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8 Attorneys for City of San Jose

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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SANTA CLARA**

12 SAN JOSE RETIRED EMPLOYEES
ASSOCIATION,
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14 Plaintiffs/Petitioners,
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16 v.
17 CITY OF SAN JOSE; DOES 1 through 50,
inclusive,
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19 Defendants/Respondents.
20 BOARD OF ADMINISTRATION FOR THE
FEDERATED CITY EMPLOYEES
RETIREMENT SYSTEM,
21
22 Real Party in Interest.

Case No. 1-12-CV-225926
*[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864,
and 112CV233660]*

**ANSWER TO FIRST AMENDED
COMPLAINT FOR INJUNCTION AND
DECLARATORY RELIEF AND
VERIFIED PETITION FOR WRIT OF
MANDATE**

Amended Complaint Filed: July 12, 2013
Trial Date: July 22, 2013

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24 Defendant City of San Jose ("City") answers and responds to the First Amended
25 Complaint for Injunction and Declaratory Relief and Verified Petition for Writ of Mandate ("First
26 Amended Complaint") filed by Plaintiff San Jose Retired Employees Association ("Plaintiff").
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28

1 Amended Complaint.

2 **EIGHTH AFFIRMATIVE DEFENSE**

3 8. Plaintiff's causes of action based on breach of contract are barred by the statute of
4 frauds.

5 **NINTH AFFIRMATIVE DEFENSE**

6 9. Plaintiff is not entitled to injunctive relief on the ground that they have adequate
7 legal remedies.

8 **TENTH AFFIRMATIVE DEFENSE**

9 10. To the extent Plaintiff is able to prove its claims, although such is not admitted
10 hereby or herein, Plaintiff had a duty to mitigate any damages to which it may be entitled, but
11 failed to do so.

12 **ELEVENTH AFFIRMATIVE DEFENSE**

13 11. Plaintiff fails to state facts sufficient to constitute a cause of action for a taking
14 without just compensation in violation of Article 1, Section 19 of the California Constitution.

15 **TWELFTH AFFIRMATIVE DEFENSE**

16 12. Plaintiff fails to state facts sufficient to constitute a cause of action for a deprivation
17 of property without due process of law in violation of Article 1, Section 19 of the California
18 Constitution.

19 **THIRTEENTH AFFIRMATIVE DEFENSE**

20 13. Plaintiff fails to state facts sufficient to constitute a cause of action for a violation
21 of separation of powers under Article 3, Section 3 of the California Constitution.

22 **FOURTEENTH AFFIRMATIVE DEFENSE**

23 14. Plaintiff fails to state facts sufficient to constitute a cause of action for a violation
24 of the California Pension Protection Act in violation of Article 16, Section 17 of the California
25 Constitution.

26 **FIFTEENTH AFFIRMATIVE DEFENSE**

27 15. Plaintiff's causes of action, and each of them, are barred on the ground that neither
28 it nor its members filed a government claim pursuant to the Government Claims Act, Cal. Gov.

1 Code Section 945.4.

2 **SIXTEENTH AFFIRMATIVE DEFENSE**

3 16. Plaintiff is not entitled to a writ of mandate on the ground that it has no adequate
4 legal remedies; there exists a plain, speedy, and adequate alternative remedy, in the ordinary
5 course of law.

6 **SEVENTEENTH AFFIRMATIVE DEFENSE**

7 17. Plaintiff's causes of action, and each of them, are barred on the grounds that
8 Plaintiff and Defendant did not have a contractual relationship, i.e., Plaintiff or its members are
9 not party to any alleged contract, including any memorandum of agreement between the City and
10 any of its employee organizations, that promised retired employees and their beneficiaries the
11 vested rights asserted in the First Amended Complaint.

12 **EIGHTEENTH AFFIRMATIVE DEFENSE**

13 18. Plaintiff's causes of action, and each of them, are barred on the ground that Plaintiff
14 lacks standing, in whole or in part, to assert the claims alleged in First Amended Complaint.

15 **NINETEENTH AFFIRMATIVE DEFENSE**

16 19. Plaintiff's causes of action are barred by the privileges and immunities applicable
17 to public agencies, including without limitation California Government Code Sections 815, 815.2,
18 815.6, 818, 818.2, 818.8, 820.4, 820.2, 820.8, 821, and 822.2.

19 **TWENTIETH AFFIRMATIVE DEFENSE**

20 20. If the City's current or former employees or any of them made promises or
21 representations alleged in the First Amended Complaint, although such is not admitted hereby or
22 herein, such statements were made outside the scope of employment and not by agents of
23 Defendant and, thus, the City is not liable for such acts.

24 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

25 21. Plaintiff's causes of action, and each of them, as pled in the Petition and Complaint
26 are uncertain, lack ripeness and are not justiciable.

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TWENTY-SECOND AFFIRMATIVE DEFENSE

22. Plaintiff's causes of action, and each of them, are barred by the doctrine of separation of powers in that a court cannot find an implied contract by the governing body of a public entity in the absence of clear legislative intent to create such a binding contract, nor can a court bind a public entity to an implied contract term for a period extending far beyond the term of the contract of employment in the absence of clear legislative intent.

TWENTY-THIRD AFFIRMATIVE DEFENSE

23. Plaintiff is not entitled to the relief requested on the ground that it would compel an illegal act or violation of duty by a public officer or official.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. The First Amended Complaint is barred because the relief requested by the Plaintiff would compel Defendant to exercise its discretionary and/or legislative power in a particular manner.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. The Petition and Complaint are barred because the relief would abrogate Defendant's municipal and police powers granted by the California and United States Constitutions.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. Plaintiff's claims are barred by laches, waiver, estoppel, and/or the statute of limitations: Cal. Civ. Proc. Code Section 339 (2 years for unwritten contract); Cal. Civ. Proc. Code Section 342 (referral to Government Claims Act); Cal. Gov. Code Section 911.2 (6 mos. to 1 year to file claims); Cal. Gov. Code Section 945.6 (time to file after claim filed).

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

27. Plaintiff fails to state facts sufficient to constitute grounds to grant the costs of suit incurred herein and for any other relief.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

28. Plaintiff fails to state facts or statutory authority sufficient to entitle them to recover attorneys' fees. Plaintiff is not entitled to attorney's fees under California Civil Code section 52.1,

1 Civil Procedure Code section 1021.5, Government Code section 800, or any other statute.

2 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

3 29. The allegations of Plaintiff are frivolous, unreasonable and/or without foundation,
4 and accordingly, the City should recover all costs and attorneys' fees incurred herein from
5 Plaintiff.

6 **THIRTIETH AFFIRMATIVE DEFENSE**

7 30. Defendant reserves the right to amend this answer to assert additional affirmative
8 defenses and to supplement, alter or change the answer and defenses upon revelation of more
9 definitive facts, and upon the undertaking of discovery and investigation in this matter.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Defendant respectfully prays for relief as hereinafter set forth:

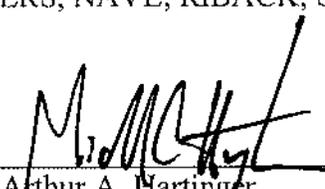
- 12 1. That all relief requested in the First Amended Complaint be denied with prejudice;
13 2. That Plaintiff and its members take nothing by their action;
14 3. That judgment be entered in Defendant's favor;
15 4. That Defendant be awarded all costs of suit, including reasonable attorneys' fees;

16 and,

- 17 5. Such further and other relief as the Court deems just and proper.

18 DATED: July 19, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

19
20 By: 

21 Arthur A. Hartinger

22 Linda M. Ross

23 Jennifer L. Nock

24 Michael C. Hughes

Attorneys for Defendant City of San Jose

25 2111350.1

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF ALAMEDA

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

5 On July 19, 2013, I served true copies of the following documents described as

6 **ANSWER TO FIRST AMENDED COMPLAINT FOR INJUNCTION AND**
7 **DECLARATORY RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE**

8 on the interested parties in this action as follows:

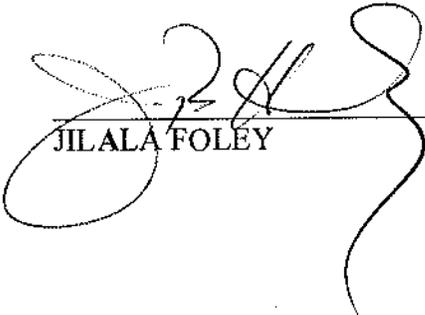
9 **SEE ATTACHED SERVICE LIST**

10 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
11 persons at the addresses listed in the Service List and placed the envelope for collection and
12 mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave,
13 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.

14 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
15 document(s) to be sent from e-mail address **jfoley@mcyersnave.com** to the persons at the e-mail
16 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.

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 July 19, 2013, at Oakland, California.

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JILALA FOLEY

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 E-Mail: jmcbride@wmprlaw.com cplatten@wmprlaw.com mrenner@wmprlaw.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 Gonzalo Martinez Amber L. West CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 Telephone: 415-989-5900 Fax: 415-989-0932 E-Mail: 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 E-Mail: tpaterson@beesontayer.com; vsoroushian@beesontaver.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 <u>E-Mail:</u> hleiderman@reedsmith.com; jrieger@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 <u>E-Mail:</u> shsilver@shslaborlaw.com rlevine@shslaborlaw.com jkalinski@shslaborlaw.com</p> | |

SJPOA MASTER EMAIL LIST

Case No. 1-12-CV-225926

Consolidated with Case Nos. 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, 1-12-CV-227864 and 1-12-CV-23360

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