.com

1 believe are impaired.

2 Do you see that?

3 A. Yes.

4 Q. So if you go to the Interrogatory Answer A --
5 actually, it's D, saying that there's a right to have
6 the City of San Jose fund all contributions for all --
7 for any actuarially -- I'm sorry, for any unfunded
8 actuarially accrued liabilities. Do you see that?
9 It's at line 16 through 18?

10 A. Yes.

11 Q. So how do you square that right with the fact
12 that you signed off on a document that called for
13 additional employee contributions as we previously
14 discussed at the deposition?

15 MR. MCBRIDE: I'm going to object on the basis
16 it calls for a legal conclusion, or legal opinion and
17 conclusion.

18 If you can answer it, you can try.

19 THE WITNESS: Two separate issues to me.

20 BY MR. HARTINGER:

21 Q. How so?

22 A. This is a legal document prepared by our
23 attorneys. That was an agreement.

24 Q. Is there anything else that you would say as
25 explaining how it is you could claim that there is some

1 contract impairment in this document marked Exhibit 12
2 and in your lawsuit on the one hand and on the other
3 hand sign off on an MOU that called for additional
4 contributions?

5 MR. MCBRIDE: Same objections. And also, Art,
6 you're really getting into the area that you're not
7 entitled to ask him about, and that is, even though
8 these are answers to interrogatories, they were
9 contention interrogatories, there's no different than
10 asking a layperson the basis for or explanation of a
11 contention in a complaint. I object on that basis.

12 MR. HARTINGER: And presumably you talked to
13 your partner Mr. Platten and he made some objections
14 along those lines. We've done --

15 MR. MCBRIDE: No. We --

16 MR. HARTINGER: But let me just finish. We've
17 done some research and believe that you have Mr. Mukhar
18 signing a document that, you know, is directly relative
19 to this, it appears, so I think we're entitled to an
20 answer what his understanding is.

21 MR. MCBRIDE: I disagree. I think that's no
22 different than a contention in a complaint.

23 You ask what are your contentions in the
24 complaint based -- or what are your contentions based
25 on the complaint. These are the contentions and

1 they're legal contentions. You know full well that
2 interrogatories of these type are prepared and the
3 information for that -- those interrogatories come from
4 the attorney. They don't come from the client. They
5 have to be verified under the terms of the code. And
6 they can be used as verified answers. But I don't
7 think you have any business to ask him those kind of
8 questions.

9 MR. HARTINGER: So are you instructing him not
10 to answer?

11 MR. MCBRIDE: Yes.

12 MR. HARTINGER: So if I go to the --

13 MR. MCBRIDE: You can go to anyone in here.
14 I'll make it simple. You go to anyone in here and ask
15 him the same type of question, I will object and
16 instruct him not to answer.

17 MR. HARTINGER: And these questions, just to
18 make my record, are relative to what Mr. Mukhar has
19 executed and why, given what he's executed, is
20 consistent or inconsistent with the claims that he's
21 making here.

22 Is it the same instruction?

23 MR. MCBRIDE: Yes.

24 MR. HARTINGER: So -- so, for example, just to
25 make sure my record is clear in case we have to have

1 this resolved by somebody with more power than me, I
2 would go to subparagraph E and...

3 MR. MCBRIDE: E?

4 MR. HARTINGER: Yes. I'm sorry. So lines 19
5 through 20 and ask concerning the right to have the
6 contributions paid by plan members for retirement
7 pensions set at 3/11ths, it goes on. What are you
8 referring to, 3/11ths? I would ask that question, what
9 is that 3/11ths? Can I ask that?

10 MR. MCBRIDE: I'm sorry. I'm confused now.
11 3/11ths -- oh, 3/11ths. Okay. Yeah. That's one of
12 the contentions.

13 MR. HARTINGER: So I can ask the question or
14 no?

15 MR. MCBRIDE: You can ask it. I'm going to
16 instruct him not to answer.

17 MR. HARTINGER: That's what I wanted to know so
18 I know you're being square here so we're not wasting
19 time.

20 So you will instruct him not to answer with
21 respect to any questions concerning...

22 MR. MCBRIDE: The basis for the contentions.

23 MR. HARTINGER: The basis for these claims and
24 an explanation for how these claims can be made given
25 what Mr. Mukhar has executed in agreements with the

1 Q. Strike that.

2 Do you have any knowledge of what your
3 disability retirement plan benefits are as of today?

4 A. No, I don't.

5 Q. Have you done any comparison with Measure B to
6 see how Measure B has impacted or not impacted any
7 disability retirement benefits you have?

8 A. No.

9 Q. So, with that, I'm not going to close the
10 deposition, I'm going to suspend the deposition in
11 light of two things.

12 One is we may have a disagreement on the legal
13 issue that we described concerning Mr. Mukhar's duty or
14 not to respond relative to documents he prepared and
15 answers in his interrogatories. That's number one.

16 And, number two, I'm a little concerned that
17 Mr. Mukhar hasn't really looked in his files, and I
18 know that -- I'm not suggesting that you haven't acted
19 in good faith. I think everyone is acting in good
20 faith, but there's a lot of paper going back and forth,
21 and so it may very well be that you have documents that
22 were responsive that have not been produced, and so for
23 that reason I reserve the right to recall you, but it's
24 been my pleasure to meet you, Mr. Mukhar, and thank you
25 for coming, and I appreciate your attendance.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

---oOo---

SAN JOSE POLICE OFFICERS' ASSOCIATION,
Plaintiffs,

COPY

vs.

No. 1-12-CV-225926

CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE AND
FIRE DEPARTMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 INCLUSIVE,

Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS

DEPOSITION OF ROBERT SAPIEN

Taken before EARLY LANGLEY, RSA, RMR

CSR No. 3537

May 14, 2013

Aiken Welch Court Reporters
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(510) 451-1580/(877) 451-1580
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1 BY MR. HARTINGER:

2 Q. So, for the record, Defendant's 8 is a letter
3 dated December 5, 2011, from Robert Sapien, Jr. to the
4 mayor and the city council.

5 Do you recognize this document, Mr. Sapien?

6 A. I do.

7 Q. And did you write this document?

8 A. I did.

9 Q. If you look at the fourth paragraph, you
10 write, "As the sobering numbers arrived in recent budget
11 years, the council had to make difficult decisions
12 including reduction of vital services, employee layoffs,
13 and pay reductions as much as 18 percent in gross pay for
14 some members of the fire department."

15 That's a true statement, I take it?

16 A. To the best of my knowledge, yes.

17 Q. And you believed it at the time?

18 A. Yes.

19 Q. And you believe it today?

20 A. Yes.

21 Q. I'm back to Exhibit 2, which is Measure B.

22 A. Okay.

23 Q. And, if you look at page 3, and this is part of
24 Section 1502-A, Intent.

25 And I take you to the finding that says -- I'm

1 sorry. Statement of Intention, I guess, is what it is.
2 "This act is not intended to deprive any current or
3 former employees of benefits earned and accrued for prior
4 service as of the time of the act's effective date;
5 rather, the act is intended to preserve earned benefits
6 as of the effective date of the act."

7 Do you contend in this case that, in fact, the
8 act that is Measure B deprives any current employees in
9 San Jose of benefits earned and accrued for prior
10 service?

11 MR. PLATTEN: I'm going to object and instruct
12 the witness not to answer. That's an improper question
13 asking the witness to state or explain any legal
14 contention. Citing the case of Rifkind versus Superior
15 Court.

16 MR. HARTINGER: I'll just ask that the court
17 reporter mark those instructions not to answer rather
18 than arguing on the record here.

19 BY MR. HARTINGER:

20 Q. Do you believe that anything in Measure B
21 deprives you, Robert Sapien, of benefits earned and
22 accrued for prior service?

23 MR. PLATTEN: Same objection and instruction.

24 MR. HARTINGER: And I guess I have to ask you,
25 why do you think that's improper? Belief about his

1 benefits and his lawsuit?

2 MR. PLATTEN: Sure. If you take a look at the
3 caselaw, specifically the Rifkind case, you cannot pose
4 in a deposition a question that seeks to determine legal
5 contention. That's appropriate for interrogatories. And
6 I cite you to 22 Cal.App.4th 1255 at 1259.

7 So, if you just rephrase the question in a
8 manner that asks again for a legal contention, that's an
9 appropriate question for a written interrogatory and we
10 will be glad to respond to that there.

11 MR. HARTINGER: Okay. So we'll just ask that
12 that be marked, and so I -- if I ask -- so I don't have
13 to waste our time.

14 MR. PLATTEN: Sure.

15 MR. HARTINGER: If I asked Mr. Sapien any
16 questions relative to how Measure B deprives him of
17 benefits, am I to assume that you will instruct him not
18 to answer?

19 MR. PLATTEN: You may so assume.

20 MR. HARTINGER: Okay. Thank you.

21 MR. PLATTEN: We've been going about an hour,
22 Counsel.

23 Could we take a five-minute break.

24 MR. HARTINGER: Absolutely. No problem.

25 (Break taken.)

1 Q. And so it looks like you executed the
2 verification today; is that correct?

3 A. Correct.

4 Q. Did you read the responses prior to verifying
5 them?

6 A. Did I read this document?

7 Q. Yes.

8 A. Yes.

9 Q. So everything in here is true and correct to the
10 best of your knowledge; right?

11 A. Yes.

12 Q. And so I'm going to turn to page 2, and
13 Interrogatory No. 1 asks for you to list those contracts
14 that were impaired by the enactment of Measure B.

15 Do you see that?

16 A. Uh-huh. Yes. I'm sorry.

17 Q. No problem.

18 And the first response relates to a contract
19 concerning the right to a disability retirement pension
20 benefit if an employee becomes incapable of assuming the
21 responsibility, et cetera, et cetera. Can you explain
22 how Measure B impairs that right?

23 MR. PLATTEN: Objection. Again, based on the
24 Rifkind decision.

25 Instruct the witness not to answer.

1 You can assume that would be the same
2 instruction if you ask him any questions on any of the
3 answers.

4 MR. HARTINGER: Okay. Will the instruction be
5 the same even if I'm asking about his belief?

6 MR. PLATTEN: Well, to the extent you're asking
7 him to explain what he's contending, yes.

8 BY MR. HARTINGER:

9 Q. Let me try another question to see if we're on
10 the same page.

11 So if I ask, please state the basis for your
12 belief that Measure B impairs your right to a disability
13 retirement pension benefit, what would the instruction
14 be?

15 MR. PLATTEN: Same instruction.

16 MR. HARTINGER: An instruction not to answer.

17 MR. PLATTEN: Right. You get those answers
18 through written interrogatories such as the responses
19 provided here in Exhibit 11.

20 MR. HARTINGER: So what I think I need to do is
21 go look at the Rifkind case quickly.

22 Do you mind if we take a break?

23 MR. PLATTEN: Not at all.

24 MR. HARTINGER: So I need about five minutes,
25 okay?

1 BY MR. HARTINGER:

2 Q. And so the contract rights with respect to
3 specific paragraphs, that is, A, B, C, D, E, G, H, K and
4 N, you are contending are express contracts?

5 MR. PLATTEN: We are contending all of these are
6 express pursuant to those municipal code chapters listed
7 in the Supplemental Answer to Interrogatory No. 3 and
8 that contract rights emanate from there specifically with
9 respect to Special Interrogatory No. 1, answer to A, B,
10 C, D, E, G, H, K and N.

11 MR. HARTINGER: Okay. So now I am confused.

12 MR. PLATTEN: Maybe the best way to do it, since
13 it's not appropriate to ask the witness, is to put that
14 in a question to us and we'll -- we'll attempt to give
15 you better clarity on the answer if that's needed.

16 MR. HARTINGER: Well, let me ask the witness
17 first so I can make my record and then if we can work it
18 out some other way, I think we'll have to work on that,
19 but.

20 BY MR. HARTINGER:

21 Q. So, Mr. Sapien, looking at the Supplemental
22 Answer to Interrogatory No. 3, can you explain how those
23 contract rights listed in Answer to Special Interrogatory
24 No. 1 A, B, C, D, E, G, H, K and N are express as you've
25 answered in the interrogatory?

1 MR. PLATTEN: Again, object on the basis of an
2 improper question pursuant to Rifkind versus Superior
3 Court and instruct the witness not to respond.

4 BY MR. HARTINGER:

5 Q. Do you have any idea how those are express?

6 MR. PLATTEN: Same -- same instruction.

7 BY MR. HARTINGER:

8 Q. I would like to take you to Interrogatory -- let
9 me ask you this: Have you ever read the San Jose
10 Charter?

11 A. I don't know if I could say in its entirety, but
12 I have referred to the charter.

13 Q. Okay. Have you -- let me mark this as -- well,
14 have you -- are you aware that the City has raised as one
15 of its positions that the charter has a reservation of
16 rights clause in it with respect to its pension plans?

17 A. I think so, but if you show me, I can -- if you
18 show me the document, I can maybe confirm it.

19 Q. So, without seeing the document, you do not know
20 whether the City is making that point?

21 A. I don't know the verbiage exactly.

22 Q. Have you ever read anything in the charter that
23 you would -- you would call a reservation of rights
24 clause?

25 MR. PLATTEN: Let me object to the form of the

EXHIBIT 8

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Arthur A. Hartinger
Attorney at Law
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May 29, 2013

Via E-mail

John McBride
Christopher Platten
WYLIE, MCBRIDE, PLATTEN &
RENNER
2125 Canoas Garden Avenue, Suite 120
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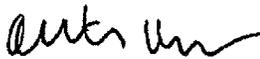
Re: *POA, et al. v. San Jose*
Case No. No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574,
1-12-CV-227864 and 1-12-CV-233660)
MN File No. 135.023
Instructions Not to Answer in Deposition

Dear Counsel:

I am following up regarding the various instructions not to answer made at the depositions of Messrs. Mukhar and Sapien, and Ms. Harris. I believe the various instructions, primarily based on the *Rifkind* decision, were overbroad and improper. Given our discussion at the deposition, I believe further meet and confer would be futile. However, if you wish to consider changing your position on the scope and application of *Rifkind*, please contact me.

Thank you.

Very truly yours,


Arthur A. Hartinger
AAH:kt

2091169.1

**WYLIE, MCBRIDE,
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Direct Dial Number

June 13, 2013

Via E-Mail & U.S Mail

Arthur A. Hartinger, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Ste. 1500
Oakland, CA 94607

**Re: Sapien, et al, Harris, et al, Mukhar, et al, v. City of San Jose; Case Nos. 1-
12-CV-225928; 1-12-CV-226570; 1-12-CV-226574
(Depositions)**

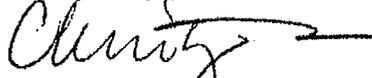
Dear Mr. Hartinger:

Thank you for your letter of May 29, 2013.

As you will recall, we offered to resolve this matter by permitting you to provide us deposition questions posed and objected to in the form of written interrogatories. We remain open to responding to those questions in that manner which we believe is appropriate under the law and the decision in *Rifkind v. Superior Court* (1994) 22 Cal.App. 4th 1255, 1259, 1262-1263.

If you wish to proceed in that manner, we will be happy to respond to the interrogatories.

Very truly yours,



CHRISTOPHER E. PLATTEN

CEP:imt

cc: All counsel
Robert Sapien
John Mukhar
Teresa Harris

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EXHIBIT 9

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22 Attorneys for Plaintiff San Jose Retired
23 Employees' Association

24 SUPERIOR COURT OF THE STATE OF CALIFORNIA
25 COUNTY OF SANTA CLARA

26 SAN JOSE POLICE OFFICERS'
27 ASSOCIATION,

28 Plaintiff,

v.

29 CITY OF SAN JOSE, BOARD OF
30 ADMINISTRATION FOR POLICE
31 AND FIRE DEPARTMENT
32 RETIREMENT PLAN OF CITY OF
33 SAN JOSE, and DOES 1-10, inclusive,

34 Defendants.

35 AND RELATED CROSS-COMPLAINT
36 AND CONSOLIDATED ACTIONS

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

**FINAL EXHIBIT LIST OF SAN JOSE POLICE
OFFICERS' ASSOCIATION, SAN JOSE
RETIRED EMPLOYEES' ASSOCIATION,
HOWARD E. FLEMING, DONALD S.
MACRAE, FRANCES J. OLSON, GARY J.
RICHERT, AND ROSALINDA NAVARRO**

Trial Date: July 22, 2013
Time: 9:00 a.m.
Place: Dept. 2
Judge: Hon. Patricia M. Lucas

Complaint Filed: June 6, 2012
Trial Date: July 22, 2013

Pursuant to the parties' April 24, 2013 Stipulation and Order Regarding Pre-Trial and Trial Schedule, Plaintiffs San Jose Police Officers' Association ("SJPOA") and San Jose Retired Employees' Association ("SJREA") submit the following final list of exhibits. Plaintiffs SJPOA and SJFREA reserve the right to revise and supplement this final list.

SJPOA Final Exhibit List

<u>Exh. No.</u>	<u>Date</u>	<u>Description</u>
1.	1/7/46	Chapter 5, Statutes of California, First Extraordinary Session 1946 pertaining to Assembly Concurrent Resolution No. 4 - Relative to approving certain amendments to the Charter of the City of San Jose
2.	1960 & 1961	Chapter 20, Statutes of California 1960 and 1961, Volume 2, pertaining to Assembly Concurrent Resolution No. 17 - Approving a certain amendment to the charter of the City of San Jose
3.	7/26/71	The City of San Jose Resolution No. 40129 (1971)
4.	7/20/79	The City of San Jose Ordinance No. 19690 (1979)
5.	1980-1981	The City's 1980-1981 recruiting booklet
6.	7/27/84	San Jose City Ordinance No. 21686 (1984)
7.	2/29/98	Memorandum to the Board of Administration of the San Jose Police and Fire Department Retirement Plan from Saltzman & Johnson Law Corporation ("the 1998 Saltzman Memorandum") dated February 19, 1998
8.	1/24/92	Memo from Susan Devencenzi, Sr. Deputy City Attorney, to the Board of Administration, Policy and Fire Department Retirement Plan
9.	Fall 1995	Chapter 10 of the San Jose Police and Fire Department Retirement Plan Handbook - Fall 1995
10.	Fall 1997	Chapter 10 of the San Jose Police and Fire Department Retirement Plan Handbook - Fall 1997
11.	9/17/97	The September 17, 1997 City of San Jose Memorandum, from Susan Devencenzi, Sr. Deputy City Attorney, to Board of Administration Police and Fire Department Retirement Plan, Subject: Allocation of Contribution Rates Between City and Members

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<u>Exh. No.</u>	<u>Date</u>	<u>Description</u>
12.	12/29/97	The December 29, 1997 City of San Jose Memorandum, From Susan Devencenzi, Sr. Deputy City Attorney to Board of Administration Police and Fire Department Retirement Plan, Subject: Allocation of Actuarial Gains and Losses
13.	2/19/98	Memo from Saltzman & Johnson Law Corporation to the Board of Administration of the San Jose Police and Retirement Plan
14.	7/31/98	San Jose City Ordinance No. 25615 (1998)
15.	9/11/98	September 11, 1998 presentation to the San Jose Police and Fire Department Retirement Plan entitled "Allocation of Actuarial Surplus to Contributions" by Drew James of William M. Mercer, Inc. and Russell Richeda of Saltzman & Johnson Law Corporation
16.	2002	A recruiting flyer issued by the City in 2002 states: "Retirement options begin with 20 years of service and age 55 for 50% of salary. Regular retirement is 25 years of service and age 50 for 65% of salary. 30 years of service provides an 85% retirement with a guaranteed cost of living raise of 3% every year after retirement for all plans." This flyer is attached as Exhibit "C" to the Declaration of John Robb in Support of Plaintiff SJPOA's Opposition to Motion for Summary Adjudication.
17.	March 1, 2004- June 20, 2008	Memorandum of Agreement
18.	April 2005	The City of San Jose Retirement System Newsletter, April 2005
19.	2005	The Chief of Police's 2005 Recruiting Letter for U.S. Military
20.	January 2006	City of San Jose Retirement System Newsletter dated January 2006
21.	5/9/06	San Jose City Ordinance 27721 (2006)
22.	6/30/07	Excerpts from the Notes to Financial Statements and Actuarial Certification Letter from the City of San Jose Police and Fire Department Retirement Plan Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2007

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<u>Exh. No.</u>	<u>Date</u>	<u>Description</u>
23.	6/30/08	Excerpts from the Notes to Financial Statements and Actuarial Certification Letter from the City of San Jose Police and Fire Department Retirement Plan Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2008
24.	6/30/09	Excerpts from the Notes to Financial Statements and Actuarial Certification Letter from the City of San Jose Police and Fire Department Retirement Plan Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2009
25.	6/30/10	Excerpts from the Notes to Financial Statements and Actuarial Certification Letter from the City of San Jose Police and Fire Department Retirement Plan Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2010
26.	7/28/10	The July 28, 2010 San Jose Rules and Open Government Committee Meeting Report
27.	8/3/10	The August 3, 2010 Minutes of San Jose City Council
28.	September 2010	Printout from City of San Jose webpage: City of San Jose Retirement Benefits Frequently Asked Questions, September 2010
29.	10/13/10	Memorandum dated October 13, 2010 (from Mayor Chuck Reed to the Rules and Open Government Committee, Subject: Suspension of SRBR Payments
30.	10/29/10	Memo from Alex Gurza, the City's Director of Employee Relations, to Russell Crosby, the City's Director of Retirement Services
31.	11/2/10	The City Attorney's Impartial Analysis of the City of San Jose's Measure W - from the November 2, 2010 Election
32.	2011-2013	Memorandum of Agreement
33.	3/28/11	March 28, 2011 Memorandum from Sean Kaldor Board of Administration Police and Fire Retirement Plan to Chairman David Bacigalupi, Board of Administration Police and Fire Retirement Plan, Subject: P&F Plan ARC Calculation
34.	5/13/11	The May 13, 2011 Memorandum from Mayor Chuck Reed, Vice Mayor Madison Nguyen, and Council members Rose Herrera and Sam Liccardo to City Council, Subject Fiscal Reforms
35.	6/24/11	The June 24, 2011 Special Minutes of the San Jose City Council

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<u>Exh. No.</u>	<u>Date</u>	<u>Description</u>
36.	6/30/11	Excerpts from the Notes to Financial Statements and Actuarial Certification Letter from the City of San Jose Police and Fire Department Retirement Plan Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2011
37.	January 2012	January 2012 Printout from San Jose Police Department
38.	12/1/11	December 1, 2011 Memorandum from Mayor Chuck Reed, Vice Mayor Madison Nguyen and Council members Pete Constant, Rose Herrera and Sam Liccardo to Honorable Mayor and City Council, Subject Fiscal and Service Level Emergency and Pension Reform Ballot Measure
39.	12/1/11	The December 1, 2011 Memorandum from City Manager Debra Figone to Honorable Mayor and City Council, subject: Declaration of Fiscal and Service Level Emergency
40.	12/29/11	December 29, 2011 Printout from City of San Jose webpage: Current Retirement Benefits
41.	February 2012	John Robb's individual annual retirement statement for FY 2010-2011. These documents are attached as Exhibit "F" to the Declaration of John Robb in Support of Plaintiff SJPOA's Opposition to Motion for Summary Adjudication.
42.	March 2012	March 2012 Printout from San Jose Police Department "Salary and Benefits" webpage
43.	4/5/12	The Police and Fire Department Retirement Plan, City of San Jose California Resolution No. 3761 adopted April 5, 2012
44.	6/24/12	Police Benefits Fact Sheet issued by the Department of Retirement Services
45.	7/26/12	July 26, 2012 Memorandum from Dennis Hawkins, City Clerk to Honorable Mayor and City Council, Subject: Certification of the Results of the Primary and Special Municipal Elections Held June 5, 2012
46.	8/2012	California State Auditor Report 2012-106 City of San Jose Some Retirement Cost Projections Were Unsupported Although Rising Retirement Costs Have Led to Reduced City Services, August 2012
47.	3/7/13	The Police and Fire Department Retirement Plan, City of San Jose California Resolution No. 3800 adopted March 7, 2013

<u>Exh. No.</u>	<u>Date</u>	<u>Description</u>
48.	4/12/13	Total Compensation Information from San Jose Office of City Manager
49.	Various	Recruiting flyers and booklets stating that Police Officers are provided pensions from City of San Jose's Retirement Plan. Several flyers state: "Up to 90% of Salary for Retirement (30 years of service) with 3% Annual Cost of Living Increase." These flyers are attached as Exhibit "B" to the Declaration of John Robb in Support of Plaintiff SJPOA's Opposition to Motion for Summary Adjudication.
50.	Undated	Three undated recruiting flyers
51.	Various	2002, 2006, 2008 and 2009 recruiting flyers
52.	Various	San Jose Police & Fire Department Retirement Plan Annual Reports: 1981-1983, 1984-1985, 1988-1989 and 1992 to 1994, 2006-2007, 2010-2011, 2011-2012
53.	Various	Police and Fire Department Retirement Plan Handbooks, 1976, 1979, 1981, 1991, 1995 and 1997, 2002-2003

SJREA Final Exhibit List

<u>Exh. No.</u>	<u>Description</u>
1.	San Jose City Charter (1961, 1965, Prior to passage of Measure B)
2.	San Jose Municipal Code Chapters 3.16, 3.20, 3.24, 3.28 and 3.44 (Prior to the passage of Measure B)
3.	San Jose Municipal Code Section 3.28.340 (Prior to the passage of Measure B)
4.	Measure B (2012)
5.	Ballot Argument in Favor of Measure B (2012)
6.	Ordinance No. 15118 (1970)
7.	Minutes for Ordinance No. 15118 (1970)
8.	Ordinance No. 21763 (1984)
9.	Minutes for Ordinance No. 21763 (1984)
10.	Ordinance No. 22261 (1986)
11.	Minutes for Ordinance No. 22261 (1986)
12.	Ordinance No. 22262 (1986)
13.	Minutes for Ordinance No. 22262 (1986)
14.	Ordinance No. 22263 (1986)
15.	Minutes for Ordinance No. 22263 (1986)
16.	Ordinance No. 22807 (1988)

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<u>Exh. No.</u>	<u>Description</u>
17.	Minutes for Ordinance No. 22807 (1988)
18.	Ordinance No. 22808 (1988)
19.	Minutes for Ordinance No. 22808 1988)
20.	Ordinance No. 22809 (1989)
21.	Minutes for Ordinance No. 22809 (1989)
22.	Ordinance No. 23736 (1991)
23.	Minutes for Ordinance No. 23736 (1991)
24.	Ordinance No. 24347 (1993)
25.	Minutes for Ordinance No. 24347 (1993)
26.	Ordinance No. 26642 (2002)
27.	Minutes for Ordinance No. 26642 (2002)
28.	Ordinance No. 27521 (2005)
29.	Minutes for Ordinance No. 27521 (2005)
30.	Ordinance No. 27652 (2006)
31.	Minutes for Ordinance No. 27652 (2006)
32.	Complaint in City of San Jose v. San Jose Police Officer's Association (Case No. C12-02904, United States District Court, Northern District of California)
33.	Federated City Employees Retirement System Handbook Fall 1995 (Chapters 11 and 13)
34.	Federated City Employees Retirement System Handbook Fall 1997
35.	Federated City Employees Retirement System Handbook Fall 1999
36.	Federated City Employees Retirement System Handbook Fall 2004

Dated: June 20, 2013 CARROLL, BURDICK & McDONOUGH LLP

By Amber West (K.P.)

Gregg McLean Adam
Gonzalo C. Martinez
Amber L. West

Attorneys for Plaintiff and Cross-Defendant
San Jose Police Officers' Association

Dated: June 20, 2013 SILVER, HADDEN, SILVER, WEXLER & LEVINE

By Amber West (K.P.) for

Stephen H. Silver
Jacob Kalinski

Attorneys for Plaintiff San Jose Retired
Employees' Association

1 *San Jose POA v. City of San Jose, et al.*,
2 Santa Clara County Superior Court, No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574,
3 1-12-CV-227864, and No. 1-12-CV-233660)

4 **PROOF OF ELECTRONIC SERVICE**

5 I declare that I am employed in the County of San Francisco, California. I am
6 over the age of eighteen years and not a party to the within cause; my business address is
7 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On June 20, 2013, I served
8 the enclosed:

9 **FINAL EXHIBIT LIST OF SAN JOSE POLICE OFFICERS' ASSOCIATION, SAN JOSE
10 RETIRED EMPLOYEES' ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE,
11 FRANCES J. OLSON, GARY J. RICHERT, AND ROSALINDA NAVARRO**

12 by electronic service. Based upon a court order or an agreement of the parties to accept
13 service by electronic transmission, I caused the documents to be sent to the persons at the
14 electronic notification addresses listed below. I did not receive, within a reasonable time
15 after the transmission, any electronic message or other indication that the transmission
16 was unsuccessful.

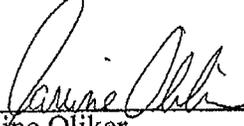
13 Arthur A. Hartinger, Esq. 14 Linda M. Ross, Esq. 15 Jennifer L. Nock, Esq. 16 Michael C. Hughes, Esq. 17 Meyers, Nave, Riback, Silver & Wilson 18 555 12th Street, Suite 1500 19 Oakland, CA 94607 20 Phone: (510) 808-2000 21 Fax: (510) 444-1108 22 Email: ahartinger@meyersnave.com 23 lross@meyersnave.com 24 jnock@meyersnave.com 25 mhughes@meyersnave.com	26 <i>Counsel for Defendants</i> 27 <i>City of San Jose (No. 1-12-CV-225926)</i> 28 <i>City of San Jose and Debra Figone</i> <i>(Nos. 1-12-CV-225928;</i> <i>1-12-CV-226570; 1-12-CV-226574;</i> <i>1-12-CV-227864)</i>
---	---

<p>1 2 3 4 5 6 7 8 9 10 11</p>	<p>Harvey L. Leiderman, Esq. Reed Smith LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Phone: (415) 659-5914 Fax: (415) 391-8269 Email: hleiderman@reedsmith.com</p>	<p><i>Counsel for Defendant Board of Administration for Police and Fire Department Retirement Plan of City of San Jose (No. 1-12-CV-225926)</i></p> <p><i>Necessary Party in Interest The Board of Administration for the 1961 San Jose Police and Fire Department Retirement Plan (No. 1-12-CV-225928)</i></p> <p><i>Necessary Party in Interest The Board of Administration for the 1975 Federated City Employees' Retirement Plan (Nos. 1-12-CV-226570; 1-12-CV-226574)</i></p> <p><i>Necessary Party in Interest The Board of Administration for the Federated City Employees Retirement Plan (No. 1-12-CV-227864)</i></p>
<p>12 13 14 15 16 17</p>	<p>John McBride, Esq. Christopher E. Platten, Esq. Mark S. Renner, Esq. Wylie, McBride, Platten & Renner 2125 Canoas Garden Ave., Suite 120 San Jose, CA 95125 Phone: (408) 979-2920 Fax: (408) 979-2934 Email: jmcbride@wmprlaw.com cplatten@wmprlaw.com mrenner@wmprlaw.com</p>	<p><i>Counsel for Plaintiffs Robert Sapien, Mary McCarthy, Thanh Ho, Randy Sekany and Ken Heredia (No. 1-12-CV-225928)</i></p> <p><i>Teresa Harris, Jon Reger, and Moses Serrano (No. 1-12-CV-226570)</i></p> <p><i>John Mukhar, Dale Dapp, James Atkins, William Buffington and Kirk Pennington (No. 1-12-CV-226574)</i></p>
<p>18 19 20 21 22 23 24 25 26 27 28</p>	<p>Teague P. Paterson, Esq. Vishtasp M. Soroushian, Esq. Beeson, Taylor & Bodine APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051 Phone: (510) 625-9700 Fax: (510) 625-8275 Email: TPaterson@beesontayer.com VSoroushian@beesontayer.com</p>	<p><i>Counsel for Plaintiff AFSCME Local 101 (No. 1-12-CV-227864)</i></p>

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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 Phone: (310) 393-1486 Fax: (310) 395-5801 Email: shsilver@shslaborlaw.com rlevine@shslaborlaw.com jkalinski@shslaborlaw.com	<i>Attorneys for Plaintiff San Jose Retired Employees Association, Howard E. Fleming, Donald S. Macrae, Frances J. Olson, Gary J. Richert and Rosalinda Navarro (No. 1-12-CV-233660)</i>
--	--

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 20, 2013, at San Francisco, California.



Janine Olikar

1 MANATT, PHELPS & PHILLIPS, LLP
2 ASHLEY K. DUNNING (Bar No. CA 185014)
3 KELLY L. KNUDSON (Bar No. CA 244445)
4 One Embarcadero Center, 30th Floor
5 San Francisco, CA 94111
6 Telephone: (415) 291-7400
7 Facsimile: (415) 291-7474

8 MANATT, PHELPS & PHILLIPS, LLP
9 MICHAEL V. TOUMANOFF (CA 106423)
10 11355 W. Olympic Boulevard
11 Los Angeles, California 90064
12 (310) 312-4000 Telephone
13 (310) 312-4224 Facsimile

14 *Attorneys for Marin County Employees' Retirement Association and*
15 *Board of Marin County Employees' Retirement Association*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA

CONTRA COSTA COUNTY DEPUTY
SHERIFFS' ASSOCIATION; UNITED
PROFESSIONAL FIRE FIGHTERS OF
CONTRA COSTA COUNTY, LOCAL
1230; KEN WESTERMANN; SEAN
FAWELL,

Petitioners/Plaintiffs,

vs.

CONTRA COSTA COUNTY
EMPLOYEES' RETIREMENT
ASSOCIATION; BOARD OF
RETIREMENT OF THE CONTRA
COSTA COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION; DOES I-
V,

Respondents/Defendants.

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL 3546;
MICHAEL MOHUN; DAVID ATKIN;
CONTRA COSTA COUNTY DEPUTY
DISTRICT ATTORNEYS
ASSOCIATION; PAUL GRAVES; GARY
KOPPEL; LOCALS 512 AND 2700 OF
THE AMERICAN FEDERATION OF
STATE, COUNTY, AND MUNICIPAL

Case No. MSN 12-1870

**MARIN CERA'S REPORT TO COURT IN
ADVANCE OF CASE MANAGEMENT
CONFERENCE REGARDING ORDER
SUSTAINING, WITHOUT LEAVE TO
AMEND, ITS DEMURRER TO VERIFIED
WRIT PETITION**

Case Management Conference

Date: June 27, 2013

Time: 9:00 am

Dept.: 6

Judge: Hon. David Flinn

1 EMPLOYEES AFL-CIO; PUBLIC
2 EMPLOYEES UNION, LOCAL NO. 1;
3 INTERNATIONAL FEDERATION OF
4 PROFESSIONAL AND TECHNICAL
5 ENGINEERS, LOCAL 21; SERVICE
6 EMPLOYEES INTERNATIONAL
7 UNION, LOCAL 1021 CTW, CLC;
8 DAVID M. ROLLEY; PETER J. ELLIS;
9 SUSAN GUEST; PETER BARTA;
10 PROBATION PEACE OFFICERS
11 ASSOCIATION OF CONTRA COSTA
12 COUNTY; UNITED CHIEF OFFICERS
13 ASSOCIATION; RICHARD SONSTENG;
14 DOMINIC CIOTOLA; AND THE STATE
15 OF CALIFORNIA,

16 Intervenor,

17 RODEO-HERCULES FIRE
18 PROTECTION DISTRICT; CENTRAL
19 CONTRA COSTA SANITARY
20 DISTRICT; BETHEL ISLAND
21 MUNICIPAL IMPROVEMENT
22 DISTRICT; CONTRA COSTA COUNTY;
23 CONTRA COSTA COUNTY FIRE
24 PROTECTION DISTRICT; CONTRA
25 COSTA COUNTY HOUSING
26 AUTHORITY; CONTRA COSTA
27 COUNTY LOCAL AGENCY
28 FORMATION COMMISSION; FIRST
FIVE OF CONTRA COSTA COUNTY;
IN-HOME SUPPORT SERVICES;
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA; EAST
CONTRA COSTA COUNTY FIRE
PROTECTION DISTRICT; BYRON,
BRENTWOOD, KNIGHTSEN UNION
CEMETERY DISTRICT; RODEO
SANITARY DISTRICT; SAN RAMON
VALLEY FIRE PROTECTION
DISTRICT; CONTRA COSTA
MOSQUITO & VECTOR CONTROL
DISTRICT; AND MORAGA/ORINDA
FIRE PROTECTION DISTRICT,

Real Parties In Interest.

24
25 Marin County Employees' Retirement Association and the Board of Retirement of
26 Marin County Employees' Retirement Association (collectively, "Marin CERA") are
27 Respondents in Marin County Superior Court Case Number CIV 1300318 (the "Marin Action").
28 This Report is to advise the Court, prior to the Case Management Conference scheduled for June

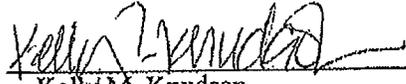
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27, 2013 in this Court ("CMC"), of the following material development in the Marin Action.

On June 19, 2013, the Marin County Superior Court sustained, without leave to amend, Marin CBRA's demurrer to the Verified Writ Petition therein as set forth in the Order attached hereto as Exhibit 1.

Dated: June 24, 2013

MANATT, PHELPS & PHILLIPS, LLP

By: 

Kelly M. Knudson
Attorneys for Respondents
MARIN COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION; BOARD OF
RETIREMENT OF THE MARIN COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION

309356841.2

Exhibit 1

FILED

JUN 19 2013

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: *J. Edwards, Presiding*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN

MARIN ASSOCIATION OF PUBLIC EMPLOYEES,
et al.,

Petitioners,

v.

MARIN COUNTY EMPLOYEES' RETIREMENT
ASSOCIATION, et al.,

Respondents,

THE STATE OF CALIFORNIA,

Intervenor.

Case No. CV 1300318

ORDER SUSTAINING DEMURRER TO VERIFIED
WRIT PETITION WITHOUT LEAVE TO AMEND

Respondents' Demurrer to the Verified Writ Petition is sustained without leave to amend. The court finds the Respondents' actions implementing Govt. Code §31461, as amended effective January 1, 2013, are proper and that the Public Employees' Pension Reform Act of 2013 is constitutional. The Respondent Board of Retirement has the exclusive authority and responsibility to determine its members "compensation earnable," which is used to

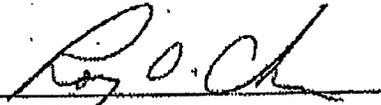
ORDER SUSTAINING DEMURRER TO VERIFIED WRIT PETITION WITHOUT LEAVE TO AMEND

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calculate members' retirement allowance, pursuant to Govt. Code §31461. (See *Howard Jarvis Taxpayers' Ass'n v. Bd. of Supervisors of Los Angeles County* (1996) 41 Cal.App.4th 1363, 1373, and *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 453.) A statute, once duly enacted, is presumed to be constitutional.

SO ORDERED.

Date: June 19, 2013


Roy O. Chernus
Judge

STATE OF CALIFORNIA)
COUNTY OF MARIN)

IN RE *MARIN ASSOCIATION OF PUBLIC EMPLOYEES, et al.,*

vs.

MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al.

ACTION NO.: *CV1300318*

(PROOF OF SERVICE BY MAIL – 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF JUSTICE, SAN RAFAEL, CA 94903. ON June 20, 2013 I SERVED THE WITHIN *ORDER SUSTAINING DEMURRER TO VERIFIED WRIT PETITION WITHOUT LEAVE TO AMEND* IN SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN RAFAEL, CA ADDRESSED AS FOLLOWS:

<i>ARTHUR LIOU LEONARD CARDER, LLP 1330 BROADWAY, SUITE 1450 OAKLAND, CA 94612</i>	<i>GREGG ADAM CARROLL, BURDICK & MCDONOUGH LLP 44 MONTGOMERY STREET, SUITE 400 SAN FRANCISCO, CA 94104</i>
<i>ASHLEY K. DUNNING MANATT, PHELPS, PHILLIPS ONE EMBARCADERO CENTER, 30TH FLOOR SAN FRANCISCO, CA 94111</i>	<i>ANTHONY P. O'BRIEN OFFICE OF THE ATTORNEY GENERAL 1300 I STREET, SUITE 125 PO BOX 944255 SACRAMENTO, CA 94244</i>
<i>KERIANNE R. STEELE WEINBERG, ROGER & ROSENFELD 1001 MARINA VILLAGE PARKWAY, SUITE 200 ALAMEDA, CA 94501</i>	

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 06-20-13

V. ORELLANA

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PROOF OF SERVICE

I, Brea Nivera, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Embarcadero Center, 30th Floor, San Francisco, CA 94111. On June 24, 2013, I served the following:

- **MARIN CERA'S REPORT TO COURT IN ADVANCE OF CASE MANAGEMENT CONFERENCE REGARDING ORDER SUSTAINING, WITHOUT LEAVE TO AMEND, ITS DEMURRER TO VERIFIED WRIT PETITION**

- By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail, addressed as set forth below.
- By Certified Mail, Return Receipt Requested. By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for Certified Mail, return receipt requested, in the United States mail, addressed as set forth below.
- By placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery to the address as set forth below:
- By electronic mail the document(s) listed above to the person(s) set forth below.
- By hand delivering via messenger the document(s) listed above to the person(s) set forth below:

Rockne A. Lucia Jr. Peter A. Hoffmann Steven Betz Rains Lucia Stern, PC 2300 Contra Costa Blvd., Suite 500 Pleasant Hill, CA 94523 Fax: (925) 609-1690 Email: rlucia@rlslawyers.com Email: phoffmann@rlslawyers.com Email: sbetz@rlslawyers.com	Harvey L. Leiderman Kerry Galusha Ann H. Devor Reed Smith LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Fax: (415) 391-8269 Email: hleiderman@reedsmith.com Email: kgalusha@reedsmith.com Email: adevor@reedsmith.com
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<p>Andrew H. Baker Teague P. Paterson Vishtasp Soroushian Beeson, Tayer & Bodine, APC 483 Ninth Street, 2nd Floor Oakland, CA 94607 Fax: (510) 625-8275 Email: abaker@beesontayer.com Email: tpaterson@beesontayer.com Email: vsoroushian@beesontayer.com</p>	<p>Vincent Harrington Kerianne R. Steele Sean D. Graham Anne I. Yen Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501 Fax: (510) 337-1023 Email: vharrington@unioncounsel.net Email: ksteele@unioncounsel.net Email: sgraham@unioncounsel.net Email: ayen@unioncounsel.net</p>
<p>James D. Maynard District Counsel for Bethel Island Maynard Law 1501 28th Street Sacramento, CA 95816 Fax: (916) 733-3512 Email: jmaynard@jamesmaynardlaw.com</p>	<p>Paul Q. Goyette Sarah A. Chesteen Goyette & Associates, Inc. 2366 Gold Meadow Way, Suite 200 Gold River, CA 95670 Fax: (916) 851-1995 Email: sarah@goyette-assoc.com</p>
<p>W. David Holsberry Davis, Cowell & Bowe, LLP 595 Market Street Suite 1400 San Francisco, CA 94105 Fax: (415) 597-7201 Email: wdh@dcbsf.com</p>	<p>Robert J. Bezemek Law Office of Robert J. Bezemek 1611 Telegraph Ave Ste 936 Oakland, CA 94612 Fax: (510) 763-4255 Email: rjbezemek@bezemeklaw.com</p>
<p>Peter W. Saltzman Arthur A. Krantz Arthur W. Liou Leonard Carder LLP 1330 Broadway Suite 1450 Oakland, CA 94612 Fax: (510) 272-0174 Email: psaltzman@leonardcarder.com Email: akrantz@leonardcarder.com Email: aliou@leonardcarder.com</p>	<p>Richard D. Pio Roda District Counsel Sarah N. Olinger Special Counsel to the District Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607 Fax: (510) 444-1108 Email: rpioroda@meyersnave.com Email: solinger@meyersnave.com</p>
<p>Christopher E. Platten Carol L. Koenig Wylie, McBride, Platten & Renner 2125 Canoas Garden Avenue, Suite 120 San Jose, CA 95125 Fax: (408) 979-2934 Email: cplatten@wmpirlaw.com Email: ckoenig@wmpirlaw.com</p>	<p>Lyle R. Nishimi Legal Services office Judicial Council of California — Administrative Office of the Courts 455 Golden Gate Avenue San Francisco, CA 94102-3688 Fax: (415) 865-7656 Email: Lyle.Nishimi@jud.ca.gov</p>

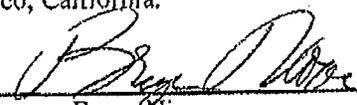
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17 I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct.

19 Executed on June 24, 2013, at San Francisco, California.

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Received

JUN 26 2013

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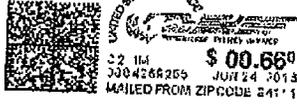
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and Kirk Pennington

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

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

17 v.

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

23 AND RELATED CROSS-COMPLAINT
24 AND CONSOLIDATED ACTIONS.

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

**PLAINTIFFS SAPIEN, ET AL, HARRIS,
ET AL, AND MUKHAR, ET AL FINAL
EXHIBIT LIST**

Trial Date: July 22, 2013
Time: 9:00 a.m.
Dept: 2
Judge: Hon. Patricia M. Lucas

1 Pursuant to the Pretrial Order plaintiffs' Sapien, et al., Harris, et al., and Mukhar, et
 2 al. submit the following Final Exhibit List. To the following, plaintiffs incorporate the Exhibit
 3 List submitted by other co-plaintiffs.

4		
5	Exhibit No. 1	City of San Jose Resolutions No. 75362 – Gurza 98
6	Exhibit No. 2	City of San Jose Resolutions No. 75443 – Gurza 260
7	Exhibit No. 3	City of San Jose Resolutions No. 75451 – Gurza 145
8	Exhibit No. 4	City of San Jose Resolutions No. 75452 – Gurza 229
9	Exhibit No. 5	City of San Jose Resolutions No. 75453 – Gurza 449
10	Exhibit No. 6	City of San Jose Resolutions No. 75762 – Gurza 329
11	Exhibit No. 7	City of San Jose Resolutions No. 75777 – Gurza 175
12	Exhibit No. 8	City of San Jose Resolutions No. 75778 – Gurza 235
13	Exhibit No. 9	City of San Jose Resolutions No. 75779 – Gurza 266
14	Exhibit No. 10	City of San Jose Resolutions No. 75812 – Gurza 462
15	Exhibit No. 11	San Jose City Ordinance No. 78752
16	Exhibit No. 12	San Jose City Ordinance No. 78914
17	Exhibit No. 13	Transcript of the hearing in the binding interest arbitration between International Association of Firefighters Local 230 (hereinafter Local 230) and the City of San Jose before arbitration Bonnie Bogue (Bogue Arbitration) on June 5, 1997 and specifically pages 24 through 26.
18	Exhibit No. 13	
19	Exhibit No. 13	
20	Exhibit No. 13	City of San Jose's Opening Brief in Bogue Arbitration and specifically page 2:10-16.
21	Exhibit No. 14	Closing Brief of the City of San Jose in Bogue Arbitration page 2:20-21
22	Exhibit No. 15	Post Hearing Brief filed in Bogue Arbitration by the City of San Jose, specifically page 1:23 – 2:4.
23	Exhibit No. 16	Transcript testimony of Alex Gurza given in a binding interest arbitration between Local 230 and the City of San Jose on June 5, 2007 before Arbitrator Cossack, pages 1667:22 – 1669:5; 1283:2-22.
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Exhibit No. 17	Testimony of Steven T. Itelson, consulting actuary to the City of Police and Fire Retirement Board on December of 1990 before Arbitrator Kagel, page 81:15 – 82:5.
Exhibit No. 18	Memorandum from San Jose City Manager Leslie R. White dated November 9, 1990 to Fire Chief Robert Osby.
Exhibit No. 19	Unfair Practice Charges filed by the California Public Employment Relations Board alleging that the City of San Jose had not bargained in good faith to impasse before placing Measure B on the June 12, 2012 ballot.
Exhibit No. 20	Memorandum from Debra Figone, City Manager to all City Employees dated March 4, 2008 regarding retiree health care developments.
Exhibit No. 21	Statement of Sam Licardo on July 16, 2012 posted on CNN (SJSU Report) website.
Exhibit No. 22	Job postings by the City of San Jose Fire Department provided in discovery.
Exhibit No. 23	Declaration of Christopher E. Platten submitted in Opposition to Motion for Summary Adjudication filed May 3, 2013.
Exhibit No. 24	December 29, 1997 - <u>Opinion memo</u> of <u>Susan Devencenzi</u> , Deputy City Attorney regarding allocation of actuarial gains.
Exhibit No. 25	San Jose Memorandum May 13, 2011 re Fiscal Reforms – SJ – Sapien 146-156
Exhibit No. 26	San Jose Memorandum December 1, 2011 – SJ – Sapien 332-333
Exhibit No. 27.	State Auditor's Report, August 2012, Report 2012 - 106

Dated: June 21, 2013

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PLATTEN & RENNER

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