

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

DEPARTMENT 2

HON. PATRICIA LUCAS, JUDGE

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7	SAN JOSE POLICE OFFICERS	)	
	ASSOCIATION,	)	
8	PLAINTIFF,	)	CASE NO.
	VS.	)	1-12-CV-225926
9	CITY OF SAN JOSE, BOARD OF	)	SAN JOSE, CA
	ADMINISTRATION FOR POLICE AND	)	JULY 22, 2013
10	FIRE RETIREMENT PLAN OF CITY OF	)	
	SAN JOSE, AND DOES 1-10	)	
11	INCLUSIVE,	)	
	DEFENDANTS.	)	
12		)	

REPORTER'S TRANSCRIPT

OF

TESTIMONY AND PROCEEDINGS

APPEARANCES:

20	FOR THE PLAINTIFF	GREGG MCLEAN ADAM
	SAN JOSE POA:	AMBER L. WEST
21		GONZALO MARTINEZ
		ATTORNEYS AT LAW

22	FOR THE PLAINTIFFS	JOHN MCBRIDE
	SAPIEN, HARRIS, AND	CHRISTOPHER E. PLATTEN
23	MUKHAR:	ATTORNEYS AT LAW

24	FOR THE PLAINTIFF	TEAGUE P. PATERSON
	AFSCME LOCAL 101:	VISHTAP M. SOROUSHIAN
25		ATTORNEYS AT LAW

ROSE M. RUEMLER, CSR NO. 9053  
OFFICIAL REPORTER

APPEARANCES: (CONTINUED)

FOR THE PLAINTIFF       STEPHEN H. SILVER  
SAN JOSE RETIRED        JACOB A.KALINSKI  
EMPLOYEES ASSOC:       ATTORNEYS AT LAW

FOR THE DEFENDANTS     HARVEY L. LEIDERMAN  
CITY OF SAN JOSE,       KERRY K. GALUSHA  
BOARD OF ADMINISTRATION ATTORNEYS AT LAW  
FOR POLICE AND FIRE  
DEPARTMENT RETIREMENT  
PLAN OF CITY OF SAN JOSE:

FOR THE DEFENDANTS     ARTHUR A. HARTINGER  
CITY OF SAN JOSE        GEOFFREY SPELLBERG  
AND DEBRA FIGONE:       LINDA M. ROSS  
ATTORNEYS AT LAW

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1 SAN JOSE, CA; JULY 22, 2013

2 DEPARTMENT 2

PATRICIA M. LUCAS, JUDGE

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4  
5 THE COURT: We're on the record this morning in  
6 San Jose Police Officers' Association versus City of San  
7 Jose.

8 Will counsel please state your appearances.

9 MR. ADAM: For San Jose Police Officers'  
10 Association, Carroll, Burdick, Gregg Adam, Gonzalo  
11 Martinez, and Amber West.

12 MR. MCBRIDE: John McBride and Christopher Platten  
13 on behalf of the Sapien, Mukhar, and Harris plaintiffs.

14 MR. PATERSON: Teague Paterson and Vishtasp  
15 Soroushian for AFSCME Local 101.

16 MR. SILVER: Stephen Silver and Jacob Kalinski for  
17 the San Jose Retired Employees' Association.

18 MR. SPELLBERG: Geoff Spellberg for City of San  
19 Jose.

20 MR. HARTINGER: Arthur Hartinger for City of San  
21 Jose, your Honor.

22 MS. ROSS: Linda Ross for City of San Jose.

23 MR. LEIDERMAN: Good morning, your Honor. Harvey  
24 Leiderman and Kerry Galusha, Reed Smith, for the real  
25 parties in interest, the Boards of Retirement of the  
26 Police and Fire Pension Fund and Federated Pension Fund.

27 THE COURT: Per your request, we added a third  
28 table. Are we going to have people permanently in the

1 jury box? I thought three tables was going to be enough.  
2 You're not sitting as close to each other as I thought you  
3 would.

4 MR. SILVER: One more chair here for plaintiffs if  
5 they wish.

6 THE COURT: We don't have room for multiple  
7 lawyers for every party. So are you okay in the jury box?

8 MS. WEST: We'll make do.

9 THE COURT: Wherever you are, does everybody have  
10 a seat? If you have a seat, please take it.

11 Thank you for your efforts and cooperation in  
12 premarking exhibits. The clerk will let you know at this  
13 time what her records are concerning premarked exhibits.

14 THE CLERK: The binders that I have are -- the  
15 Court has as plaintiffs' premarked exhibits a binder  
16 numbered from 1 to 51; and then there are seven binders  
17 which consist of numbers 200 to 522, and there's a binder  
18 that has numbers 602 to 655, and another binder that's  
19 numbers 700 to 711.

20 For the defendants' premarked exhibits, I have a  
21 binder up there that has number 5000 to 5123. That's  
22 Volume 1. Then there's Volume 2 binder, which consists of  
23 number 5200 to 5303. Volume 3 is 5400 to 5459. Volume 4  
24 is 5460 to 5508. And Volume 5 is 5600 to 5908.

25 (Plaintiffs' Exhibits 1-51, 200-522, 602-655,  
26 700-711 were marked for identification.)

27 (Defendants' Exhibits 5000-5123, 5200-5303,  
28 5400-5459, 5460-5508, 5600-5908 were marked

1 for identification.)

2 THE COURT: So I have seen the stipulation  
3 concerning the order which the plaintiffs will speak to.  
4 Thank you for that.

5 Is there a stipulation concerning when one  
6 plaintiff objects, all plaintiffs object, or do we want to  
7 have a record of that? It's okay either way with me. I  
8 just want to know for the benefit of the defendants and  
9 the court reporter and the Court.

10 MR. MCBRIDE: John McBride on behalf of our  
11 clients and on behalf of all the other plaintiffs.

12 I believe there is an agreement. One objection is  
13 one for all. One objection will be made by whoever makes  
14 it, and that will cover all the plaintiffs.

15 THE COURT: So the plaintiffs collectively are  
16 proposing a stipulation that when an objection is made on  
17 behalf of one plaintiff, the Court should consider all the  
18 objections?

19 MR. MCBRIDE: That's correct.

20 THE COURT: Are the defendants willing to so  
21 stipulate?

22 MR. HARTINGER: There are different claims with  
23 respect to different plaintiffs, so I'm afraid we cannot  
24 stipulate to that, your Honor.

25 THE COURT: Okay. I'm not sure I understand your  
26 concern. Maybe you can help me understand.

27 MR. HARTINGER: For example, the Retiree  
28 Association has three different -- they're asserting

1 claims against three different sections, and that goes on  
2 with respect to the other plaintiffs.

3 We obviously want to make this as expeditious and  
4 convenient as possible, but I'm concerned because there  
5 are different interests at stake. One objection with  
6 respect to one party would be different than with respect  
7 to another party, and how that sorts itself out later, we  
8 don't know.

9 THE COURT: Okay. It's a matter of stipulation.  
10 If the defendants don't stipulate, we won't do it that  
11 way.

12 I'm not sure I understand that concern. An  
13 objection to a question is an objection to a question.  
14 Perhaps you can reflect on it further, and if you change  
15 your mind later, you can let me know.

16 MR. HARTINGER: Very well, your Honor.

17 THE COURT: Relative to the point you just made,  
18 though, I'm hoping that we can get early on a stipulation  
19 setting forth the dates of everybody's operative  
20 pleadings, and most helpful to the Court would be a chart  
21 of all the claims and defenses as to which you are  
22 requesting a ruling.

23 And by chart, I have in mind -- for example, there  
24 are many identical or similar claims concerning taking.  
25 The idea is that there be a chart that would help me keep  
26 track of taking claims by referencing the cause of action  
27 so I would know looking at it where everybody's taking  
28 claims are located. So if that's something that's

1 possible, if I could have that tomorrow, that would be  
2 great.

3 I see from the witness lists next to a few names  
4 there's the designation "if necessary for authentication."  
5 I'm hoping no witnesses are necessary only for  
6 authentication. Any further update on that?

7 MR. MCBRIDE: John McBride.

8 We have not received authentication for, I  
9 believe, about ten of our exhibits that the City is  
10 willing to stipulate to the authentication. They did  
11 stipulate to the authentication of a certain number of  
12 documents. I think it's 15 in total. We have a total of  
13 29 exhibits, so there are some that -- most of those, we  
14 believe, should be authenticated, should be stipulated to,  
15 but we haven't got the stipulation.

16 I might also indicate, your Honor, while we're  
17 talking about the exhibits, our exhibits are the 200  
18 series. Those are the only ones that we are proffering on  
19 behalf of our clients.

20 THE COURT: Are there any exhibits that are going  
21 to be admitted pursuant to stipulation?

22 MR. SPELLBERG: Your Honor, Geoff Spellberg for  
23 defendant.

24 We did make a valiant effort at that last week,  
25 and, unfortunately, with the change in numbers by the  
26 plaintiffs towards the end, the effort faltered.

27 But on the authentication issue, it's the City's  
28 view if it's a document created by the City, kept in the

1 normal course of business, we agree that it's  
2 authenticated unless there's some issue like it's  
3 incomplete or unsigned.

4 THE COURT: I'm hoping for a little bit more,  
5 which is that there's a stipulation as to authentication  
6 as to everything unless there's some legitimate dispute  
7 about whether it's authentic.

8 MR. ADAM: Plaintiffs are willing to do that, your  
9 Honor.

10 Gregg Adam.

11 MR. MCBRIDE: Your Honor, on behalf --

12 THE COURT: I think that you should keep working  
13 on this.

14 MR. SPELLBERG: Yes, your Honor.

15 MR. MCBRIDE: I might indicate, your Honor, on  
16 behalf of our clients, we have not raised authentication  
17 issues as to any of the documents. We have a lot of  
18 arguments of why they shouldn't be admitted, but not on  
19 authentication.

20 MR. PATERSON: Teague Paterson.

21 I would second that and would agree to a  
22 stipulation that anything emanating from the City, the  
23 retirement system, would be authenticated.

24 THE COURT: I hear from two plaintiffs a proposed  
25 stipulation that all exhibits are authentic. Objections  
26 to admissibility are reserved.

27 MR. ADAM: From the POA as well, your Honor.

28 MR. KALINSKI: Jacob Kalinski, K-A-L-I-N-S-K-I.

1           We would stipulate as to the authenticity of all  
2 exhibits. I think we can also stipulate to the  
3 admissibility of some. We would continue to do so, your  
4 Honor, with the City.

5           MR. SPELLBERG: Your Honor, Geoff Spellberg for  
6 the City.

7           We agree, if it came from City files, created by  
8 the City, kept in the normal course of business, unless  
9 there's some problem with it, we agree it's authenticated.  
10 We agree to the Court's suggestion. It's authenticated  
11 from the City's files, unless there's an objection  
12 thereto.

13           THE COURT: That's not the proffered stipulation,  
14 though. The proffered stipulation is that all exhibits  
15 that have been premarked are deemed to be authentic;  
16 objections to admissibility reserved. Did I understand  
17 that correctly?

18           MR. KALINSKI: Yes, your Honor.

19           MR. MCBRIDE: Yes.

20           MR. SPELLBERG: We will not agree to that. We  
21 agree for City records, but not for some of the documents  
22 coming in from the plaintiff.

23           THE COURT: Is that because there are certain  
24 documents as to which there's a dispute about  
25 authentication?

26           MR. SPELLBERG: Exactly.

27           THE COURT: Do the plaintiffs know which those  
28 are?

1 MR. SPELLBERG: Yes, your Honor. We spent a long  
2 time last week doing this. Your Honor --

3 THE COURT: What we're going to do is, you're  
4 going to keep working on this, but let's not spend more  
5 court time on this.

6 MR. ADAM: Your Honor, I hope we can keep working.  
7 We wrote to Mr. Spellberg, Mr. Hartinger, Ms. Ross on  
8 Friday, asking them to give any reasons as to why they  
9 were not --

10 THE COURT: We're not going to spend more court  
11 time on this. You're going to keep working on it.  
12 There's no stipulation now. I remain hopeful.

13 I'm ready to rule on the City's motion to  
14 reconsider the motion in limine. My tentative ruling is  
15 to deny the motion.

16 I understand the City's concerns, and the ruling  
17 will be without prejudice to objections including 352, but  
18 I'm very mindful of the trial within a trial concern, but  
19 I don't think it's appropriate to preclude all this  
20 evidence at the outset. So does anybody want to address  
21 that tentative ruling?

22 MR. HARTINGER: Your Honor, this was our motion,  
23 and we just would, again, reemphasize that this issue is  
24 front and center to the quo warranto action. It's replete  
25 throughout that case. They're litigating that case.  
26 That's a different case. So mindful of what the Court has  
27 just said, we will be prepared to object on 352 grounds in  
28 the event it goes too far.

1 THE COURT: All right, then. I'm adopting that  
2 tentative ruling.

3 And, Madam Clerk, with respect to the City's  
4 motion to consider motion in limine number one, that  
5 request is denied. It is without prejudice to 352  
6 objections at the time the evidence is offered.

7 And I hope that the plaintiffs hear my concern  
8 about the trial within a trial issue and focus on that  
9 which is relevant in this proceeding and limit your  
10 evidence accordingly.

11 So I believe there are four requests for judicial  
12 notice. You requested that I let you know today about  
13 those. I think only one of them is opposed. So the  
14 Sapien plaintiffs, on July 8, made a request for judicial  
15 notice, and if I am not correct as to the status of  
16 opposition, please tell me that. I think I'm up to date  
17 on the papers that you filed, but as you know --

18 MR. SPELLBERG: Your Honor, there's some objection  
19 from the City to the POA request.

20 THE COURT: We're not talking about that now.  
21 This is the Sapien request for judicial notice. So I  
22 think it's unopposed.

23 MR. SPELLBERG: Correct.

24 MR. HARTINGER: Your Honor, we viewed that request  
25 as encompassed within the motion in limine with respect to  
26 collateral actions, so we assumed it would be excluded  
27 because it was -- as I recall, it was a single request for  
28 a PERB charge in 2013 which postdated the date that the

1 Court made a ruling with respect to collateral matters and  
2 limited those PERB charges with respect to the AFSCME  
3 action.

4 THE COURT: This request relates to one document?

5 MR. HARTINGER: Correct.

6 THE COURT: That I take judicial notice of its  
7 existence -- as everybody knows, I can't take judicial  
8 notice of the proof of anything stated, just simply the  
9 existence of this complaint.

10 So what I hear you say, Mr. Hartinger, is that the  
11 existence of the complaint is not relevant.

12 MR. HARTINGER: Correct, your Honor.

13 THE COURT: What's the date of the complaint?

14 MR. HARTINGER: It's 2013.

15 THE COURT: Okay. Mr. McBride?

16 MR. MCBRIDE: That's not our complaint. Our PERB  
17 complaint deals -- is before then -- I take it back.

18 THE COURT: It's number SFCE-9690.

19 MR. MCBRIDE: Let me -- the answer to that, Judge,  
20 is we are not offering it, not asking judicial notice be  
21 taken of it because of whether or not there's another  
22 issue to be tried. We simply raised it in the motion for  
23 summary adjudication and raise it here on the basis that  
24 the issue of whether or not there was good faith  
25 bargaining is not something this Court is going to be  
26 asked and could not consider because PERB has  
27 jurisdiction.

28 THE COURT: Based on what you said at the

1 beginning, that you're not asking for judicial notice, I'm  
2 taking it that the request for judicial notice filed  
3 July 8 is withdrawn.

4 MR. MCBRIDE: I misspoke, your Honor. I thought  
5 it was talking about a different complaint. The PERB  
6 complaint that we have, which is exhibit -- I don't have  
7 the exhibit number in front of me. It's one of our 200  
8 exhibits, 200 numbered exhibits, is the PERB complaint  
9 that we are asking the Court take judicial notice of, so I  
10 misspoke when I started out.

11 THE COURT: That one complaint that's mentioned in  
12 your July 8 notice, you are asking me to take judicial  
13 notice of its existence?

14 MR. MCBRIDE: Yes.

15 THE COURT: Why is that relevant to this case?

16 MR. MCBRIDE: I think it goes to the extent the  
17 City has argued, and if they don't argue, then it doesn't  
18 come in. To the extent they argue at all that, in fact,  
19 before they put Measure B on the ballot, they bargained in  
20 good faith. We say the Court does not have jurisdiction  
21 even to determine this issue because PERB has exclusive  
22 jurisdiction. That's the only reason we're asking for.

23 THE COURT: I'm going to deny that, then, subject  
24 to you renewing the request if the events you describe  
25 come to pass.

26 City filed a request for judicial notice on July  
27 11. I don't think it's opposed.

28 MR. ADAM: Your Honor, only to the extent the City

1 is trying to introduce the truth of what's asserted in the  
2 documents, no opposition to the Court taking notice of the  
3 documents.

4 THE COURT: That's all that judicial notice is.  
5 So that request is granted.

6 The AFSCME request filed July 16 was extensively  
7 opposed, so I'm going to come back to that.

8 The POA request filed July 18 was not opposed. Is  
9 there opposition to that?

10 MR. SPELLBERG: Your Honor, we received those --  
11 that request late on Friday. We haven't had a chance --  
12 there's a number that we are opposing. I'm not sure what  
13 would be the best way to do that.

14 THE COURT: When are you presenting your  
15 opposition?

16 MR. SPELLBERG: We can have that at the end of the  
17 day, your Honor.

18 THE COURT: Any reason why we can't defer that  
19 ruling till tomorrow?

20 MR. ADAM: No, your Honor.

21 MR. PATERSON: Teague Paterson for AFSCME.

22 AFSCME and the Retired Employees' Association also  
23 filed a request for judicial notice --

24 THE COURT: I said that.

25 MR. PATERSON: -- on July 19, in addition to the  
26 AFSCME notice.

27 THE COURT: I didn't even get it. If you filed it  
28 on Friday, I haven't seen it. As I've said before, the

1 court clerk's office staff is very much reduced. Just  
2 because you filed something downstairs doesn't mean I get  
3 it. Even now I don't have it, so I don't know what time  
4 you filed it on Friday.

5 MR. HARTINGER: I don't believe we have a copy  
6 either, your Honor.

7 THE COURT: Did you serve it?

8 MR. PATERSON: Yes, we served it, your Honor. And  
9 I believe we E-Mailed it as well as served it by mail.  
10 Yes, your Honor. It's my hope that if we are able to  
11 reach a stipulation related to City and retirement system  
12 documents, that we can withdraw that second notice,  
13 speaking for AFSCME.

14 THE COURT: I'll take that as an indication to  
15 defer ruling until you tell me you need me to.

16 MR. PATERSON: Speaking for AFSCME, yes, your  
17 Honor. There's also --

18 MR. KALINSKI: That's fine with the REA as well.

19 THE COURT: Is there any update for me on your  
20 July 16 request for judicial notice given the opposition?

21 MR. PATERSON: Your Honor, I think we are able to  
22 submit it. I do have some authorities regarding documents  
23 available from the government website if those authorities  
24 are of interest to your Honor.

25 THE COURT: Anything else?

26 MR. PATERSON: No, your Honor.

27 THE COURT: So the update is that you want to give  
28 me more authorities?

1 MR. PATERSON: I suppose so, your Honor.

2 THE COURT: So you're not withdrawing any portion  
3 of your request? For example, citing the Sixth  
4 District -- not citing it. Requesting judicial notice of  
5 the Sixth District opinion on Judge McKinney's case in  
6 view of the City's authority that cases ought to be cited  
7 and not the subject of request for judicial notice?

8 MR. PATERSON: Your Honor, that's a fair point,  
9 and we will withdraw that one.

10 THE COURT: Anything else? Like the Diesenroth  
11 opinion, which is not final. That was F.

12 MR. PATERSON: Thank you, your Honor. The Court  
13 may, in its discretion, take judicial notice of any court  
14 record in the United States. That's Evidence Code 451.

15 THE COURT: Why would the existence of  
16 Judge Arand's order be relevant in this case?

17 MR. PATERSON: Your Honor, frankly, in our view,  
18 it goes to another imposition of unconstitutional terms  
19 against AFSCME and AFSCME's members.

20 THE COURT: How would that be relevant in this  
21 case that Judge Arand in another case with different facts  
22 made that order?

23 MR. PATERSON: Well, I think, your Honor, it goes  
24 to at least the bill attainder and the right to petition  
25 arguments.

26 THE COURT: I think if it were final, that would  
27 be a plausible argument.

28 Are your authorities already served on the City,

1 or are those forthcoming?

2 MR. PATERSON: No, your Honor, they are not. We  
3 received -- we worked on our opposition over the weekend,  
4 so, no. And we do not have a written opposition to  
5 submit.

6 THE COURT: You mean a reply to the opposition?

7 MR. PATERSON: That's right.

8 THE COURT: So I'm deferring this until somebody  
9 tells me it's fully briefed. Actually, I'm deferring both  
10 of AFSCME's notices until there's a request for ruling.

11 MR. HARTINGER: May I inquire? I thought I heard  
12 Mr. Paterson say that he was prepared to submit. I just  
13 want to confirm he's asking for a reply brief at this  
14 point.

15 THE COURT: I thought I heard him say that he  
16 wants to reply to your opposition with respect to the July  
17 16 notice.

18 MR. PATERSON: Your Honor, I'm willing to submit  
19 on the July 16 notice.

20 THE COURT: I must have misunderstood. I thought  
21 you said you were going to give me more authorities on  
22 what's required to establish that something is an official  
23 government document. Are you taking the position that  
24 everything that comes out of the government's office is  
25 something that's subject to Evidence Code 452?

26 MR. PATERSON: Your Honor, perhaps I should  
27 provide a written reply.

28 THE COURT: Okay.

1 MR. HARTINGER: That's fine, your Honor.

2 THE COURT: And when will that be presented?

3 MR. PATERSON: Would tomorrow morning be  
4 acceptable to your Honor?

5 THE COURT: Okay. So then there wouldn't be a  
6 ruling before Wednesday.

7 So I've received your notices concerning  
8 witnesses, and there's an order stated in those. Any  
9 further comment on witnesses or the order of witnesses?

10 MR. MCBRIDE: John McBride.

11 Your Honor, Mr. Platten may well have to be an  
12 authenticating witness if we don't have a stipulation as  
13 to certain transcripts, certain briefs that were filed by  
14 the City, but we don't know.

15 THE COURT: I'm going to express again that no  
16 witness, especially counsel, will be called to  
17 authenticate documents.

18 MR. SPELLBERG: Your Honor, I have two comments.  
19 Number one, on the plaintiffs' list of witnesses, they  
20 have Carol Garcia set on Tuesday, tomorrow. The Court has  
21 ruled that she would testify on Thursday. Her deposition  
22 was only taken yesterday afternoon, so I presume that's an  
23 error on their part, but I want to make sure. I won't  
24 receive the transcript until Tuesday.

25 THE COURT: I think that was the ruling. I think  
26 that was the purpose of the ruling. The concern is that  
27 the plaintiffs otherwise will be resting before then. I  
28 think we can address that concern.

1           MR. SPELLBERG: Then the second point, your Honor,  
2 for today, they've listed Donna Busse as a witness. She's  
3 the head of the Retirement Board. She's a City employee.  
4 She's been subpoenaed. I'm prepared to make a motion to  
5 quash the subpoena. As I understand it, she's only being  
6 called to authenticate documents, and I continue to  
7 reiterate that the City agrees that if they came out of  
8 the Retirement Board office, City office, and are kept in  
9 the normal course of business, documents are authentic  
10 City documents. We don't believe Ms. Busse should be  
11 called this afternoon. If necessary, I'm prepared to make  
12 a motion to quash the subpoena which was served on her  
13 Friday.

14           THE COURT: Is there a stipulation from the  
15 plaintiffs that at least with respect to City documents,  
16 there's no need for authentication?

17           MR. ADAM: Yeah.

18           MR. PATERSON: Your Honor, yes. However, that  
19 doesn't obviate the need to call Ms. Busse with respect to  
20 admissibility for purposes of establishing the documents  
21 as business records.

22           THE COURT: That's not authentication. The  
23 witness list should say "if necessary for admissibility."

24           MR. KALINSKI: Your Honor, I think there are also  
25 some documents that -- I guess I'm not sure what the City  
26 means emanating from the City. There were certain  
27 documents that the City produced that were letters from  
28 actuaries received by Retirement Services. As long as

1 those documents would be encompassed with the City's  
2 stipulation of authenticity, then we would say Donna Busse  
3 is not necessary.

4 THE COURT: Keep working on this, please.

5 MR. SPELLBERG: Your Honor, one point -- I'm  
6 sorry -- on Ms. Busse. The subpoena -- she's available to  
7 come this afternoon if need be. But the subpoena asked  
8 her to bring hundreds of Retirement Board documents,  
9 originals, that AFSCME already has in their possession.  
10 In fact, what AFSCME did is identify the documents with  
11 Bates numbers and asked her to bring originals. We object  
12 and move to quash that part of the subpoena. There's no  
13 possible way for us to pull hundreds of original documents  
14 when we get the subpoena Friday.

15 THE COURT: Why would that be necessary?

16 MR. PATERSON: Your Honor, if we stipulate to  
17 authenticity, it certainly would not be necessary. And we  
18 also indicated to counsel that those documents were  
19 already documents that were contained in AFSCME's exhibit  
20 binders, and so if they're willing to accept that, there's  
21 no need to bring the original documents.

22 THE COURT: If they're willing to accept what?

23 MR. PATERSON: The authenticity of the documents  
24 contained in the witness binder.

25 THE COURT: So the question is, are the exhibits  
26 in the AFSCME witness binder within the scope of your  
27 proffered stipulation?

28 MR. SPELLBERG: I don't know, your Honor. They

1 sent us their list on Friday, and we haven't had a chance  
2 to go through all of it. Most of them are. Anything that  
3 came from the retirement office we agree is authentic.

4 THE COURT: Keep working on this.

5 Anything else on witnesses?

6 As I mentioned last week, I would and now have  
7 studied here trial briefs and have a few questions.

8 Mr. Adam.

9 MR. ADAM: I'm sorry, your Honor. I didn't catch  
10 your remarks.

11 THE COURT: I have some questions about the trial  
12 briefs so that I can better understand the evidence when  
13 it starts to come in.

14 Mr. Adam, in your brief, page 12, line 15, going  
15 through the chronology, there's a paragraph about the  
16 amendments to the retirement plan, 1979. Then the last  
17 sentence of that paragraph at lines 15 and 16 refers to a  
18 brief six-year period before all current police officers  
19 were hired. I don't know what that refers to.

20 MR. ADAM: Well, your Honor, I believe this came  
21 up in the MSC hearing. I think I explained that in  
22 approximately 1971, the City Council passed the resolution  
23 saying that the City paid all unfunded liability.

24 THE COURT: What's the six years?

25 MR. ADAM: I don't know where six years came from.  
26 I think we may have miscounted and it would have been  
27 eight years, from '71 to '79.

28 THE COURT: I know where the eight years came

1 from.

2 In the next paragraph at line 20, you're referring  
3 to an action by the City consistent with a theory that it  
4 was required they pay all UALL. I'm just wondering if  
5 there are going to be documents that reflect this  
6 sentence.

7 MR. ADAM: I believe there are, your Honor. This  
8 is a period of approximately ten years when the retirement  
9 system was in surplus and the City passed some --  
10 something or other to allow it to reduce its normal costs.  
11 I believe we have documentation of that.

12 THE COURT: You don't have to tell me now.

13 MR. ADAM: I believe it's Mr. Kaldor's memorandum.  
14 Mr. Kaldor is -- K-A-L-D-O-R -- is chairman of the  
15 Retirement Board. I believe there was a memorandum from  
16 March of 2011.

17 THE COURT: Then also on that page, going over to  
18 the next page, so your theory with respect to the MOA is  
19 that basically was a one-time waiver and not a waiver for  
20 all time or not a waiver at all?

21 MR. ADAM: It's not a waiver at all. I think the  
22 City is admitting in its trial brief that vested rights  
23 cannot be negotiated away by a labor union. These are  
24 individual rights. That's in the City's trial brief.  
25 That's one of the few things we seem to agree on in this  
26 case. Vested rights cannot be negotiated away.

27 So, of course, that begs the question of, is this  
28 all a vested right, which is one of the underlying

1 questions in this trial. So if it's a vested right, it  
2 doesn't really matter what the POA did in 2010 for one  
3 year. It cannot be waived. Cannot be negotiated away.

4 What our theory is, what simply happened, there  
5 was a wage concession by the POA that was very narrow in  
6 its scope. It was not just a, "Here, we're giving up this  
7 money for this one-year period. We're giving up this  
8 money. You say you've got all kinds of retirement costs.  
9 We're going to allow you to put this money towards  
10 retirement costs."

11 Our evidence is going to show that the money was  
12 placed in the individual employee accounts. So it's a key  
13 point, your Honor, but we're trying to anticipate the  
14 City's argument, and it seemed like the City was making a  
15 waiver argument, but, again, I'm pointing out that the  
16 City itself was acknowledging that a vested right can't be  
17 waived.

18 THE COURT: In the same section on page 13, at  
19 line 3, there's a quote. I couldn't tell from the way you  
20 put it. Is that the San Bernardino case, or is it from  
21 some other source?

22 MR. ADAM: You know, your Honor, I believe it came  
23 from the Jones Day opinion, which, of course, the Court  
24 has ruled -- subsequently ruled would not come in. I  
25 believe Jones Day was citing to San Bernardino and a US  
26 support case called Allied Chemicals and Alkali, big, long  
27 name, and I certainly can get you the cite for that  
28 proposition.

1 THE COURT: That case is cited in San Bernardino?

2 MR. ADAM: I'm pretty sure the Allied Chemical is  
3 certainly cited in the City's trial brief. I believe it's  
4 cited in the footnote in the City's trial brief, Allied  
5 Chemical, United States Supreme Court case.

6 THE COURT: So I have a couple questions for the  
7 City. The first is, at the very bottom of page 18 at the  
8 end of your footnote, the plaintiffs' briefs assumed that  
9 the City was not going to take the position that there was  
10 a benefit in Measure B, and this last sentence suggests  
11 that you are going to take that position.

12 MR. HARTINGER: That's correct, your Honor. The  
13 City is taking that position with respect to -- let me  
14 start, for example, with the wage cut versus contribution  
15 trade off. It's the City's position that the contribution  
16 and the unions have conceded this, in effect, is more a  
17 favorable alternative to wages.

18 THE COURT: That's what I thought you were saying.  
19 The point is that it's better to increase the contribution  
20 than the cut wages?

21 MR. HARTINGER: That is one of the points.

22 THE COURT: But don't you have to compare what  
23 Measure B proposes to what there was before, and that's  
24 really two alternatives within Measure B?

25 MR. HARTINGER: Well, that's going to be the  
26 argument, your Honor, in terms of the contours of the  
27 doctrine as it exists today and with respect to a variety  
28 of different things that Measure B impacts and what the

1 alternatives are.

2 THE COURT: So what you're saying is it's not a  
3 comparison between Measure B and what there was before;  
4 the relative benefit could be alternatives within  
5 Measure B?

6 MR. HARTINGER: It could be. Because you're  
7 looking at how Measure B is going to operate into the  
8 future. They have a ten percent wage cut that they're  
9 operating under right now.

10 THE COURT: I want to be sure I understand your  
11 argument. That is, what you're saying, that it's not  
12 necessarily comparison between Measure B and what it was  
13 before.

14 MR. HARTINGER: Not necessarily, but it could be.  
15 And those are the two alternative arguments.

16 THE COURT: Okay. Let me be sure I understand  
17 your argument. If the analysis were Measure B versus what  
18 there was before, is the City taking a position that  
19 there's a benefit? A culpable new advantage?

20 MR. HARTINGER: Yes, your Honor, we're reserving  
21 that argument.

22 THE COURT: Okay. Based on what facts?

23 MR. HARTINGER: Because what you have before is a  
24 scenario where the City was, for a period of time, picking  
25 up unfunded liabilities, and so the alternative there was  
26 a straight wage cut.

27 THE COURT: Okay. I understand.

28 Next question is footnote 17 about IRS approval.

1 Does IRS approval matter to the decision to be made in  
2 this case?

3 MR. HARTINGER: Well, the City is not going to  
4 implement the VEP without IRS approval, and we do not yet  
5 have approval, so that could impact the Court's decision  
6 because we're -- for example, we get something from the  
7 IRS impacting whatever happens with the VEP, the City will  
8 react accordingly. We're operating under that state of  
9 facts.

10 THE COURT: Based on what you know now, can you  
11 tell me a time frame in which you expect to obtain an  
12 answer?

13 MR. HARTINGER: I don't think we can. It's in  
14 this IRS vortex.

15 THE COURT: So perhaps some of you remember Judge  
16 Peter Stone who used to famously say at the outset of the  
17 motion calendar, "Who's proud of your papers?" And then,  
18 "If you're proud of your papers, do you want to add to  
19 them?"

20 I understand that all of you are proud of your  
21 trial briefs but that some of you nevertheless want to add  
22 to them. So mindful that I have studied them, who wants  
23 to add to their trial briefs?

24 MR. ADAM: By way of opening statement, your  
25 Honor, POA has got about six to eight minutes.

26 MR. MCBRIDE: John McBride on behalf of Sapien, et  
27 al.

28 I have about three or four minutes, and it will

1 not cover anything specifically set forth in the trial  
2 brief.

3 MR. SILVER: Stephen Silver.

4 Probably about five minutes or less.

5 MR. PATERSON: Your Honor, on behalf of AFSCME, we  
6 are proud of our trial briefs, so we will not provide  
7 argument.

8 MR. HARTINGER: If you add all that up, it's  
9 coming close to my time.

10 THE COURT: I have in mind that arithmetic.

11 MR. ADAM: Your Honor, could we have a moment?  
12 We're trying to set up. We're having technical  
13 difficulties. The City is kind of superimposing over us.

14 MR. HARTINGER: I need to turn off my computer.

15 THE COURT: Go ahead and do that. That's fine.

16 MR. PATERSON: Your Honor, I wonder before the  
17 presentation of evidence if we could have a moment to  
18 confer about stipulation on exhibits because I think it  
19 might be helpful for the parties to do that.

20 THE COURT: Okay. We're a ways from presentation  
21 of evidence given what you just told me about opening  
22 statements. That's a good idea, and there definitely will  
23 be a break before we start evidence in which you can do  
24 it. I hope you will.

25 Go ahead.

26 MR. ADAM: Thank you, your Honor.

27 Obviously, there's a lot of attention that this  
28 case has garnered, but at its core, this is a

1 straightforward case. It's about a creation and the  
2 impairments of vested rights. Case is not about the  
3 City's financial condition. As regrettable as that has  
4 been in recent years, Mr. Hartinger confirmed that the  
5 City is not contending that Measure B's impairments vested  
6 rights is justified by fiscal emergency.

7 I'm going to move fairly quickly through my  
8 initial slides. I'm going to spend a little more time on  
9 the issue of retiree health care, which was not addressed  
10 in the motion for summary adjudication. In my opinion,  
11 it's one of the more complex issues in the case.

12 So, first of all, the core issue really is whether  
13 vested rights and contractual rights can be legislated  
14 away, and the evidence is going to show that decades of  
15 California law says no. San Jose discretion over pension  
16 rights is constrained by the California Constitution.

17 We certainly have recent guidance from our Supreme  
18 Court in the REOC case that both sides have already relied  
19 extensively. And, of course, in interpreting the rights  
20 in this case, the Court's largely going to be drawing on  
21 official City legislation. That includes the charter  
22 itself, which imposes a duty to provide a retirement  
23 system and delegates to the City Council the ability to do  
24 that by ordinance. It also sets certain minimum standards  
25 in the charter, but the charter allows the council, in its  
26 discretion, to grant greater or additional benefits, and  
27 the Court will recall the legislative history from the  
28 1961 amendment to the charter.

1           So what are we here arguing about? We're arguing  
2 about a number of aspects of Measure B. Not all of  
3 Measure B, but a number of aspects of Measure B, one of  
4 the most prominent being the position in Measure B that  
5 from now on, unfunded liability will be split on a 50/50  
6 basis between the City and its employees. Historically,  
7 at least since 1971, the City has paid all unfunded  
8 liability.

9           It will cause up to a 16-percent salary reduction  
10 by way of additional pension contributions to employees.

11           Of course, the Court is familiar with the  
12 municipal code sections that were argued at length in the  
13 motion for summary adjudication, 3.36, 1520, and 1550,  
14 which apply to police and fire being the primary  
15 ordinances that require the City to pay for unfunded  
16 liability.

17           SRBR is similar, your Honor. We have clear  
18 ordinances, passed by the City, that mandate that when  
19 certain investment returns are achieved, there will be an  
20 additional disbursement of funds to retirees.

21           Here's the more complex issue. It's going to take  
22 a --

23           THE COURT: Mr. Adam, can you give me one second?

24           MR. ADAM: Certainly.

25           THE COURT: Go ahead.

26           MR. ADAM: What does Measure B do to retiree  
27 health care? It does three things: First of all, it  
28 intrudes on an area that's largely a subject of collective

1 bargaining. That is, it sets certain minimum  
2 contributions.

3 There are various collective bargaining agreements  
4 that can be evidence to inform the Court saying the  
5 parties can actually be at the forefront of efforts to  
6 prefund retiree medical, efforts by the unions that are  
7 unparalleled anywhere in the United States.

8 Measure B in Section A requires now through the  
9 charter that the employees must pay a minimum of 50  
10 percent of cost of retiree health care. That will now  
11 include both normal cost and unfunded liability, i.e. now  
12 you have to pay the unfunded liability from before.

13 Secondly, subsection B, City passes a so-called  
14 reservation of rights clause that basically seeks to  
15 prevent anything past or future becoming a vested right  
16 that's in the field of retiree health care.

17 Finally, you're going to hear a lot of evidence  
18 including two of the POA's three witnesses discussing this  
19 issue of a low-cost plan. What Measure B tries to do is  
20 to redefine a low-cost plan to define it as the plan  
21 that's available to any City employee.

22 For police officers, historically, as the evidence  
23 will show, their retiree medical benefits have always been  
24 attached to what current police officers receive, and the  
25 evidence is going to show that since this clause went into  
26 effect on January 1 of this year, that is one -- this is  
27 one of the sections that is in effect -- retired police  
28 officers have had to pay hundreds of dollars per month in

1 extra retiree medical contributions.

2 So, of course, we're talking about vested right  
3 here. We have to establish what the vested right is.  
4 We're going to look at an ordinance from 1984 that  
5 expressly provided the retired police officers will be  
6 entitled to a medical premium paid by the City in the same  
7 amount as is currently paid on employees in the City in  
8 classification for which the member retired. So  
9 explicitly tying it to your former position. That's 1984.

10 Then in 1987, there was an interest arbitration  
11 under Charter Section 1111. That's the section in the  
12 charter that requires an arbitrator to determine what the  
13 working conditions, wages, and hours will be when police  
14 or fire fighters get to impasse. 1987 arbitration  
15 involved both the police and the fire fighters and the  
16 City. There were counter proposals on the subject of  
17 retiree medical. The City made a proposal. It's hard to  
18 read. I think if actually both the City and the Court had  
19 a hard copy of this, it would help.

20 MR. HARTINGER: This is a hard copy of?

21 MR. ADAM: What you're seeing before you. I think  
22 we're on page 12 here.

23 MR. HARTINGER: Thank you.

24 MR. ADAM: You see that in that arbitration  
25 decision, your Honor, it was the City's proposal that  
26 employees would be entitled to the City paying their  
27 premiums for 100 percent of the lowest plan option.

28 The next page shows -- this will be coming into

1 evidence -- that the arbitration panel granted the City's  
2 proposal, so that became a Memorandum of Agreement on the  
3 next page. It was a four-year Memorandum of Agreement  
4 just dealing with retirement benefits. You'll hear the  
5 term as the tripartite agreement, your Honor, because the  
6 agreements involved both police, fire fighters, and the  
7 City, again, covering retirement benefits.

8 Section 6.2 of that agreement basically  
9 incorporates the arbitrator's award for the retirement  
10 plan will pay the premium for the lowest priced medical  
11 plan available to active employees. Of course, this is an  
12 MOA only applicable to police officers and fire fighters.

13 In 1997, after the arbitrator's award, you'll see  
14 that there was a new ordinance that amended Section  
15 3.36.1930, and it specifically amended the ordinance to  
16 implement the arbitrator's award, and we've highlighted on  
17 that first line --

18 THE COURT: Is this tripartite agreement '87 or  
19 '97?

20 MR. ADAM: The tripartite agreement is '96 to  
21 2000. The arbitration, your Honor, came in '97 and then  
22 had retroactive effect, so it lasted for four years. Then  
23 after the arbitration decision, you'll see the ordinance  
24 was amended specifically for the purpose of implementing  
25 the arbitrator's award.

26 On the next page, we have Section 1930 again. The  
27 language became a little bit more ambiguous in the  
28 ordinance as opposed to the MOA. As we will explain in

1 the hierarchy of what takes precedence, a collective  
2 bargaining agreement, as a creature of state law, would  
3 supersede a local ordinance when there's a conflict. That  
4 was passed in 1997.

5 In 2000, the MOA was extended for another four  
6 years. This is the MOA solely on retirement benefits.  
7 This exists separate and apart from the MOA on other wages  
8 and conditions of employment. This is for police and fire  
9 with the city. The same language was continued in Section  
10 6.2. Substantively, the same language continued the  
11 benefit that the retirees would be entitled to the  
12 lowest-priced medical insurance plan, single or family  
13 coverage, available to active employees.

14 Now, subsequently, there was no -- the tripartite  
15 agreements ended, and there was no further retirement  
16 benefits. The retirement benefits went into the  
17 individual MOAs. But what the evidence is going to show,  
18 your Honor, from the testimony of retired police officers  
19 and confirmed by excerpts in the police and fire  
20 retirement plan handbook, is that the employees continued  
21 to receive -- retired police officers continued to receive  
22 100 percent of the lowest-cost plan available to active  
23 police officers.

24 Now, interestingly, your Honor, the retiree  
25 benefit on medical actually became a richer benefit than  
26 it did for active employees because, subsequently, the  
27 active employees agreed to reduced medical benefits.  
28 First of all, they dropped to 90 percent of the

1 lowest-cost plan with the remainder paid by the employee.  
2 They're currently at 85 percent of the lowest-cost plan  
3 paid for by the City. The retirees, throughout this  
4 entire period, have continued to receive 100 percent  
5 consistent with the original intention of the 1984  
6 ordinance and the arbitration award.

7 Disability retirement, your Honor. You're going  
8 to see that both the charter and the municipal code have  
9 specific language that ties disability to a police  
10 officer's ability to perform duties in the same  
11 classification he or she held. Measure B changes that and  
12 says -- makes two parts standard. One, can the employee  
13 do any job in the employee's department, including  
14 non-police officer jobs? Two, is the employee incapable  
15 of engaging in any gainful employment for the City?  
16 That's a brand new standard.

17 The COLA, quite similar to the SRBR, your Honor.  
18 You're going to see a lot of ordinances referencing the  
19 three percent COLA. The City's approach in Measure B is  
20 to give the council unilateral authority to suspend the  
21 COLA for up to five years, and the City Measure B  
22 basically authorizes the City to create a forfeiture of  
23 the rights to COLA.

24 To summarize, your Honor, Measure B is not  
25 constitutionally reasonable or necessary. The alterations  
26 it's made are not -- have no material relation to the  
27 theory of pension system and its successful operation.

28 The City partly is going to argue the comparative

1 advantages, but those comparative advantages need to be  
2 contained within the retirement plan. There are none  
3 under Measure B.

4 THE COURT: You're saying that the comparison has  
5 to be Measure B versus what there was before?

6 MR. ADAM: Absolutely.

7 THE COURT: What's the law that says that?

8 MR. ADAM: I believe the whole line of vested  
9 rights cases, Bets, Miller versus State of California,  
10 right through REOC. You see the violations of the  
11 collective bargaining agreement. There's been an  
12 agreement to pay certain amount of prefunding of retiree  
13 health care. Measure B would immediately make that 50  
14 percent total. There's also a threat, your Honor, a more  
15 onerous threat, by the City that if the associations  
16 prevail in this litigation, that in any case the employees  
17 will suffer 16-percent pay cut.

18 So in the City's world, under Measure B, either  
19 they get the 16 percent through the initial contributions,  
20 or if that's declared unlawful, the employees will take a  
21 16-percent salary cut, which we believe is a direct  
22 infringement of our right to petition under the first  
23 amendment to both the United States and the California  
24 constitutions.

25 Finally, there are sections dealing with the  
26 fiduciary responsibilities of the retirement plan. The  
27 City would like to have the retirement plan have fiduciary  
28 responsibilities to the City and the taxpayers, which we

1 believe is clearly precluded by a California  
2 constitutional measure in the Pension Protection Act.  
3 There's a question of the separation of powers where  
4 Measure B has determined that if any part of the Measure B  
5 is declared illegal, it will be for the City Council, not  
6 the Court, to decide issues of severability.

7 Your Honor, we believe this is a straightforward  
8 case. It can largely be determined based on City  
9 legislation, and our only witnesses will be augmenting  
10 that on the subject of retiree health care.

11 Thank you, your Honor.

12 THE COURT: Madam Court Reporter, do you need a  
13 break?

14 THE REPORTER: I'm okay.

15 THE COURT: Who's next?

16 MR. MCBRIDE: Thank you, your Honor. John McBride  
17 on behalf of Sapien, Mukhar, and Harris plaintiffs.

18 Your Honor, our view of this case is that there  
19 really are only three documents that are crucial to be  
20 reviewed. The first two are the two plans. Those plans  
21 are explicit offers by the City to employees. When the  
22 employee comes to work for the City, here is a benefit you  
23 will get. Here is a benefit you will have the entitlement  
24 to earn. That is very clear.

25 We talked in our motions about implied rights,  
26 implied contract rights. These are express. The employee  
27 comes to work for the City, and that employee is covered  
28 by the pension plan. The City has made an express

1 promise. This is what you're going to get.

2 The third document that you have to look at is, of  
3 course, Measure B. And the question -- without going over  
4 what Mr. Adam very cogently expressed, the question is,  
5 does Measure B impair those contract rights? We believe  
6 that without regard to any other evidence, you can look at  
7 those documents and determine that, in fact, clearly  
8 Measure B impairs a number of important contract rights.

9 We've got all of this evidence. It is our belief  
10 that that is the core issue or the core approach to the  
11 case.

12 Obviously, the City makes a claim that the  
13 provision -- they call it the reservation of rights -- in  
14 the charter controls. We don't believe it does. They had  
15 the right. The charter said, "You can preserve these  
16 rights." They didn't do it when they passed the 1961  
17 police and fire department pension plan. They didn't do  
18 it in the 1975 Federated plan, and, therefore, now what  
19 they're trying to do is do what they didn't do then, and  
20 we say they can't do it.

21 Thank you.

22 MR. SILVER: Your Honor, I would like to make a  
23 brief opening statement. This is Stephen Silver. I'm the  
24 attorney for the San Jose Retired Employees' Association.

25 Very briefly. I just want to make it clear that  
26 at least our lawsuit does not seek to invalidate Measure B  
27 in its entirety.

28 In the City's brief, it spends much time talking

1 about how it has the power to take some of the action that  
2 is contained in Measure B. Frankly, with respect to  
3 people who have not earned vested rights, that's true.  
4 Much of what the Measure B does would probably be lawful  
5 for new hires, for people who are hired after the date of  
6 Measure B. The problem is is that what the City has done  
7 has been to alter, reduce benefits that were awarded and  
8 earned by people prior to the passage of Measure B,  
9 particularly those who retired before that time.

10 The last point I want to make, your Honor -- this  
11 is very puzzling to me -- is when I look at the second  
12 sentence in the City's brief, it says, "The voters' stated  
13 objective in Measure B is for the City to provide  
14 essential City services while preserving," and then it  
15 quotes earned benefits as of the effective date of the  
16 act.

17 Then the following sentence says, "The provisions  
18 of Measure B are carefully drawn to avoid taking away any  
19 earned invested benefits and instead focus primarily on  
20 issues affecting active employees." And that's consistent  
21 with Section 1502-A of Measure B, which specifically says  
22 that the act is intended to preserve earned benefits as of  
23 the effective date of that act. It is not intended to  
24 deprive any former employees, my clients, of benefits  
25 earned and accrued for prior service at the time of the  
26 act.

27 Nevertheless, hearing all that, you wonder, why  
28 are the retired employees involved in this lawsuit? Why

1 are we even here? Why didn't the City make it clear if  
2 this is their intent that they weren't going to apply  
3 Measure B with respect to people who had already retired  
4 and earned benefits as they say they intend? Why didn't  
5 they -- at least when we filed the lawsuit, why didn't  
6 they say, "You didn't have to file this lawsuit. We're  
7 not out to take away any benefits that you retirees have  
8 already earned"?

9 And the only answer I can give to that, your  
10 Honor, is that probably like most of the lawsuits that are  
11 pending in this courtroom, or in this courthouse, I should  
12 say, right now, this is really about money. And I think  
13 the only reason that the City has not acted consistent  
14 with the intent it acknowledges in its own brief is  
15 because of the SRBR funds. The City admittedly has taken  
16 money, a considerable sum of money that has already been  
17 earmarked for retirees. This money has already been  
18 earned by the retirees, and the City has proudly, if you  
19 read its brief, said they have used these monies to reduce  
20 the City's obligation to make current retirement  
21 contributions.

22 I think that it's important to emphasize that,  
23 well, certainly the City Council has the discretion as to  
24 when to distribute those monies, although that discretion  
25 must be exercised in accordance with fiduciary standards  
26 and whether or not the failure to properly exercise its  
27 discretion. That may be a matter for another day.  
28 Hopefully not.

1           Clearly, the money has been earmarked for a  
2           limited purpose, and that money -- that purpose is to  
3           provide supplemental benefits to retirees. The City has  
4           taken all of that money away from the retirees. So I  
5           think it's important for your Honor to appreciate that I  
6           think the City has to be consistent and either state  
7           that -- or act in accordance with its stated intent, which  
8           is not to -- which is to preserve earned benefits and not  
9           to take anything away that's already been earned or not.

10          Thank you.

11          THE COURT: May I hear from the City.

12          MR. HARTINGER: Your Honor, I have -- it might be  
13          a good time for a break in the sense I need at least five  
14          minutes to sort of arrange moving parts. So it's up to  
15          the Court.

16          THE COURT: So we're in recess for ten minutes.

17          (Recess.)

18          THE COURT: Mr. Hartinger.

19          MR. HARTINGER: I hope you don't mind if I'm  
20          standing in the well.

21          THE COURT: That's fine.

22          MR. HARTINGER: Can the Court see the screen okay?

23          THE COURT: I can.

24          MR. HARTINGER: Your Honor, thank you for the  
25          opportunity to outline some of the issues and evidence  
26          involved in this challenge to Measure B.

27                 I did want to introduce some of the City  
28          representatives. Debra Figone, who is here, she is the

1 City Manager of the City of San Jose. She's named as a  
2 defendant in the case. Representing the City is Deputy  
3 City Manager Alex Gurza, who is also with us on the  
4 defense side.

5 THE COURT: You know, Mr. Hartinger, you just  
6 reminded me that I probably should make a record of the  
7 entity representatives for the plaintiffs.

8 Mr. Adam?

9 MR. ADAM: Our entity representative on duty, he  
10 will be here after 2:00 p.m., the vice-president, John  
11 Robb.

12 THE COURT: Mr. McBride?

13 MR. MCBRIDE: We don't represent any entities. We  
14 represent individual plaintiffs.

15 MR. PATERSON: Your Honor, AFSCME representative  
16 is Charles Allen. He's on a flight back from his  
17 brother's wedding. He will be here tomorrow.

18 MR. SILVER: The president of the San Jose Retired  
19 Employees' Association is here. Bob Leininger.

20 THE COURT: Thank you.

21 Go ahead, Mr. Hartinger.

22 MR. HARTINGER: Thank you, your Honor.

23 Your Honor, Measure B, the Sustainable Retirement  
24 Benefits and Compensation Act, as we know, was enacted by  
25 70 percent of the City's voters in the June 2012 election.  
26 And there are four key points that the evidence will show.  
27 San Jose voters control their charter. The time Measure B  
28 was adopted. Unless it's implemented, the City's pension

1 and post-employment benefit programs are unsustainable and  
2 out of control and threaten the City's ability to provide  
3 essential City services.

4 This Measure B represents reasonable and lawful  
5 pension reform, and plaintiffs will not be able to meet  
6 their burden of proof to show that the voters acted  
7 unlawfully to control employee compensation.

8 There's a lot of different sections at issue here,  
9 your Honor, and we wanted to sort of lay those out.  
10 Actually, the chart that the Court asked for before is  
11 going to be displayed for you, and we will be happy to  
12 share it with counsel so that they can see if they agree  
13 with what's at issue for the Court.

14 There are 13 sections of Measure B that are  
15 challenged, all or several expressly under the terms of  
16 the measure at Section 1515-A. The Court's review has to  
17 be made with respect to categories of folks who may have  
18 different rights and interests. Retirees are one  
19 category. We have active employees, and there are future  
20 employees.

21 And I don't think I've heard any dispute from the  
22 plaintiffs' side that with respect to future employees who  
23 have yet to become employed by the City and subject to  
24 Measure B, that there is any issue at all with respect to  
25 various provisions of Measure B.

26 This is --

27 THE COURT: Just on that last point. Are you  
28 saying -- I'm not sure whether you're saying there's a

1 plaintiff here who represents the interest of future  
2 employees.

3 MR. HARTINGER: You have unions who are  
4 representing their interests of present employees. The  
5 question is -- I think the answer is no, that no one is  
6 contending here that any aspect of Measure B in terms of  
7 its effects on a future employee is unlawful.

8 THE COURT: Does anybody disagree with that?  
9 Okay. Go ahead.

10 MR. HARTINGER: So this is the chart that we will  
11 share with counsel -- and hopefully reach some sort of an  
12 agreement here -- listing the 13 sections of Measure B  
13 that are at issue. Many of these are obviously purely  
14 legal issues, your Honor.

15 As we discussed how the trial would go, the  
16 plaintiffs wanted to put on evidence, and here we are.  
17 There are some evidentiary issues, and I'm going to do my  
18 best to limit my presentation to the evidence versus the  
19 legal argument.

20 These are the first sections starting with  
21 reservation of voter authority, moving to COLA cost  
22 containment Section 1510-A, and the first discussion that  
23 I'm going to raise with you shortly is about the sections  
24 that are for increased employee contributions or  
25 alternatively a wage cut.

26 THE COURT: Will you be -- is this the chart that  
27 you referred to?

28 MR. HARTINGER: That I would plan to share with

1 counsel if they -- because I believe the Court asked for  
2 that.

3 THE COURT: Well, this is a nice chart, and I  
4 would like a copy of it, but it's not the chart that I  
5 asked for. I want to be sure we're all on the same page  
6 with respect to the dates of the operative pleadings and  
7 then the claims in the sense of legal causes of action and  
8 defenses so that when I get around to ruling on all this,  
9 I know exactly what I'm supposed to decide and I decide  
10 all the issues presented.

11 Go ahead.

12 MR. HARTINGER: So we also have that chart, your  
13 Honor, and we'll make it available to see if we can come  
14 up with some stipulated agreement on that.

15 THE COURT: Okay. Thank you.

16 MR. HARTINGER: These are the remaining sections.  
17 Again, as the evidence will show, contrary to what you've  
18 heard, some of these involve no change. The one-to-one  
19 contributions toward retiree health care, there's been no  
20 change there. That simply moved what was in the municipal  
21 code to the charter. And, additionally, the low-cost plan  
22 subsidy, you'll see very, very concrete evidence. There's  
23 no change there from what was in the municipal code and  
24 what had been negotiated, and I'll be going into that in a  
25 little bit more detail.

26 So this isn't all about money, your Honor, as the  
27 retirees have accused us. But we do have a claim by the  
28 AFSCME union to the effect that this was somehow intended

1 in some retaliatory negative way. We'll see what they're  
2 going to put on as evidence. They didn't make an opening  
3 statement.

4 How did we get here? There is no question that  
5 the City has been in the midst of this perfect storm, if  
6 you will, of dramatic cost increases. See the range here?  
7 South of 50 million up to 250 million in this incredibly  
8 ramped up period up to 2010.

9 The City has been grappling with a cumulative  
10 general fund shortfall for a decade of \$673 million,  
11 dealing with that issue, reducing payroll, and taking  
12 other measures in order to balance the budget.

13 The retirement cost increases have gone through  
14 the roof. This is a dramatic jump here in these couple of  
15 years where you're now looking at a projection of 325  
16 million in the 2015-2016 fiscal year.

17 You've got well-intentioned people, management of  
18 the City and the City Council and the mayor trying to deal  
19 with this very real problem of balancing costs versus  
20 services. This is simply one slide. You're going to see  
21 a little bit more during the trial about police and fire,  
22 reducing field patrols, eliminating police school liaison  
23 programs, eliminating the majority of crime prevention  
24 programs, eliminating other police units, reducing  
25 staffing, closing companies, closing truck companies,  
26 brownouts.

27 So the notion here that somehow that there's some  
28 bad intention to target -- I think it's only AFSCME that's

1 making this claim -- is simply not tenable, and the  
2 evidence will show that's simply not true.

3 I want to talk about who the parties are a little  
4 bit here. Who's suing the City over Measure B. It's a  
5 collection of labor unions, a variety of individual City  
6 employees, some individual retirees, and we have a Retiree  
7 Association. All of them claim Measure B harms them in  
8 some way, but you'll learn during trial that many can't  
9 even explain how it harms them. They don't know how it  
10 harms them, and you'll see that evidence during trial.

11 Because we're talking about pensions and cost and  
12 compensation and money to a certain extent, I wanted to  
13 give you a flavor of sort of where the pensions are in the  
14 City. These are police and fire pensions. These are the  
15 highest of the pensions to be sure. You have somebody  
16 making a pension now of \$228,000 a year. Within this  
17 particular slide, \$185,000 per year with a three percent  
18 COLA driver that compounds over time.

19 These are people who you're going to see. They're  
20 plaintiffs and/or witnesses. Mike Fehr is going to  
21 testify. His benefit right now is 100 -- approximately  
22 \$120,000 per year. Again, for the rest of his life,  
23 retired at the age of 54.

24 Ranging here -- these are the people who are  
25 plaintiffs or designated witnesses at one point.  
26 \$133,000, the high out of that group, Mr. Sekeny,  
27 Mr. Ricketts, something more than \$100,000 a year. That's  
28 the police and fire. And you get into the Federated plan.

1 Police and fire unions have been more successful in  
2 negotiating higher pension benefits. The Federated  
3 benefits, again, with this group of the higher group,  
4 \$174,000, Mr. Rios, to \$131,000, again, using the formula.  
5 Just a snapshot of the folks who are in the pension plan.

6 Pensions -- those are retirees. Pensions are  
7 directly related to compensation, and one of the pieces of  
8 evidence that you're going to be analyzing during the  
9 trial is the fact that compensation, contributions, this  
10 is all an element of compensation. The City is very, very  
11 devoted to the concept of transparency, and transparency  
12 means when you're talking about compensation, you're  
13 talking about total compensation. Total compensation is  
14 not just the amount of money that's in your paycheck.  
15 It's also these enormous numbers that relate to benefits  
16 that the City is also paying.

17 Mr. Sapien, who is the president of the fire  
18 union, his total comp is over \$275,000 per year. The  
19 other folks -- again, these are people who are either  
20 designated as witnesses or plaintiffs in the case -- you  
21 have another range here of \$197,000. We'll talk about  
22 this employer paid benefit piece, which is the  
23 contribution piece, primarily related to pension and  
24 retiree health. This has become irrational.

25 Police officers don't have an individual  
26 plaintiff. This just shows an average slide for those  
27 members in their group. They're making \$196,000 per year  
28 on average for folks who are represented by the Police

1 Officers' Association.

2 Moving to non-sworn employees, again, just  
3 snapshots of compensation, if you will, your Honor.  
4 Mr. Mukhar, who was deposed, was designated as a witness.  
5 At this point, I understand he will not testify. Total  
6 comp is north of \$200,000 a year, ranging down to  
7 Mr. Rhoads, 113,000.

8 So I wanted to kind of bring the Court to basic  
9 retirement formula that I think all public employees, all  
10 folks who have served in public service are familiar with,  
11 and that is, what's my pension formula? My pension  
12 formula is a function of age, years of service. A  
13 percentage, if you will, that drives the accrual number  
14 and final compensation. Final compensation is one of the  
15 things that there's no dispute that the City can control.  
16 Constitutionally, the City has the authority to control  
17 compensation.

18 So I wanted to pause here and point out, your  
19 Honor, I don't think there will be any dispute. None of  
20 this is remotely affected by Measure B. The pension  
21 formula has not changed. The dramatic statements about  
22 how this is taking away something that was promised to  
23 them is an exaggeration. This has not changed.

24 Let's talk about the COLA for a second. The COLA  
25 measure provided that in the event of an emergency, in the  
26 future, if the City declares an emergency, the City can  
27 temporarily deal with this COLA, which you'll find during  
28 trial is one of the most significant cost drivers of this

1 whole program.

2 We've made the argument. This is a legal  
3 argument. The Court is going to have to decide this.  
4 This is sometime in the future. There's no fiscal  
5 emergency on the books. It's not agendized for action.  
6 It's entirely speculative as to when that could happen.  
7 So the only issue for the Court to decide is is it --  
8 could it be on a facial challenge? Could it be  
9 permissible in the future based upon the authorities that  
10 we will brief to the Court which indicate, we think, very  
11 clearly that the doctrine has existed since the mid '30s  
12 from the United States Supreme Court that agencies can --  
13 even if there is a contract, agencies can temporarily  
14 impair. That will be briefed. That's the subject of  
15 legal arguments at a future time, your Honor.

16 If you take Mr. Sekany, who was the president of  
17 the fire union, and you do the math, you have his final  
18 salary coming out to number of years. You do the math,  
19 three percent COLA, and his number comes out to \$133,000 a  
20 year.

21 There was some claim here that the COLA was --  
22 there's a forfeiture of the COLA. That's entirely  
23 speculative, your Honor. Nothing -- if you read the  
24 provisions of Measure B and if you -- and as the evidence  
25 will show, nobody is taking away any of the COLA that has  
26 been banked. It remains in the account. There will be no  
27 dispute about that. The only aspect of Measure B that is  
28 at issue is with respect to something that could happen in

1 the future. An emergency.

2 So I want to turn to, your Honor, the facts --

3 THE COURT: The future eventuality, is that a  
4 suspension or forfeiture?

5 MR. HARTINGER: A suspension, but not with respect  
6 to any prior earned COLA benefits.

7 So, your Honor, I want to turn to one of the  
8 issues that you're going to hear a lot about during trial,  
9 and that is this issue of Measure B's provision which, in  
10 light of a multi-billion dollar unfunded liability, the  
11 voters said you have to pay a little bit more. Four  
12 percent per year. They refer to it as 16 percent, but it  
13 is phased in. Capped at 16 percent, and also with a cap  
14 of 50 percent of the cost amortize to pension any unfunded  
15 liability. That has to be read, your Honor, with the  
16 alternative under 1514-A. Voters said -- you'll find that  
17 the plaintiffs actually proposed this at one point. If we  
18 can't get it this way because somehow there's something  
19 unlawful about it, which we don't think it's unlawful, but  
20 if we cannot do it that way, then we'll go straight pay  
21 cut, and we know we can do that because that's what the  
22 California Constitution says that charter cities can do.

23 You're going to see different unfunded liability  
24 numbers around in this case. I think the City will be  
25 accused of exaggerating the numbers. The fact is that  
26 there's snapshots in time taken based upon assumptions at  
27 the time by the experts who were doing the calculation.  
28 This comes from the CAFRs ending June 20, 2012. They have

1 a staggering unfunded liability of 3.45 billion.

2 This shows you how things are turning upside down  
3 in terms of the contribution rates. This is police and  
4 fire. This year, the City's contribution rate is 70.55  
5 percent of payroll with the employees currently  
6 contributing 11.67 percent.

7 Federated is similar, though not as rich. 55.3  
8 percent employer contribution with this range of  
9 contribution depending what tier you're in for the  
10 Federated plan.

11 So Mr. Adam flashed some charters. We have to go  
12 through some charters here to figure out whether their  
13 claim that the promises or what was contained at various  
14 points in various documents is somehow -- we're bound to  
15 that in perpetuity. I believe their claim is once you  
16 enter the workforce at the age of 25, if it said something  
17 somewhere on a piece of paper, you can't change that for  
18 the lifetime of the individual.

19 We don't believe the evidence will show that to be  
20 accurate on a variety of different levels. We start with  
21 the 1961 charter where the voters first introduced a  
22 reservation of rights. Voters said the council, in its  
23 discretion, may, at any time or from time to time, amend  
24 or otherwise change the retirement plan.

25 THE COURT: Down at the lower right, it looks like  
26 there's an exhibit number.

27 MR. HARTINGER: 6028.

28 THE COURT: Thank you.

1 MR. HARTINGER: So --

2 THE COURT: Is there a spare hard copy available  
3 now?

4 MR. SPELLBERG: Yes, your Honor. We do have that.

5 MR. HARTINGER: It's not at my fingertips now.

6 MR. SPELLBERG: We have it.

7 THE COURT: Go ahead.

8 MR. HARTINGER: So I think we all agree that when  
9 you are looking at the interpretation of retirement  
10 provisions, you have to effectuate the intent of the  
11 voters at the time, and you have to -- one instrument in  
12 doing that or one means of doing that is looking at the  
13 voter pamphlets.

14 THE COURT: I didn't ask a very good question. I  
15 meant a hard copy of the PowerPoint.

16 MR. SPELLBERG: I thought you meant the exhibit.

17 THE COURT: I got lots and lots of exhibits.

18 MR. HARTINGER: I am going to get that to you,  
19 your Honor, as soon as I can.

20 THE COURT: It's okay.

21 MR. HARTINGER: Turning to the ballot argument  
22 with respect to the reservation of rights clause. This is  
23 what the voters saw. This amendment gives discretionary  
24 powers to the City Council. This is good involvement.  
25 Let them do it. This is simple. That was 1961.

26 One of our arguments with respect to whatever the  
27 muni code has said over time -- and you'll find that a lot  
28 of provisions even relating to retirement have been

1 negotiated in the muni code. The legal argument, as you  
2 know, your Honor -- I'm not going to argue here -- is the  
3 fact that the charter, as a fundamental matter, prevails  
4 over ordinances, and the voters reserved the right. They  
5 moved to the '65 charter which contains both the police  
6 and fire Federated plans.

7 Again, subject to other provisions of this  
8 article, the council may, at any time, or from time to  
9 time, amend or otherwise change any retirement plan or  
10 plans. San Jose's voters were smart enough to reserve  
11 their rights to be able to make adjustments if necessary.  
12 Plaintiffs won't have evidence that can overcome this  
13 express reservation of rights.

14 With respect to existing systems, which was the  
15 police and fire plan at the time, the council shall, at  
16 all times, have the power and right to repeal or amend any  
17 such retirement system or systems.

18 So one of our, again, core arguments here, your  
19 Honor, and you'll hear more evidence on it, is that this  
20 prevails over the municipal code. The voters reserved  
21 their right to make reasonable adjustments.

22 So I want to turn to the contribution portions of  
23 the charter that are going to be before you. We're still  
24 in the 1965 charter, and there are -- there's a provision  
25 here related to minimum benefits. This is police and fire  
26 minimum benefits.

27 This is the minimum benefit for contributions.  
28 Contributions required to be made by officers and

1 employees of the police department or fire department  
2 shall not exceed the ratio of three to eight.

3 The three to eight ratio, as we're going to hear  
4 from some actuary experts -- actually, we don't need an  
5 expert for this particular point because everybody  
6 concedes that this is all relating to normal cost. The  
7 cost of the benefit, assuming the investments stay the  
8 same based on assumptions that there are no added  
9 benefits, that people live as long as the actuaries, God  
10 bless them, have estimated they are going to live, that's  
11 normal cost. It's another very important piece of this  
12 minimum benefit section, your Honor. It does not apply to  
13 any contributions required for or because of any prior  
14 service. Prior service has been used interchangeably with  
15 unfunded liabilities. That's what we're talking about.

16 And you'll hear from -- there's various  
17 concessions made by these gentlemen that unfunded -- that  
18 this -- that the charter is silent with respect to  
19 unfunded liabilities, and, therefore, you can require  
20 people to pay towards that, and they did, as we'll find  
21 out.

22 Your Honor, similarly, in the Federated plan, you  
23 have a provision here. This is still --

24 THE COURT: Silent in the sense that there's no  
25 provision at all?

26 MR. HARTINGER: Prior service, we think, has been  
27 used interchangeably with unfunded liability as people  
28 have become more sophisticated in talking about it.

1 Clearly prior service is an unfunded liability, but  
2 charter doesn't say unfunded liability.

3 Turning to the minimum benefits for officers and  
4 employees other than members of police and fire. These  
5 are the Federated civilian non-sworn employees. Similar  
6 language on contributions. Here's what's hired to be made  
7 by officers and employees. Three eight ratio of normal  
8 cost. There will be no evidence that that was ever  
9 infringed upon, but it doesn't apply to prior service.

10 So we've heard this cry from the plaintiffs that  
11 the Measure B's call for increased contributions is  
12 unlawful. It's unconstitutional. It's wrongful. It's  
13 violating their rights, and all of this. But many of the  
14 folks here proposed it and agreed to it in connection with  
15 the City making efforts to try to deal with a very, very  
16 significant crisis it faced. Here is the fire union's  
17 proposal. All union employees shall contribute an  
18 additional five percent of base pay.

19 THE COURT: What's the date of that document?  
20 April something?

21 MR. HARTINGER: It's in 2010, your Honor. April  
22 30, 2010. The demonstrative exhibit is 5408.

23 THE COURT: That number, I can see.

24 MR. HARTINGER: I'm just going to go through a  
25 series of these, your Honor, because there will be no real  
26 credible dispute here, again, in this 2010 leading up to  
27 2010-2011 budget cycle. Another proposal. We want seven  
28 and a half percent of our members' base pay coming to the

1 checks and going to the retirement fund toward unfunded  
2 liability.

3 What the evidence will show is that the City and  
4 the unions treated wages and contributions essentially as  
5 negotiable. You've heard counsel say if it's negotiable,  
6 it's not vested. That's our point. Everybody agreed to  
7 this. They understood it. Here's a POA proposal. They  
8 negotiated for a one-time contribution in the course of  
9 collective bargaining. That does not change the fact that  
10 they still negotiated it. It could be two times; it could  
11 be three times; it could be ten times; it could be  
12 ongoing. And this chart, I think, really very graphically  
13 shows, here's the effect. It basically changes the  
14 contribution ratios after this 5.25 percent goes into  
15 effect.

16 Another proposal in this 2010 range, your Honor,  
17 from a group of labor unions effective June 27, 2010,  
18 through June 28, 2011, all employees will make additional  
19 retirement contributions in an amount equal to ten  
20 percent. Everybody understood that this was all  
21 negotiable.

22 And I wanted -- this chart, which is Exhibit 6023,  
23 which we'll proffer, where you have a P here, these deals  
24 all included a component of pension contribution, pension  
25 contribution that helped defray the City's obligation to  
26 pay towards unfunded liabilities.

27 So why did they -- why were the unions preferring  
28 a pension contribution versus a straight wage reduction?

1 There's no dispute here that we can simply make a wage  
2 reduction, and the reason is is because it's a better deal  
3 for them. This chart simply shows that if you have a four  
4 percent additional retirement contribution, it doesn't  
5 affect your final compensation for purposes of retirement,  
6 whereas a pay cut does. A pay cut is less advantageous  
7 for at least three reasons: A pay cut reduces your final  
8 compensation, which has a direct impact on retirement. A  
9 pay cut reduces your overtime because it lowers the  
10 overtime rate.

11 And the deal that was struck with the unions was  
12 that these pension amounts would go into the members'  
13 accounts, and they could, if laid off or separated from  
14 City service -- and employees were being laid off in this  
15 period -- have the money refunded to them.

16 Everyone understood that contributions were  
17 negotiable, and we have one proffered clip here showing  
18 Mr. Platten, counsel for the -- for some of the employees  
19 here, making the argument at this council meeting when  
20 this issue came up. Can we do this? This is what  
21 Mr. Platten said.

22 (Video played and not reported.)

23 THE COURT: So I didn't know you were going to be  
24 using a recording during your opening statement, and I  
25 didn't get there fast enough. Is the audio or the video a  
26 trial exhibit?

27 MR. HARTINGER: Yes, your Honor.

28 THE COURT: What number?

1 MR. HARTINGER: I have to check my exhibit book.  
2 Would you like me to find it now?

3 THE COURT: Perhaps one of your colleagues can  
4 find that. The trial exhibit is a CD?

5 MR. HARTINGER: There's two exhibits, your Honor.  
6 There's one that's a hard copy of comments.

7 MR. SPELLBERG: 5435. It is a CD, your Honor.

8 THE COURT: 5435 is the CD?

9 MR. SPELLBERG: Yes, your Honor.

10 THE COURT: There's also a transcript of the  
11 audio?

12 MR. HARTINGER: Yes, your Honor.

13 THE COURT: What number is that?

14 MR. SPELLBERG: I believe it would be 5435A, your  
15 Honor.

16 THE COURT: Normally, before a recording is  
17 played, I request a stipulation that the court reporter  
18 need not transcribe the recording. I'm hoping, although  
19 it's a little bit late, I can still get that stipulation.

20 MR. HARTINGER: We would so stipulate, obviously,  
21 your Honor.

22 MR. MCBRIDE: Your Honor, we would stipulate. We  
23 have not raised any objection to the transcript in any  
24 event. It's going to be an exhibit.

25 THE COURT: Normally, with recordings, transcript  
26 is required by the rules of court. Normally, the  
27 transcript is not received into evidence. Only the  
28 recording is. But let's do one thing at a time. Can we

1 get a stipulation from everybody about the record, please?

2 MR. ADAM: So stipulated.

3 THE COURT: Go ahead.

4 MR. HARTINGER: Thank you, your Honor.

5 So the point, obviously, is everybody  
6 understanding the contributions to be interchangeable with  
7 compensation, to be negotiable, and as we've heard, if  
8 it's negotiable, it's not vested, and it can be changed.

9 I also wanted to bring the Court back to what was  
10 said as the point number three here, which was if for any  
11 reasons the contributions cease, we're going to come right  
12 back to the table and give you exactly what you needed to  
13 get through the contributions. That's what the charter  
14 says at Section 1514-A. That's the savings provision  
15 saying if you can't get it through the contributions, you  
16 can get it just through a wage reduction. 1514-A.

17 Your Honor, as -- I'm going to turn to another  
18 section shortly, and I will be briefer with respect to the  
19 other issues. Much has been made of municipal code  
20 provisions. These are the current provisions in place  
21 which were enacted in connection with the deals that were  
22 struck about the contributions that we just talked about.

23 Members -- this is Federated. Members of this  
24 system shall make such additional retirement contributions  
25 as may be required by resolution, adopting by the City  
26 Council or by executed agreement. That's what the current  
27 municipal code says that's in effect.

28 And what's significant about that -- or one of the

1 things that's significant about that is, again, everybody  
2 understood this was going into effect. It went into  
3 effect three years ago. Over three years ago. So we  
4 think to the extent that anybody is relying on a municipal  
5 code change, it's barred by the statute of limitations.  
6 That's an argument that we will be making to you. This is  
7 in effect. It's the current municipal code.

8 THE COURT: Effective 2010?

9 MR. HARTINGER: Correct.

10 Police and fire struck a different deal, as has  
11 been pointed out. But our point is is that they  
12 understood that the City could require additional  
13 retirement contributions as may be required by resolution  
14 or by executed agreement. You're going to hear a little  
15 bit about the charter, about charter Section 1111, which  
16 is a -- which calls for interest arbitration, and here  
17 this section refers to if you're subject to this section,  
18 either requires an executed agreement or by binding order  
19 of arbitration.

20 The point being for us here, again, municipal code  
21 goes into effect over three years ago. It's barred by the  
22 statute of limitations, and it reflects the parties'  
23 mutual understanding that you can do this because that's  
24 what the charter permits.

25 So I'm going now to turn to retiree health care,  
26 your Honor. The section at issue in Measure B is section  
27 1512-A. And there are two provisions I want to call out  
28 that are severable and are at issue in this trial.

1           The first is with respect to the minimum  
2 contribution for retiree health care. This is, again,  
3 just straight out of Measure B, Section 1512-A. It  
4 requires existing and new employees to contribute a  
5 minimum of 50 percent of the cost of retiree health care,  
6 normal cost and unfunded included.

7           So one of our points that you will learn at trial  
8 is, if you come to this board here, this is the Federated  
9 medical contribution municipal code section that existed  
10 prior to Measure B. "Contribution shall be made by the  
11 City and the members of the ratio one to one." 50  
12 percent.

13           So all that happened here is that the voters said,  
14 we want control over this issue, and they took what was  
15 already in the municipal code, and they moved it into the  
16 charter, which they have the right to do, to give it a  
17 greater degree of permanence surge only to future charter  
18 amendments that may be put before them. Same with police  
19 and fire. These provisions preexisted Measure B, a  
20 one-to-one ratio.

21           Now, you're going to have evidence that is going  
22 to come at different points and see there was really some  
23 difference in what people meant here. But the evidence  
24 will also show, your Honor, that we've got agreements on  
25 this in -- agreements in various places, and we'll show  
26 you those agreements as they come in to evidence during  
27 the trial.

28           There was a mention to this 1984 ordinance.

1 That's the next slide. I'm going to move to another  
2 section, your Honor, which is called section 1512-C. This  
3 refers to low-cost plan and the City's program in place to  
4 pay premiums tied to the lowest-cost plan available to  
5 employees.

6 So here's what Measure B provides. It defines  
7 low-cost plan as the medical plan which has the lowest  
8 monthly premium available to any active employee, police  
9 and fire, or in the Federated system.

10 So much has been made of this being a violation.  
11 So here's the muni code. Again, the muni code in effect,  
12 your Honor, prior to Measure B going into effect,  
13 Federated refers to the lowest, talks about the premium to  
14 be paid, and an amount equivalent to the lowest of the  
15 premiums for single or family medical insurance coverage.

16 We don't think the charter did anything to change  
17 what was in the municipal code. We think the charter  
18 could have but it didn't in this instance.

19 Police and fire. What are we looking at for  
20 police and fire? Lowest cost medical plan.

21 THE COURT: You just said the charter did not do  
22 anything to change the muni code. Are you referring to  
23 Measure B?

24 MR. HARTINGER: Yes. So police and fire, again,  
25 low-cost plan, the voters decided, let's put this in the  
26 charter so we can't have people changing it through  
27 negotiations or otherwise, which they can do, but the muni  
28 code already had a provision for police and fire tying the

1 health care premium to the lowest monthly premium.

2 THE COURT: So, actually, what you mean is  
3 Measure B was not inconsistent with the then existing  
4 municipal code?

5 MR. HARTINGER: Correct, your Honor.

6 And, again, with respect to deals that were  
7 struck, to their credit, many of the unions, most of the  
8 unions, have come forward and agreed we're going to ramp  
9 this up to pay what's called the ARC, the Annual Required  
10 Contribution. Again, this is a labor agreement with the  
11 POA, and the benefits shall be made by the City and  
12 members in a ratio of one to one. Everybody acknowledging  
13 that that picks up unfunded liabilities.

14 Most of the unions understood that this was an  
15 important plan that needed to be fully funded; otherwise,  
16 it was going to go in the tank, so many stepped up and  
17 reached this agreement, and there have been recent  
18 agreements that have amended this and changed the ramp-up  
19 schedule somewhat, which you'll learn about during trial.

20 So I want to move to another section briefly of  
21 Measure B. This section is 1513-A, actuarial soundness,  
22 and as we understand the challenge, the sole challenge  
23 here is that when the boards are setting actuarial  
24 assumptions, they have to consider the taxpayers with  
25 respect to that, among other factors that you would  
26 normally see in terms of an obligation of a retirement  
27 board.

28 So the unions have all objected to the fact that

1 the charter says you have to take the taxpayers' interest  
2 into account also. That's the central objection. And  
3 their contention is that this violates the Pension  
4 Protection Act of the California Constitution.

5 So our point here, your Honor, is this is a --

6 THE COURT: You just said the Pension Protection  
7 Act of the Constitution.

8 MR. HARTINGER: Yes.

9 THE COURT: Is that what you meant?

10 MR. HARTINGER: Yes. The California Constitution  
11 has Section 17. Article 16 has a provision called Pension  
12 Protection Act, which you will hear about during trial.

13 So our point with respect to this section, your  
14 Honor, is that they're mounting a facial challenge, and  
15 that means that their burden is that this measure presents  
16 a fatal and irreconcilable conflict with the California  
17 Constitution. It cannot be reconciled under any  
18 circumstances by a court, and they can't make that showing  
19 for a variety of reasons, but one of which is the City  
20 already adopted a municipal code provision that clarifies  
21 that the Pension Protection Act will be honored, and this  
22 is a provision in an ordinance, City Exhibit 5301, and it  
23 indicates and directs the Board of Retirement to discharge  
24 its duties in a manner consistent with the California  
25 Pension Protection Act. That's how the City interprets  
26 it. That's what the municipal code says. There's no way,  
27 given how the City has construed it, that it is reasonable  
28 to suggest that Measure B's provision relating to a

1 taxpayer's interest is somehow unlawful.

2 THE COURT: That kind of begs the question,  
3 though, right, whether they have done what the ordinance  
4 says they're going to do?

5 MR. HARTINGER: Facial challenge. Again --

6 THE COURT: I understand.

7 MR. HARTINGER: Okay.

8 So, your Honor, I want to turn briefly to what's  
9 been called the Supplemental Retirement Benefit Reserve,  
10 SRBR, and you're going to hear evidence of this during  
11 trial, so I'm going to keep my comments brief. I've  
12 already taken probably too much time here. But there are  
13 two different provisions. I wanted to highlight one of  
14 the provisions. Again, this is the municipal code section  
15 as it existed with respect to SRBR prior to the adoption  
16 of Measure B.

17 And if you look at this language in the municipal  
18 code -- and we're hearing that this is a promise that you  
19 can never take away and people relied on and so forth --  
20 it just doesn't -- that evidence just is not going to hold  
21 water given what this language says.

22 City Council can request recommendations regarding  
23 the distribution, if any. City Council shall determine  
24 the distribution, if any. And our legal argument, of  
25 course, is that when you retain discretion to this degree,  
26 there's no -- it doesn't make it some sort of vested  
27 right. And there's going to be more evidence about how  
28 SRBR operates, your Honor, during the trial. And there

1 are some wrinkles in the language with respect to police  
2 and fire.

3 But what the evidence will show is that the City  
4 has always retained discretion over the fund. It's  
5 retained its right to eliminate SRBR. There have been  
6 proposals by the unions to eliminate it. No one could  
7 have relied on this fund. This is -- sometimes you  
8 receive the so-called 13th check. Sometimes you didn't  
9 receive it. It operated irrationally, as you'll learn  
10 during trial, your Honor.

11 What it would do is if, for example, in a given  
12 year, the fund performance measured in a given year showed  
13 that it exceeded the actuarial assumption, you'd take that  
14 money, and then subject to the discretion, you could give  
15 it away, even though you're facing a multi-billion-dollar  
16 unfunded liability.

17 And in the last several years, there have been no  
18 SRB distributions without objection. It's been suspended.

19 So I'm going to conclude here, your Honor, and  
20 simply thank you once again for your willingness to sit  
21 through this. And we believe the evidence will show that  
22 Measure B is lawful. It must be upheld, and we're asking  
23 that the voters will be implemented.

24 THE COURT: I would like to make as complete a  
25 record as possible in this proceeding. I'm going to  
26 suggest that we mark hard copies of the PowerPoint used  
27 during the POA opening as well as the City's opening, and  
28 then 8-and-a-half-by-11 versions of the 2 boards that were

1 displayed during the City's opening.

2 Madam Clerk, can you suggest a number for the POA  
3 PowerPoint based on everything you know.

4 THE CLERK: Based on what I know and the exhibits  
5 they have given, the last exhibit number was 509. So I  
6 can make that 5909.

7 MS. WEST: That's the City's numbers.

8 MR. MCBRIDE: What was the number again?

9 THE COURT: This would be a POA exhibit.

10 MS. WEST: It would be Exhibit 52.

11 THE COURT: How about 52? We'll mark as 52 the  
12 hard copy of the POA PowerPoint Mr. Adam used before.

13 (Plaintiffs' Exhibit 52 was marked  
14 for identification.)

15 THE COURT: And then, Madam Clerk, can you suggest  
16 two more numbers. The first would be for the hard copy of  
17 the City PowerPoint once provided, and the second would be  
18 for the 8-and-a-half-by-11 versions of the two boards that  
19 they displayed. Now we want to use City numbers. That  
20 may have been the number you gave us earlier.

21 THE CLERK: 656 and 657.

22 MR. HARTINGER: If I may, your Honor. Our next  
23 demonstrative in order is 6062.

24 THE COURT: How about that? 6062 is the  
25 PowerPoint, and 6063 is the small version of the two  
26 boards. Then we'll have a record of what was displayed  
27 during the opening.

28 (Defendants' Exhibits 6062 and 6063 were marked

1           for identification.)

2           THE COURT: Mr. McBride, you want to say  
3 something?

4           MR. MCBRIDE: I assume we will be supplied with  
5 copies of those.

6           MR. HARTINGER: Of course.

7           THE COURT: Anything else before we call the first  
8 witness?

9           Mr. Adam?

10          MR. ADAM: Your Honor, the POA calls Mike Fehr.  
11 I'm going to use Mr. Hartinger's table if he  
12 doesn't mind leaving it up.

13          THE COURT: Whose table is that?

14          MR. HARTINGER: We brought this in, your Honor.

15          THE COURT: Mr. Fehr, pause there. Face the clerk  
16 and raise your right hand.

17          THE CLERK: You do solemnly state, under penalty  
18 of perjury, that the evidence you shall give in this issue  
19 or matter shall be the truth, the whole truth, and nothing  
20 but the truth?

21          THE WITNESS: I do.

22          THE COURT: Mr. Hartinger, during the break, maybe  
23 you can remove the board so the witnesses have a clearer  
24 path.

25          MR. HARTINGER: Yes. Absolutely.

26          THE COURT: Go ahead, Mr. Adam.

27          MR. ADAM: Just a moment, your Honor. I just  
28 advised everyone we're going to be referencing the

1 documents under POA tab 51, what's been marked as POA 51.

2 THE CLERK: Please state and spell your name for  
3 the record.

4 THE WITNESS: Michael, middle initial of J, last  
5 name Fehr, spelled F, as in Frank, E-H-R.

6 THE CLERK: Thank you.

7 MR. ADAM: Do I understand there's a witness  
8 exhibit binder?

9 THE CLERK: The witnesses' binders are all up  
10 there.

11 THE COURT: Witness can't really get to those.  
12 Maybe at the break we'll move them so they're closer, but  
13 for now, which binder would you like Mr. Fehr to look at?

14 MR. ADAM: Whatever binder has POA 51 in it.

15 Mr. Fehr, unfortunately, I've got you at the very  
16 back documents. If you can keep that handy.

17 Ready? Thank you.

18

19 MICHAEL J. FEHR

20 called as a witness by counsel for the Plaintiffs, being  
21 first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. ADAM:

24 Q. Mr. Fehr, are you currently employed?

25 A. No. However, I do work security in the cash room  
26 at the San Jose Arena, and probably I've averaged about 15  
27 times a year since I've retired in the last eight and a  
28 half years.

1 Q. Were you formerly employed by the City of San  
2 Jose?

3 A. Yes, I was. For 32.45 years. I began as a police  
4 officer on September 11, 1972, and worked my last shift as  
5 a patrol sergeant on January 28, 2005.

6 Q. So you retired in 2005?

7 A. That's correct. The actual date -- last date in  
8 the books was January 29, 2005.

9 Q. During your career with the City, were you  
10 involved with the Police Officers' Association?

11 A. Yes, I was. For 12 years, from January 1st, 1982,  
12 until January 1st, 1994, the first 6 years being a board  
13 member, the next 3 vice-president, our long-term  
14 president, Carm Grande, and last 3 years as president of  
15 the organization.

16 Q. I'm going to ask you to slow down a little bit for  
17 the benefit of the court reporter.

18 During your time working with the POA, were you on  
19 any negotiating teams with the City?

20 A. Yes, I was. I sat on the 1987 negotiations team  
21 as a board member, 1989 as vice-president, and 1992 as  
22 president.

23 Q. Did any of those negotiations involve pension  
24 matters?

25 A. Yes, they did.

26 Q. Do you recall which ones?

27 A. In 1992, we had an agreement that I actually kind  
28 of referred to as a combination requirement, whereas if an

1 officer had vested their time prior to turning 50 years of  
2 age, when they turn the 50 years of age, they had the  
3 opportunity to choose the same medical health care plans  
4 that retirees were once they turned age 50.

5 MR. SPELLBERG: Your Honor, I'm going to object.  
6 This witness was designated to testify about the low-cost  
7 plan. I took his deposition about the low-cost plan. At  
8 the end of the deposition, I asked whether --

9 THE COURT: What's the legal basis for your  
10 objection?

11 MR. SPELLBERG: Failure to disclose testimony and  
12 thus precluded from questioning about it in the  
13 deposition. And there was an agreement by opposing  
14 counsel that he wouldn't testify beyond low-cost plan. So  
15 we --

16 THE COURT: So, generally, that principle applies  
17 to expert witnesses. Is there something in this case that  
18 would cause me to think that it applies to percipient  
19 witnesses?

20 MR. SPELLBERG: Your Honor, it's a matter of  
21 fairness. If I have asked specifically in deposition of a  
22 witness who has been designated for trial what is going to  
23 be testified and I'm told it's only going to be a limited  
24 topic and I didn't question about anything further.

25 THE COURT: This strikes me as background. Is  
26 there anything you want to add?

27 MR. ADAM: That's all it is.

28 THE COURT: The objection is overruled.

1 MR. ADAM: Closing in on medical, your Honor.

2 BY MR. ADAM:

3 Q. Mr. Fehr, during your period as a employee, did  
4 the POA negotiate any increases in pension benefits?

5 A. Yes, they did. We went from 75 percent to 80  
6 percent, 80 percent to 85 percent while I was still  
7 active; then shortly thereafter, I retired within about  
8 six months, they went from 85 percent to 90 percent.

9 Q. Were you familiar with the changes in pension  
10 benefits that were negotiated by the POA throughout your  
11 time as an employee with the City?

12 A. Yes, I was.

13 Q. Do you recall any material retiree medical benefit  
14 improvements that the POA negotiated with the City?

15 A. Yes, I do.

16 Q. What were those?

17 A. I believe it was in the mid-1980s, the POA had an  
18 agreement with the City that afforded the retiree an  
19 opportunity to choose the same health care providers as  
20 the active employee, the active police officer, to include  
21 the 100 percent paid low-cost plan.

22 Q. Now, leaping forward to when you were preparing to  
23 retire. Did the City do anything to help you prepare for  
24 retirement?

25 A. They did. It was actually an agreement between  
26 the POA and the City some years before that afforded  
27 retirement planning and preparation classes.

28 Q. And what was -- what were those classes? Could

1 you briefly describe what occurred in those classes.

2 A. They give you somewhat of an idea what your  
3 pension will be based on your number of years of service.  
4 They will give you an idea of what your health care plans  
5 will be offered and what your premiums will be, and  
6 they'll also go through different insurance policies that  
7 you currently have and may want to have before you retire.

8 Q. So at the time of your retirement, did you  
9 understand what level of pension benefit you would be  
10 receiving?

11 A. Yes, I was.

12 Q. That was pursuant to a formula; correct?

13 A. That's correct.

14 Q. How about retiree medical benefits? Were you  
15 aware at the point of your retirement what your retiree  
16 medical benefits would be?

17 A. Yes, I was.

18 Q. What do you understand that they would be?

19 MR. SPELLBERG: Objection. Hearsay.

20 THE COURT: Overruled. Well, I'm receiving this  
21 for the purpose of Mr. Fehr's notice.

22 BY MR. ADAM:

23 Q. What was your understanding of what your retiree  
24 medical benefits would be during your retirement?

25 A. My understanding and belief was the same as the  
26 agreement from the 1980s, is that I, as a retiree, would  
27 continue in my same plan if I so chose or any plan, health  
28 plan providers provided by the City at the same cost as

1 the active police officer.

2 Q. What was that belief based on?

3 A. It was probably based on three things: one, my  
4 knowledge of collective bargaining agreements, my  
5 retirement preparation and planning course that I took  
6 with the retirement services, and my exit interview with  
7 human resources at the beginning of January before I  
8 retired.

9 Q. Describe briefly what occurred in your exit  
10 interview with human resources.

11 MR. SPELLBERG: Objection. Calls for hearsay.

12 THE COURT: If you want to lay a foundation for an  
13 exception, you can do that. But in any event, it's  
14 received for the non-hearsay purpose of the witness'  
15 understanding.

16 BY MR. ADAM:

17 Q. What was your understanding coming out of that  
18 exit interview?

19 A. My understanding was the same as during our  
20 retirement classes. We had an idea of what our pension  
21 was going to be and to that point I had an actual  
22 retirement date, so it was more exact. I had an idea of  
23 what my health care would be, which was the same as I was  
24 when I was active, to include the same premium month by  
25 month for that first year, and lastly any insurance  
26 policies that I, in fact, had with the City would  
27 continue.

28 Q. When you actually retired, what medical benefits

1 did you receive from the City?

2 A. I received and kept the same benefits that I had  
3 as an active police officer.

4 Q. That's the same plan?

5 A. The exact same plan and the exact same cost per  
6 month.

7 Q. Since you retired, have you received publications  
8 from the retirement plan?

9 A. I have periodically through the last eight and a  
10 half years.

11 Q. I'd like to direct your attention to what's been  
12 previously marked as POA Number 51. It's in the binder on  
13 the right-hand fold. And the front cover is a memorandum  
14 from Mark Skeen to retirees' beneficiaries of the City of  
15 San Jose Police and Fire Department retirement plan. Are  
16 you familiar with this document?

17 A. Yes, I am.

18 Q. How so?

19 A. Well, I had received probably a handful, if that,  
20 in the first three years I was retired. And this came in  
21 the beginning of my fourth year of retirement, and it was  
22 the first one that I read.

23 Q. You reviewed Mr. Skeen's memorandum?

24 A. Yes, I did.

25 Q. Did you review the memorandum that Mr. Skeen  
26 attaches from City Manager Figone?

27 A. I sure did.

28 Q. Can I direct you to the second page of

1 Ms. Figone's memorandum.

2 THE COURT: So the third page of the exhibit?

3 MR. ADAM: The third page of the exhibit.

4 BY MR. ADAM:

5 Q. You see the first paragraph under title Vested  
6 Benefit? Do you see that?

7 A. I do.

8 Q. Did you review that page?

9 A. I did.

10 Q. Was Ms. Figone's statement consistent with your  
11 understanding that there were legal protections that would  
12 prevent the City from adversely altering your retiree  
13 medical benefits?

14 A. Yes.

15 MR. SPELLBERG: Objection. Lack of foundation.  
16 Misstates the document.

17 THE COURT: Overruled.

18 BY MR. ADAM:

19 Q. You can answer.

20 A. Yes, it did. In fact, it reinforced my  
21 understanding of collective bargaining agreements and  
22 vested rights.

23 Q. Are you still in the same medical plan as when you  
24 first retired?

25 A. Yes, I am.

26 Q. So I'm assuming between your retirement in 2005  
27 and 2012, there were probably some increases in monthly  
28 premiums for that plan; is that true?

1 A. Yes, there were. Predominantly every year but  
2 one.

3 Q. Approximately how much each year would the  
4 retirement -- would the monthly premium go up?

5 A. They average probably between about 30 and \$50 per  
6 month each year with two exceptions. One, I believe it  
7 was in 2010, that increased \$105, then in this last year,  
8 2013, that increased \$232 per month.

9 Q. Did the cost of your premium ever go down?

10 A. It, in fact, did. In 2012, it went down. We had  
11 lower premiums. However, the co-pays and the deductibles  
12 were substantially higher.

13 Q. I'd like to direct your attention to another  
14 document. It's the final document under that tab 51.  
15 It's an October 26 letter from the City.

16 A. Yes.

17 Q. Department of Retirement Services. Are you  
18 familiar with this letter?

19 A. Yes, I am.

20 Q. Did you receive it approximately October 26, 2012?

21 A. Yes, I did. In fact, it's generally the same time  
22 of year each year that we receive an update for the future  
23 year.

24 Q. What is this letter?

25 A. This letter states what my monthly premium was for  
26 the health care plan that I am in, \$569 per month, and it  
27 shows a little column there that my monthly premium for  
28 the exact same health care provider would be \$801 per

1 month.

2 Q. Let me ask you, after you retired but before you  
3 received this letter in October 2012, did anyone, be it  
4 from the City or anywhere else, ever tell you that instead  
5 of having your retiree medical benefits tied to what  
6 active police officers get, it would be tied to what other  
7 City employees get?

8 MR. SPELLBERG: Objection. Lack of foundation.

9 THE COURT: That's the question. Overruled.

10 THE WITNESS: Never.

11 BY MR. ADAM:

12 Q. So in reviewing this letter, it appears your  
13 premiums increased from 2012 when they were 569 a month to  
14 more than \$800 per month; correct?

15 A. That's correct.

16 Q. Were you offered a different plan?

17 A. There were different alternatives. However, the  
18 premiums were lower as the benefits and the co-payments  
19 and the deductibles were substantially higher.

20 Q. So you decided not to take the new plan you were  
21 offered?

22 A. That's correct.

23 Q. And in 2013, you're in the same plan?

24 A. I'm in the same plan I was since I've retired and  
25 when I was an active police officer.

26 Q. You're paying \$801 per month for your medical  
27 benefits?

28 A. Yes, I am.

1 MR. ADAM: Your Honor, I'd ask to move the two  
2 documents I've referenced into evidence, POA 51. That's  
3 the Skeen memorandum and attachment and the letter to  
4 Mr. Fehr.

5 THE COURT: Let's call it 51.

6 MR. ADAM: Maybe we should have broken it into 51  
7 and 52.

8 THE COURT: It's all 51. Any objection?

9 MR. SPELLBERG: No objection, your Honor.

10 THE COURT: 51 is received.

11 (Plaintiffs' Exhibit 51, previously marked for  
12 identification, was received in evidence.)

13 MR. ADAM: No further questions, your Honor.

14 THE COURT: Mr. McBride?

15 MR. MCBRIDE: We have no questions of this  
16 witness.

17 THE COURT: Mr. Paterson?

18 MR. PATERSON: No, your Honor.

19 THE COURT: Mr. Silver?

20 MR. SILVER: No questions.

21 THE COURT: City?

22 MR. SPELLBERG: I do, your Honor. I need a minute  
23 to switch over the Elmo if I can have that.

24 THE COURT: You can do that right now.

25 MR. SPELLBERG: You had mentioned there was going  
26 to be a break.

27 THE COURT: No.

28 MR. SPELLBERG: Your Honor, we have the original

1 deposition transcript to lodge.

2 THE COURT: We usually don't do that unless and  
3 until we need -- we don't have a lot of places to put  
4 things. Why don't you hold on to original deposition  
5 transcripts unless and until we need them.

6 MR. SPELLBERG: That's fine, your Honor. Thank  
7 you.

8 CROSS-EXAMINATION

9 BY MR. SPELLBERG:

10 Q. Sergeant Fehr, good afternoon.

11 A. Good afternoon.

12 Q. Good morning still, I guess.

13 A. Good morning.

14 Q. I took your deposition a couple weeks ago, did I  
15 not?

16 A. Yes, you did. I believe it was last Friday.

17 Q. Let me start off, you saw Mr. Hartinger's slide  
18 this morning. You were here during opening statements.  
19 It showed you received about \$119,000 a year in your  
20 retirement; is that correct?

21 MR. ADAM: Objection, your Honor. Relevance and  
22 beyond the scope of direct examination.

23 MR. MCBRIDE: I join in that objection, your  
24 Honor.

25 MR. PATERSON: As do we.

26 THE COURT: What's the purpose of this question?  
27 It does go beyond the scope. What's the purpose?

28 MR. SPELLBERG: It's background, your Honor, as to

1 his retirement benefits, which include health care. It  
2 all ties together.

3 THE COURT: Sustained.

4 BY MR. SPELLBERG:

5 Q. Sergeant, you told us in addition to your  
6 retirement, you're employed down at the Oracle Arena; is  
7 that correct?

8 A. Correct. Called SAP Center as of this last week  
9 or so.

10 Q. You're employed by Air Mac and receive some monies  
11 from them when you provide services; right?

12 A. Yes, I do.

13 Q. As part of your retirement, you receive health  
14 care benefits; right?

15 A. As part of the retirement through the City of San  
16 Jose, that's correct.

17 Q. And every October or November, you receive updated  
18 statements showing what your premium is going to change  
19 to; correct?

20 A. Yes, that is correct.

21 Q. Typically since you've been retired in 2005;  
22 right?

23 A. Correct.

24 Q. Typically since 2005, those premiums have gone up  
25 most years; right?

26 A. Yes, they have.

27 Q. There's been a rather large jump this last year;  
28 correct?

1 A. Yes, there was.

2 Q. Sergeant, do you know whether the retirement  
3 benefits you're receiving now are tied to the low-cost  
4 plan of an active officer or the low-cost plan of a  
5 regular City employee?

6 A. Low-cost plan of an active police officer.

7 Q. What's the basis for that?

8 A. The basis was that agreement that was made in the  
9 mid-1980s that I explained earlier in my testimony. I can  
10 do so again if you like.

11 Q. Have you understood differently since that  
12 agreement was reached?

13 A. Never.

14 Q. Now, you agree, do you not, that this change, this  
15 higher amount that you're now paying for your health care  
16 benefits, that's not tied to Measure B, is it?

17 MR. ADAM: Objection, your Honor, to the extent it  
18 calls for a legal conclusion.

19 THE COURT: Overruled.

20 That means you can answer the question.

21 THE WITNESS: Can you restate that question one  
22 more time.

23 BY MR. SPELLBERG:

24 Q. The large increase that you've received or you're  
25 now paying for your health care benefits, that's not in  
26 any way tied to Measure B, is it?

27 A. I have no idea.

28 Q. Do you recall in deposition you told me it was

1 not? That they're apples and oranges?

2 A. Measure B -- yes, that is correct, my statement.  
3 There was two different items. Whether or not it was cost  
4 effective for the City or not, I don't know. I don't have  
5 the answer for that. But that is what I had testified to.

6 Q. So you agree the increase that you've experienced  
7 is, it's not related to increase that's been put in place  
8 by Measure B; right?

9 A. I don't know that for sure.

10 MR. SPELLBERG: Your Honor, I would like to read  
11 from the deposition.

12 THE COURT: Okay. You need to specify a page and  
13 line number.

14 MR. SPELLBERG: Would you like the original, your  
15 Honor?

16 THE COURT: Yes. At this time, you should lodge  
17 the original. And counsel need to have an opportunity to  
18 review the excerpt, and then you can go ahead.

19 MR. SPELLBERG: Thank you, your Honor. I propose  
20 to read from page 26, lines 5 to 9.

21 THE COURT: Go ahead.

22 MR. SPELLBERG: Go ahead and read it, your Honor?

23 THE COURT: Yes.

24 MR. SPELLBERG: "Question: This dramatic increase  
25 that you've just talked about and what you have to pay for  
26 retiree health care, do you have any reason to believe  
27 that that increase is in any way tied to Measure B?

28 "Answer: No. I believe that they're apples and

1 oranges."

2 BY MR. SPELLBERG:

3 Q. Isn't it true, Sergeant, that you were advised  
4 while you were still employed as an officer at San Jose  
5 that the retiree health care plan was going to be tied to  
6 low cost for any City employee as opposed to the low-cost  
7 plan for a police officer?

8 A. I can't say that I was.

9 MR. SPELLBERG: Your Honor, I would like to mark a  
10 new exhibit. It seems funny that we're marking with so  
11 many exhibits premarked, but this was a POA exhibit that  
12 was withdrawn recently, and we didn't have it in our  
13 binder. This would be 5510, the next in order under  
14 retiree health.

15 THE COURT: Is that the number you will give it?  
16 Madam Clerk is in charge of numbers. It's the next City  
17 exhibit in order.

18 THE CLERK: I have 5908. It would be 5909.

19 MR. SPELLBERG: Under retiree health, our last  
20 number should be 5509.

21 THE COURT: You had subsets.

22 MR. SPELLBERG: Right.

23 THE COURT: What we're going to do is we're going  
24 to give you a chance to say the number, and then unless,  
25 Madam Clerk, there's a problem with that -- because we  
26 couldn't predict what they're doing. So the number is?

27 MR. SPELLBERG: 5509, your Honor.

28 (Defendants' Exhibit 5509 was marked

1 for identification.)

2 THE COURT: And the description of 5509 is?

3 MR. SPELLBERG: These are police and fire  
4 department retirement plan benefits fact sheets running  
5 from August of 2004 up to June of 2012.

6 THE COURT: Okay. And does everybody have this  
7 document?

8 MR. ADAM: We do now, your Honor, yeah.

9 THE COURT: If they didn't have it, then you need  
10 to give everybody a chance to look at it before you  
11 question the witness about it.

12 MR. SPELLBERG: Thank you, your Honor. May I  
13 approach to hand the witness the exhibit?

14 THE COURT: Well, do all the parties have this  
15 document?

16 MR. MCBRIDE: We just got it now, your Honor.

17 THE COURT: Then, yes, you may approach the  
18 witness and give the witness the document.

19 MR. SPELLBERG: Thank you, your Honor.

20 BY MR. SPELLBERG:

21 Q. Sergeant Fehr, I'm handing you Exhibit 5509.

22 Have you seen these documents before, Sergeant?

23 A. I don't recall seeing them, and I don't have them  
24 in my file at home.

25 Q. Do you recall when you were employed as a police  
26 officer, that periodically you would receive benefits fact  
27 sheets explaining what your benefits are?

28 A. Can you repeat that question, please.

1 Q. Isn't it true that periodically when you were with  
2 the department, you would receive fact sheets showing what  
3 your benefits are?

4 A. I don't honestly recall, to be very honest with  
5 you. I don't recall seeing anything like this.

6 MR. SPELLBERG: Your Honor, I would like to move  
7 this into evidence under 403, conditionally. We'll make  
8 an offer of proof that will lay the foundation later, but  
9 I'd like to show it on the screen and question the witness  
10 about some aspects of it.

11 THE COURT: Okay. I don't have 5509. Is there  
12 any objection?

13 MR. ADAM: No objection from the POA, your Honor.

14 MR. MCBRIDE: No objection for Sapien.

15 THE COURT: I'm receiving 5509. And, yes, you may  
16 publish it.

17 (Defendants' Exhibit 5509, previously marked for  
18 identification, was received in evidence.)

19 BY MR. SPELLBERG:

20 Q. Sergeant, what I'm going to do is put the first  
21 page of the exhibit on the Elmo so we've got it up here in  
22 the courtroom.

23 MR. ADAM: Your Honor, I'll object. The witness  
24 has testified he doesn't recall seeing these. I'm not  
25 understanding why we're going to put them up.

26 THE COURT: He's putting them up because they were  
27 received into evidence without objection. That's why he's  
28 putting them up.

1 MR. ADAM: Okay.

2 BY MR. SPELLBERG:

3 Q. Sergeant, look at the top here. There are  
4 benefits fact sheets. You don't recall receiving anything  
5 like this?

6 A. No, I don't.

7 Q. The date on this one --

8 THE COURT: He hasn't seen them. They're in  
9 evidence. Let's not read the document that's in evidence.

10 BY MR. SPELLBERG:

11 Q. Okay. Sergeant, the date on this is 2004. My  
12 question to you, then, is in 2004, were you aware that the  
13 POA acknowledged that the low-cost plan was tied to just  
14 regular City employees as opposed to police employees?

15 A. If I'm understanding your question correctly,  
16 there's a separation between the two, and that being the  
17 case, I do understand that retirees have the opportunity  
18 to choose that same health care plan as the actives to  
19 include the 100 percent paid for low-cost plan.

20 Q. But you understood in 2004, did you not, that the  
21 retirees could accept the low-cost plan that was tied to  
22 regular employees, not active police officers?

23 A. I never was under that understanding.

24 Q. Did you stay up on -- this is a benefits fact  
25 sheet that I put in front of you, Exhibit 5509. Did you  
26 stay up on your benefits since they changed over time?

27 MR. ADAM: Objection, your Honor. Vagueness in  
28 terms of stayed up.

1 THE COURT: Overruled.

2 THE WITNESS: I kept up being involved with the  
3 association for 12 years. I kept up pretty close to what  
4 was going on. Obviously not as close as when I was a  
5 member of the board. But, yes, overall, I had a pretty  
6 good idea of what our benefits were.

7 BY MR. SPELLBERG:

8 Q. Can you tell us again what years you were a member  
9 of the board.

10 A. Sure can. From January 1st, 1982, until January  
11 1st, 1994.

12 Q. Are you aware, Sergeant, that the municipal code  
13 changed to specifically remove the provision that police  
14 officer retiree health care would be tied to an active  
15 officer's -- active officer's health care?

16 MR. ADAM: Objection, your Honor. Argumentative.

17 THE COURT: Overruled.

18 THE WITNESS: No, I was not. In fact, I believe I  
19 mentioned that in my deposition as well. But I am  
20 understanding -- the understanding that any collective  
21 bargaining agreement supersedes the municipal code.

22 MR. SPELLBERG: Your Honor, I'm going to move to  
23 strike the last section. Lack of foundation.

24 THE COURT: Denied.

25 MR. SPELLBERG: I didn't hear the ruling.

26 THE COURT: Denied. Next question.

27 BY MR. SPELLBERG:

28 Q. Sergeant, I'm going to ask you to go to the

1 binders behind you, and I'd like you to take the ones on  
2 the table there. I'd like you to take binder number two,  
3 please.

4 MR. ADAM: Mr. Spellberg, do we have a copy of  
5 your exhibits?

6 MR. SPELLBERG: You should.

7 THE COURT: What exhibit are we going to  
8 reference?

9 MR. SPELLBERG: 5303, your Honor. Your Honor,  
10 5303 is a portion of the municipal code. It's police and  
11 fire department retirement plan section, and I would just  
12 move that into evidence. I think there's no objection on  
13 foundation on that.

14 MR. PATERSON: Your Honor, AFSCME has not been  
15 provided a copy of the City's exhibits.

16 MR. SILVER: Nor have we, your Honor.

17 THE COURT: You don't have copies of the exhibits?

18 MR. SILVER: No, your Honor.

19 MR. SPELLBERG: They were all provided, your  
20 Honor. We listed all the -- what both sides did is  
21 provide Bates numbers of the exhibits. We pulled the  
22 exhibits that they designated. We presume they did the  
23 same. We weren't provided with copies of theirs either,  
24 but everybody had the same Bates numbers. That's how I  
25 understand the exhibits were done.

26 MR. KALINSKI: On behalf of the REA, we gave the  
27 City and all the other parties specific binders of the  
28 exact documents.

1 MR. MCBRIDE: We transferred all of the exhibits  
2 to all of the parties by E-Mail.

3 MR. PATERSON: Your Honor, we, at considerable  
4 cost, had binders made for all parties.

5 THE COURT: You don't have copies. Apparently you  
6 didn't talk to each other about how this was going to go.

7 Somebody get counsel one copy that they can share  
8 so we can continue with this examination. Over the lunch  
9 hour, please meet and confer and resolve this.

10 Do you have your copy of 5303 now?

11 MR. PATERSON: We'll share this one.

12 THE COURT: Go ahead.

13 MR. SPELLBERG: I move 5303 into evidence. It's a  
14 portion of the municipal code related to police and fire.

15 THE COURT: Any objection?

16 5303 is received.

17 (Defendants' Exhibit 5303, previously marked for  
18 identification, was received in evidence.)

19 BY MR. SPELLBERG:

20 Q. Did you ever learn, Sergeant, that -- sorry.  
21 Wrong section. I'm going to mark -- I'm going to put on  
22 the Elmo Bates number 355. Sergeant, my question to you  
23 is, there was a change in the municipal code that  
24 specifically provided --

25 THE COURT: Is 355 in evidence?

26 MR. SPELLBERG: It's just the Bates number. It's  
27 the page of 3303.

28 THE COURT: Thank you.

1 BY MR. SPELLBERG:

2 Q. Did you ever come to learn, Sergeant, that in  
3 November of 1997, there was a change so that the low-cost  
4 medical plan for police officers switched; instead of  
5 being tied to an active officer, it was then tied to just  
6 a regular City employee?

7 A. No, I was not, as I believe I testified to you at  
8 my deposition.

9 Q. When you were in the department, were there  
10 efforts made by the POA to keep its membership up on  
11 changes in benefits that affected their benefits?

12 A. We had monthly meetings, and we had  
13 representatives that would come to the different units.  
14 By and far, it was the responsibility of the individual to  
15 keep up to date.

16 Q. So it's your testimony that nobody from the POA  
17 discussed that there was a change in the low-cost plan and  
18 what it would be tied to; correct?

19 A. If there was, none that I ever heard.

20 Q. Isn't it true, Sergeant, that even though you're  
21 paying more now for your retiree medical care,  
22 substantially more after this year in 2013, you don't know  
23 whether there was a change and whether the -- that was  
24 tied to a low-cost plan, tied to police officers or tied  
25 to regular City employees?

26 A. My only understanding, it's been the same as it  
27 has been since the agreement in the mid-1980s that it's  
28 tied to an active police officer.

1 Q. So the increase that you saw in what you have to  
2 pay for premiums, you don't know if there's been a change  
3 in your plan being now tied from an active officer to a  
4 regular City worker; correct?

5 A. No. I have never been made aware of that or have  
6 heard that.

7 Q. You don't know either way, do you?

8 A. I definitely know that I haven't heard that. I  
9 know what I know, and I know what I don't know.

10 Q. You don't know if the -- if your current  
11 retirement is already tied to the lowest-cost plan of a  
12 City employee as opposed to an active police officer;  
13 right?

14 MR. ADAM: Objection. I think it's been asked and  
15 answered at least twice before.

16 THE COURT: I think this is actually a different  
17 question. I think you meant to inquire about health  
18 benefits, so I invite you to rephrase the question.

19 MR. SPELLBERG: I'm sorry. I didn't realize it,  
20 your Honor.

21 BY MR. SPELLBERG:

22 Q. The health benefits that you have now, you don't  
23 know whether those are tied to the lowest-cost plan for  
24 City employee or an active police officer, do you,  
25 Sergeant?

26 A. I would have to say based on my belief through the  
27 last almost 30 years now, that it's tied to the 100  
28 percent low-cost plan for police officers, active police

1 officers.

2 Q. But nobody from the City has told you that, have  
3 they?

4 MR. ADAM: Objection. Ambiguous. Told him what?

5 THE COURT: Overruled.

6 THE WITNESS: The only thing that -- in way of  
7 communication that we hear from the City is anything that  
8 we receive from other retirement services, and, no, I have  
9 not seen, read, or heard that.

10 MR. SPELLBERG: That's all I have, your Honor.  
11 Thank you.

12 THE COURT: Anything else for Mr. Fehr?

13 MR. ADAM: I'll designate -- your Honor,  
14 Mr. Spellberg read from line 5 to 9 of page 26. I would  
15 designate lines 9 through 19.

16

17 REDIRECT EXAMINATION

18 BY MR. ADAM:

19 Q. Mr. Fehr, you recall your deposition?

20 THE COURT: You are making this request pursuant  
21 to the rule of completeness?

22 MR. ADAM: Yeah. Mr. Spellberg read from four  
23 lines. I want to read from the following ten lines to  
24 give a more complete recital of what the witness actually  
25 testified to during his deposition.

26 THE COURT: So your proposed designation is 10 to  
27 19?

28 MR. ADAM: Sorry?

1 THE COURT: The lines --

2 MR. ADAM: Sorry. It's 9 through 19. 10 through  
3 19. He's already covered 9.

4 THE COURT: This is pursuant to the rule of  
5 completeness?

6 MR. ADAM: Yes.

7 THE COURT: All right. Is there an objection?

8 MR. SPELLBERG: No, your Honor.

9 THE COURT: Go ahead.

10 BY MR. ADAM:

11 Q. "Question: Okay.

12 "Answer: You know, the end result may be the  
13 same, but I don't think it's anything tied specifically to  
14 it.

15 "Question: Do you have an understanding -- strike  
16 that.

17 "What's your understanding as to why there was  
18 this approximate \$250 increase in your monthly payment?

19 "I honestly did not know.

20 "Question: As you sit here now, do you have any  
21 understanding?

22 "Answer: No, I do not."

23 Mr. Fehr, you testified that it's your  
24 understanding that -- strike that.

25 You testified that based on your experience with  
26 the association, it's your understanding that a collective  
27 bargaining agreement would supersede an inconsistent  
28 municipal ordinance; correct.

1 A. Yes, it is.

2 MR. SPELLBERG: Objection. Leading and lack of  
3 foundation.

4 THE COURT: Overruled.

5 MR. ADAM: Nothing further, your Honor.

6 THE COURT: May this witness be excused? Hearing  
7 no response at all, thank you, Mr. Fehr. You're excused.  
8 You're free to stay or to go.

9 Who's the next witness?

10 MR. ADAM: Your Honor, my next witness is not  
11 available until 2:00 based on him working on a schedule,  
12 so I would ask that if we could go out of order and take  
13 any other plaintiffs' witness if we have time.

14 THE COURT: Who's the next witness?

15 MR. MCBRIDE: Your Honor, our only witness other  
16 than Mr. Platten, if that becomes necessary, is scheduled  
17 to testify tomorrow morning. He's flying in from the East  
18 Coast.

19 THE COURT: Somebody needs to call a witness.  
20 So --

21 MR. PATERSON: We had arranged for Ms. Busse to be  
22 here today to testify. I think she's available --

23 THE COURT: Somebody needs to call a witness. Who  
24 will be calling a witness?

25 MR. ADAM: I'm not sure if we've got a witness  
26 here until, as I say, 2 o'clock.

27 THE COURT: That's a problem. Remember we  
28 discussed it at pretrial conference. There's always a

1 witness available. Witnesses from time to time have to  
2 wait, but --

3 MR. PATERSON: Your Honor, we have a witness  
4 arranged for after the lunch break. I didn't  
5 anticipate --

6 THE COURT: We have to always have a witness  
7 available. This is not good.

8 MR. ADAM: Understood, your Honor.

9 THE COURT: None of the plaintiffs have any  
10 witnesses available?

11 MR. PATERSON: We would call Donna Busse, who is  
12 supposed to be here under subpoena.

13 THE COURT: Okay.

14 MR. PATERSON: Is she available?

15 MR. SPELLBERG: You told me in the afternoon, so  
16 I've arranged for her to come in the afternoon.

17 MR. PATERSON: I don't recall that.

18 THE COURT: None of the plaintiffs have a witness  
19 available?

20 MR. MCBRIDE: Your Honor, if your Honor wants us  
21 to, I can put Mr. Platten on. I hoped to have discussion  
22 over the break as to whether that was going to be  
23 necessary.

24 THE COURT: And you should have had that  
25 discussion. Let's not have this ever happen again. Okay?

26 MR. PATERSON: Your Honor, if I may --

27 THE COURT: We were very clear at the pretrial  
28 conference that there never comes a time when a witness is

1 unavailable.

2 MR. PATERSON: Your Honor, if I may. At the trial  
3 setting, we did indicate that our two primary witnesses,  
4 Mr. Allen and Mr. Doonan, would not be available today.

5 THE COURT: That's fine. But what I'm saying is,  
6 this can't happen again because I made it very clear at  
7 the pretrial conference that you're not to run out of  
8 witnesses until you rest. So let's not have this happen  
9 again. We have a lot of meeting and conferring to do. I  
10 propose that we reconvene at 1:15. Is that okay with  
11 staff?

12 We're in recess until 1:15.

13 (At 12:00 p.m., a recess was taken  
14 until 1:30 p.m. of the same day.)

15 THE COURT: Any update before we proceed with the  
16 second phase?

17 MR. ADAM: Yes, your Honor. I believe on  
18 stipulations as to authenticity and perhaps admissibility,  
19 the City has a response. They were just in the process of  
20 giving us that response when the Court appeared. So  
21 Mr. --

22 MR. SPELLBERG: We've agreed to authenticity and  
23 admissibility of dozens of exhibits which we had  
24 previously, and the numbers changed, so it's still the  
25 same. I think we're still trying to get on the same page  
26 as to what the new numbers are and what's in. Certainly  
27 many, many documents we would agree are authentic.

28 THE COURT: It sounds like something you can

1 reduce to writing at the end of the day.

2 MR. SPELLBERG: That's what we're going to try to  
3 do.

4 THE COURT: Anything before we call the next  
5 witness?

6 MR. ADAM: Well, the challenge, I guess, from the  
7 POA's perspective -- and I think AFSCME is going to put on  
8 a witness next -- is our witness that's going to be on  
9 this afternoon, part of what he's going to be doing is  
10 authenticating documents that the City may or may not have  
11 already decided it's willing to stipulate to authenticity.

12 THE COURT: Then one option would be to defer  
13 those witnesses until after you've had a chance to  
14 thoroughly discuss this.

15 MR. ADAM: Okay.

16 THE COURT: Who's the next witness?

17 MR. SOROUSHIAN: AFSCME calls Jeffrey Rhoads.  
18 Vishtasp Soroushian for AFSCME.

19 MR. SPELLBERG: Your Honor, they have told us  
20 Donna Busse would be the next witness. We pulled her away  
21 from her duties at the retirement services to be here.  
22 She's in the courtroom right now.

23 THE COURT: Right. She is one of those  
24 authentication witnesses that we hope we won't have to  
25 call.

26 MR. PATERSON: Your Honor, we would need to call  
27 her --

28 Teague Paterson for AFSCME.

1           We would need to call her for admissibility  
2 purposes as well.

3           I'd also like to point out that Mr. Rhoads is also  
4 pulled away from his duties. On the other hand, he's not  
5 receiving pay for his time to be here today.

6           THE COURT: What are you asking me to do,  
7 Mr. Spellberg?

8           MR. SPELLBERG: To call Ms. Busse, your Honor. We  
9 specifically brought her down right now for testimony. If  
10 she's released, she's released.

11          THE COURT: Many times I have pointed out that we  
12 won't be calling witnesses necessary for authentication if  
13 it's not necessary. So --

14          MR. SPELLBERG: Mr. Paterson just told us she's  
15 going to testify beyond that. I can just have her wait in  
16 the hallway, of course. It makes it difficult for us if  
17 they tell us one thing then call witnesses that are  
18 different than what we've anticipated.

19          MR. PATERSON: Your Honor, we understood that we  
20 had to have witnesses ready, and it's difficult to predict  
21 exactly when they will be called.

22          THE COURT: It's unfortunate that these potential  
23 stipulations could not be ironed out ahead of time, but we  
24 need to make the best use of court time to hear  
25 substantive testimony from witnesses, and I hope and  
26 expect that most, if not all, of the witnesses who are  
27 called only to authenticate or lay a foundation for  
28 documents will not need to be called.

1           So I suggest we use the time we have available to  
2 hear from witnesses with more substantive testimony, and  
3 then if we need witnesses for authentication or  
4 admissibility, we can do that.

5           Is there anybody now who's ready to testify about  
6 a substantive matter?

7           MR. SOROUSHIAN: Yes, your Honor. Mr. Rhoads is.

8           THE COURT: Okay. Then in light of the fact that  
9 you're going to continue work on the stipulations, may we  
10 excuse Ms. Busse till no sooner than tomorrow?

11          MR. ADAM: Yes.

12          MR. PATERSON: Your Honor, the problem is that a  
13 large number of the witnesses we had scheduled for today,  
14 and, in fact, several of our witnesses are not available  
15 until tomorrow, as the Court knows, and the parties  
16 already knew that. It may be that we will not have  
17 witnesses to call once Mr. Rhoads finishes his testimony.

18          I'd also say that the City has not agreed to  
19 stipulate to admissibility, merely authenticity, so I  
20 would suggest that we could have Ms. Busse testify as to  
21 matters of admissibility, namely, maintaining records in  
22 the ordinary course of business, subject to bringing her  
23 back once we go through the stipulation to authenticity  
24 because it may not be that we agree on all the documents  
25 that we proposed.

26          THE COURT: Apparently, you haven't talked about  
27 it yet. I think testimony of a custodian of records is in  
28 the category of things the Court will hear after you've

1 exhausted and met and conferred about the opportunity to  
2 eliminate the need for that testimony.

3 MR. PATERSON: Your Honor, the City has -- from my  
4 understanding, the City has never indicated it would  
5 stipulate to admissibility with respect to the retirement  
6 system documents. It is repeatedly stated only  
7 authenticity.

8 THE COURT: You need to be careful not to mix up  
9 concepts here. Admissibility is a large concept. The  
10 testimony of custodian of records is a subset of that.

11 May I hear from the City as to whether the City is  
12 going to require a custodian of records from the City to  
13 testify foundationally with respect to, I suppose, a  
14 business records exception.

15 MR. SPELLBERG: No, your Honor. We agree anything  
16 that is --

17 THE COURT: Is there anything else Ms. Busse would  
18 address?

19 MR. PATERSON: No, your Honor. Merely the  
20 authentication and business records exception to the  
21 hearsay rule.

22 THE COURT: Then I'm going to repeat my suggestion  
23 that she be excused and not called until tomorrow at the  
24 earliest after you have done the meeting and conferring  
25 that should be done. Okay?

26 MR. ADAM: Yes.

27 MR. SPELLBERG: Thank you very much, your Honor.

28 THE COURT: Go ahead.

1 MR. SOROUSHIAN: We'd like to call Mr. Rhoads.

2 THE COURT: Mr. Rhoads, please come forward.  
3 Stand right here next to the jury box. Face the clerk and  
4 raise your right hand.

5 THE CLERK: You do solemnly state, under penalty  
6 of perjury, that the evidence you shall give in this issue  
7 or matter shall be the truth, the whole truth, and nothing  
8 but the truth?

9 THE WITNESS: I do.

10 THE CLERK: Thank you. Have a seat, please.  
11 Please state and spell your name for the record.

12 THE WITNESS: My name is Jeffrey Rhoads,  
13 J-E-F-F-R-E-Y, R-H-O-A-D-S.

14

15

JEFFREY RHOADS

16 called as a witness by counsel for the Plaintiffs, being  
17 first duly sworn, testified as follows:

18

DIRECT EXAMINATION

19

BY MR. SOROUSHIAN:

20

Q. Hi, Mr. Rhoads.

21

A. Hello.

22

Q. Thank you for taking up your time to come help us  
23 today. I'm going to ask you a few questions. Are you  
24 currently employed?

25

A. Yes, I am.

26

Q. Where are you employed?

27

A. I work in the finance department with the City of  
28 San Jose.

1 Q. What is currently your position in the finance  
2 department?

3 A. My current position is I'm an accountant tech.

4 Q. Can you just briefly tell us what you do in that  
5 position.

6 A. In that position, I supervise the IBS, integrated  
7 billing system, for garbage and water services provided to  
8 the City.

9 Q. Are you a member of AFSCME?

10 A. Yes, I am.

11 Q. Let me take a step back real quickly. What is  
12 your educational background?

13 A. My educational background is primarily accounting.

14 Q. You have a degree in accounting?

15 A. I have an AA in accounting.

16 Q. And how many years of service do you have with the  
17 City?

18 A. I currently have 15 and a half years.

19 Q. Where do you live currently?

20 A. I'm sorry. I meant 14 and a half.

21 Q. Where do you currently live?

22 A. I'm sorry?

23 Q. Where do you currently live?

24 A. I live in Fremont.

25 Q. Now, I'm going to bring your attention to when you  
26 took your full-time position with the City. When you  
27 first came to work at the City full-time, were you  
28 familiar with their retirement benefits that the City was

1 offering you?

2 A. Yes, I was.

3 Q. How were you made aware of those benefits?

4 A. I was made aware of the benefits when I first came  
5 to the City as a contract employee. One of the managers  
6 that I worked for, Carol Gan, took the time to explain it  
7 to me, basically show why working for the City would be a  
8 good career path.

9 Q. Do you recall what Ms. Gan told you about the  
10 retirement benefits the City would afford you?

11 MR. SPELLBERG: Objection. Hearsay.

12 MR. SOROUSHIAN: Your Honor, that's an admission.  
13 She's a manager. It also goes to his state of mind, what  
14 he understood his benefits to be.

15 THE COURT: Anything else?

16 MR. SPELLBERG: State of mind, your Honor, but  
17 that would be the only reason.

18 THE COURT: It appears there's a foundation for a  
19 hearsay exception, so I'm going to overrule the objection.

20 MR. SOROUSHIAN: Thank you, your Honor.

21 BY MR. SOROUSHIAN:

22 Q. I apologize. Can you tell us what Ms. Gan told  
23 you about the retirement benefits that you would receive.

24 A. She told me that if I was to work for the City of  
25 San Jose, that if I put in, you know, 30 years, I could  
26 earn 75 percent at 2 and a half percent a year. And once  
27 I've vested 15 years, I would be guaranteed health  
28 benefits.

1 Q. When you said 75 percent at 2 and a half percent a  
2 year, can you clarify what you mean by that.

3 A. If I worked for 30 years, I would earn 75 percent,  
4 which comes out to 2 and a half percent a year.

5 Q. Is that 35 percent of your salary?

6 A. 75 percent of my base pay, yes.

7 Q. Thank you. Did you also have a new employee  
8 orientation at some point?

9 A. Yes. Once I went permanent, we had orientation,  
10 and the same things that Carol Gan informed me were  
11 repeated in our orientation.

12 Q. Now, were these retirement benefits one of the  
13 reasons why you came to work for the City?

14 MR. SPELLBERG: Objection. Leading.

15 THE WITNESS: Yes.

16 THE COURT: Overruled.

17 THE WITNESS: Yes, it was.

18 BY MR. SOROUSHIAN:

19 Q. Did you know anything about -- did you know  
20 whether you would receive Social Security from your time  
21 with the City?

22 A. That was one of the things -- when I was still a  
23 contract employee, when I spoke with Carol Gan, that was  
24 the first thing that actually caught my attention when she  
25 says the City of San Jose does not -- you don't contribute  
26 to Social Security. So, yes.

27 Q. So was that important to you?

28 A. Yes, it was.

1 Q. So around the time you came to work with the City,  
2 were you aware of any other positions, openings, either  
3 with public agency or private sector?

4 A. I knew of other positions outside of the City when  
5 I took permanent with the City, yes.

6 Q. Were any of these positions ones you were  
7 potentially qualified for, in your opinion?

8 A. Yes, I was qualified for them.

9 Q. Can you elaborate? Can you give me an example?

10 A. An example was, prior to going permanent with the  
11 City and shortly after, my ex-wife told me about a  
12 position at her company, which is Altera. She asked me to  
13 apply with them, and the pay would have been about 30  
14 percent more than what I was currently making.

15 Q. So did you apply?

16 A. No, I didn't.

17 Q. Why is that?

18 A. Because I felt that the City's retirement plan was  
19 something that was more interested because I was more  
20 concerned with my future than what I was going to receive  
21 now.

22 Q. Now, besides Altera, were there any other --  
23 strike that.

24 Were there any other possible employment avenues  
25 that were brought to your attention?

26 A. Yes. Over the last few years, I had a friend with  
27 AT&T encourage me to apply with them as a project manager.

28 Q. What was -- do you recall what this position was

1 with AT&T?

2 A. The position was project manager.

3 Q. Your friend's position?

4 A. My friend's position is assistant director.

5 Q. Assistant director. Do you recall how the pay  
6 compared to the pay with the City?

7 A. At that time, the pay was roughly --

8 MR. SPELLBERG: Objection. Hearsay.

9 THE COURT: Sustained.

10 BY MR. SOROUSHIAN:

11 Q. Do you know if the pay was better or worse?

12 MR. SPELLBERG: Same objection.

13 THE COURT: Sustained.

14 BY MR. SOROUSHIAN:

15 Q. Did you ultimately take that position?

16 A. No, I didn't.

17 Q. Why is that?

18 A. Once again, it was the benefits with the City, the  
19 retirement and -- what I recall, it was also the security  
20 with the City because I felt that with the City, the  
21 long-term was more stable.

22 Q. Do you recall approximately how many years of  
23 service you had at that point?

24 A. When I was first approached, I was around 13  
25 years. That's what I meant by security is because if I  
26 walked away before the 15 years, I would lose the health  
27 benefits.

28 Q. I'm going to talk to you about Measure B. Are you

1 familiar with Measure B?

2 A. Yes, I am.

3 Q. Have you reviewed it?

4 A. Yes, I have.

5 Q. Do you recall approximately when was the first  
6 time you reviewed it?

7 A. The first time I briefly reviewed it was when it  
8 was being introduced, part of the ballot.

9 Q. Have you more thoroughly reviewed it since?

10 A. Yes, I have. I've reviewed it probably the first  
11 time more thoroughly when the City Manager sent it as an  
12 E-Mail, Debbie Figone, and I reviewed it then. And since  
13 then -- since then, I've reviewed it a few times.

14 Q. Are you familiar with the changes that Measure B  
15 could make to your current pension plan?

16 A. Yes, I am.

17 Q. What is your understanding of that?

18 MR. SPELLBERG: Objection. Lack of foundation.

19 THE COURT: I'm a little bit unclear as to what  
20 this question goes to. You want him to tell me what  
21 Measure B says?

22 MR. SOROUSHIAN: No. I want him to explain what  
23 he thinks Measure B will do to his retirement benefits.

24 THE COURT: Okay. Please rephrase the question.

25 BY MR. SOROUSHIAN:

26 Q. What do you believe that Measure B will do to your  
27 current pension plan?

28 MR. SPELLBERG: Objection. Lack of foundation;

1 legal conclusion.

2 MR. SOROUSHIAN: I'm not asking him to interpret  
3 Measure B. I'm asking for what he understands it to be.

4 THE COURT: I understand that's the topic to which  
5 the question is directed, so I'll overrule the objection.

6 BY MR. SOROUSHIAN:

7 Q. You can answer the question.

8 A. My understanding is if the Measure B was to go  
9 forward, my -- what I would earn each year would go from  
10 two and a half to two percent. So my original goals when  
11 I came to the City of leaving at 55 would also be changed,  
12 meaning I would not be able to collect a pension until I'm  
13 62.

14 Q. So that is your -- is that your understanding of  
15 what Measure B does to your current retirement plan?

16 A. Well, in addition to my current, I would have to  
17 contribute up to an additional 16 percent.

18 Q. Is there an alternative to contributing up to 16  
19 percent of your income?

20 MR. SPELLBERG: Objection, your Honor. Lack of  
21 foundation; calls for a legal conclusion.

22 THE COURT: No. I'm really not clear what the  
23 witness is going to do except tell me what Measure B says.  
24 So --

25 MR. SOROUSHIAN: I can ask him a better question.

26 BY MR. SOROUSHIAN:

27 Q. So you testified to two things: 16 percent  
28 increase contributions and the rate changing. In your

1 opinion, do you see -- for your personal position, which  
2 of those is a better option to you?

3 A. I see neither of them as a better option.

4 Q. Why is that?

5 A. The way I see it is I --

6 MR. SPELLBERG: Objection. Relevance.

7 THE COURT: Overruled.

8 THE WITNESS: I see it as if I stay in my current  
9 plan, it'll cause a financial hardship, and if I go into  
10 the so-called volunteer program, I would not be able to  
11 retire at 55, and to reach the same goal, I would have to  
12 work longer to get the same percentage.

13 BY MR. SOROUSHIAN:

14 Q. Fair enough.

15 I want to ask you a few more questions. What is  
16 your current salary with the City?

17 A. My current salary with the City is approximately  
18 67,000 a year gross.

19 Q. Do you get any other additional compensation?

20 A. I get health in lieu.

21 Q. Approximately how much is that?

22 A. I believe it's a little over 5,000 a year.

23 Q. Do you do any overtime? Do you get overtime?

24 A. It's rarely seen.

25 Q. I think by my calculations, we're at about 73,000  
26 a year. Is that net or gross?

27 A. That would be gross.

28 Q. How much do you currently pay in terms of pension

1 contributions?

2 A. Currently, I believe I'm around 11 percent.

3 Q. 11 percent of your salary?

4 A. Correct.

5 Q. How much, do you know, approximately you pay on  
6 taxes on your gross income?

7 MR. SPELLBERG: Objection. Irrelevant.

8 THE COURT: What's the relevance of this?

9 MR. SOROUSHIAN: Your Honor, they've put this into  
10 issue by putting up the PowerPoint presentation with  
11 everybody's salaries and saying that these employees are  
12 grossly overpaid, and I believe that it's within the scope  
13 of the question. They've also addressed this issue in  
14 their pretrial brief too.

15 THE COURT: The pending question is, how much do  
16 you pay in taxes?

17 MR. SOROUSHIAN: Yes. I'm trying to get his  
18 understanding of what his net salary is. I think that the  
19 figures that the City is displaying in terms of what  
20 certain workers earn is grossly misleading, and I'm trying  
21 to address that point.

22 THE COURT: Sustained.

23 BY MR. SOROUSHIAN:

24 Q. So would it be accurate to say that you earn over  
25 \$100,000 a year?

26 A. That I earn? No, I don't earn over \$100,000 a  
27 year.

28 Q. Why is it not accurate to say that?

1 A. Because that's not what my classification earns.

2 Q. So do you have \$100,000 to pay the bills, your  
3 rent, and groceries?

4 A. 100,000, no, I don't.

5 MR. SOROUSHIAN: That's all, your Honor. Thank  
6 you.

7 THE COURT: Mr. Adam?

8 MR. ADAM: No questions, your Honor.

9 MR. KALINSKI: No questions, your Honor.

10 MR. SILVER: No questions, your Honor.

11 THE COURT: Mr. Spellberg?

12 MR. SPELLBERG: Thank you, your Honor. I do.

13

14

CROSS-EXAMINATION

15 BY MR. SPELLBERG:

16 Q. Mr. Rhoads, good afternoon.

17 A. Hello.

18 Q. Mr. Rhoads, you recall I took your deposition  
19 within the last few weeks?

20 A. Yes, I do.

21 Q. So you told us a few months ago, Mr. Rhoads, that  
22 one of the primary reasons you took employment with San  
23 Jose was because of the pension system; correct?

24 A. That's correct.

25 Q. But isn't it more accurate to say that was really  
26 your best job opportunity regardless of the City's pension  
27 system?

28 A. I did not say that.

1 Q. I'm asking, isn't that more accurate?

2 A. No.

3 Q. Now, before you went to the City, you worked at a  
4 number of different jobs, did you not?

5 A. I worked at a few, yes.

6 Q. You worked at Sony Electronics; correct?

7 A. Yes.

8 MR. SOROUSHIAN: Objection. Irrelevant. Outside  
9 the scope.

10 THE COURT: Overruled.

11 BY MR. SPELLBERG:

12 Q. You left that position because you didn't like it;  
13 right?

14 A. That's not correct.

15 Q. How long did you work at Sony?

16 A. I believe three, four years.

17 Q. Prior to that time you worked at a company called  
18 C Tech; right?

19 A. Correct.

20 Q. You left as a result of some accounting  
21 irregularities that were uncovered in an audit; is that  
22 right?

23 MR. SOROUSHIAN: Objection. Relevance.

24 THE COURT: Overruled.

25 THE WITNESS: Yes.

26 BY MR. SPELLBERG:

27 Q. And you left under mutual agreement that you would  
28 leave and not pursue claims against C Tech; right?

1 A. That's correct.

2 Q. Then after you left your position at Sony, you  
3 were working at a series of jobs that you received through  
4 a temporary employment agency; right?

5 A. Yes.

6 Q. And, in fact, the whole reason that you first came  
7 to the City of San Jose was because the employment agency  
8 placed you at San Jose; right?

9 A. That's correct.

10 Q. So you didn't see something about San Jose  
11 benefits and then applied there. You went there initially  
12 because the temp agency placed you there; right?

13 A. That's correct.

14 Q. After being temporary at the City of San Jose,  
15 there was ultimately a full-time position available, and  
16 you applied for it and obtained it; right?

17 A. Yes. Down the road I did, yes.

18 Q. There was no other job offer that you had at that  
19 time when you took the position at San Jose; right?

20 A. No. That's not correct.

21 Q. What other company had offered you a job?

22 A. As I stated earlier, my ex-wife was telling me  
23 about a job with her company. At the time we were  
24 married, and she was asking me to go work with her.

25 Q. Other than that, no other company had offered you  
26 a job; right?

27 A. Nobody called me to offer me a job, no.

28 Q. Were you interviewing at other positions when you

1 took the San Jose position?

2 A. I didn't actively look.

3 Q. Now, the job with your ex-wife, that's called  
4 Altera; right?

5 A. Altera, yes.

6 Q. You didn't actually apply to them, did you?

7 A. No, I didn't.

8 Q. You don't know whether you had an option of being  
9 hired there or not. Isn't that fair to say?

10 A. That's fair to say.

11 Q. And Altera, you told me, had 401K benefits; right?

12 A. Yes.

13 Q. Did you make a comparison of those 401K benefits  
14 with the City's pension plan at the time you took the City  
15 job?

16 A. Only based on what my wife at the time told me.

17 Q. You didn't go to Altera and ask for employee  
18 information, then analyze it that way; right?

19 A. No.

20 Q. Now, after you started at the City of San Jose,  
21 you left employment -- you left the City and went to other  
22 employment, did you not?

23 A. Yes, I did.

24 Q. You went to the State of California; correct?

25 A. Correct.

26 Q. And the reason you went to the State of California  
27 was because you thought it was a better paying job; right?

28 A. I saw more potential.

1 Q. Didn't you tell me at deposition that you thought  
2 it was a better paying job?

3 A. At the time, yes.

4 Q. And you didn't go to the State because you thought  
5 it was a better retirement system; it was because it paid  
6 more; right?

7 A. When I went, I was under the impression, because  
8 from one government agency to another, PERS program, they  
9 would be very similar.

10 Q. Did you do an analysis to determine whether the  
11 retirement systems were similar?

12 A. After I took the job, yes, I did.

13 Q. But not before you took it?

14 A. Correct.

15 Q. You took it because you thought it paid better;  
16 right?

17 A. I took the job mainly because I saw the potential.

18 Q. What happened -- what you told me in deposition is  
19 you left the State's employment because it didn't pay as  
20 much as you thought it would; right?

21 A. I did leave the State job because the pay was not  
22 what I thought it was, correct.

23 Q. When you left the state's -- the position with the  
24 state, you were working selling toys in a toy store; isn't  
25 that correct?

26 A. In between coming back to the City, yes.

27 Q. And so coming back to the City was a much better  
28 position than working at the toy store, obviously; right?

1 A. If you compare those two, yes.

2 Q. When you were working in the toy store, were you  
3 trying to find other work besides the City of San Jose  
4 work?

5 A. No. Because I was already communicating with  
6 staff -- with the City of San Jose. They said I would  
7 have no problem coming back.

8 Q. You told us also that you were looking at an AT&T  
9 position. Remember that?

10 A. Yes.

11 Q. You didn't actually apply for the position;  
12 correct?

13 A. No, I didn't.

14 Q. What happened is your friend just told you about  
15 it, and you thought maybe I would be eligible for the  
16 work; right?

17 A. He told me I would be eligible.

18 Q. Did you check that out independently of what your  
19 friend said?

20 A. I felt the position he held and what he was  
21 telling me was accurate.

22 Q. Isn't it true that you did not bother to check the  
23 AT&T pension plan when your friend made those comments to  
24 you?

25 A. I didn't -- I did review the positions on the AT&T  
26 website, and I decided not to pursue it. As I stated  
27 earlier, because I felt I was in a position where if I  
28 left the City at that time, I'd lose my health benefits,

1 and I wasn't going to put in 13 years and walk away from  
2 it.

3 Q. You didn't make any determination whether the 401K  
4 retirement plan at AT&T was superior or inferior to the  
5 San Jose benefit plan, did you?

6 A. I didn't get that far in, no.

7 Q. You never made that analysis?

8 A. No, I didn't.

9 Q. The one thing you told us is that it was important  
10 to you that you weren't going to be in the Social Security  
11 system, and that's one reason why you liked the San Jose  
12 system?

13 A. That's correct.

14 Q. Can you tell us how Social Security is calculated?  
15 What's the rate on Social Security if you retire -- when  
16 you start drawing Social Security at 65, do you know what  
17 the rate is?

18 MR. SOROUSHIAN: Objection. Calls for legal  
19 conclusion. Outside of his knowledge, expertise.

20 THE COURT: Overruled.

21 THE WITNESS: No, I don't.

22 BY MR. SPELLBERG:

23 Q. So why do you feel the San Jose system is superior  
24 to the Social Security system?

25 A. It's not something I feel that is superior. It's  
26 just I felt -- I just didn't believe in the Social  
27 Security system, and I didn't want to contribute to  
28 something I didn't believe in.

1 Q. You don't know which system is better for the  
2 retiree, the San Jose system or Social Security; right?

3 MR. SOROUSHIAN: Objection. As far as it calls  
4 for him to speculate as to what's better for retirees.

5 THE COURT: The question is does he know or not.  
6 Overruled.

7 THE WITNESS: The way I hear, you're trying to say  
8 a person should only rely on Social Security.

9 BY MR. SPELLBERG:

10 Q. I'm asking, did you ever make an analysis about  
11 which system is better for the retiree, Social Security or  
12 the San Jose system?

13 A. The way I hear you're asking, one or the other.  
14 It's not a combination of the two.

15 Q. Just asking the question, did you make that  
16 determination?

17 A. I guess I don't understand the question.

18 Q. You told us one reason you -- you were interested  
19 in coming to the San Jose system was because you weren't  
20 going to be contributing to Social Security; right?

21 A. That's correct.

22 Q. But you have no idea whether the Social Security  
23 system provided a richer benefit to retirees as opposed to  
24 the San Jose system; is that right?

25 A. I'm still hearing as Social Security as my only  
26 option for a retirement.

27 Q. Are you able to answer the question, Mr. Rhoads?

28 A. The way I'm hearing -- I'm answering the best way

1 I understand the question.

2 Q. Let me try it one more way. Did you ever make a  
3 comparison of the two systems before you decided, gee, the  
4 San Jose system is going to be better for me?

5 MR. SOROUSHIAN: Asked and answered.

6 THE COURT: Overruled.

7 THE WITNESS: Yeah. The City's pension would be  
8 better for me.

9 BY MR. SPELLBERG:

10 Q. Why is it better than the Social Security system?

11 A. Well, I only see the Social Security -- it's  
12 only -- it's a supplement. It's not designed to be your  
13 sole retirement. So to say why is it better or not, I'm  
14 just -- I'm not grasping the question, the reality of it.

15 Q. You don't have any basis to -- you told us you  
16 didn't want to be on Social Security. There's no real  
17 reason for that; right? It's just your personal feeling.  
18 That's kind of what I'm hearing.

19 A. Yeah. It's my personal feeling.

20 Q. It has nothing to do with the relative value or  
21 richness of each system; right?

22 MR. SOROUSHIAN: Objection to the word "richness"  
23 being ambiguous, vague.

24 THE COURT: Overruled.

25 THE WITNESS: I'm sorry?

26 BY MR. SPELLBERG:

27 Q. Your decision not to go to Social Security and  
28 stick with just San Jose has nothing to do with the

1 relative values of the two systems; right?

2 A. It does have to do with the value of the two.

3 Q. I'm sorry. I'm going to ask one more time. Why  
4 is the San Jose system superior in your view?

5 A. Superior in --

6 Q. Yes.

7 MR. SOROUSHIAN: Mischaracterizes his testimony.

8 THE COURT: I think you should rephrase that  
9 question.

10 BY MR. SPELLBERG:

11 Q. Why do you prefer the San Jose system as opposed  
12 to Social Security?

13 A. Because my understanding of it, it's more stable.

14 Q. San Jose is more stable?

15 A. Than Social Security, yes.

16 Q. Mr. Rhoads, you talked about your salary. You're  
17 making about 67 -- your gross salary is about 67,000;  
18 correct?

19 A. Yes. Approximately.

20 MR. SPELLBERG: Your Honor, I'd like to mark for  
21 identification Exhibit Number 6020 in our binders.

22 THE COURT: If it's in the binders, has it already  
23 been marked?

24 MR. SPELLBERG: It's already marked. I wasn't  
25 sure how --

26 THE COURT: Then you can just say, I'm referring  
27 to the exhibit that's been premarked as.

28 MR. SPELLBERG: I'm referring to Exhibit 6020,

1 your Honor. I'd like to move it into evidence.

2 MR. SOROUSHIAN: I don't have a copy, your Honor.

3 MS. ROSS: Your Honor, we gave them a set.

4 MR. ADAM: Which number?

5 MR. HARTINGER: Volume 6.

6 THE COURT: Okay. It's come to my attention that  
7 I have defendants' exhibits, Volume 1 through 5, which one  
8 of them I have says of six, but I have five of them.

9 MR. SPELLBERG: It's right there, your Honor. I  
10 apologize. We're working out the kinks in everything this  
11 morning.

12 THE COURT: Okay. 6020.

13 MR. SPELLBERG: 6020. I'd like --

14 THE COURT: Mr. Rhoads, do you have that?

15 THE WITNESS: No, I don't.

16 THE COURT: I think you need to help him with one  
17 of these binders. The witness binders are on the witness  
18 stand. Do we have a set of exhibits in binder six that  
19 has been premarked?

20 MR. SPELLBERG: Yes, your Honor.

21 THE COURT: We do?

22 MR. SPELLBERG: Yes.

23 THE COURT: Who has those?

24 MR. SPELLBERG: Everybody has them, your Honor.

25 We all have Volume 6.

26 MR. KALINSKI: No.

27 THE COURT: The question is, Volume 6 that's been  
28 premarked, is there a binder of Volume 6 that has exhibits

1 that have been premarked?

2 MR. SPELLBERG: Yes.

3 THE COURT: Where is that?

4 MR. SPELLBERG: We just handed one to your clerk,  
5 your Honor. We had handed one up earlier today, and it  
6 didn't quite make it.

7 THE COURT: This is it. The witness has to have  
8 the ones with the tags. That's what marking exhibits is  
9 all about. The witness has the ones, so it's right here.

10 MR. SPELLBERG: I'll swap them, your Honor.

11 THE COURT: That's great.

12 BY MR. SPELLBERG:

13 Q. Mr. Rhoads, I'm talking about Exhibit 6020 in that  
14 binder.

15 MR. SOROUSHIAN: Your Honor, I would object to  
16 this exhibit as irrelevant, especially as far as it  
17 implicates other individuals other than Mr. Rhoads.

18 MR. SPELLBERG: Your Honor, we're moving this into  
19 evidence under 403; that we would lay the foundation with  
20 another witness. And the last line is Mr. Rhoads' salary  
21 and his total compensation, which has clearly been put at  
22 issue with the questioning on direct.

23 MR. ADAM: Your Honor, Gregg Adam for the POA.

24 I would join in AFSCME's objection.

25 THE COURT: I think the objection is well-taken,  
26 and I'm sustaining it. If you believe at a later time  
27 that you addressed that objection with respect to all the  
28 information on 6020, you can offer it again.

1 MR. MCBRIDE: Your Honor, while we're on that  
2 subject, our index -- we don't have the documents. We do  
3 not have them. But our index of 6020 is a reference to an  
4 ordinance.

5 MR. ADAM: We have a shared --

6 MR. KALINSKI: Right now we're sharing one.

7 THE COURT: Okay. So I'm not receiving 6020 at  
8 this time. You can question the witness about it if you  
9 wish to do so.

10 MR. SPELLBERG: I do. Thank you very much, your  
11 Honor.

12 BY MR. SPELLBERG:

13 Q. So, Mr. Rhoads, you told us that you make  
14 approximately 67,000, 68,000 a year at the City; is that  
15 right?

16 A. That's correct.

17 Q. You make an additional 5800 for in lieu pay  
18 because you don't receive medical care through the City;  
19 correct?

20 A. That's correct.

21 Q. Have you ever heard of the phrase "total  
22 compensation"?

23 A. No.

24 Q. Look at Exhibit 20. There's a column there that  
25 lists total annual compensation for a number of employees,  
26 including yourself.

27 MR. MCBRIDE: Your Honor, I thought the objection  
28 was sustained.

1 THE COURT: There's not a question pending. He's  
2 directing the witness to Exhibit 6020.

3 BY MR. SPELLBERG:

4 Q. Do you see that, Mr. Rhoads?

5 A. Yes, I do.

6 Q. Are you aware that the City pays roughly  
7 two-thirds of your salary for the benefits that you  
8 receive through the City?

9 MR. MCBRIDE: Objection, your Honor. Irrelevant  
10 on behalf of our clients anyway.

11 MR. SOROUSHIAN: I would join in the objection.

12 THE COURT: Overruled.

13 THE WITNESS: I see what you have on this paper,  
14 yes.

15 BY MR. SPELLBERG:

16 Q. Do you agree with that, the City pays roughly  
17 two-thirds of your salary to cover the benefits that you  
18 receive at the City?

19 MR. SOROUSHIAN: Objection. Lacks foundation.  
20 Outside of his personal knowledge.

21 THE COURT: Overruled.

22 THE WITNESS: I'm sorry. The question again?

23 BY MR. SPELLBERG:

24 Q. Are you aware that the City pays roughly  
25 two-thirds of your \$67,000 annual salary to provide the  
26 benefits that you receive through the City?

27 A. But I'm not receiving them all.

28 Q. Are you aware the City pays money to pay for your

1 benefits?

2 A. Yes.

3 Q. You agree it's roughly two-thirds of your salary?

4 A. Based on what I see on here, yes.

5 Q. You don't have any reason to believe it's  
6 inaccurate, do you?

7 A. No.

8 Q. I'm sorry?

9 A. No.

10 Q. Mr. Rhoads, you gave some testimony about your  
11 options of going --

12 MR. HARTINGER: Your Honor, if I might interject.  
13 Witnesses have been excluded, and I think a witness -- if  
14 I'm not mistaken, that's Mr. Robb.

15 MR. ADAM: That's Mr. Robb, and he's a party  
16 representative as we identified earlier.

17 MR. HARTINGER: My apologies.

18 BY MR. SPELLBERG:

19 Q. Mr. Rhoads, you testified that with regard to  
20 Measure B, that you didn't want to be paying an annual  
21 contribution or you didn't want to be in the VEP, which  
22 results in a longer -- you said it was, your view,  
23 resulted in a longer retirement time before you maxed out  
24 on the retirement. Do you remember that testimony?

25 A. I believe I remember most of it, yes.

26 Q. So let me -- with that in mind, let me ask this.  
27 Are you aware of individuals that have either lost --  
28 either been laid off or positions that weren't filled at

1 the City as a result of the financial problems that the  
2 City has?

3 MR. MCBRIDE: Objection.

4 MR. SOROUSHIAN: Objection. Relevance.

5 MR. MCBRIDE: John McBride.

6 We object on the grounds of relevance.

7 MR. ADAM: POA as well, your Honor.

8 Gregg Adam.

9 MR. SILVER: We'll join in that objection.

10 THE COURT: What is the relevance of this?

11 MR. SPELLBERG: Your Honor, if he's being asked to  
12 give testimony about what --

13 THE COURT: The question is his awareness of  
14 individuals laid off. What's the relevance?

15 MR. SPELLBERG: Because it's one of the  
16 alternatives that Measure B doesn't become implemented.  
17 There's that potential that there will be further layoffs,  
18 further tightening of staff.

19 THE COURT: I take it you are going to prove that  
20 through some means other than cross-examining Mr. Rhoads  
21 about his awareness?

22 MR. SPELLBERG: Yes, your Honor.

23 THE COURT: Then I suggest there's very minimal  
24 relevance to Mr. Rhoads' awareness of this, so I'm going  
25 to sustain the objection under 352 concerning undue  
26 consumption of time.

27 BY MR. SPELLBERG:

28 Q. So my last question, Mr. Rhoads. Wouldn't you

1 agree that it would be better to make a selection under  
2 the two options in Measure B that you talked about earlier  
3 as opposed to you being laid off from your position  
4 because the City doesn't have enough money to fund your  
5 position?

6 MR. SOROUSHIAN: That's irrelevant.  
7 Argumentative.

8 MR. MCBRIDE: John McBride.

9 We object to it on the basis of relevance.

10 MR. PATERSON: Also calls for speculation.

11 MR. ADAM: POA too.

12 THE COURT: It does call for speculation. I came  
13 to memorialize this morning that the City has this other  
14 theory of comparisons. I'm not aware of any cases that  
15 have been provided to me to support that. Am I incorrect  
16 about that?

17 MR. SPELLBERG: You're correct about the first  
18 part, your Honor. I'm not sure we have the authority yet  
19 that says exactly that, but it's certainly one of our  
20 theories.

21 THE COURT: I hope that you are going to give me  
22 authority on that because I agree we -- the plaintiffs'  
23 assertion that everything I've seen so far in this line of  
24 cases has not supported this theory of relevance, but I'm  
25 going to let this one question get answered and hope that  
26 you are going to provide me with that authority in the  
27 future.

28 MR. SPELLBERG: Yes, your Honor.

1 BY MR. SPELLBERG:

2 Q. Mr. Rhoads, it's better to have Measure B and make  
3 those selections than for you to be laid off, is it not?

4 A. Of course it's better to have a job than to be  
5 laid off.

6 MR. SPELLBERG: That's all I have, your Honor.  
7 Thank you.

8 THE COURT: Anything else for Mr. Rhoads?

9 MR. SOROUSHIAN: Just a few questions, your Honor.

10

11

REDIRECT EXAMINATION

12

BY MR. SOROUSHIAN:

13

Q. Mr. Rhoads, Mr. Spellberg asked you about the job  
14 that you had at C Tech. Do you remember that?

15

A. Yes, I do.

16

Q. Were you terminated from C Tech?

17

A. No, I wasn't.

18

Q. So you didn't leave because of your misconduct?

19

MR. SPELLBERG: Objection. Leading.

20

BY MR. SOROUSHIAN:

21

Q. Did you leave because of misconduct on your part?

22

A. No, I did not leave on that reason.

23

Q. The AT&T job that you were talking about, do you  
24 remember that?

25

A. Yes.

26

Q. Who, again, was it -- what was the position of the  
27 individual who told you about that job?

28

A. Assistant director.

1 Q. Now, I'm going to ask you, in your opinion, is a  
2 pension plan -- was the pension plan that the City offered  
3 preferable to a 401K plan?

4 MR. SPELLBERG: Objection. Lack of foundation.

5 THE COURT: Overruled.

6 THE WITNESS: I'm sorry. Can you repeat it.

7 BY MR. SOROUSHIAN:

8 Q. Do you prefer the defined benefit plan over 401K  
9 plan?

10 A. Yes, I do.

11 Q. Why is that?

12 A. The reasoning is is because it's already -- it's a  
13 set structure, whereas in a 401, my understanding is I'm  
14 going to have to contribute an additional amount at a  
15 greater -- a lot more money to reach the same amount of  
16 outcome for my 75 percent.

17 Q. Could you just clarify what you mean by same  
18 structure with respect to the defined benefit plan.

19 A. Well, with the City is -- I see it as I'm getting  
20 a pay reduction now, and I accept that under those terms,  
21 and in the long haul, I would have money put to the side,  
22 you know, for when I reach the retirement. Whereas if I  
23 was to go with the 401Ks, I would have the set pay, and I  
24 would have to contribute at a higher level to reach the  
25 same amount.

26 Q. I'm just going to ask you a few more questions.  
27 Mr. Spellberg asked you about your understanding of  
28 employer paid benefits. Are you aware -- does that money

1 go into your pocket?

2 A. No.

3 Q. Can you use that money to pay your bills?

4 A. No.

5 Q. Can you use it to pay groceries?

6 A. No.

7 MR. SOROUSHIAN: No further questions, your Honor.

8 THE COURT: May this witness be excused?

9 MR. SPELLBERG: I have some questions, your Honor.

10 THE COURT: Okay.

11

12

RECROSS EXAMINATION

13 BY MR. SPELLBERG:

14 Q. Mr. Rhoads, you talked about a comparison of 401K  
15 plans. What 401K plans have you been in in your career?

16 A. In my career, I have been in one with C Tech.

17 Q. How many years ago was that?

18 A. Over two decades.

19 Q. So the comparison you're making of the City's plan  
20 and a 401K plan was when you were in a 401K plan at C Tech  
21 two decades ago?

22 A. Yes. But it was also around the same time. That  
23 was the same decade when I came to the City.

24 Q. You haven't looked at any 401K plans in comparison  
25 to the City since then; right?

26 A. That's correct. Because I have no reason.

27 MR. SPELLBERG: That's all I have.

28 THE COURT: May this witness be excused?

1 MR. SOROUSHIAN: Yes, your Honor.

2 THE COURT: Thank you, Mr. Rhoads. You are free  
3 to go or to stay.

4 Who's the next witness?

5 MR. ADAM: POA calls John Robb, your Honor.

6 THE CLERK: You do solemnly state, under penalty  
7 of perjury, that the evidence you shall give in this issue  
8 or matter shall be the truth, the whole truth, and nothing  
9 but the truth?

10 THE WITNESS: Yes.

11 THE CLERK: Thank you. Have a seat, please.  
12 Please state and spell your name for the record.

13 THE WITNESS: My name is John Robb. My last name  
14 is spelled R-O-B-B.

15

16 JOHN ROBB

17 called as a witness by counsel for the Plaintiffs, being  
18 first duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. ADAM:

21 Q. Mr. Robb, by whom are you currently employed?

22 A. Currently employed by the City of San Jose.

23 Q. In what capacity?

24 A. I'm a police sergeant.

25 Q. How long have you been employed by the City of San  
26 Jose?

27 A. Just over 24 years.

28 Q. How long have you been a sergeant?

1 A. Just over ten years.

2 Q. Are you a member of the Peace Officers'  
3 Association?

4 A. Yes.

5 Q. For how long have you been a member of the  
6 association?

7 A. Approximately 22 years.

8 Q. Are you an officer in the association?

9 A. Yes.

10 Q. Can you describe your history of being an officer  
11 or a board member in the association.

12 A. I was elected to the board, starting the term in  
13 January of 2010, and then I became vice-president of the  
14 board, and that would be in approximately November of  
15 2011.

16 Q. You're still the vice-president?

17 A. Yes.

18 Q. Have you been involved in negotiations between the  
19 association and the City?

20 A. Yes.

21 Q. Any of those negotiations involve the pensions?

22 A. Yes.

23 Q. When was that?

24 A. They began through the first half of --  
25 approximately June of 2011.

26 Q. Was this in relation to Measure B before it went  
27 in front of the voters?

28 A. Yes.

1 Q. Were you involved in negotiating the 2011-2013  
2 Memorandum of Agreement between the POA and the City?

3 A. Yes.

4 Q. Are you familiar with the provisions covering  
5 medical benefits for active employees?

6 A. Yes.

7 Q. I'd like you to look at a document that has been  
8 marked as POA Number 21.

9 MR. ADAM: Your Honor, I believe POA 21 only has  
10 excerpts of the MOA, the ones we were relying on, rather  
11 than the whole MOA. If the Court prefers, we can put the  
12 whole MOA in front of the witness, although there will  
13 be --

14 THE COURT: I'm not complaining I don't have  
15 enough paper.

16 MR. ADAM: That's what I thought, but I wonder if  
17 there's an objection from the defendant.

18 MR. SPELLBERG: There's no objection. Just  
19 reserve on completeness in case there's something we want  
20 to supplement.

21 THE COURT: Okay.

22 BY MR. ADAM:

23 Q. Sergeant Robb, looking through those pages, do you  
24 find the bottom right-hand corner, there's a stamp POA  
25 1056?

26 A. Yes.

27 Q. Could you look at those next couple pages.

28 MR. HARTINGER: Counsel, could you repeat the

1 Bates number.

2 MR. ADAM: 1056. It's related insurance benefits  
3 is the provision on the page.

4 THE WITNESS: Okay.

5 BY MR. ADAM:

6 Q. First of all, any idea why this copy is in  
7 straight through in underlined form?

8 A. It was common when we were negotiating contracts  
9 and proposals we made to show what the changes were from  
10 the previous contract to what may be the newer or current  
11 contract, would be they would strike out the language so  
12 you could clearly see what the differences were.

13 Q. But this was the actual contract that was in  
14 effect from June 2011 to June of 13; correct?

15 A. Correct.

16 THE COURT: By that you mean the strike-outs; is  
17 that right?

18 MR. ADAM: Yeah. This is the -- the parties never  
19 got around to actually finalizing the documents.

20 THE COURT: When you're referring to '11 to '13 --

21 MR. ADAM: I'm talking about years.

22 THE COURT: Right. Maybe I'll just hold off and  
23 you'll explain it to me as you go.

24 BY MR. ADAM:

25 Q. This was the collective bargaining agreement that  
26 governed working conditions, terms of employment for  
27 police officers from July of 2011 to June of 2013;  
28 correct?

1 A. Yes.

2 Q. And has there subsequently been a new process  
3 where there's a new Memorandum of Agreement between the  
4 City and the police officers?

5 A. We just concluded interest arbitration, and  
6 there's been a ruling made, but I haven't seen the final  
7 documents.

8 Q. Were medical benefits for active employees an  
9 issue in that arbitration?

10 A. No.

11 Q. So they've remained the same as they were --  
12 currently the same as they were in this contract?

13 MR. SPELLBERG: Objection. Leading.

14 THE COURT: Overruled.

15 THE WITNESS: Yes.

16 BY MR. ADAM:

17 Q. So under this section, active police officers are  
18 paid premiums for monthly insurance that are equivalent to  
19 85 percent of the cost of the low-cost plan for either the  
20 employee or the employees' family; correct?

21 MR. SPELLBERG: Objection. Leading, your Honor.  
22 He's just reading the document.

23 MR. ADAM: Is it controverted?

24 THE COURT: The leading objection is overruled.

25 So, Mr. Adam, the paragraph at the bottom of page  
26 1056 that's stricken out, that represents the language  
27 from the '10-'11 contract?

28 MR. ADAM: Exactly.

1 THE COURT: Then the language below it that goes  
2 over to the next page is the current contract?

3 MR. ADAM: Correct.

4 THE COURT: So, yes.

5 BY MR. ADAM:

6 Q. Sergeant Robb, the paragraph the judge just  
7 indicated, that's the current level of medical benefits  
8 for police officers; correct?

9 A. Correct.

10 Q. Prior to January 1 -- strike that.

11 Through your work with the POA, you have some  
12 sense of what the retirement benefits are for police  
13 officers; correct?

14 A. Yes.

15 MR. SPELLBERG: Objection. Leading.

16 THE COURT: Overruled.

17 BY MR. ADAM:

18 Q. So prior to January 1, 2013, did you know what  
19 benefits retired police officers were receiving for  
20 medical insurance?

21 A. Yes.

22 Q. What was that?

23 A. They received the same benefit that active workers  
24 received, which was slightly different. They received the  
25 lowest-cost plan available to police officers in the  
26 contract, and that was 100 percent paid for.

27 Q. So the retiree received 100 percent of the  
28 lowest-cost plan?

1 A. Yeah. Available to active police officers.

2 Q. But the actives only received 85 percent under the  
3 MOU language you just pointed to?

4 A. Correct.

5 MR. SPELLBERG: Objection. Leading.

6 THE COURT: Overruled.

7 BY MR. ADAM:

8 Q. In approximately 2008, did the association agree  
9 with the City to start prefunding retiree medical costs?

10 A. Yes.

11 Q. So during that period of time from 2008 until this  
12 year, 2013, how much have police officers been paying  
13 towards retiree health care?

14 A. The dollar amounts have been going up annually, so  
15 I don't have a specific dollar amount. I can tell you we  
16 pay right now 9.51 percent of our gross pay.

17 Q. Has that been increasing in amounts over the four  
18 or five years?

19 A. I should preface. Probably our pension will pay,  
20 I think, is the figure the City looks at.

21 Q. At the moment, police officers are paying about  
22 nine and a half percent pension just to retiree medical?

23 A. Yes.

24 Q. And that amount, that percentage, has been  
25 increasing since the agreement was first struck in 2008?

26 A. Yes.

27 Q. And on top of that, what do police officers  
28 currently pay for their normal cost of pension benefit?

1           A.    I have to use a calculator.  I think we're just  
2           above 21 percent now total cost, so it would be  
3           approximately 21 percent minus the nine and a half.

4           Q.    I want to go back to the health care benefits.  In  
5           Article 8 of the MOA, other than perhaps the premiums for  
6           a particular plan increasing in 2012 and 2011, did  
7           anything else about the medical benefits for active  
8           employees change during the lifetime of the 2011 to 2013  
9           contract?

10          A.    No.

11          Q.    During that same period, the 2011 to 2013  
12          contract, did the City ever make a proposal to create a  
13          new lower cost medical plan for active police officers?

14          A.    Yes.

15          Q.    When did that occur?

16          A.    I think it was approximately June of 2011.

17          MR. ADAM:  I would ask that POA Exhibit 21 be  
18          moved into evidence.

19          MR. SPELLBERG:  Your Honor, the same reservation.  
20          No objection with --

21          THE COURT:  That reservation being that if the  
22          City or any other party wants to supplement this document  
23          to ensure its completeness, you can do so?

24          MR. SPELLBERG:  Yes, exactly.

25          THE COURT:  That's fine.  Received.

26          (Plaintiffs' Exhibit 21, previously marked for  
27          identification, was received in evidence.)

28          MR. ADAM:  Then, your Honor, the remaining

1 questions I have for Sergeant Robb have to do with  
2 authenticity of documents. And at the Court's suggestion,  
3 I'll reserve him. He's going to be here each day as a  
4 party representative, and I'll bring him back up if we're  
5 not able to stipulate.

6 THE COURT: Okay. I think that's a good  
7 suggestion.

8 MR. ADAM: With that, I have no further questions.

9 THE COURT: Mr. McBride?

10 MR. MCBRIDE: No questions, your Honor.

11 THE COURT: Mr. Paterson?

12 MR. PATERSON: None, your Honor.

13 MR. SILVER: No questions, your Honor.

14 MR. SPELLBERG: Thank you, your Honor.

15  
16 CROSS-EXAMINATION

17 BY MR. SPELLBERG:

18 Q. Sergeant Robb, good afternoon.

19 A. Good afternoon.

20 Q. Sergeant --

21 MR. MCBRIDE: Your Honor, may I ask counsel to not  
22 block our view of the witness.

23 THE COURT: I understand your concern. How is  
24 that?

25 MR. MCBRIDE: That's fine.

26 MR. ADAM: It's great.

27 THE COURT: It's not easy, but if that works,  
28 thank you.

1 MR. MCBRIDE: That's fine.

2 BY MR. SPELLBERG:

3 Q. Sergeant, I missed the -- your position at the POA  
4 before you became vice-president, you were treasurer?

5 A. No. Was just a member of the board of directors.

6 Q. For how many years?

7 A. Over one year. Approximately 20 months, 22  
8 months. From January of 2010 until November, late  
9 November of 2011.

10 Q. Sergeant, what I'm going to have you look at first  
11 is what's been marked as Exhibit 5510, which is right  
12 here.

13 MR. SPELLBERG: Your Honor, if I might approach.

14 THE COURT: Yes.

15 BY MR. SPELLBERG:

16 Q. Sergeant, I'm going to hand you Exhibit 5510.

17 THE COURT: The one you marked this morning is  
18 5509.

19 MR. SPELLBERG: That's what I mean, 5509.

20 THE COURT: I got it.

21 BY MR. SPELLBERG:

22 Q. Sergeant, 5509 are police and fire department  
23 benefits fact sheets. Have you ever seen any of these  
24 before?

25 A. Yes.

26 Q. How is it that you've seen these?

27 A. Well, in my capacity working with the union from  
28 over 24 years on the job, retirement services routinely

1 puts these out to describe benefits. Now they use an  
2 online website, and you can bring up this information  
3 online. It's got, like, a fact summary sheet of the  
4 benefits.

5 Q. And you've looked at these over the course of the  
6 years; right?

7 A. Yes.

8 Q. In your position as a member of the board of the  
9 POA and as vice-president, you've looked at them in those  
10 positions as well; right?

11 A. Yes.

12 Q. And these are documents that are kept by the City  
13 and provided by the City in the normal course of business,  
14 are they not?

15 A. I would say it's part of our retirement service,  
16 which is a sub-function of the City. I would assume so,  
17 yes.

18 MR. SPELLBERG: I think these went into evidence  
19 under Evidence Code 403. I would ask to move them in  
20 completely.

21 THE COURT: There's no objection?

22 MR. ADAM: No objection.

23 MR. MCBRIDE: No objection on the part of our  
24 client, your Honor.

25 BY MR. SPELLBERG:

26 Q. Mr. Robb -- Sergeant Robb --

27 THE COURT: Were they in before?

28 THE CLERK: They were.

1 THE COURT: It's still in.

2 BY MR. SPELLBERG:

3 Q. Sergeant Robb, there's a section on these benefits  
4 fact sheets that show the medical benefits available to  
5 police officers; right?

6 A. I have to review the document here.

7 MR. ADAM: What time period, Counsel?

8 THE COURT: There's an objection that the question  
9 is vague.

10 MR. SPELLBERG: I was going to do that, your  
11 Honor.

12 BY MR. SPELLBERG:

13 Q. There's a section on here, is there not -- I'm  
14 going to have to do it --

15 A. Sorry. Was that a question, sir?

16 Q. There's a section on here that identifies medical  
17 benefits; correct?

18 A. Correct.

19 MR. ADAM: Objection, your Honor. It goes beyond  
20 the scope of the direct. I believe I asked Sergeant Robb  
21 questions in the 2011 to 2013 time frame with respect to  
22 current employee medical benefits, and then time period  
23 2008 to 2013 with respect to retiree medical  
24 contributions. This appears to be a 2004 document.

25 MR. SPELLBERG: They go from 2004 to 2012.

26 THE COURT: The objection is beyond scope of  
27 direct. It's overruled.

28 BY MR. SPELLBERG:

1 Q. Sergeant, there's a section that explains to  
2 police officers and fire fighters the medical benefits and  
3 pertinent information about that; right?

4 A. On this document here, sir?

5 Q. Right. On these -- retirement fact sheets;  
6 correct?

7 A. Correct.

8 Q. And this one that I put in front of you, the first  
9 page is from 2004. Do you see that?

10 A. Yes.

11 MR. ADAM: Counsel, I'm sorry. I'm not following  
12 which Bates number it is.

13 MR. SPELLBERG: It's the very first page, very  
14 right, 2004.

15 THE COURT: 5266, I think, is the page.

16 MR. SPELLBERG: I think that's right, your Honor.  
17 It's covered over.

18 BY MR. SPELLBERG:

19 Q. What I've provided, at least in this 2004  
20 document, is that the retirement system pays 100 percent  
21 of the lowest-cost plan available to active City  
22 employees; right?

23 A. Correct.

24 Q. And it doesn't specify that it's 100 percent of  
25 the lowest-cost plan available to active police officers;  
26 isn't that right?

27 A. No. Sir, I'm looking at the title police and fire  
28 retirement plan which is a separate retirement plan from

1 other City employees, so I would assume they're talking  
2 about just the benefits for police officers and fire  
3 fighters only were in a separate system.

4 Q. Where it says active City employees, you interpret  
5 that to be police officers and fire fighters only; is that  
6 right?

7 A. That's correct. Because we have our own -- our  
8 pension system, it's still under the City umbrella, but  
9 it's different than other City employees. They have a  
10 pension system called Federated.

11 Q. For completeness, I'm going to go to the last  
12 three pages of the document. Bates number 5289, and the  
13 date on this is June of 2012; right?

14 A. Correct.

15 Q. It's the same comment that the retirement system  
16 pays 100 percent of the lowest-cost plan available to  
17 active City employees; right?

18 A. In that box, yes.

19 Q. It's your view that when it says active City  
20 employees, it only means City and fire. It doesn't mean  
21 any other employee. That's how you interpret this; right?

22 A. Police and fire, yeah. Because we're separate  
23 pension plans, so we have separate benefits.

24 Q. You're aware, are you not, Sergeant, that in 19 --  
25 at the end of 1997, the low-cost plan changed for police  
26 and fire such that retired police and fire only received  
27 the low-cost plan that was available to the lowest cost  
28 City employee plan, not police or fire? You're aware of

1 that change in the municipal code?

2 A. No, sir. I'm sorry. That's before my time.

3 Q. Did the POA ever do anything to challenge the  
4 municipal code that made the change in 1998 that the  
5 low-cost plan for retired police would be tied to City  
6 employees and not to active police officers?

7 MR. ADAM: Objection, your Honor. Beyond the  
8 scope of direct.

9 THE COURT: Overruled.

10 THE WITNESS: I don't know. I wasn't on the  
11 board. I have no idea.

12 BY MR. SPELLBERG:

13 Q. I'd like you to take a binder that's behind you.  
14 It might be up there still. Binder six. Plaintiff binder  
15 number six. 5909. If you look in that binder, Sergeant,  
16 to Exhibit 5909. Can you tell us what that document is.

17 A. Under tab 5909, I'm not seeing a document. I see  
18 a photocopy of an annual CAFR for the police and  
19 retirement fund.

20 Q. It's police and fire department retirement plan,  
21 5909?

22 A. It looks like a photocopy of the CAFR of the  
23 document.

24 Q. The whole document is the plan; right?

25 A. Okay. It looks like you've got photocopies of the  
26 CAFR report here. So it looks like a copy of the CAFR  
27 report, like audited financials for the retirement plan.

28 MR. SPELLBERG: Your Honor, we'll move 5909 into

1 evidence.

2 THE COURT: I think the witness is saying all cap  
3 CAFR report.

4 MR. SPELLBERG: CAFR.

5 MR. ADAM: Your Honor, that stands for  
6 Comprehensive Annual Financial Report.

7 THE COURT: So the record can reflect it's all cap  
8 CAFR.

9 Any objection to 5909?

10 MR. ADAM: None, your Honor.

11 MR. MCBRIDE: No, your Honor.

12 THE COURT: It's received.

13 (Defendants' Exhibit 5909, previously marked for  
14 identification, was received in evidence.)

15 BY MR. SPELLBERG:

16 Q. If you look, Sergeant, at Bates number 3618.

17 A. Yes.

18 Q. That provided that the plan for retirees only pays  
19 health care for the lowest-cost plan for an active City  
20 employee. Does not say police or fire, does it?

21 A. I'll have to read the whole document, sir. I'm  
22 not sure.

23 THE COURT: The question is about what the exhibit  
24 says, so we can go on to something else.

25 BY MR. SPELLBERG:

26 Q. So, Sergeant, this annual report for police and  
27 fire does not provide that retirees receive the low-cost  
28 plan tied to an active officer. It provides that they

1 receive the lowest-cost plan to active City employees;  
2 right?

3 A. I don't know.

4 Q. That's what it says, doesn't it?

5 A. But the title of the document is for the police  
6 and fire plan, so I'm not sure how the City is  
7 interpreting active City employees. I'm assuming we're  
8 talking about policemen and firemen and their retirement  
9 plan because that's -- this is the financial report for  
10 that plan.

11 Q. That's how you interpret it?

12 A. Yeah. You asked the question. That's my  
13 understanding of this document, what that means.

14 Q. One thing, Sergeant, you spoke about in your  
15 direct testimony was Exhibit 21 which was excerpts from  
16 the 2011 to 2013 MOA. Do you remember that?

17 A. Yes.

18 Q. You talked about sections that were struck out and  
19 then there was a new section?

20 A. Yes.

21 Q. Now, nowhere in that MOA does it say that police  
22 retirees receive a low-cost plan that's tied to an active  
23 police officer versus as being tied to an active City  
24 employee; isn't that correct?

25 A. I don't know. I would have to read the entire  
26 document.

27 Q. Does the section that you talked about only refer  
28 to active police officers and what their -- how their

1 health care benefits are provided; right?

2 A. Yeah. I testified as to what was being asked  
3 regarding active police officers, yes.

4 Q. You don't know if there's anything in the complete  
5 MOA that talks about retired officers; correct?

6 A. Correct.

7 Q. Sergeant, do you recall I took your deposition  
8 some weeks ago?

9 A. Yes.

10 Q. And you told me that you don't know how Measure B  
11 would impact your pension benefits. Do you remember that  
12 testimony?

13 MR. ADAM: Objection, your Honor. That's beyond  
14 the scope of direct. I did not discuss Measure B with the  
15 witness.

16 THE COURT: Okay. So that does appear to be  
17 beyond the scope of direct, and I understand that Sergeant  
18 Robb is going to be here every day; is that right?

19 MR. ADAM: Yes.

20 THE COURT: So the alternative is to have him  
21 called later by the City, but if he has work obligations,  
22 it might be better to just address these questions.

23 MR. ADAM: Withdraw the objection.

24 THE COURT: Okay. Sergeant, would you like the  
25 question again, or do you have it in mind?

26 THE WITNESS: Could you please reread the  
27 question.

28 BY MR. SPELLBERG:

1 Q. You don't know how Measure B will impact your  
2 pension benefits; isn't that true?

3 A. Yeah. I don't know -- the depo I gave lasted two  
4 to three hours. I don't know in what context from the  
5 deposition you're taking that. I don't know if you're  
6 asking about something specific prior or what we were  
7 discussing, so I don't -- I'm trying to recall where  
8 you're getting that section of the deposition so I have  
9 context.

10 THE COURT: Do you want to ask him what he said in  
11 the deposition, or do you want to ask him a question?

12 MR. SPELLBERG: I'm going to ask him a question.  
13 I wanted to double-check what the question was at the  
14 deposition.

15 THE COURT: Okay.

16 BY MR. SPELLBERG:

17 Q. Sergeant Robb, you have not sat down and figured  
18 out how your pension benefits would change if Measure B  
19 were implemented; is that right?

20 A. If I remember -- this is based on my memory of the  
21 deposition. I think the context of the question was had I  
22 sat down and figured out exactly how my benefits had  
23 changed, and, no, I have not done the math.

24 Q. I didn't say exactly. I asked if you figured out  
25 how your -- they would change if Measure B were enacted,  
26 and you said you had not made that analysis; right?

27 MR. MCBRIDE: For the record, your Honor, can we  
28 have a page and line number?

1 THE COURT: Are you asking him a question, or are  
2 you reading from his deposition?

3 MR. SPELLBERG: I'm asking him a question, your  
4 Honor. Maybe it's easier if I read from the deposition.  
5 I would be happy to do that.

6 THE COURT: Whatever you want to do. I am trying  
7 to figure out.

8 MR. SPELLBERG: I'll read from the deposition,  
9 your Honor.

10 THE COURT: Then you need to give page and line  
11 number.

12 MR. SPELLBERG: Right. Page 74, line 11, to 75,  
13 line 1. I've got the original transcript here, your  
14 Honor.

15 THE COURT: Any objection?

16 MR. ADAM: Your Honor, I'm just pulling the pages  
17 up. No.

18 THE COURT: Go ahead.

19 MR. SPELLBERG: Question to Sergeant Robb: "So,  
20 Sergeant Robb, have you sat down and figured out if or how  
21 your pension benefits would change if Measure B were  
22 enacted, or implemented, I should say?"

23 "Answer: Specifically, no.

24 "Question: Okay.

25 "Answer: I'm assuming you're talking about the  
26 financial impact. No.

27 "Question: Right. And I take it you have not  
28 talked to a financial advisor about how your pension

1 benefits might be impacted by Measure B; right?

2 "No.

3 "Question: Okay. What I said is correct?

4 "Answer: No, I have not talked to a financial  
5 advisor."

6 That's all I have, your Honor. Thank you.

7 THE COURT: All right.

8 MR. ADAM: One question, your Honor.

9 THE COURT: Okay.

10  
11 REDIRECT EXAMINATION

12 BY MR. ADAM:

13 Q. Sergeant Robb, does the POA negotiate on behalf of  
14 current employees, or does it negotiate on behalf of  
15 active employees?

16 A. I'm sorry. I don't understand the question.

17 Q. When the POA negotiates with the City, is it on  
18 behalf of just active employees, or does the POA also  
19 negotiate for people who are already retired?

20 A. Active employees.

21 Q. Meaning active police officers, people currently  
22 employed versus those who have already retired?

23 A. Correct.

24 Q. Which group?

25 A. Current police officers.

26 MR. ADAM: Nothing further.

27 THE COURT: May we have the sergeant step down?

28 MR. SPELLBERG: Yes, your Honor.

1 THE COURT: Thank you. You are free to stay or to  
2 go.

3 Who's next?

4 MR. ADAM: Your Honor, other than authentication,  
5 POA has one other witness who, due to a family emergency,  
6 whose only unavailable day is today, and we advised  
7 everyone he would be available first thing tomorrow  
8 morning.

9 THE COURT: Who is that person?

10 MR. ADAM: Pete Salvi.

11 MR. HARTINGER: Again, it's Sergeant Robb or  
12 Ms. Busse authenticating documents.

13 THE COURT: So other than document issues and  
14 Mr. Salvi, POA rests?

15 MR. ADAM: That's it.

16 THE COURT: Mr. McBride?

17 MR. MCBRIDE: Your Honor, as I indicated before,  
18 the one witness we have, live witness, if you will, is  
19 available tomorrow morning. Flying in tonight or this  
20 afternoon from the East Coast. We had advised everybody  
21 of that situation. I'm prepared to go ahead with  
22 Mr. Platten. I've had no headway with the defense in  
23 terms of authentication of documents, and we're prepared  
24 to put Mr. Platten on.

25 THE COURT: The individual you're speaking of  
26 tomorrow is?

27 MR. MCBRIDE: Mr. Lowman.

28 THE COURT: Give me an offer of proof concerning

1 Mr. Platten.

2 MR. MCBRIDE: I have to move some heavy paperwork  
3 here, Judge. This has to do with our exhibit numbers 213  
4 through 218. These consist --

5 MR. HARTINGER: Your Honor, can we have a moment  
6 to gather the exhibit while he's talking?

7 THE COURT: 213 --

8 MR. MCBRIDE: 213, 214, 215, 216, 217, and 218.

9 THE COURT: Okay. So these are all documents  
10 relating to the arbitration?

11 MR. MCBRIDE: There are actually, I believe, three  
12 arbitrations involved. Three separate -- consists of  
13 either portions of briefs. We only put into evidence --

14 THE COURT: Any issue that these exhibits are what  
15 they purport to be?

16 MR. HARTINGER: Your Honor, with respect to  
17 Exhibits 213, 214, 215, and 216, we have no problem with  
18 authenticity, reserving all issues about admissibility.  
19 We do reserve on the issue of completeness because it  
20 appears these are partial copies. So long as we're able  
21 to supplement -- we'll make a proffer as to make a plea at  
22 some point. We're prepared to stipulate to authenticity.  
23 Again, in terms of admissibility, we're reserving issues  
24 like relevance and hearsay.

25 MR. MCBRIDE: Your Honor, we have provided the  
26 entire transcripts of all of those documents in discovery,  
27 and we're prepared to bring it in. We did not think it  
28 was appropriate to add another 500 pages.

1 THE COURT: I hear you saying that the City has no  
2 authentication objections subject to completeness if  
3 they're admitted. 213 to 215; is that right?

4 MR. HARTINGER: 213, 214, 215, 216, and 217.

5 THE COURT: All the way to 17?

6 MR. HARTINGER: Right.

7 THE COURT: Okay.

8 MR. HARTINGER: Again, listening to what you said,  
9 your Honor, I want to make sure I'm reserving on issues of  
10 admissibility, relevance.

11 THE COURT: We haven't gotten to admissibility  
12 yet.

13 And 218, what is your authentication position  
14 there?

15 MR. HARTINGER: It's a 1990 transcript taken from  
16 a larger proceeding. We just haven't had the opportunity  
17 to go back and verify exactly where it comes from and what  
18 it is.

19 THE COURT: What is your objection to the receipt  
20 of these exhibits?

21 MR. HARTINGER: The objection is with respect to  
22 213 through 217, hearsay, relevance. Those are the two  
23 objections.

24 THE COURT: Okay. Is there a non-hearsay purpose  
25 to these?

26 MR. MCBRIDE: I still didn't understand you.

27 THE COURT: There's a hearsay objection. What are  
28 you offering them to prove?

1 MR. MCBRIDE: The statements that are involved  
2 involve City Attorney, George Rios, and most of the  
3 instances in arbitration proceeding -- in interest  
4 arbitration proceeding making a statement that goes  
5 directly to the question of whether or not these rights  
6 are vested.

7 THE COURT: I take it you are invoking a hearsay  
8 exception that they're statements of --

9 MR. MCBRIDE: Yes. In fact, we filed a memoranda  
10 of points and authorities in opposition to their motion in  
11 limine that went directly to that issue in terms of there  
12 being an exception. Namely, these are admissions.

13 THE COURT: Okay. What is the relevance of these  
14 documents?

15 MR. MCBRIDE: The relevance of the documents are  
16 that they refute or they directly contradict the City's  
17 position in this case that none of these rights, the  
18 pension rights or pension benefits were vested. And the  
19 statements go from 1990 -- I think the last one --  
20 although it's not the one we're talking about -- is the  
21 Figone statement or memorandum that was sent out in 2008,  
22 I believe it was.

23 THE COURT: Okay.

24 MR. MCBRIDE: I can give you the specific page or  
25 line numbers for each of those exhibits, your Honor.

26 THE COURT: Yes. I think that's a good idea.

27 MR. MCBRIDE: Starting with 213, it would be page  
28 24, line 21, through 25, line 12.

1 THE COURT: Okay. All the pages are numbered two  
2 in my copy, so I take it some numbers got cut off. What  
3 is the page number where the first line is Mr. Rios, if  
4 you'll just give me a minute? What page number is that?

5 MR. MCBRIDE: What page number? It was page --

6 THE COURT: Is that 24?

7 MR. MCBRIDE: Page 24, line 21, through 25, 12.

8 THE COURT: And the page where Mr. Rios says at  
9 the top, "If you'll just give me a minute," what page  
10 number is that? What page number is that?

11 MR. MCBRIDE: 24. The page numbers I'm giving you  
12 are from the documents.

13 THE COURT: Right. But they're not on my copy.

14 MR. MCBRIDE: I understand. I apologize. That  
15 copy came off skew.

16 THE COURT: So the next page is 25?

17 MR. MCBRIDE: Right.

18 THE COURT: They're consecutively numbered?

19 MR. MCBRIDE: Yes.

20 THE COURT: So, Mr. Hartinger?

21 MR. HARTINGER: I think there are a variety of --  
22 taking just this exhibit, we don't see this as an  
23 admission that qualifies -- I guess they're proving it  
24 under Evidence Code 1222(a). If the section is it's only  
25 opening statements made in the context of an interest  
26 arbitration by a lawyer who's advocating on behalf of the  
27 City in that particular proceeding, I don't think it  
28 qualifies as an admission, and I think it's irrelevant in

1 this proceeding.

2 THE COURT: Okay. So your position, it's not an  
3 authorized statement under 1222(a)?

4 MR. HARTINGER: Correct.

5 THE COURT: But there's no dispute that this is a  
6 statement by an attorney representing the City in this  
7 proceeding?

8 MR. HARTINGER: That's correct, your Honor.  
9 There's no dispute that this is a Deputy City Attorney who  
10 is employed by the City Attorney's office making the  
11 statement on behalf of the City.

12 THE COURT: What further foundation would be  
13 required under 1222(a)?

14 MR. HARTINGER: It's not clear he's authorized to  
15 make whatever -- I'm not sure exactly what statement  
16 they're looking to here specifically. They've got -- they  
17 want to have them say that the existing plan is an  
18 excellent retirement plan for its members. What is the  
19 admission here? And I'd ask, I guess, if there be more of  
20 a pinpointed proffer in terms of what he's suggesting  
21 constitutes an admission that Mr. Rios is authorized to  
22 make on behalf of the City.

23 MR. MCBRIDE: We're offering that particular  
24 paragraph. The next paragraph, I think, it's clearly an  
25 admission.

26 THE COURT: I think the designation was 24 at 21  
27 to 25 at 12.

28 MR. HARTINGER: Some of these are not -- they're

1 not admission. How is this an admission? It's a defined  
2 benefit.

3 THE COURT: It doesn't have to be an admission.  
4 It's a statement. Authorized statement. Anything else?

5 MR. HARTINGER: It's entitled under Evidence Code,  
6 but, no, your Honor. Submitted.

7 THE COURT: It doesn't have to be -- I think  
8 you're invoking the concept an admission against interest.  
9 It doesn't have to be against. It's just a statement, an  
10 authorized statement.

11 MR. HARTINGER: Also 352 problem here, because  
12 we're going to have to, I guess, put this in context.

13 THE COURT: So I understand your respective  
14 positions on 213.

15 Let's go on to 214.

16 MR. MCBRIDE: 214 is a brief by Mr. Rios in that  
17 same arbitration, their opening brief. And we're  
18 referring specifically to pages 2, 10 through 16, and  
19 pages -- page 26, 4 through 18.

20 MR. HARTINGER: We don't have 26. That's my first  
21 problem.

22 THE COURT: It's page 2. Is that what you --

23 MR. MCBRIDE: Yes.

24 THE COURT: Page 2, lines 10 to 16.

25 MR. MCBRIDE: I'm sorry. Forget about 26. Just  
26 page 2, 10 through 16.

27 MR. HARTINGER: I apologize, your Honor. Counsel,  
28 can you tell me, is it just page 2, or is there another

1 page?

2 MR. MCBRIDE: No. Just that one page, page 2.

3 THE COURT: Okay. Any objection other than the  
4 ones that you've said on 213?

5 MR. HARTINGER: No. Same concerns, your Honor.  
6 Including 352.

7 THE COURT: Okay.

8 MR. HARTINGER: Actually, I have one other. This  
9 is a legal brief, so it's legal argument. So the Court  
10 has previously excluded legal opinions about how  
11 retirement systems operate and what they mean and what's  
12 the impact and so forth. We think it falls within the in  
13 limine rulings.

14 THE COURT: I understand. Let's get the portion  
15 of 215 that you want to refer to.

16 MR. MCBRIDE: 215 would be a subsequent brief in  
17 the same arbitration. Page 1, line 23, through 2, line --  
18 pardon me. Yes.

19 MR. HARTINGER: Cover page?

20 MR. MCBRIDE: Page 1, 23, through page 2, 4. 2,  
21 line 4.

22 MR. HARTINGER: We have no text on page 1.

23 THE COURT: Right. We don't have anything after 2  
24 ii, which is the end of the table of contents, and the  
25 page that's numbered two, which starts at the top,  
26 conditions of the City -- or condition, singular, of the  
27 City. If there's a text that's under page 1, I don't have  
28 it.

1 MR. HARTINGER: I don't either, your Honor. I  
2 don't even have 2 ii.

3 THE COURT: So we'll pass that because we're  
4 missing the page.

5 216?

6 MR. MCBRIDE: 215 would be a December -- 216 would  
7 be a transcript of an arbitration.

8 THE COURT: 216 looks like an opening brief.

9 MR. MCBRIDE: Yes, you're correct, your Honor.  
10 This, again, is a brief by Mr. Rios in a separate  
11 proceeding and, again, has language in it pertaining to  
12 the vesting.

13 THE COURT: Give us the cite, please.

14 MR. MCBRIDE: I've got to coordinate here, Judge.  
15 It would be page 1, line 23, through page 2, line 4.

16 THE COURT: Maybe it's a coincidence, but that's  
17 exactly the same cite that you gave me for 215.

18 MR. MCBRIDE: I got them mixed up. We'll get the  
19 correct one in.

20 THE COURT: For 216, the cite is 1 at 23, to 2 at  
21 4?

22 MR. MCBRIDE: That's correct.

23 THE COURT: What's the cite for 215?

24 MR. MCBRIDE: 215 is page 2, line -- pardon --  
25 lines 20 and 21.

26 THE COURT: Okay. How about 217?

27 MR. MCBRIDE: 217 is a separate arbitration  
28 proceeding in front of Arbitrator Cossack. This is a

1 partial transcript of that hearing in which the City was  
2 represented by an attorney, and they presented an expert  
3 witness who basically indicated what he had been told by  
4 the City about the plan and/or the responsibility for  
5 unfunded liability.

6 THE COURT: Let's get the cite so we can all  
7 follow along, please.

8 MR. MCBRIDE: Can I have just one moment, your  
9 Honor? My papers are shuffled up.

10 THE COURT: Okay.

11 MR. MCBRIDE: 217 was a separate finding in  
12 arbitration between the City and the Local 230 in which  
13 Alex Gurza testified. We were talking about his testimony  
14 on page 1667.

15 THE COURT: 1167?

16 MR. MCBRIDE: 1667.

17 MR. HARTINGER: I'm sorry.

18 MR. MCBRIDE: 1667. 1167, line 22, through 1169,  
19 line 5, and 1283, line 2 through 22. The first page cite  
20 has to do with Mr. Gurza explaining SRBR. The second one  
21 has to do, again, with a statement by an authorized  
22 representative of the City confirming that the pension  
23 rights are vested.

24 THE COURT: So you're telling me that the two  
25 excerpts you identified are testimony of Mr. Gurza?

26 MR. MCBRIDE: Yes. Again, we have the full  
27 transcript. But as you can see, it's fairly lengthy.

28 THE COURT: Okay. What was Mr. Gurza's position

1 on January 5, 2007?

2 MR. MCBRIDE: I believe he held the same position  
3 he holds today.

4 MR. HARTINGER: I'm not sure he was a Deputy City  
5 Manager.

6 The one thing I would also add, your Honor, he's  
7 going to testify. So to the extent this is marked and  
8 he's cross-examined on it, that seems to us to be the  
9 appropriate way to deal with this.

10 THE COURT: Okay. What about 218?

11 MR. MCBRIDE: 218 is testimony in another binding  
12 interest arbitration in December of 1990 in which an  
13 expert testimony was proffered by the City by Mr. Idleson  
14 who basically indicates at page 81, line 15, through 82,  
15 line 5, his understanding from the City of the  
16 responsibility for the unfunded liabilities.

17 THE COURT: Anything else?

18 MR. MCBRIDE: Not on those, your Honor.

19 THE COURT: Mr. Hartinger, anything else?

20 MR. HARTINGER: The only thing I would add would  
21 be to Exhibit 218 is from what I'm hearing, it's very  
22 clearly not somebody who qualifies as a person authorized  
23 by the party to make a statement under 12.2.

24 MR. MCBRIDE: Your Honor, seems to me if the City  
25 offers an expert's testimony in an arbitration proceeding,  
26 that's an authorized statement. They didn't do anything  
27 to detract it.

28 THE COURT: Is it correct that 214 through 216 are

1 all in the same proceeding?

2 MR. MCBRIDE: 213, 214, 215, and 216 are all in  
3 the same proceeding. The one -- 216 was a subsequent  
4 brief after the arbitrator had rendered her original  
5 decision, which dealt with issues about -- and it actually  
6 ties in with a change that was made in the municipal code  
7 pertaining to payment for this specific benefit.

8 THE COURT: Okay. So, Mr. Hartinger, what is --  
9 to better understand your 352 objection with respect to  
10 213 to 216, is this an undue consumption of time  
11 objection?

12 MR. HARTINGER: Absolutely, your Honor.

13 THE COURT: What would, in fairness, the City need  
14 to do to respond if 213 through 216 were admitted?

15 MR. HARTINGER: We're going to have to gather the  
16 entire record of this arbitration, put this all in  
17 context, decide how many witnesses we need to put it in  
18 context, and make a presentation after we do that  
19 analysis.

20 THE COURT: Anything else?

21 MR. MCBRIDE: I disagree, your Honor. These  
22 statements are fairly clear. They don't need any context.  
23 They have had the transcript in their entirety in  
24 discovery, and now they say we have to gather them up. I  
25 don't think that's a good argument.

26 THE COURT: Submitted?

27 MR. MCBRIDE: No.

28 MR. HARTINGER: Yes, your Honor.

1 THE COURT: With respect to 213 and 216, I think  
2 that there is an adequate foundation under 1222, so the  
3 hearsay objection is overruled.

4 I see these as different from the legal opinions.  
5 It's not the same kind of issue, and I don't think that  
6 352 issue is well taken. I don't think there's an undue  
7 consumption of time to address these particular issues.  
8 So I'm receiving 213 to 216.

9 217, I think, is probably better handled when  
10 cross-examining Mr. Gurza, and so he'll be given the  
11 opportunity to question him. Offer 217 again if a proper  
12 foundation is laid at that time.

13 With respect to 218, I don't think there's a 1222  
14 foundation, and there's also the issue of whether or not  
15 whatever Mr. Idleson said was hearsay. Of course, at the  
16 hearing he was an expert, but we don't have an opportunity  
17 now to know the basis for this assertion. So I'm not  
18 receiving 218 and not 217 at this time.

19 We'll be in recess for ten minutes.

20 (Plaintiffs' Exhibits 213 and 216, previously  
21 marked for identification, were received in  
22 evidence.)

23 (Recess.)

24 THE COURT: Mr. McBride, anything else for your --

25 MR. MCBRIDE: Yes, your Honor. The City has  
26 stipulated to the authenticity of certain of our  
27 documents. I'm sure Mr. Hartinger will correct me if I  
28 name the wrong ones.

1 THE COURT: This is a stipulation to  
2 admissibility?

3 MR. MCBRIDE: This is a stipulation as to  
4 authenticity.

5 THE COURT: Oh, I'm sorry.

6 MR. HARTINGER: We're working on admission, your  
7 Honor.

8 MR. MCBRIDE: My recollection of Mr. Hartinger  
9 was -- although I don't know I've seen the written  
10 stipulation. I did sign it. Chris signed it, and we had  
11 a stipulation with reference to Plaintiffs' Exhibit 219,  
12 which is the Leston Hoyt memorandum.

13 MR. HARTINGER: I thought you were going to start  
14 with -- I thought the discussion that you had had with my  
15 co-counsel was beginning --

16 MR. MCBRIDE: The written stipulation. We talked  
17 about it. That was why we are not bringing in Heredia or  
18 Sekany. They were going --

19 MR. SPELLBERG: We stipulated to three documents.  
20 You had a different numbering system.

21 THE COURT: Okay. It looks like you still have  
22 some discussions to be had, so maybe you can iron that out  
23 at a different time.

24 Is there anything else?

25 MR. MCBRIDE: Yes, your Honor. Our Exhibit 220,  
26 which they have not stipulated to. The authenticity is  
27 the unfair practices filed with PERB, and we talked about  
28 that in terms of the limited reason we want it in.

1 THE COURT: Wasn't this the subject of your  
2 request for judicial notice?

3 MR. HARTINGER: I believe it was, your Honor.

4 MR. MCBRIDE: We made a request for judicial  
5 notice early on, but I think that was in motion for  
6 summary adjudication.

7 THE COURT: I thought that was granted this  
8 morning. Am I remembering that wrong?

9 MR. HARTINGER: I don't have that down as granted,  
10 your Honor. I could be mistaken. I object to this  
11 exhibit. It's a PERB complaint. It falls under the in  
12 limine rulings regarding collateral matters.

13 THE COURT: I remember. There was an issue about  
14 the date; right? There was an issue about the date  
15 because it's from March 8 of this year.

16 MR. MCBRIDE: Yes.

17 THE COURT: Okay.

18 MR. MCBRIDE: Has to do with the issue, what your  
19 Honor could do or not do on the issue of whether they  
20 bargained in good faith.

21 THE COURT: I did rule on this. It was denied  
22 without prejudice to you seeing what the City did. I did  
23 rule on this. I remember it now.

24 What else?

25 MR. MCBRIDE: The next item is our Exhibit 224,  
26 which is the opinion memo of Suzann Devencenzi to the  
27 Board of Administration. We touched on this in the  
28 motions in limine. However, our position is that -- not

1 the position of the other plaintiffs. Our position is are  
2 statements in her report that, again, constitute  
3 admissions on the -- on two things: One, the vested  
4 nature of the pension benefits; and number two, the  
5 responsibility of the City for the unfunded liability.

6 MR. HARTINGER: Your Honor, we thought this had  
7 been resolved in in limine motion number two. The Court  
8 specifically excluded the Devencenzi opinions unless there  
9 was an appropriate foundation laid by AFSCME who had a  
10 particular claim relating to those opinions.

11 MR. MCBRIDE: My understanding was ruling had to  
12 do with a totally different issue, not the admission --  
13 our admission position.

14 THE COURT: There was a motion in limine  
15 concerning Ms. Devencenzi, but I think it was about  
16 testimony concerning legal advice. And then I think  
17 somebody said she wasn't going to be called.

18 MR. HARTINGER: That's right, your Honor. It's  
19 paragraph 5 of the order. The motion to exclude evidence  
20 concerning the legal opinions by Jones Day, Suzann  
21 Devencenzi, and by Salzman and Johnson are granted subject  
22 to reconsideration if there's an offer of proof regarding  
23 an expectation formed by plaintiff. That's the order.

24 MR. MCBRIDE: And our offer of proof, your Honor,  
25 is that they contain -- she clearly is an authorized  
26 representative of the City of San Jose. She was  
27 requested -- you can tell from the report itself, she was  
28 requested to give an explanation concerning allocation of

1 unfunded liabilities, and she did so, and in that  
2 explanation, she both indicates the responsibility for the  
3 unfunded liabilities and the vested nature of the pension  
4 benefits.

5 THE COURT: Okay. And will there be evidence that  
6 this was posted on the City's website or published to  
7 employees?

8 MR. MCBRIDE: We're not taking the position the  
9 employees had to know about it. What we're saying is this  
10 was something that was obviously available to the public  
11 because we have it. The question whether it was published  
12 or known by the employees has no bearing on our position.  
13 We're saying she was requested to describe something to  
14 the Board of Administration, who was an interested party  
15 in this case, and she did so, and in the course of doing  
16 that, made statements which we believe constitute  
17 admissions just as Mr. Rios' statements.

18 THE COURT: Mr. Rios' statements were made -- they  
19 were not in any way legal advice. They were statements  
20 made in a proceeding characterized in the City's position.  
21 This is a memo to her client; is that right?

22 MR. HARTINGER: Yes, your Honor.

23 MR. MCBRIDE: Yes.

24 THE COURT: I don't know how it's public, which is  
25 why I started down the way this was posted on the website  
26 because I think the Jones Day opinions were.

27 MR. HARTINGER: I think it was because we talked  
28 about the way it could possibly come in. I'm hearing an

1 entirely different argument now, and this has already been  
2 ruled on.

3 MR. MCBRIDE: We, in our opposition to the motions  
4 in limine, specifically addressed this and indicated that  
5 we believed, just as the other statements, that these  
6 statements constitute admissions.

7 THE COURT: What portion of the lengthy exhibit?

8 MR. MCBRIDE: I'm sorry, your Honor. I don't have  
9 my marked up copy with me, so I can't indicate to you at  
10 this point. I have one in the office.

11 THE COURT: So you're saying this is relevant  
12 regardless of whether any employee had notice of it? It's  
13 relevant because it's a authorized statement by the City  
14 on this subject?

15 MR. MCBRIDE: That is correct. And it contradicts  
16 their position in this case.

17 THE COURT: And when will you be able to tell me  
18 what portions of this?

19 MR. MCBRIDE: I'll have that for you tomorrow  
20 morning. I'll notify counsel tonight.

21 THE COURT: Okay. Anything else on that issue?

22 MR. HARTINGER: No, your Honor.

23 MR. ADAM: Your Honor, Gregg Adam.

24 I'll add that the number of Ms. Devencenzi's  
25 memoranda to the retirement system are available online if  
26 you simply put Devencenzi, City of San Jose memorandum,  
27 into a Google search. It comes up entire services.

28 THE COURT: You're not condoning that I conduct a

1 Google search?

2 MR. ADAM: No. In terms of it being publicly  
3 available.

4 THE COURT: We tell jurors all the time that  
5 they're not supposed to do that, so I'm not doing that  
6 either, so I'm not sure of the import of your comment.  
7 Are you saying that this was done with this memo and that  
8 would be proved?

9 MR. ADAM: I thought I heard the Court ask  
10 Mr. McBride if it had been published, and I'm suggesting  
11 that it -- I think all of her memos are presently on the  
12 retirement system's website. We'll look into that further  
13 overnight.

14 THE COURT: Okay. I am not going to. Okay.  
15 Okay. So I will await your input on the portion  
16 of 224 that you think makes this relevant.

17 Anything else?

18 MR. MCBRIDE: Yes. 227, your Honor, is supplement  
19 award by Arbitrator Bogue on the matters that we have  
20 other documents. The reason that's important, it follows  
21 up. It will fall in -- we'll explain why changes were  
22 made in the municipal code as far as the police and fire  
23 are concerned. What happened was she made an award, and  
24 it was, in essence, an award that goes back to the date to  
25 the arbitration the claim was made.

26 THE COURT: Why does it matter why the changes  
27 were made in the municipal code?

28 MR. MCBRIDE: Because the City relies on those

1 changes in part as a blanket authorization, a blanket  
2 indication that at least police and fire were taking or  
3 took or agreed with the position that they were  
4 responsible for.

5 THE COURT: So there will be a witness who will  
6 say, "I looked at this award, and because of that, the  
7 municipal changes were made"?

8 MR. MCBRIDE: No. I don't believe there will be a  
9 witness unless Mr. Gurza testifies to that. It's simply  
10 in terms of the information, it simply ties in with that  
11 to both in terms of time and explains why that change was  
12 made.

13 THE COURT: Okay. But that's my question. How  
14 does it explain that's why the change was made?

15 MR. ADAM: Your Honor, Gregg Adam for the POA.  
16 He was also party to the arbitration. Bear in  
17 mind that a arbitrator's award under Charter Section 1111,  
18 which essentially becomes a collective bargaining  
19 agreement under state law, supersedes an inconsistent  
20 municipal ordinance. And the City is arguing that the  
21 ordinance means one thing, and I think Mr. McBride is  
22 pointing out that the ordinance flows from the  
23 arbitrator's award. So really the best evidence as to  
24 what the benefit was is contained in the arbitrator's  
25 award.

26 THE COURT: I'm sorry. This one is all new to me.  
27 So the argument is that this arbitration award is evidence  
28 of what a municipal code section means?

1 MR. ADAM: Yeah. The operative document is really  
2 the arbitrator's award. The municipal code section is  
3 subordinate to the arbitrator's award. And, again, the  
4 City is trying to argue that in 1997, this municipal code  
5 section changed the 1984 agreement that has already been  
6 testimony on. And that certain language in the --

7 THE COURT: I'm not following you. So if this  
8 arbitration award supersedes the municipal code, then it's  
9 not evidence of what the municipal code means. I think  
10 you're saying it's evidence of what the law is because the  
11 municipal code is superseded by this.

12 MR. ADAM: Yes.

13 MR. MCBRIDE: I see it a little differently, your  
14 Honor. I think that the change in the municipal code that  
15 the City is arguing means something. The change in the  
16 municipal code was simply to be consistent with the  
17 arbitration award.

18 THE COURT: Is this a factual matter in dispute?  
19 Mr. Hartinger.

20 MR. HARTINGER: We stipulate to the authenticity  
21 of the award, your Honor. We disagree with the position  
22 that has been stated that this award supersedes a  
23 municipal code which is not a factual question. I guess  
24 that's a legal question to some degree. We don't think --  
25 we object to the admission of the documents on grounds of  
26 352 and hearsay.

27 THE COURT: Submitted?

28 MR. HARTINGER: Yes, your Honor.

1 MR. MCBRIDE: Yes, your Honor.

2 THE COURT: I'm going to receive 227, and then you  
3 can all tell me later what it means.

4 (Plaintiffs' Exhibit 227, previously marked for  
5 identification, was received in evidence.)

6 THE COURT: Anything else, Mr. McBride?

7 MR. MCBRIDE: No, your Honor.

8 THE COURT: So you just have two outstanding  
9 matters. Then you have 224 and Mr. Lowman?

10 MR. MCBRIDE: We may have a couple others, but  
11 they would be rebuttal exhibits. That's it. We have  
12 Mr. Lowman and 224.

13 THE COURT: AFSCME?

14 MR. PATERSON: Your Honor, our witnesses are  
15 scheduled for tomorrow. We have one witness who has cold  
16 feet today, unfortunately, but the rest of them we had  
17 arranged for tomorrow, and that's where we are.

18 I will say that the witnesses we had scheduled for  
19 Wednesday can all be here tomorrow. We've moved them up  
20 in the plaintiffs' order that we filed with the Court.

21 MR. HARTINGER: Your Honor, I would simply ask for  
22 clarification. I think I heard Mr. Paterson say the  
23 witness has cold feet, in which case is he withdrawing the  
24 witness?

25 THE COURT: That's what I heard too. Perhaps you  
26 can give us more information.

27 MR. PATERSON: Perhaps it was an inartful way of  
28 describing it. She's not here, and so we will -- she was

1 originally scheduled for tomorrow, and she's unable to be  
2 here at this time.

3 THE COURT: Who are you talking about?

4 MR. PATERSON: I'm talking about Peggy Horning.

5 THE COURT: You're telling me you won't be calling  
6 Ms. Horning?

7 MR. PATERSON: I would like to. I could not do it  
8 right now, your Honor.

9 THE COURT: Well, did you subpoena her?

10 MR. PATERSON: No, your Honor, I did not.

11 MR. SPELLBERG: Your Honor, we don't mind if they  
12 move Ms. Martinez and Mr. Mark to tomorrow. They're  
13 scheduled for Wednesday. That's fine with us, but we  
14 still have an issue with Ms. Garcia who I won't have the  
15 transcript until Tuesday, so we ask that she still remain  
16 on Wednesday.

17 MR. PATERSON: That's correct, your Honor. To  
18 obviate concerns about the scheduling, we would be willing  
19 to withdraw her as a witness so we can move things along  
20 so we're not delaying things unduly.

21 MR. HARTINGER: Ms. Garcia?

22 MR. PATERSON: Yes.

23 MR. SPELLBERG: Have you withdrawn Ms. Horning?

24 MR. PATERSON: I have not, although it sounds like  
25 I may not have a choice in the matter.

26 THE COURT: I don't understand what that means.

27 MR. PATERSON: We have not withdrawn her, your  
28 Honor. She's not here today to testify.

1 THE COURT: This is back on Ms. Horning?

2 MR. PATERSON: Yes, your Honor.

3 THE COURT: If you didn't subpoena her, then we'll  
4 go on.

5 Your witnesses for tomorrow are Mr. Allen --

6 MR. PATERSON: Mr. Allen, Mr. Doonan, and  
7 Ms. Martinez, who is listed for Wednesday but can be here  
8 tomorrow. And we'll withdraw Scott Martin as well in  
9 order to move things along. I think that would be largely  
10 duplicative anyway.

11 THE COURT: Okay. Then does the Retired  
12 Employees' Association have other witnesses to present?

13 MR. SILVER: No, we don't, your Honor. We haven't  
14 designated any witnesses as part of our case in chief. We  
15 reserve the right to call witnesses for rebuttal if  
16 necessary.

17 THE COURT: Okay. Any update on the City's  
18 witness?

19 MR. SPELLBERG: Mr. Lowman, is he scheduled for  
20 tomorrow as well?

21 MR. MCBRIDE: Yes.

22 MR. SPELLBERG: Your Honor, the City -- I believe  
23 we're calling five witnesses: Sharon Erickson,  
24 Ms. Figone, Mr. Gurza, Mr. Bartel, and then Ms. Murphy.  
25 We anticipate doing our case in roughly two days.

26 MR. HARTINGER: The Court will recall we have a  
27 scheduling issue with Mr. Bartel. He's only available  
28 Friday morning. Given the pace of the trial, it seems

1 like it could have been otherwise completed on Thursday,  
2 but we have Mr. Bartel on Friday.

3 THE COURT: So then to recap, tomorrow Mr. Salvi  
4 has been called by the POA, the Sapien plaintiffs are  
5 calling Lowman, and we're figuring out what to do with  
6 224. AFSCME is calling Mr. Allen and Mr. Doonan and  
7 Ms. Martinez. Did I miss anything?

8 MR. PATERSON: This assumes, your Honor, we are  
9 able to reach an acceptable stipulation on exhibits.  
10 Other than that --

11 THE COURT: I think we'll be adjourning shortly,  
12 so you will have plenty of time to accomplish that. Is  
13 that right?

14 MR. PATERSON: (Nods head.)

15 THE COURT: That means that your folks will be in  
16 the wings except for Mr. Bartel.

17 MR. HARTINGER: Yes, your Honor.

18 THE COURT: Anything else that we can do today?

19 MR. SPELLBERG: Not from us, your Honor.

20 THE COURT: So please continue discussions, see if  
21 we can move this forward in an orderly fashion. Thank you  
22 for the cooperation that you've given so far. Can we  
23 begin with the evidence at 8:45?

24 MR. ADAM: Yes.

25 THE COURT: The courtroom will be open no later  
26 than 8:30. So we're in recess.

27 MR. PATERSON: Your Honor, one question. I  
28 believe we are filing some papers on the RJN you requested

1 tomorrow morning. I assume we should bring those to lodge  
2 with your clerk as well.

3 THE COURT: Yes. Please bring a courtesy copy  
4 here.

5 (Whereupon, the proceedings were adjourned.)  
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1 STATE OF CALIFORNIA )

2 ) ss:

3 COUNTY OF SANTA CLARA )

4  
5 I, Rose M. Ruemmler, hereby certify that I, as Official  
6 Reporter, Santa Clara County Superior Court, was present  
7 and took down correctly in stenotype, to the best of my  
8 ability, all the testimony and proceedings in the  
9 foregoing-entitled matter on July 22, 2013; and I further  
10 certify that the annexed and foregoing is a full, true and  
11 correct statement of such testimony.

12 I further certify that I have complied with CCP  
13 237(a)(2) in that all personal juror identifying  
14 information has been redacted if applicable.

15 Dated at San Jose, California, on August 4, 2013.

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19 ROSE M. RUEMMLER

20 Official Reporter, CSR No. 9053

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