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(ENDORSED)
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DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

S. VERA

9 Attorneys for Defendant and Cross-Complainant
10 City of San Jose

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

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

Case No. 1-12-CV-225926
[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864]

**DEFENDANT CITY OF SAN JOSE'S
OPPOSITION TO PLAINTIFFS'
MOTIONS IN LIMINE**

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

19
20 AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS
21

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

BY FAX

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1 **I. INTRODUCTION**

2 Plaintiffs have filed a total of three *motions in limine*. As set forth below, each motion
3 must be denied.

4 **II. MOTION NO. 1 – WHICH SEEKS TO EXCLUDE EXHIBITS COMPRISING**
5 **PART OF THE CHARTER’S LEGISLATIVE HISTORY – MUST BE DENIED**

6 Filed by plaintiffs SJPOA and SJREA (and joined by the other plaintiffs), Plaintiffs’
7 Motion in Limine No. 1 seeks to exclude four exhibits (Nos. 5207, 5210, 5212 and 5213) based on
8 the argument that these documents do not constitute “proper” legislative history. Plaintiffs argue
9 that these exhibits were not actually reviewed and considered by the San Jose City Council when
10 it placed the 1965 San Jose Charter Amendment on the ballot, and they should thus be excluded
11 under the authority of *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133
12 Cal.App.4th 26, 30-37 (2005).

13 As an initial matter, the Court has already taken judicial notice of these exhibits (pursuant
14 to the City’s request and without objection from plaintiffs.) The City submitted them as Exhibits
15 R, U, W, and X to its Supplemental Request for Judicial Notice in Support of Its Motion for
16 Summary Adjudication. (See Declaration of Arthur Hartinger In Support of Defendant’s
17 Opposition to Plaintiffs’ Motions in Limine (“Hartinger Decl.”), ¶¶2-3, Exhs. A & B.) The Court
18 granted the City’s request. (*Id.*) There is no legitimate basis to revisit this issue.

19 Plaintiffs did not and cannot now dispute the relevance of these exhibits, in that they are
20 part of the legislative file, the public record of the 1964 Charter Committee meetings, which led to
21 the final Charter proposal adopted by the voters in 1965. (The 1965 Charter is the Charter
22 adopting the key retirement provisions at issue in this litigation.) The record shows that
23 employees were concerned that the City could reduce their existing benefits under the new Charter
24 proposal, with the eventual outcome being that the Charter Committee adopted new provisions
25 establishing “minimum benefits,” but with a delegation to the City Council permitting it to adopt
26 new (and richer) plans, subject to a reservation of rights to “repeal or amend any such retirement
27 system....” (Charter § 1503.)

28 Plaintiffs’ argument is thus that these records were not actually received in the course of

1 the legislative process. The City agrees with the general legal principle that when the Court
2 considers legislative intent, the Court must evaluate the intent of the legislative body as a whole,
3 and there must be evidence that the documents at issue were, in fact, received in the course of the
4 legislative process. *See Quintano v. Mercury Casualty Co.*, 11 Cal.4th 1049 (1995). This *in limine*
5 motion fails because the legislative record shows that each of these four exhibits was in fact
6 reviewed and considered by the Charter Revision Committee.

7 Attached as Exhibits C through J to the Hartinger Declaration are copies of each of the
8 challenged exhibits, along with the relevant minutes from the Charter Revision Committee
9 meetings showing that each of these four letters was properly provided to and considered by the
10 Committee. (The relevant sections of the minutes are highlighted with brackets.) Notably, each of
11 these four challenged exhibits (Nos. 5207, 5210, 5212, and 5213) are addressed to the Charter
12 Revision Committee, and there is a presumption that the legislative body enacting the changes
13 received and considered the documents.¹ Exhibits D, F, H and J (at the bracketed sections)
14 unequivocally show that each of these four challenged trial exhibits was received by and
15 considered by the San Jose City Charter Revision Committee. Because the factual underpinning
16 of this motion is inaccurate, these exhibits are not excludable under the principles articulated in
17 *Kaufman & Broad* and *Quintano*.

18 If necessary, the City Clerk can authenticate these records. It is would be clear error at this
19 juncture to preclude their admission – each facially shows they were received by the City’s
20 Charter Revision Committee. And again, the Court previously took judicial notice of these
21 exhibits.

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¹ The recipient of Exhibit 5210 (Hartinger Dec., Exh. E) is not clear from the face of the document but Exhibit F shows that it was received by the Charter Revision Committee.

1 **III. PLAINTIFFS' MOTION NO. 2 – WHICH WOULD EXCLUDE EVIDENCE**
2 **OF THE CITY'S FINANCIAL CONDITION AND UNDERLYING**
3 **MOTIVATION FOR PLACING MEASURE B ON THE BALLOT – IS**
4 **OVERBROAD AND SHOULD BE DENIED FOR SEVERAL, SEPARATE**
5 **AND INDEPENDENT REASONS**

6 The second SJPOA and SJREA *motion in limine* is exceedingly broad and seeks to
7 exclude virtually all evidence and argument related to the City's financial hardship and its
8 motivation in placing Measure B on the ballot. The argument advanced by plaintiffs is summed
9 up at page 3 of the motion where they state that "economic conditions, budget decisions, the
10 City's fiscal health, and the motive for the City officials putting Measure B on the ballot are
11 entirely unrelated to the Court's inquiry whether the City violated the vested rights of its
12 employees." This statement is completely inaccurate. The evidence that plaintiffs seek to exclude
13 (substantial City witness testimony and at least three proposed exhibits) is key historical evidence
14 which informed and influenced the City's conduct. In addition, the *City's financial condition and*
15 *its intent and motivation have been specifically put at issue by a number of the claims brought by*
16 *plaintiffs themselves.*

17 **A. The Plaintiffs' Claims Place the City's Motive and Intent Behind Measure B**
18 **Directly at Issue**

19 Plaintiffs' primary argument is that the City's fiscal condition and financially based
20 decisions are irrelevant because "municipal arguments based on fiscal health do not justify a city
21 walking away from pension obligations," citing *Bellus v. City of Eureka*, 69 Cal.2d 336, 352
22 (1968).² This argument is wrong because plaintiffs have directly placed the City's motive and
23 intent at issue.

24 The Second Cause of Action to the AFSCME Amended Complaint seeks a judicial
25 determination that Measure B is an unlawful bill of attainder. A "bill of attainder" is a "legislative

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27 ² This case does not really stand for the proposition cited by plaintiffs. The *Bellus* Court held that
28 a City is obligated to provide promised pension benefits. *Id.* at 352. There was no reservation
29 right clause at issue in *Bellus*, and the circumstances there are much under different than those
30 presented in this lawsuit.

1 act[] ... that appl[ies] either to named individuals or to easily ascertainable members of a group in
2 such a way as to inflict punishment on them without a judicial trial.” *Legislature of the State of*
3 *California v. Eu*, 54 Cal. 3d 492, 525 (1991) (citations omitted). Courts look to three tests to
4 determine punishment: (1) an “historical test” to “determine whether the subject legislation
5 imposes a kind of punishment traditionally deemed prohibited by the federal Constitution;” (2) a
6 “functional test” of whether the law “reasonably can be said to further nonpunitive legislative
7 purposes;” and (3) a “motivational” test, “inquiring whether the legislative record evinces a
8 congressional intent to punish.” *Eu*, 54 Cal. 3d at 526 (citations omitted) (emphasis added).

9 The City demurred to this cause of action and in overruling that challenge, the Court’s
10 single finding was that AFSCME had stated sufficient facts to proceed to trial on the
11 “motivational” test. To satisfy the “motivational” test for punishment, AFSCME must prove that
12 the legislation or ballot arguments were intended to *punish* those individuals for any particular
13 past misconduct.” *Eu*, 54 Cal. 3d at 527 (emphasis in original). Motivation is unquestionably an
14 issue with respect to this claim. Since the City’s motivation is thus at issue, the City clearly is
15 entitled to offer evidence of its actual motivation which is to ameliorate the out of control pension
16 costs—and to show that motivation, the City necessarily must offer evidence of the underlying
17 financial conditions and its responses thereto. The exact evidence that plaintiffs seek to exclude
18 on this motion is what the City must present to support its defense to the Bill of Attainder claim.

19 Furthermore, both SJPOA and AFSCME assert in their complaints that Measure B (at
20 section 1514-A) violates the constitutional rights of City employees to petition for redress of
21 grievances. (AFSCME Amended Complaint, Sixth Cause of Action and SJPOA Amended
22 Complaint, Fourth Cause of Action). Under section 1514-A, if the Court holds that Measure B
23 may not lawfully require a 4% pension contribution to help defray unfunded liabilities, then the
24 City will impose an alternative 4% wage reduction. Plaintiffs argue that this wage cut alternative
25 was intended to frighten City employees into foregoing any legal challenge to the terms of section
26 1506-A. (Obviously plaintiffs’ own actions in bringing six different lawsuits show the flaw in that
27 argument.) Thus, again, the City’s intent and motivation for placing Measure B has been placed
28 directly at issue by these causes of action.

1 Given that the City’s motivation for placing Measure B on the ballot is at issue, the City
2 must obviously be permitted to show the motivation underlying Measure B – which includes the
3 financial and services crisis, and the unsustainable costs facing the City’s retirement and post
4 employment benefit programs. The City will and must be permitted to defend itself by offering
5 evidence and argument that this alternative provision was presented to the voters because of the
6 serious financial issues facing the City and that section 1514-A was intended to assure that
7 sufficient future savings would be realized in order to assure both the viability of the City’s
8 pension and compensation programs, and Essential City Services. The City is able and entitled to
9 defend against this “right to petition” argument by showing the financial hardship and financial
10 necessity which in turn lead to the City presenting Measure B to the voters in order to resolve
11 these problems—and not to punish or chill plaintiffs’ constitutional rights.

12 Finally, AFSCME asserts a violation of Civil Code section 52.1 at its Seventh Cause of
13 Action. This section is also called the “Bane Act.” To prevail under this section, plaintiff must
14 prove that the City *intentionally interfered* with a constitutional right. See *Shoyoye v. County of*
15 *Los Angeles*, 203 Cal.App.4th 947, 958 (2012) (intentional as opposed to negligent conduct is
16 required to prove a Bane Act violation). Because intentional conduct is implicated by this claim,
17 the City is entitled to defend by establishing that it lacked any such intent—and it can do so by
18 showing that its intent was to address and seek resolution of the crushing financial burdens that it
19 faces, and preserve Essential City Services. In order to assert its defense to the Bane Act claim,
20 the City necessarily must offer evidence of the relevant financial issues.

21 In sum, because a number of the claims in this case directly implicate the underlying
22 financial background and financial decision making by the City, the plaintiffs cannot seriously
23 argue that the City should be restricted in its ability to defend against those claims. Because the
24 evidence challenged here tends to prove or disprove disputed facts, it is relevant under Evidence
25 Code section 210, and it must be permitted.

26 **B. The City’s Defenses are Premised in Part on Financial Related Evidence**

27 As set forth in the City’s trial brief, the City will prove that the Supplemental Retirement
28 Benefit Reserve led to anomalous and unreasonable financial outcomes. Further, the City will

1 prove that the plaintiffs agreed to make increased retirement contribution in light of economic
2 conditions and the enormous unfunded liabilities facing the retirement plans. Financial evidence
3 is also relevant to the City's defense that any financial disadvantages caused by Measure B are
4 offset by comparable advantages. *Board of Administration v. Wilson*, 52 Cal.App.4th 1109, 1113
5 (1977).

6 Economic evidence regarding the City's defenses is obviously relevant, and all relevant
7 evidence is admissible as a matter of law. Cal. Ev. Code § 351.

8 **C. The Financial Background Is Also Relevant Simply as Background**
9 **Information**

10 It is axiomatic courts may consider background information and the circumstances
11 surrounding the enactment of statutes. *See, e.g., People v. Mel Mack Co.*, 53 Cal. App. 3d 621
12 (1975). It is almost impossible for any party to present any argument for or against the validity of
13 Measure B without presenting the antecedents of the Measure. The Measure was not drafted nor
14 submitted to the voters in a vacuum. There is considerable prior history and thoughtful analysis
15 before the Measure was drafted and placed on the ballot.

16 The City intends to offer evidence of the concerns about the abuses in the disability
17 retirement system and the lack of sustainability of the pension system that the City Auditor Sharon
18 Erickson initially identified. The City will offer evidence showing the early decisions and actions
19 intended to curb the out-of-control costs and the eventual decision to place Measure B on the
20 ballot. The City will offer the testimony of Sharon Erickson (City Auditor), Alex Gurza (Deputy
21 City Manager and Director of the Office of Employee Relations) and Debra Figone (City
22 Manager) to establish the City's mounting financial problems, the intent and motivations to
23 present Measure B to the electorate and, critically, how the various provisions of Measure B are
24 intended to help ameliorate the outstanding problems.

25 It is noteworthy that the City's financial condition is itself part of Measure B. (See the
26 Findings set forth at section 1501-A). To suggest that the Court should exclude such evidence is
27 completely unavailing. How could the City present its evidence of how Measure B is intended to
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1 resolve outstanding issues if the City were to be precluded from explaining those pre-existing
2 issues? Plaintiffs' motion essentially asks the Court to selectively exclude certain portions of the
3 relevant financial history. Such a ruling would lead to a hop scotch and almost arbitrary
4 presentation of evidence where certain financial evidence is permitted, but other similar financial
5 evidence is excluded. The Court should reject such an unworkable process. The challenged
6 evidence provides the necessary historical background supporting the City's conduct and
7 establishing its motivation.

8 For all of these reasons, the second Motion *in Limine* filed by SJPOA and SJREA (and
9 joined by the others) must be denied.

10 **IV. THE MULTIPART MOTION *IN LIMINE* FILED BY THE *SAPIEN* PLAINTIFFS**
11 **MUST BE DENIED**

12 The *in limine* motion brought by the *Sapien* plaintiffs involves broad brush evidentiary
13 objections to various exhibits. These plaintiffs assert that the City is precluded from claiming
14 fiscal emergency as a defense here, and they also assert that the City cannot argue that any
15 significant disadvantages caused by Measure B are matched by comparable advantages. These
16 arguments are unavailing.

17 First, the City has already indicated that it is not claiming that a "fiscal emergency"
18 justified a contract impairment.³ This defense is a narrow defense based on a line of authority
19 beginning with *Home Building & Loan Association v Blaisdell*, 42 U.S. 311 (1934). The fact that
20 the City is not claiming a fiscal emergency under this doctrine does not logically preclude a
21 showing of the underlying circumstances that motivated Measure B.

22 Second, plaintiffs are wrong that the City "cannot" argue that Measure B disadvantages
23 were offset by comparable advantages. The City does make this alternative argument, and pleaded
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26 ³ See the letter to Gregg Adam from Arthur A. Hartinger, dated June 25, 2013, attached as Exhibit
27 K to the Hartinger Declaration.
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1 it as an affirmative defense.⁴ Notably, plaintiffs do not offer evidence or legal authority
2 supporting their proposition that the City is somehow precluded from proffering evidence relevant
3 to this defense.

4 With respect to the exhibits referenced by the *Sapien* plaintiffs in their motion, the City
5 notes that the primary objection is that the plaintiffs had not received the documents. All parties
6 have been actively exchanging supplemental discovery as the case approaches trial. All of the
7 documents challenged by the *Sapien* plaintiffs have been or will shortly be produced (although the
8 City is still finalizing some of its demonstrative exhibits).

9 (1) **Exhibits 5508-5509:** Exhibit 5508 has been provided to Plaintiffs, and so the
10 foundational objection must accordingly fail. (Likewise Exhibit 5509 will shortly be produced
11 and so the foundational objection fails.) The relevance objection to Exhibit 5508 should be
12 overruled until the City actually offers the document, lays the foundation and establishes the
13 relevance. Because the City has designated over 100 potential exhibits and may offer into
14 evidence a lesser subset, it makes little sense to engage in protracted argument over exhibits prior
15 to the time that the exhibits are actually identified and offered into evidence. Assuming the City is
16 able to establish relevance through the sponsoring witnesses, the current objections lacks merit.

17 (2) **Exhibits 5600-5605:** These documents either have already been produced (Nos.
18 5600-5603) or will shortly be produced (5604-05). Virtually all of these documents are also
19 publicly available. The foundational and alleged lack of relevance objections should wait until the
20 City offers these exhibits into evidence through sponsoring witnesses.

21 (3) **Exhibit 5800-5803:** These documents will shortly be produced and like the others,
22 for the most part are publicly available. Again, the evidentiary objections asserted by plaintiffs
23 should be ruled upon at the time any of these exhibits are identified and offered into evidence at
24 trial.

25 (4) **Exhibit 6000-6061:** These documents are all demonstrative exhibits and for the
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27 ⁴ *E.g.*, see the Eighth Affirmative Defense in the City's Answer to AFSCME's Complaint.
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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 July 8, 2013, I served true copies of the following documents described as **Defendant City of San Jose's Opposition to Plaintiffs' 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 July 8, 2013, at Oakland, California.


Kathy Thomas

SERVICE LIST

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