

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 24, 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

1 SAN JOSE, CA; JULY 24, 2013

2 DEPARTMENT 2 HON. PATRICIA M. LUCAS, JUDGE

3 ---oooOooo---

4  
5 THE COURT: Good morning. What updates do you  
6 have for me this morning?

7 MR. ADAM: Good morning, your Honor. Gregg Adam,  
8 POA.

9 Some of the lawyers had some technical  
10 difficulties last night with leaving things in the  
11 courtroom, so we were hindered a little bit, but we talked  
12 at 9:30 last night, and we have the outlines of kind of a  
13 global deal on admissibility, authenticity. It's  
14 currently being typed up by Ms. West, and my hope would be  
15 that after -- it's finalized by the time we get to our  
16 morning break; that during the morning break, each side's  
17 attorneys can review it, could have it signed and ready to  
18 present to the Court when we resume for the sake of  
19 parties this morning.

20 How that fits in with witnesses, I'm not sure. I  
21 know Ms. Busse is here. I think there's still at least  
22 one document I'll need to call her for, but I think we  
23 have made progress. It's just a case of reducing it to  
24 writing.

25 THE COURT: Okay. Why don't we proceed with our  
26 current witness, and we'll do our best.

27 MR. HARTINGER: Before Mr. Allen takes the stand,  
28 I reviewed his testimony. I have no questions.

1 THE COURT: Very good. Mr. Allen, are you here?

2 THE WITNESS: Yes, I'm here.

3 THE COURT: That means that you're excused.

4 MR. PATERSON: Your Honor, one item of  
5 housekeeping, and that is there were some duplicative  
6 exhibits that are Plaintiffs' 523, 524, and 525. I wanted  
7 to withdraw those because I thought we had taken them off  
8 our list and because the exhibit that we marked last in  
9 order yesterday was 523 and on our exhibit list it already  
10 has one for that. So I just wanted to, on the record,  
11 make sure that the 523, 524, and 525 that are listed on  
12 our exhibit list are withdrawn and that those numbers can  
13 now be filled with other exhibits.

14 THE COURT: Okay. So the record is clear, what  
15 was marked yesterday as 523, it's your intent that that is  
16 523?

17 MR. PATERSON: Yes, your Honor.

18 THE COURT: And the exhibit that was previously  
19 marked as 523 has been withdrawn, replaced by the one from  
20 yesterday, and 524 and 525 previously marked are  
21 withdrawn; is that correct?

22 MR. PATERSON: Yes, your Honor.

23 THE COURT: Okay.

24 MR. PATERSON: And if I may, your Honor.

25 THE COURT: Yes.

26 MR. PATERSON: We have another proposed  
27 stipulation. This is in conferring with the POA's  
28 attorneys, and our stipulation would be to withdraw the

1 bill of attainder cause of action and to -- there may be  
2 other components of the stipulation, but for now, that  
3 would be our offer.

4 THE COURT: Okay. So you're asking me to dismiss,  
5 with prejudice, a certain cause of action in AFSCME's  
6 complaint?

7 MR. PATERSON: Yes, your Honor.

8 THE COURT: Which number is that? Anybody can  
9 answer this question.

10 MR. PATERSON: I apologize, your Honor. I thought  
11 I had it at my fingertips, and I do not.

12 THE COURT: What is the City's position concerning  
13 this stipulation?

14 MR. HARTINGER: No objection.

15 MR. PATERSON: I found the complaint, your Honor.  
16 It is --

17 THE COURT: Am I correct, then, that that is the  
18 only bill of attainder claim in any of the plaintiffs'  
19 pleadings?

20 MR. MCBRIDE: That's correct.

21 MR. ADAM: Correct, your Honor.

22 MR. SILVER: That's correct, your Honor.

23 MR. SPELLBERG: I think it's AFSCME's second cause  
24 of action.

25 MR. PATERSON: It is, your Honor.

26 THE COURT: Very good, then. At AFSCME's request,  
27 and pursuant to stipulation, I'm dismissing, with  
28 prejudice, the second cause of action of AFSCME's

1 complaint.

2 So subject to the stipulation that you're still  
3 working on, are the plaintiffs resting?

4 MR. PATERSON: Your Honor, I believe I need to  
5 call Ms. Busse in order to -- pardon me -- for the purpose  
6 of admitting certain exhibits that the City has  
7 tentatively indicated -- at least orally has indicated  
8 they'll stipulate to. I would add that if -- ultimately,  
9 it was my hope and understanding we have an agreement, but  
10 if we don't, clearly we will need Ms. Busse for --

11 THE COURT: That's why I said subject to the  
12 stipulation.

13 MR. PATERSON: That's right, your Honor. I will  
14 need her for a few brief questions regardless.

15 THE COURT: Does the retirement employees --

16 MR. KALINSKI: We have some evidence we'd like to  
17 move in. We don't have any witnesses to call. We have  
18 completed our stipulation with the City. It takes care of  
19 a lot of the issues, but I would like to, I guess, at this  
20 point is as good as any to go over documents we'd like to  
21 move into evidence.

22 THE COURT: Yes. Why don't you give us the list.  
23 We don't -- are they already marked?

24 MR. KALINSKI: This is the stipulation. I guess  
25 I'll read out the ones that are stipulated to, and then  
26 there are some that are authenticated, and I suppose that  
27 the City may have objections to some of them.

28 THE COURT: So it may be best if I just read as

1 being received into evidence the exhibits referenced in  
2 the first paragraph. Is that okay?

3 MR. KALINSKI: Yes, your Honor.

4 THE COURT: The following exhibits, then, are  
5 received into evidence pursuant to stipulation: 602, 605,  
6 606, 610, 614, 618, 620, 622, 626, 628, 630, 649, 650,  
7 651, 652, 700, 701, 709, 710, and 711.

8 (Plaintiffs' Exhibits 602, 605, 606,  
9 610, 614, 618, 620, 622, 626, 628,  
10 630, 649-652, 700, 701, 709-711,  
11 previously marked for identification, were  
12 received in evidence.)

13 THE COURT: So how shall we proceed next, Mr.  
14 Kalinski?

15 MR. KALINSKI: I would like to move Exhibit 632  
16 into evidence as well.

17 MR. HARTINGER: Can we have a moment?

18 THE COURT: So as to 632, there's an  
19 authentication stipulation. 632 is the City's complaint  
20 in federal court filed June 5, 2012. Is there any  
21 objection?

22 MR. SPELLBERG: Yes, your Honor. It's irrelevant.

23 THE COURT: Mr. Kalinski, would you address that?

24 MR. KALINSKI: Yes, your Honor. As we heard in  
25 the City's opening statement, they are -- their defense to  
26 some of our causes of action, they're on the ground of  
27 ripeness. And in this complaint that they filed in  
28 federal court, if you look on page 9 -- it's also

1 elsewhere in the complaint, but on page 9, paragraph 29,  
2 the City highlights certain sections of Measure B,  
3 including section 510(a), 511(a), and 511(a) -- it's  
4 1510(a), 1511(a), 1504(a) that are relevant here, and in  
5 paragraph 30, the City states an actual controversy  
6 essentially on the City alleges that those sections are  
7 ripe for determination.

8 THE COURT: Is the City -- this is one of the  
9 reasons why the first day I asked for a chart of claims  
10 and defenses still in the case. I hope somebody is still  
11 working on that.

12 MR. SPELLBERG: We are.

13 THE COURT: Is the City asserting a ripeness  
14 defense?

15 MR. SPELLBERG: No, your Honor. Measure B is  
16 not --

17 MS. ROSS: Yes, your Honor.

18 MR. SPELLBERG: I apologize.

19 MS. ROSS: Yes, your Honor. The City is asserting  
20 a ripeness defense in connection with certain elements of  
21 Measure B.

22 When the City brought the declaratory relief  
23 action in federal court, plaintiffs were already asserting  
24 the illegality of those sections, and the City included  
25 them in the federal complaint in order to adjudicate  
26 whether or not they were ripe. The City always intended  
27 to present a ripeness defense in whatever form we were in.  
28 So the fact that those claims are in the case, the federal

1 case does not mean that the City ever waived --

2 THE COURT: Given the ripeness defense, how is 632  
3 not relevant?

4 MR. SPELLBERG: In that case, your Honor, I'll  
5 withdraw.

6 THE COURT: 632 is received.

7 (Plaintiffs' Exhibit 632, previously marked for  
8 identification, was received in evidence.)

9 THE COURT: It's probably best to have one lawyer  
10 per issue.

11 MR. SPELLBERG: Fair enough, your Honor.

12 MR. KALINSKI: The next exhibit we'd like to move  
13 into evidence is Exhibit 636.

14 THE COURT: As to 636, there's an authentication  
15 stipulation. So it looks like 636 is the Federated  
16 Retirement System 2004 handbook. Any objection?

17 MR. SPELLBERG: Yes, your Honor. We object. The  
18 relevance. There's been no evidence that any plaintiff or  
19 witness from the plaintiff relied on anything in these  
20 books, this one in particular.

21 MR. KALINSKI: Your Honor, the handbooks are how  
22 the City explains to the employees its understanding of  
23 what rights and benefits it has. We believe it's relevant  
24 for that purpose, your Honor. And --

25 THE COURT: Is there any foundational evidence  
26 that anybody relied on Exhibit 636?

27 MR. KALINSKI: We're not putting on any evidence  
28 certainly that anybody relied on it. We would say this is

1 the City's -- the City publishing their understanding of  
2 what each employee's benefits are, so it's relevant to the  
3 City's understanding.

4 In addition, each of these handbooks, for example,  
5 does not contain a reservation of rights. It does not  
6 tell any employee that any of their rights are subject to  
7 a reservation of rights, so we believe the absence of that  
8 reservation of rights is relevant.

9 THE COURT: Okay. So this is not offered to prove  
10 in connection with the issue of the creation of vested  
11 right that anybody relied on 636?

12 MR. KALINSKI: That's correct. It's offered --  
13 sorry, your Honor. It's offered just to show that the  
14 City never believed that it had any power or reservation  
15 of rights either.

16 THE COURT: Okay. And that's a matter of law;  
17 right? Whether the City is right or the City is wrong, it  
18 doesn't matter because I have to decide that issue.

19 MR. SPELLBERG: That's correct, your Honor.

20 THE COURT: Actually, that's to Mr. Kalinski.

21 MR. SPELLBERG: I'm sorry.

22 MR. KALINSKI: That's true, your Honor. Whether  
23 there's a vested right, we believe, was established when  
24 the rights were established and not by what somebody says  
25 after it, that's true, your Honor. But it does show the  
26 City's understanding. It shows that they agree with our  
27 position as to what the rights were when they were  
28 established.

1 MR. MCBRIDE: Your Honor, John McBride. I would  
2 also suggest that arguably it is an implied admission, if  
3 not an overt admission, on the part of the City. It's an  
4 official statement by the City, and here's what the plan  
5 is. If, in fact, they believed or thought that there was  
6 some contingency as part of the plan, they would have put  
7 it in. I think there's at least an implied admission  
8 there.

9 THE COURT: But as to the law, that's what I'm  
10 concerned about, that it's an admission only as to what  
11 the City thought the law was, and if the City is right or  
12 the City is wrong, how does that matter? I have to decide  
13 what the law is.

14 MR. KALINSKI: We don't believe that the City can  
15 now state that the law is different from how they  
16 represented the law. It's for however many years.

17 THE COURT: That's a different theory. What kind  
18 of theory that --

19 MR. KALINSKI: We have an understanding of the  
20 law, and we believe that this handbook shows that the City  
21 has that same understanding or had it up until Measure B  
22 was being formulated.

23 THE COURT: It sounded like there was some sort of  
24 estoppel theory going on.

25 MR. KALINSKI: No, your Honor.

26 MR. MCBRIDE: It also goes to the issue of  
27 impairment of contract. What was the contract? What was  
28 the contract? This is an excerpt, if you will, or an

1 exposition of the Federated plan. Federated plan, as I  
2 indicated in opening statement, is the contract we're  
3 talking about, so I think it goes to the issue of  
4 impairment.

5 THE COURT: I don't understand this. How does it  
6 go to impairment?

7 MR. MCBRIDE: It goes to the issue of what the  
8 contract was and whether it is impaired. It goes to the  
9 issue of the interpretation of the contract. I guess  
10 that's a better way of putting it.

11 THE COURT: Okay. Yes.

12 MR. ADAM: Your Honor, for the POA, the REOC case,  
13 the Orange County Supreme Court case, discussed implied  
14 vested rights, and there's been a number of cases that  
15 have interpreted REOC since it came out, including a case  
16 out of the first DCA called Requa.

17 THE COURT: Would you spell that for the record.

18 MR. ADAM: I believe it's R-E-Q-U-A, versus  
19 Lawrence Livermore National Laboratories. Requa reversed  
20 a superior court demurrer which had -- the case involved  
21 the employees asserting that they had an implied vested  
22 right to health care benefits and that part of the  
23 evidence showing such an implied right was the handbooks  
24 and other documents that had been put out by the  
25 laboratory reciting what the benefits would be that these  
26 retirees would get.

27 The first DCA reversed the demurrer and said these  
28 were legitimate pieces of evidence to consider in

1 determining whether or not there was an implied contract.

2 THE COURT: Anybody know the cite for this case?

3 MR. ADAM: I'll get it for you, your Honor.

4 THE COURT: Thank you for mentioning the  
5 procedural posture of the case. On the demurrer, all the  
6 facts pleaded are presumed to be true. In this case,  
7 presumably there was an allegation of reliance. In this  
8 case, admittedly, we have no evidence of reliance, so I'm  
9 not sure how that case would be helpful to a theory of  
10 admissibility apart from reliance.

11 MR. KALINSKI: Your Honor, if I may. It seems to  
12 me that part of what you're being tasked to do is  
13 interpret that reservation of rights, and we believe that  
14 these handbooks would be helpful in interpreting any  
15 ambiguity.

16 THE COURT: I understand. Submitted?

17 MR. KALINSKI: Submitted, your Honor.

18 MR. SPELLBERG: Yes, your Honor.

19 THE COURT: I'm receiving 636.

20 (Plaintiffs' Exhibit 636, previously marked for  
21 identification, was received in evidence.)

22 THE COURT: What's next?

23 MR. KALINSKI: 637, your Honor. We move to admit  
24 637 into evidence.

25 THE COURT: Okay. 637 appears to be a September  
26 27, 1984, memo from the director of personnel to the  
27 mayor. And the objection? This is stipulated to be  
28 authentic. Is there an objection to 637?

1 MR. SPELLBERG: Give us one second, your Honor.  
2 No objection, your Honor.

3 THE COURT: 637 is received.  
4 (Plaintiffs' Exhibit 637, previously marked for  
5 identification, was received in evidence.)

6 THE COURT: What's next?

7 MR. KALINSKI: We move to admit 638 into evidence.

8 THE COURT: 638 is stipulated to be authentic. It  
9 appears to be a May 6, 1986, memo from director of  
10 personnel to the mayor. Is there an objection to 638?

11 MR. SPELLBERG: Just a moment, your Honor. No  
12 objection, your Honor.

13 THE COURT: 638 is received.  
14 (Plaintiffs' Exhibit 638, previously marked for  
15 identification, was received in evidence.)

16 MR. KALINSKI: We'd move to admit 639 into  
17 evidence.

18 THE COURT: 639 is stipulated to be authentic. It  
19 appears to be a November 30, 2001, memo from Edward  
20 Overton to the police and fire retirement board. Is there  
21 an objection?

22 MR. SPELLBERG: No, not on this one, your Honor.

23 THE COURT: 639 is received.  
24 (Plaintiffs' Exhibit 639, previously marked for  
25 identification, was received in evidence.)

26 MR. KALINSKI: We would move to admit 640 into  
27 evidence.

28 THE COURT: 640 is stipulated to be authentic. It

1 appears to be a one-page memo dated October 13, 2010, from  
2 the mayor to the rules and open government committee.

3 MR. SPELLBERG: We're not going to object to this  
4 one, your Honor.

5 THE COURT: 640 is received.

6 (Plaintiffs' Exhibit 640, previously marked for  
7 identification, was received in evidence.)

8 MR. KALINSKI: Your Honor, with respect to 641,  
9 there is a stipulation as to authenticity, but we're going  
10 to reserve this one to the extent it becomes relevant on  
11 cross or rebuttal.

12 THE COURT: So you're not offering 641?

13 MR. KALINSKI: We're not offering 641.

14 We would move to admit 642 into evidence.

15 THE COURT: Any objection? 642 is stipulated to  
16 be authentic. It appears to be a January 18, 2011, memo  
17 from Alex Gurza to the mayor and the council.

18 MR. SPELLBERG: No objection.

19 THE COURT: 642 is received.

20 (Plaintiffs' Exhibit 642, previously marked for  
21 identification, was received in evidence.)

22 MR. KALINSKI: We would move to admit 643 into  
23 evidence, your Honor.

24 THE COURT: 643 is stipulated to be authentic.  
25 It's a two-page document, resolution 6364. Not signed by  
26 anybody.

27 MR. SPELLBERG: Your Honor, if there's a signed  
28 copy, we would stipulate into evidence. I realize that's

1 an authentication issue. I didn't realize this was  
2 unsigned. I understood all the resolutions being proposed  
3 were signed. Certainly if it's signed, we would have no  
4 objection.

5 THE COURT: Is that a request to substitute a  
6 signed copy? It's not objectionable because you  
7 stipulated.

8 MR. SPELLBERG: Right. That's the request, your  
9 Honor.

10 THE COURT: I'll receive 643, and if counsel  
11 wishes to substitute a signed page, that's agreeable to  
12 the Court.

13 (Plaintiffs' Exhibit 643, previously marked for  
14 identification, was received in evidence.)

15 MR. KALINSKI: Your Honor, I don't believe we have  
16 one. These documents were received from the City in  
17 response to inspection demands.

18 THE COURT: Are you asking me to change my ruling?

19 MR. KALINSKI: I am not, your Honor.

20 THE COURT: What's next?

21 MR. KALINSKI: We would move to admit Exhibit 644  
22 into evidence.

23 THE COURT: 644 is stipulated to be authentic.  
24 It's three pages and appears to be a resolution. It's  
25 signed. Any objection?

26 MR. SPELLBERG: No objection, your Honor.

27 THE COURT: 644 is received.

28 (Plaintiffs' Exhibit 644, previously marked for

1 identification, was received in evidence.)

2 MR. KALINSKI: We move to admit Exhibit 645 into  
3 evidence.

4 THE COURT: 645 is stipulated to be authentic.  
5 Three pages, resolution 2002. It's signed. Any  
6 objection?

7 MR. SPELLBERG: No objection, your Honor.

8 THE COURT: 645 is received.

9 (Plaintiffs' Exhibit 645, previously marked for  
10 identification, was received in evidence.)

11 MR. KALINSKI: Just for the record, your Honor,  
12 with respect to 646, again, we'll reserve that one even  
13 though -- actually, there is a modified authenticity  
14 stipulation. It's not exactly an authenticity stipulation  
15 with respect to 646.

16 THE COURT: But you're reserving it?

17 MR. KALINSKI: But I'm reserving it.

18 THE COURT: What's next?

19 MR. KALINSKI: Those comments are equally true  
20 with respect to 648 and 705.

21 The next one we would move into evidence is 653.

22 MR. HARTINGER: Can we have one moment to catch up  
23 on the number? Did I understand 648 --

24 THE COURT: He's not offering now. 653 is  
25 currently offered. It is subject to a authentication  
26 stipulation and appears to be the Federated retirement  
27 handbook without a date.

28 MR. KALINSKI: 653, the date is on the last page,

1 your Honor. It's from 1979.

2 THE COURT: I see that on the last page. Any  
3 objection to 653?

4 MR. SPELLBERG: Yes, your Honor. This is an  
5 objection on reliance, relevance. There was no testimony  
6 about reliance, what the City thought or what they were  
7 thinking when they created this handbook back then.

8 THE COURT: So this is the same as 636?

9 MR. SPELLBERG: Yes, your Honor.

10 THE COURT: I'm receiving 653.

11 (Plaintiffs' Exhibit 653, previously marked for  
12 identification, was received in evidence.)

13 MR. KALINSKI: Your Honor, we would move Exhibit  
14 655 into evidence.

15 THE COURT: 655 is stipulated to be authentic.  
16 It's a very big document. Appears to be the Federated  
17 handbook from year 2000. Any objection?

18 MR. SPELLBERG: Yes, your Honor. It's the same  
19 objection, relevance, that we've made to the prior two we  
20 discussed.

21 THE COURT: I'm receiving 655.

22 (Plaintiff's Exhibit 655, previously marked for  
23 identification, was received in evidence.)

24 MR. KALINSKI: We would move -- the other two are  
25 actually from the joint book. We would move to admit  
26 Exhibit 706 into evidence.

27 THE COURT: 706 is stipulated to be authentic. It  
28 appears to be the Federated handbook, 1995. Any

1 objection?

2 MR. SPELLBERG: It's the same objection, your  
3 Honor. Relevance, reliance.

4 THE COURT: I'll receive 706.

5 (Plaintiffs' Exhibit 706, previously marked for  
6 identification, was received in evidence.)

7 MR. KALINSKI: Finally, for now, your Honor,  
8 Exhibit 707, we would move to admit that into evidence.

9 THE COURT: 707 is stipulated to be authentic. It  
10 appears to be a Federated handbook, 1997.

11 MR. SPELLBERG: Same objection, same reasoning,  
12 your Honor.

13 THE COURT: Very good. I'm receiving 707.

14 (Plaintiffs' Exhibit 707, previously marked for  
15 identification, was received in evidence.)

16 MR. KALINSKI: Your Honor --

17 THE COURT: Anything else for the Retired  
18 Employees' Association?

19 MR. KALINSKI: No, your Honor.

20 THE COURT: So then subject to your stipulation  
21 concerning authentication and admissibility of other  
22 documents, any further evidence from any of the  
23 plaintiffs?

24 MR. KALINSKI: No, your Honor. The REA rests.

25 THE COURT: The other plaintiffs rest as well  
26 subject to that caveat?

27 MR. PATERSON: Yes, your Honor.

28 MR. ADAM: Yes, your Honor.

1 MR. MCBRIDE: Yes.

2 THE COURT: Madam Clerk, here's the stipulation.

3 Does the City wish to call a witness?

4 MR. SPELLBERG: We do, your Honor. Before I  
5 start, I thought I would raise the issue. Ms. Busse is  
6 here, and Mr. Adam had indicated that he has at least one  
7 document that he wanted to put in through her. She is not  
8 here the rest of the week, so I thought that if she's  
9 really needed, probably we should do that. Clearly we  
10 have to do it today.

11 THE COURT: Right. I thought that at the break,  
12 you were going to resolve this. I think that's more  
13 efficient.

14 MR. SPELLBERG: Very good, your Honor.

15 THE COURT: If necessary, we'll take her out of  
16 order. We'll call her after the break for that purpose if  
17 it still remains necessary.

18 MR. SPELLBERG: Sounds good.

19 The City will call Sharon Erickson as its first  
20 witness.

21 MR. ADAM: Your Honor, I have a cite for Reque.  
22 213 Cal.App.4th 213.

23 THE COURT: The page and volume are the same?

24 MR. ADAM: I double-checked.

25 THE COURT: Do we have Ms. Erickson?

26 MR. SPELLBERG: I asked her to remain in the hall,  
27 your Honor.

28 MR. PLATTEN: Counsel, are you going to use the

1 chart?

2 MR. SPELLBERG: I am not.

3 MR. PLATTEN: Can we remove that?

4 THE COURT: Yes. Deputy, can you assist with  
5 that, just to move the easel pad.

6 MR. HARTINGER: I'm happy to do it.

7 THE COURT: Okay. Mr. Hartinger.

8 Ms. Erickson, would you stand and face the clerk  
9 and raise your right hand, please.

10 THE CLERK: You do solemnly state, under penalty  
11 of perjury, that the evidence you shall give in this issue  
12 or matter shall be the truth, the whole truth, and nothing  
13 but the truth?

14 THE WITNESS: I do.

15 THE CLERK: Thank you.

16 THE COURT: I was hoping for a little bit more.  
17 No criticism intended. Deputy, could you move these  
18 instructions over next to the jury box. That way they  
19 will truly be out of the way.

20 THE CLERK: Please state and spell your name for  
21 the record.

22 THE WITNESS: Sharon Erickson, S-H-A-R-O-N,  
23 E-R-I-C-K-S-O-N.

24 MR. ADAM: Your Honor, can I offer one  
25 stipulation? POA and AFSCME have right to petition claims  
26 in their complaints, and we're prepared to stipulate that  
27 those are facial challenges only.

28 THE COURT: Okay. Is that a stipulation offered

1 on behalf of AFSCME as well?

2 MR. PATERSON: Yes, your Honor. We offer the same  
3 stipulation.

4 THE COURT: Does the City accept that stipulation?

5 MR. SPELLBERG: No, thank you, your Honor.

6 MR. ADAM: That was a no?

7 MR. SPELLBERG: That was a no.

8 THE COURT: Can you explain to me the significance  
9 of your response.

10 MR. SPELLBERG: Yes, your Honor. The plaintiffs  
11 are trying to winnow down their claims to try to limit the  
12 testimony of the witnesses that we have appearing. It's  
13 our view that all the evidence that we're about to submit  
14 is relevant to all of the claims, and so this idea that  
15 they're trying to winnow things down is not appropriate.  
16 We would like to be able to put on our case. If it  
17 doesn't affect our case, we don't mind.

18 THE COURT: Let me try to say this back to you.  
19 The City believes that certain testimony you're about to  
20 elicit from Ms. Erickson is relevant to claims in addition  
21 to the right to petition claim; is that right?

22 MR. SPELLBERG: Her testimony will go to the right  
23 to petition claim, your Honor. I'm not sure what counsel  
24 means by it's only a facial challenge. We want to make  
25 sure --

26 THE COURT: Mr. Adam, would you please make a  
27 record of what you mean by that.

28 MR. ADAM: We are asserting that on its face, I

1 think it's Section 1514, is in and of itself, without any  
2 additional requirement of intent by the City. We're  
3 prepared to stipulate that the City desired to reduce its  
4 employee costs, including its pension costs, but that the  
5 language of the charter Section 1514 in and of itself  
6 impedes the right to petition for plaintiffs, the right to  
7 go to court and to file a lawsuit under the first  
8 amendment in California Constitution.

9 MR. SPELLBERG: The trouble is, your Honor,  
10 there's an intent component to that. Part of  
11 Ms. Erickson's testimony and our other testimony will  
12 address that. I don't understand how it can just be a  
13 facial challenge.

14 MR. PATERSON: Your Honor, if I may. The intent  
15 goes to de incentivizing the public's use of the courts.  
16 It doesn't go towards the intent to harm or any animus  
17 towards the public or individuals' access to the courts.

18 THE COURT: Let's see if we can approach it this  
19 way: I heard that Mr. Adam reformulated the proposed  
20 stipulation from a legal formula to a factual formula.  
21 That is, that the City desired to reduce its costs and  
22 that that motivated 1514. Did I understand you correctly?

23 MR. ADAM: Yes.

24 THE COURT: Does the City -- is that also AFSCME's  
25 stipulation?

26 MR. PATERSON: Yes, your Honor.

27 THE COURT: Is that a stipulation the City  
28 accepts?

1 MS. ROSS: Your Honor, if we accept the  
2 stipulation, we believe it's the end of their cause of  
3 action because the right to petition cause of action can  
4 be defended against by the City based on a legitimate  
5 public purpose. The City had a legitimate public purpose  
6 in putting -- in having the alternative of four percent  
7 wage cut, then that defeats their claim of a violation of  
8 the right to petition.

9 So if they want to concede that the City's having  
10 the two alternatives, the contribution rate increase  
11 versus, if that doesn't succeed, the four percent wage  
12 decrease, if they want to concede that the four percent --  
13 that that alternative and the four percent wage decrease  
14 had a legitimate public purpose, then it's our contention  
15 that their case is over on that cause of action.

16 THE COURT: So the stipulation offered, which I've  
17 confirmed with both POA and AFSCME, is that the City  
18 desired to cut its costs and that motivated 1514. I  
19 didn't hear your answer whether that stipulation is  
20 accepted.

21 MS. ROSS: We would take the stipulation, but we  
22 would still need to put on our evidence.

23 THE COURT: So the City accepts the stipulation?

24 MS. ROSS: Yes. We would still need to put on our  
25 evidence.

26 THE COURT: I don't know what that means yet  
27 because I don't have any objections. We haven't started  
28 the testimony. So what I'm hearing is that there is a

1 stipulation offered, and I understand this to be on behalf  
2 of all plaintiffs pursuant to our earlier discussion of  
3 the fact that the City desired to reduce its cost and that  
4 that motivated 1514. I understand that to be the  
5 stipulation that's been accepted. Does anybody have a  
6 different understanding?

7 MR. HARTINGER: Your Honor, I think that the --  
8 the way that you've -- we don't accept the stipulation as  
9 phrased. Because the way that it could be construed could  
10 suggest that the City's motivation was solely money, which  
11 is not accurate. The City's motivation goes beyond money.  
12 It was about preserving services.

13 THE COURT: It's important that we have one lawyer  
14 per issue because we've had several different answers to  
15 this question. I understand the last answer is, no, the  
16 City doesn't accept the stipulation, so we're going to go  
17 to somebody else. Go ahead.

18 MR. SPELLBERG: Thank you, your Honor.

19  
20 SHARON ERICKSON

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

23 DIRECT EXAMINATION

24 BY MR. SPELLBERG:

25 Q. Ms. Erickson, good morning.

26 A. Good morning.

27 Q. Ms. Erickson, let's start. Can you tell us first  
28 with whom you're employed.

1 A. I'm employed by the City of San Jose.

2 Q. What's your position at the City of San Jose?

3 A. City auditor.

4 Q. And we'll back up just a bit. Can I ask you to  
5 share with us your education and your brief relevant job  
6 history up to the point that you became the City auditor  
7 for San Jose.

8 A. Yes. I have a BA from Stanford University in  
9 political science. I am a certified government -- I am a  
10 Certified Government Financial Manager and a Certified  
11 Internal Auditor.

12 I was first employed by the City of San Jose in  
13 1989 as a program performance auditor. I progressed from  
14 a performance auditor one to a two to a senior to a  
15 supervising auditor. In 2008, I left the City of San  
16 Jose. In 2001 -- excuse me -- I left the City of San Jose  
17 to be City auditor for the City of Palo Alto. In 2008, I  
18 returned as City auditor for San Jose.

19 Q. You mentioned you had a couple of certificates.  
20 Did I hear that correctly?

21 A. Yes.

22 Q. What are -- who are the certifications from?

23 A. The Certified Internal Auditor is from the  
24 Institute of Internal Auditors, and the Certified  
25 Government Financial Manager is from the Association of  
26 Government Accountants.

27 Q. And in the duties of City auditor, are you  
28 required to take continuing education to keep up on your

1 auditing skills?

2 A. Yes. Our office complies with government auditing  
3 standards. Those standards require that we have no less  
4 than 80 hours of continuing education relevant to audit  
5 every two years. No fewer than 24 in government, no fewer  
6 than 20 in any given year.

7 Q. And you stay up with that continuing education?

8 A. Correct.

9 Q. Let me ask you, what does the City auditor do for  
10 San Jose? What are the duties of your office?

11 A. So our mission is to independently assess and  
12 review City government services and provide information to  
13 the City Council, to the public, and to other state  
14 boards.

15 Q. Do you have a staff that works with you?

16 A. Yes. We're currently authorized for 15 full-time  
17 equivalent in our department.

18 Q. They all provide auditing functions in your  
19 office?

20 A. Yes. Correct. Audit and support staff.

21 Q. Are there accounting standards that apply to your  
22 office that you follow?

23 A. There are government accounting standards. So the  
24 Government Accounting Standards Board promulgates  
25 standards for accounting that are applied to all of the  
26 City's financial statements. There are also auditing  
27 standards, and our office abides by the government  
28 auditing standards that are promulgated by the general

1 accounting office.

2 Q. Your office abides by all of those standards that  
3 you've just discussed?

4 A. Yes.

5 Q. So in the course of the auditor's duties, how are  
6 topics selected for audit? In other words, how is it  
7 determined what parts of City government would be audited?

8 A. On an annual basis, we prepare a proposed audit  
9 work plan that is reviewed and accepted by the City  
10 Council.

11 Q. How are topics selected to go on that proposed  
12 audit work plan?

13 A. We request all parties to provide us suggestions  
14 for audit topics. So we get suggestions from the public,  
15 from staff, from department heads, from City Council  
16 members, and from within our own staff. Then what we do  
17 is we take the City's budget, and we basically look at all  
18 the auditable entities in the City and we risk rank them  
19 based on how much in revenue, how much in expenditure,  
20 date since last audit, how many employees they have in  
21 that function and so on. We risk rank those entities to  
22 come up with the top selections for audit during the  
23 fiscal year.

24 Q. Once you have that list on your risk rank, when  
25 you have that list, then how is it selected which ones  
26 will actually be audited?

27 A. There is some discretion in that. We generally  
28 look very seriously at the top ten on that list for

1 inclusion in the work plan.

2 Q. Is there a new risk rank list created every year?

3 A. Yes.

4 Q. And who makes the final decision about which ones  
5 are selected for audit?

6 A. I do.

7 Q. And was there an occasion recently where the City  
8 of San Jose's pension system was selected for audit?

9 A. Yes. When I prepared the 2009 -- so this would be  
10 for fiscal 2009-10 work plan, the two pension plans popped  
11 to the top of that risk assessment in that they were among  
12 the highest ranked in our risk assessments. Again, that  
13 was based on the sheer volume of transactions. So the  
14 sheer dollars involved in those plans.

15 Q. You say the two pension plans that popped to the  
16 top. That's the Federated pension plan and police --

17 A. And police and fire, correct.

18 Q. Did anybody suggest to you or give you direction  
19 that those pension plans should be audited?

20 A. Well, we knew from our experience in auditing  
21 pensionable earnings and other audits we had done in  
22 retirements, we had been paying attention to the cost, and  
23 there was general concern about the cost even in 2009.

24 Q. So were audits performed of the two pension  
25 systems?

26 A. Yes.

27 Q. And can you explain to all of us sort of broadly  
28 and generally, how were the audits performed. What was

1 looked at? What was done?

2 A. I have assigned a team to an audit. We begin by  
3 looking at the history of the program. As we put together  
4 in this case the history of pension benefits, we saw those  
5 benefits had changed. We pulled financial documents,  
6 budgets, comprehensive annual financial reports, and we  
7 interview staff to get a sense of the current issues in  
8 any program that we're auditing, whether it's the housing  
9 department or police staffing or pensions.

10 Q. You interviewed some of the pension staff?

11 A. Pension staff, correct.

12 Q. And did you look at some individual pension  
13 statements, things like that?

14 A. Yes. As part of any audit, we do detailed testing  
15 as well as pension earnings and so on.

16 Q. And what happened after you conducted the audit?  
17 Let me back up.

18 How long did the audit take, approximately, of the  
19 pension systems?

20 A. You know, we started work, I believe, in February  
21 of 2010. So the audit had been approved in June, but by  
22 the time staff came available, we started in February of  
23 2010, we issued the report in September of 2010.

24 Q. So that's about seven months to do the audit?

25 A. Approximately.

26 Q. And what was the end result? What did the  
27 audit -- when the audit is finished, what do you prepare  
28 and provide to show that you've conducted the product?

1           A.    Government auditing standards require that we  
2   prepare a written report of our findings and that that  
3   report be made public, so that's what we did.

4           Q.    Did you do that here?

5           A.    Yes.

6           Q.    So what I'm going to do at this point,  
7   Ms. Erickson -- I'm sorry. I was going to pull the binder  
8   out for you. If you look on the table behind you, if you  
9   can take -- it's going to be binder one if you're able to  
10   find it.

11           With binder one in front of you, Ms. Erickson, can  
12   you look at Exhibit 5101.

13          A.    Yes.

14          Q.    If you'd look at the document. Can you tell us  
15   what that is, please.

16          A.    This is a copy of our pension sustainability  
17   report.

18          Q.    It's the pension sustainability report. What is  
19   that? Is that the report from the audit, the pension  
20   audits you were telling us about?

21          A.    Yes. So this is the report that we issued to the  
22   City Council. I'm just double-checking. Yes, it is  
23   addressed to the City Council. This is the report we  
24   issued to the City Council in September of 2010. It's  
25   entitled Pension Sustainability Rise in Pension Cost  
26   Threaten the City's Ability to Maintain Service Levels,  
27   Alternatives For Sustainable Future.

28          Q.    This report, this pension report -- excuse me --

1 this audit report, was this prepared in the normal course  
2 of the City's business through the auditor's office?

3 A. Yes.

4 Q. Is it kept in the normal course of business at the  
5 City auditor's office?

6 A. Yes.

7 Q. Have you looked at it to ensure this is a true and  
8 correct copy of the report?

9 A. Yes.

10 MR. SPELLBERG: Your Honor, we would offer 5101  
11 into evidence.

12 MR. ADAM: Objection, your Honor. I'd object to  
13 its relevance and to the fact that it's hearsay to the  
14 extent it's admitted for the truth of what's asserted in  
15 the report.

16 On the relevance, this is a aspirational policy  
17 document by the City. What's at issue in this proceeding  
18 is, of course, the creation and impairment vested rights.  
19 I don't see the relevance. The fact that the City wanted  
20 to change its benefits is a completely different question  
21 from whether the City can, in fact, change its retirement  
22 benefits under the law.

23 MR. PATERSON: AFSCME joins those objections, your  
24 Honor, and also would suggest that the record is not a  
25 business record prepared in ordinary course of business.  
26 It's a unique record prepared one time for a special  
27 purpose.

28 MR. SILVER: Your Honor, the Retired Employees

1 would join in the relevancy objection. This has nothing  
2 to do with any of the issues in our case.

3 MR. PLATTEN: Your Honor, plaintiffs Sapien,  
4 Mukhar, and Harris would join.

5 MR. PATERSON: I would also add lack of foundation  
6 as to what the -- whether the documents on which it is  
7 based are liable -- are consistent with what's contained  
8 in the pension sustainability report or in the document.

9 THE COURT: So I am overruling the hearsay and  
10 foundation objections. If you want to address the  
11 relevance objections.

12 MR. SPELLBERG: Yes, your Honor. The City's  
13 intent is at issue in at least the petition for redress  
14 claim. It still remains in the case. It also -- the  
15 evidence -- as such, the evidence goes to our motivation,  
16 part of our motivation in promulgating Measure B and  
17 providing it to the electorate, and it's the historical  
18 context to Measure B, your Honor, which to the extent  
19 there's any factual issues in the case, including  
20 reliance, so forth, the City's entitled to show the  
21 factual background and the historical background leading  
22 up to Measure B.

23 So, primarily, it goes to intent, and it's also  
24 the factual background, the underpinning, if you will, of  
25 Measure B. It goes to notice to the City of the pension  
26 issues. This is when the issues were first flagged in a  
27 definitive way by a City analysis.

28 THE COURT: Anything else?

1 MR. SPELLBERG: Finally, for the Court of Appeal,  
2 it's just underlying evidence about how we came to this  
3 juncture.

4 MR. ADAM: Your Honor, I would be prepared to  
5 withdraw the relevance claim except as towards -- we'll  
6 allow it to be relevant towards the right of petition  
7 claim, but for nothing else. I haven't heard counsel go  
8 particularly beyond that.

9 THE COURT: Submitted?

10 MR. ADAM: Yes.

11 MR. PATERSON: Yes, your Honor.

12 THE COURT: I'm receiving 5101.

13 (Defendants' Exhibit 5101, previously marked for  
14 identification, was received in evidence.)

15 BY MR. SPELLBERG:

16 Q. Ms. Erickson, after this report was prepared and  
17 provided to City Council, was it made public?

18 A. Yes.

19 Q. How was that done? How was it made public?

20 A. So it was made public -- I believe the date on the  
21 report was September 29. So that's the date that we would  
22 have published the report on the web and begun making  
23 copies available to any member of the public who would  
24 stop by our office.

25 Q. And I'd like to direct your attention in the same  
26 binder to Exhibit 5102.

27 A. Yes.

28 Q. Can you tell us what that is, please.

1           A.    This is a copy of the PowerPoint presentation that  
2 we presented to -- in different variations to the general  
3 funds structural deficit elimination task force, the  
4 public safety and finance committee of the City Council,  
5 to the City Council itself, to various employee groups of  
6 employees at straight talk presentations that were  
7 presented by -- that were put on by the City Manager. We  
8 were invited to give this presentation to employees at the  
9 water pollution control plant, at the central service  
10 yard, and a few times in the City Council chambers.

11           Q.    So just to summarize your answer there, this is a  
12 PowerPoint that was prepared and presented to a number of  
13 different groups, if you will; right?

14           A.    Correct.

15           Q.    Where did the slides and the information come from  
16 that are in this PowerPoint?

17           A.    They were taken directly from our audit report  
18 with the exception of a couple of updates that we did  
19 toward the end of that series of pensions.

20           Q.    Updates to take into account changes in time?

21           A.    So it's when -- audit report is generally looking  
22 backwards, and additional history had passed since the  
23 time we issued the report. So this was updated -- I  
24 believe the last presentations we did for employees were  
25 in April of 2011.

26           Q.    So by and large, though, Exhibit 5102 contains  
27 slides and information taken from 5101. Is that fair?

28           A.    Correct.

1 Q. Was 5102 created in the normal course of business?

2 A. Yes.

3 Q. Is it maintained in the City's files in the  
4 regular course of business?

5 A. Yes.

6 Q. Have you reviewed 5102 to assure that this is a  
7 true and accurate copy of the PowerPoint you testified  
8 about?

9 A. Yes.

10 MR. SPELLBERG: Your Honor, I'd move 5102 into  
11 evidence.

12 MR. PLATTEN: Objection. Relevance and  
13 cumulative.

14 MR. ADAM: POA would join in the cumulative, your  
15 Honor. Mr. Spellberg just confirmed that this is largely  
16 the same document as the previous document that just came  
17 in.

18 MR. PATERSON: AFSCME renews its objection as to  
19 the 5102 on the same basis of 5101 and would also join in  
20 the cumulative objection.

21 MR. SILVER: Again, your Honor, this is completely  
22 irrelevant to any of the issues presented in the retirees'  
23 case.

24 THE COURT: I'm overruling the objections. The  
25 evidence is that it's the same except for ways in which  
26 it's not. So I'm receiving 5102.

27 (Defendants' Exhibit 5102, previously marked for  
28 identification, was received in evidence.)

1 MR. SPELLBERG: Thank you, your Honor.

2 BY MR. SPELLBERG:

3 Q. Ms. Erickson, did I show to you selected slides  
4 out of 5102?

5 A. Yes.

6 MR. SPELLBERG: Your Honor, I'd like to -- what  
7 I'd like to do is mark for identification several of the  
8 slides. Actually, it's 13 of the slides out of 5102. I  
9 thought I'd mark it as 5102A, and then I was going to go  
10 through them briefly with the witness via PowerPoint.

11 THE COURT: Okay. Well --

12 MR. SPELLBERG: I can just --

13 THE COURT: The alternative is to say we're  
14 talking about page 3. I think that's better rather than  
15 adding more paper to this record. We have everything  
16 already. We'll just make a clear record of which part of  
17 5102 you're talking about.

18 MR. SPELLBERG: That sounds fine, your Honor. I  
19 thought you would like a separate PowerPoint as you had  
20 requested earlier on another matter, but I can do it that  
21 way.

22 BY MR. SPELLBERG:

23 Q. Ms. Erickson, I've put on the screen in the  
24 courtroom one slide that comes out of 5102. And this is a  
25 slide that's in both -- this is a graph that is in both  
26 5101 and 5102; correct?

27 A. Correct.

28 MR. ADAM: Counsel, can you direct us --

1 THE COURT: Page 3 of 5102.

2 MR. ADAM: We just have Bates stamps, your Honor.  
3 Is it 1512?

4 MR. SPELLBERG: 1512.

5 BY MR. SPELLBERG:

6 Q. So, Ms. Erickson, can you tell us the context of  
7 your audit report. What does this slide depict?

8 A. As I said earlier, when we begin an audit, we  
9 begin looking at the history of the program under review.  
10 In this case, we looked at the benefit payments. These  
11 are the payments out that the plans were paying to  
12 pensioners both in terms of the blue line on the bottom,  
13 blue bars are the pension benefit payment, and the health  
14 insurance premiums are on the top.

15 When we looked at this graphic, we saw that in  
16 1991, that cost was about \$34 million in total. So  
17 \$30 million in pension payments, about 4 million in  
18 retiree health care premiums. By the time we issued the  
19 audit report, the City was -- the plans were paying --  
20 excuse me. This is the benefits payments out of the plan.  
21 So the plans were paying pensioners about \$212 million a  
22 year and 45 million in health care premiums.

23 Q. Did you find this rising curve going up here --  
24 was that unusual in your -- when you were -- did you find  
25 that to be unusual?

26 A. Any time you see a rising curve like that, you  
27 worry. So we were going to look deeper into that. But as  
28 we discovered, this is a curve that's happening across the

1 country in terms of pension plans. If you looked at a  
2 Social Security curve, it would probably look much the  
3 same way.

4 Q. Did you -- in your report, are there conclusions  
5 as to why we have this rising curve going from roughly 30  
6 million up to over 250 million?

7 A. Yes. So there are a larger number of retirees in  
8 the system, so there are two and a half times more  
9 retirees as of the end of this curve than there were at  
10 the beginning of the curve. In addition, salaries have  
11 increased dramatically over the time period that's shown  
12 in that graphic. Salaries had doubled. So those are the  
13 salaries on which the pension benefit is based. And in  
14 addition, we found that benefits had been enhanced.

15 Q. So we'll talk about those later. You talk about  
16 all of that in your report, do you not?

17 A. Correct.

18 Q. So we go to the next slide. That's the next page  
19 of 5102; correct?

20 A. Correct.

21 Q. What are you depicting -- what was being depicted  
22 in this slide?

23 A. Then we tried to break down which piece of this  
24 was pensions because we had decided to focus the audit on  
25 the pension side, not the retiree health care side. So  
26 this is the pension contributions by both employees and  
27 the City over the last -- over the decade prior to issuing  
28 the report. It showed that employee contributions had

1 gone from a total of 21 million to a total of 33 million  
2 by the end of that graphic, and the City's contributions  
3 had gone from 54 million to 107 million.

4 Q. The 54 million you're talking about in 2000?

5 A. Correct.

6 Q. Going up at the end of the audit report in 2010?

7 A. Correct.

8 Q. We have a slight decrease here in the City's  
9 contribution. Did your report account for what that was?

10 A. Yes. That's when the prepayment kicked in. So  
11 the City began prepaying contributions at the beginning of  
12 the year rather than during the year. So that dropped  
13 slightly.

14 Q. Now, this goes up -- this graph goes up to 2010,  
15 and we're something maybe 105 million or so, 107 million.  
16 Have you looked, Ms. Erickson -- as to the City's  
17 contribution to the pension system, have you looked at  
18 what it's been in 2011, 2012, 2013?

19 A. Yes. In 2011, it was 137 million; in 2012, it was  
20 208 million; the next year was 209 million; and this year  
21 it's 222 million.

22 Q. So it's continued to rise from what you've shown  
23 in 2010?

24 A. Yes.

25 Q. And from the City auditor's perspective, was this  
26 concerning?

27 A. Yes.

28 Q. How so? Why so?

1           A.    The potential it crowds out other expenditures.  
2    Any time you see expenditures growing at that rate,  
3    particularly in the years since we've issued the report,  
4    but even to the extent we were seeing at that time, it was  
5    beginning to crowd out other expenditures.

6           Q.    Other expenditures such as what?

7           A.    For services.

8           Q.    City services?

9           A.    So the point of having the City is to provide  
10   services.

11          Q.    The next slide from 5102, can you tell us what --

12          A.    When we put those two graphics together, we saw  
13   the pension benefit payments had exceeded contributions  
14   since 2001.

15                So this is just putting together the retirement  
16   benefits paid out, the top line, so that's the increase in  
17   the amount of the payments going out of the two plans.

18          Q.    That's the purple line; right?

19          A.    Right.

20          Q.    That's outflow?

21          A.    Outflow compared to contributions.

22          Q.    The bottom line is inflow?

23          A.    Right.  So that gap is made up by investment  
24   earnings, which --

25          Q.    This is the gap you're talking about between the  
26   two lines?

27          A.    Correct.

28          Q.    I'm sorry.

1           A.    It's typically made up by investment earnings.  
2    The concern is if you -- that's not so much of a concern  
3    if the plan is fully funded.  In other words, if there are  
4    sufficient assets in the bank at the time to cover that  
5    outflow.  My concern when I saw this graph was we are not  
6    fully funded.

7           Q.    So if we're not fully funded, what does that mean?  
8    How are we able to pay this gap if we're not fully funded?

9           A.    The gap is coming off your investment earnings and  
10   your asset base.

11          Q.    How has this gap done?  The difference between  
12   money going out the top line, money coming in in the  
13   bottom line, how has this gap done in 2011, 2012, 2013?

14          A.    It's grown.

15          Q.    The gap has grown?

16          A.    Yes.

17          Q.    So if we go to the next slide, funded ratios have  
18   fallen.  What is this telling us?

19          A.    So this goes back to the 1980s.  What it is is the  
20   total assets invested divided by the total assets that we  
21   would hope to have invested in order to fully fund the  
22   pension benefits that have already been earned.

23          Q.    So the purple line is the Federated plan; right?

24          A.    Correct.

25          Q.    Then the darker line above is the police and fire  
26   plan?

27          A.    Right.

28          Q.    So your report looked at both plans separately;

1 right?

2 A. In some cases we looked separately, and other  
3 cases we pulled graphics together. In this case, it was  
4 important because of the difference in the plans to look  
5 at them separately.

6 THE COURT: I'm sorry. I missed what the ratio  
7 is. Would you say that again.

8 THE WITNESS: The ratio is the assets that we  
9 currently have invested divided by the assets that we  
10 should have invested in order to cover the pension  
11 benefits.

12 THE COURT: Thank you.

13 BY MR. SPELLBERG:

14 Q. This chart you show police and fire about 80  
15 percent; Federated just below 70 percent?

16 A. Right.

17 Q. As an auditor, what percentage would you like to  
18 see?

19 A. I would like to see 100 percent, meaning that the  
20 plans would have banked sufficient assets earning a rate  
21 of return in order to cover the benefits that had been  
22 promised.

23 Q. If it's 100 percent, does that mean it's a  
24 sustaining pension system?

25 A. No.

26 MR. ADAM: Objection.

27 MR. PLATTEN: Objection. Lacks foundation. This  
28 witness is not a qualified actuary.

1 THE COURT: Overruled.

2 MR. SPELLBERG: I'll withdraw the question, your  
3 Honor.

4 THE COURT: Okay. Question withdrawn.

5 BY MR. SPELLBERG:

6 Q. Ms. Erickson, again, this stops at 2010, the date  
7 of the report. Can you tell us where these graphic lines  
8 have gone in the following years, 2011, 2012, 2013?

9 A. On an actuarial or smooth basis, the actuary's  
10 report shows the police and fire is at 79 percent, and  
11 Federated is another 62 percent.

12 Q. Federated has made a fairly significant drop?

13 A. Yes.

14 Q. What would happen if --

15 THE COURT: Can we make a record, because the  
16 colors don't show up on the copy. At the bottom, there's  
17 a code distinguishing police and fire plan and Federated  
18 plan, and it's all over the place. The Federated plan  
19 starts out -- which is a purple line, which doesn't show  
20 up in the copy, starts out above the police and fire line,  
21 and then in 1988 dips below and stays below. Is that  
22 fair?

23 MR. SPELLBERG: Correct, your Honor. The  
24 Federated line ends at roughly 70 percent, and police and  
25 fire line ends roughly 80 percent.

26 BY MR. SPELLBERG:

27 Q. You just told us the police and fire have dropped  
28 a little bit to 79; the Federated dropped 8 percent to 62.

1 A. Correct.

2 Q. Now, what would happen if these lines continue in  
3 this downward spiral?

4 MR. ADAM: Objection, your Honor. Calls for  
5 speculation.

6 MR. PATERSON: Join the objection, your Honor.

7 THE COURT: Could we have some foundation for this  
8 question, please.

9 BY MR. SPELLBERG:

10 Q. Ms. Erickson, as part of your duties as auditor  
11 for the City of San Jose, do you analyze financial trends  
12 and how they could affect a City's fiscal viability?

13 A. Yes. We do that both in general and for any  
14 specific program that we're auditing.

15 Q. And you would have done that for this program  
16 here, the pension funds that you were auditing?

17 A. Yes.

18 Q. So I'll re-ask the question. If the downward  
19 trend continues, in your view, what would occur?

20 MR. ADAM: Restate the objection, your Honor. The  
21 witness -- we went through this with AFSCME's witness  
22 yesterday about qualified actuarial. We're not testing to  
23 a City function here. This is a retirement plan that's  
24 run by --

25 THE COURT: What's the legal basis for the  
26 objection?

27 MR. ADAM: It's calling for speculation and lacks  
28 foundation.

1 MR. PATERSON: I would join in that, your Honor.  
2 I would also add it assumes facts not in evidence.

3 MR. PLATTEN: Separate grounds for objection, your  
4 Honor, based on relevance.

5 MR. SILVER: We'll join the relevancy.

6 THE COURT: Overruled.

7 BY MR. SPELLBERG:

8 Q. Do you have the question in mind, Ms. Erickson?

9 A. I'm not sure what just happened. I'm sorry.

10 THE COURT: It just means you can answer the  
11 question.

12 So perhaps, Mr. Spellberg, you can state the  
13 question again.

14 BY MR. SPELLBERG:

15 Q. Ms. Erickson, we just understood from you that the  
16 police and fire lines dropped a little bit in the year  
17 since 2010, Federated dropped to 62 percent. If the  
18 downward trend continues, in your view, what's going to  
19 happen?

20 A. Eventually it's insolvency.

21 Q. Insolvency. That's like bankruptcy; right?

22 A. Correct. There would not be sufficient assets in  
23 the plan to pay pensioners.

24 Q. I take it this caused you concern as City auditor  
25 when you saw this downward trend?

26 A. Yes.

27 Q. What I'd like to do is skip one page and then go  
28 to Exhibit 5102 to Bates number 1517, which I've put up on

1 the screen. I've always found this to be a confusing  
2 slide. Let's do a little more with it. Ms. Erickson,  
3 what's the dotted line?

4 A. So the dotted line is the Federated contribution  
5 rate. So for every dollar of payroll, that's what percent  
6 would need to be contributed to the pension plans by the  
7 City for pension and retiree health care.

8 Q. So does that mean that as of the date you have  
9 here projected out to 2015, the amount that would have to  
10 be contributed by the City would be roughly 45 percent of  
11 every dollar paid to a Federated employee?

12 A. That's correct. If I could explain that the  
13 earlier years were based on actuals. The last five  
14 years -- so the years after we issued the audit reports --  
15 so keep in mind we issued the report in September of 2010.  
16 Those projections were coming from the City's budget  
17 office.

18 Q. Past 2010?

19 A. Yes.

20 Q. So as of 2010, how much of -- approximately how  
21 much of the pension in retiree health care contribution  
22 was the City making for every dollar paid to a Federated  
23 employee?

24 A. It was 20-some percent. I don't have the exact  
25 figure in front of me.

26 Q. If we look -- it's roughly between 20 and 30  
27 percent; right?

28 A. Yes.

1 Q. Now, have you looked at what the numbers have  
2 actually grown to? So if we go past 2010 when your report  
3 was done and we're at 2013 right now, what is the number  
4 for Federated? How much does the City contribute for  
5 every dollar paid?

6 A. So in the actuarial reports for this year, the  
7 Federated system would be paying -- it was estimated here  
8 it would be paying 45 percent, and the actuarial reports  
9 show 60 percent.

10 Q. 60 percent as of 2013?

11 A. Yes.

12 Q. So here's 2013. It's already up to 60 percent?

13 A. Yes. I believe there may have been some  
14 subsequent adjustments in the final contribution rates,  
15 but those were the numbers that were provided in the  
16 actuarial report.

17 Q. What does that 60 percent mean? For every dollar  
18 that's paid to a Federated employee, what's the 60  
19 percent?

20 A. For every dollar that's paid to a Federated  
21 employee, another 60 cents needs to be paid by the City  
22 into the pension plan.

23 Q. So that number, at least as to Federated, was  
24 rising more dramatically than your audit report had  
25 anticipated?

26 A. Yes.

27 Q. Let's look at the upper line, the solid line.  
28 It's blue, and then there's a brown and kind of maroon or

1 kind of dark green. It goes to blue again. Can you  
2 explain what that is.

3 A. The two lines in the middle show the difference.  
4 Those are the actual contribution rates for police and  
5 fire. There was some difference between them. The  
6 projection that was prepared by the budget office showed  
7 them as one single line. So that's the line at the top of  
8 that graphic. Those current rates are 75 and 76 percent  
9 according to the actuarial report. So as 2013-14, we  
10 basically hit those projections.

11 Q. Let me do it again so we're clear on the record.  
12 Where the lines are different colors, the brown and olive  
13 line, one is -- police is the upper line there, and then  
14 the fire is the lower line?

15 A. Correct.

16 Q. And at 2010 when your report was done, there was  
17 different contribution rates. Is that what you're telling  
18 us?

19 A. Yes.

20 Q. Then it's projected together up to about 75  
21 percent?

22 A. Correct.

23 Q. But then you told us what the actual numbers are  
24 for the present time. What are those?

25 A. 75 and 76 percent.

26 Q. Which is which?

27 A. 75 was fire and 76 was police. These are the  
28 numbers from the recent actuarial report.

1 Q. So what does that mean? For every dollar that is  
2 paid to a police officer in salary, what does that 76  
3 percent mean?

4 A. So 76 cents would need to be set aside for  
5 post-employment benefits; that is, retirement and retiree  
6 health care. These figures do not include other current  
7 benefits that active employees receive.

8 Q. So it's going to be higher than the number you've  
9 just told us? It's going to be higher than 76 percent  
10 that has to be set aside?

11 A. The City's total cost for an employee is going to  
12 be higher than even this.

13 Q. Then for a fire fighter, for every dollar paid to  
14 a fire fighter, how much would be set aside?

15 A. So according to these reports, 75 cents would be  
16 set aside for post-employment benefits. Again, pension  
17 and retiree health care. That does not include current  
18 health care or other employee benefits.

19 THE COURT: Are you through with 1517? Are you  
20 through with that? I have some more comments for the  
21 record.

22 MR. SPELLBERG: Yes, your Honor. I was going to  
23 move on, yes.

24 THE COURT: Correct me if any part of what I'm  
25 about to say is incorrect. So the key at the bottom of  
26 the page indicates that there's a blue line for police and  
27 fire.

28 THE WITNESS: Yes.

1 THE COURT: The blue line is a solid line and --  
2 so it goes above the dotted line starting at the left, and  
3 then there's a break around 2006. I think the blue line  
4 picks up again about 2011. So the solid line on the far  
5 right is blue; is that right?

6 THE WITNESS: Yes.

7 THE COURT: So the brown line, which is not brown  
8 in the exhibit, which is why I'm doing this, that's for  
9 police; right?

10 THE WITNESS: Police, yes.

11 THE COURT: So the brown line appears in the  
12 middle of this from about 2006 to about 2007; is that  
13 right? 11.

14 THE WITNESS: Correct.

15 THE COURT: It starts out as the top line and then  
16 dips below the other line and then is the same as the  
17 other line for about 2010 and 2011?

18 THE WITNESS: Yes.

19 THE COURT: The other solid line is fire. That  
20 starts out in that middle section below the police line,  
21 goes above it and then overlaps?

22 THE WITNESS: Yes.

23 THE COURT: Go ahead. Thank you.

24 MR. SPELLBERG: Thank you, your Honor.

25 BY MR. SPELLBERG:

26 Q. Ms. Erickson, you found this trend to be  
27 concerning as well, did you not, this steep climb up?

28 A. Yes.

1 MR. PLATTEN: Objection. Leading.

2 THE COURT: Sustained.

3 BY MR. SPELLBERG:

4 Q. Did you find it to be concerning?

5 A. Yes.

6 Q. Why?

7 A. Again, it's potentially crowding out other  
8 expenditures. So these are post-employment benefits. It  
9 crowds out pay increases for current employees, it crowds  
10 out services, and we were already, as we issued this  
11 report, beginning to see layoffs in the City.

12 Q. Let's go to the next slide. It's the next page in  
13 5102. It just says what happened? Really what you're  
14 saying is how did this come to pass, what we just talked  
15 about; how did we get there; right?

16 A. Part of our job as performance auditors is to  
17 explain what's happened in the past. The other thing is  
18 to explain the causes for that to the best of our ability,  
19 then to make recommendations for improvement or change.

20 Q. So this next section where you say what happened,  
21 we're going into the causes; is that correct?

22 A. Correct.

23 Q. So I'm sorry that this -- our screen isn't big  
24 enough. It says there's a declining ratio of employees to  
25 retirees and beneficiaries that creates a risk of even  
26 higher future contribution rates. What does this slide  
27 show us, Ms. Erickson?

28 MR. PLATTEN: Your Honor, excuse me. You have

1 overruled our objection on relevancy as to the entire  
2 documents. I just want to have the record reflect that we  
3 have a continuing objection to all of these particular  
4 questions and the testimony as to these tables on the  
5 basis of relevancy. Although you have admitted the  
6 documents into evidence, I'd request that that standing  
7 objection --

8 THE COURT: No. We need a clear record of what  
9 your objections are.

10 MR. PLATTEN: Then we object.

11 THE COURT: I have overruled the objection stated  
12 to the entire document. If you have other objections for  
13 the sake of a clear record, you need to make them.

14 MR. PLATTEN: Object to the question on the  
15 grounds of relevancy.

16 THE COURT: Overruled.

17 BY MR. SPELLBERG:

18 Q. So the question, Ms. Erickson, is, what does this  
19 slide tell us?

20 A. What it told us in the course of our audit work  
21 was 30 years ago, we had about 5 active employees for  
22 every one retiree.

23 Q. That's the first bump up here; right?

24 A. Yes. The very top of that graphic. 20 years ago,  
25 there were about three to one. By the time we issued the  
26 report, we were down to 1.4 to one.

27 Q. What effects did that have on your conclusions?  
28 How did that -- how did this slide, this information

1 that's pictorially reflected here, how did that factor  
2 into your conclusions here?

3 A. Well, what we were concerned about was even higher  
4 contribution rates. So we had already seen the  
5 contribution rates were projected to go up. If you have  
6 even fewer employees, then the contribution rates would go  
7 even further.

8 Q. Because there's more spread over fewer --

9 A. More costs spread over fewer employees.

10 Q. So if you go to the next slide in 5102, what is  
11 this slide?

12 A. This slide shows you that even if you were fully  
13 funded, which was a question you asked earlier, even if  
14 you had 100 percent --

15 THE COURT: Do you have the Bates number on this,  
16 please?

17 MR. SPELLBERG: I'm sorry, your Honor. 1520.

18 THE COURT: Okay. Thank you.

19 THE WITNESS: So this one shows even if you are  
20 100 percent funded, what can happen, and that's because  
21 the investment -- the pension fund assets were invested in  
22 various markets. This shows the effect of the downturn in  
23 2008 and '9 where the City lost more -- I'm sorry -- where  
24 the pension funds lost more than \$970 million. So in the  
25 following year, the pension funds recovered somewhat, but  
26 we were keeping in mind that funds at that point were  
27 expected to earn somewhere around eight percent every  
28 year.

1 BY MR. SPELLBERG:

2 Q. Instead of earning eight percent, there was a  
3 series of significant losses?

4 A. Correct.

5 Q. What's happened with the fund in 2011-2012?

6 A. So in 2010, the fund gained money. In 2011,  
7 the --

8 Q. You say 2010?

9 A. Fiscal year 2010, which is the last year of that  
10 graphic, the fund gained money. The year after that,  
11 which was fiscal year 2011, the fund also gained money.  
12 Gained about 681 million between the two funds. In the  
13 year subsequent to that, fiscal year 2012, the funds  
14 actually lost a cumulative of 100 million. So it's  
15 fluctuating.

16 Q. In your view as the auditor, is the City able to  
17 count on investment gains to help with this problem we've  
18 identified with these increasing contribution rates? Is  
19 this going to be the answer, investment gains?

20 MR. PATERSON: Objection.

21 MR. PLATTEN: Objection. Relevance; no  
22 foundation; it's not a qualified actuary.

23 MR. PATERSON: I'll join.

24 MR. ADAM: As well as the POA.

25 MR. SILVER: As will we.

26 MR. SPELLBERG: Your Honor, I'll withdraw. I have  
27 a better question.

28 BY MR. SPELLBERG:

1 Q. In your work as an auditor looking at the pension  
2 plans, did you come to any conclusion, Ms. Erickson, about  
3 whether investment gains are a mechanism to help resolve  
4 these rising pension costs that we've talked about?

5 MR. PLATTEN: Objection. Relevance; no foundation  
6 or expertise in this area.

7 MR. PATERSON: Join.

8 MR. ADAM: Join.

9 MR. SILVER: Join.

10 THE COURT: Overruled.

11 THE WITNESS: I felt it was important to let the  
12 City Council know and the public know. So part of my job  
13 is to report to the City Council and to the taxpayers and  
14 the public that, in our opinion, it's possible that  
15 investment gains would wipe away the problem, but we were  
16 several billion dollars short at that point, and I was not  
17 confident that Wall Street was going to give us our money  
18 back.

19 BY MR. SPELLBERG:

20 Q. We're still talking about the causes. How did we  
21 get there? So we'll go to the next slide, which is a  
22 document; title on it is Retroactive Pension Benefit  
23 Enhancements Added to the Unfunded Liability.

24 MR. PLATTEN: Counsel, can we have a Bates stamp?

25 MR. SPELLBERG: Just the next page, 1521.

26 BY MR. SPELLBERG:

27 Q. So this is -- I've always thought this was a  
28 little bit unusual graph. Can you explain what it is for

1 us.

2 A. What we were trying to do is show what happens  
3 when you grant a retroactive increase. So we just picked  
4 an example. So in this example, it's a fire department  
5 employee who began service in 1980. At the time that that  
6 employee began service in 1980, the maximum retirement  
7 allowance was 75 percent. That was increased in 1996 to  
8 80 percent, and it was increased to 85 percent in 2000,  
9 and finally it was increased to 90 percent in 2008. When  
10 the retiree retired out in 2010, the retiree was eligible  
11 for 90 percent compensation. So three percent going to  
12 years of -- for the years of service.

13 Q. So how did that -- that's a benefit enhancement;  
14 right?

15 A. Right.

16 Q. The employee went from 75 percent in 1980 to 90  
17 percent in around 2006, 2008?

18 A. Right.

19 Q. How did that benefit enhancement add to the  
20 unfunded liability?

21 A. Well, the problem is, in 1980, the actuary -- the  
22 City and employee would have been contributing on the  
23 basis of a 75 percent benefit.

24 Q. Contributing to the pension fund on 75 percent?

25 A. Right.

26 Q. So when it went to 80 percent, those prior years  
27 of service, neither the City nor the employee had been  
28 contributing for that level of benefit? They hadn't been

1 contributing at 80 percent; they had only been --

2 A. For 75 percent benefit.

3 Q. Why did that create unfunded liability?

4 A. The problem is when you haven't contributed, then  
5 there is created an unfunded liability. Those liabilities  
6 can be in the tens of millions of dollars any time that  
7 the City enhances or a benefit is enhanced. I say a  
8 benefit is enhanced because at least one of those was  
9 through arbitration.

10 MR. PATERSON: Your Honor, I would like to pose an  
11 objection. It's unclear to me which pension system this  
12 chart of the witness' testimony is referring to.

13 THE COURT: Are you objecting to the question  
14 that's been answered?

15 MR. PATERSON: Belatedly, your Honor. I think  
16 it's unclear whether this is police and fire or Federated  
17 or some hypothetical plan.

18 THE COURT: If that's an objection, it's  
19 overruled.

20 BY MR. SPELLBERG:

21 Q. Fair point. What are the P and F here?

22 A. One was police was granted the increased benefit  
23 to 90 percent in 2006, and fire was granted in 2008.

24 Q. Our hypothetical employee, this is police or fire;  
25 right?

26 A. Yes. The example that we used when we made this  
27 presentation, it was a hypothetical fire employee.

28 Q. You said that the -- whenever there's an

1 enhancement. So when it goes from 75 to 80, that's an  
2 enhancement; right?

3 A. Yes.

4 Q. Then 80 to 85 is an enhancement?

5 A. That's what we called an enhancement, yes.

6 Q. 85 to 90, same; right?

7 A. Yes.

8 Q. You said each enhancement can cost -- or can add  
9 to the unfunded liability in tens of millions of dollars?

10 A. Yes.

11 Q. In your audit report, is there discussion about  
12 what -- how much the unfunded liability was increased?

13 A. There have been various numbers over the years  
14 that we encountered. We ended up not including them, and  
15 the reason was -- and we talked about this in our report.  
16 The reason was we believe those estimates were -- those  
17 were underestimated, so I was not confident that some of  
18 those numbers were reliable.

19 Q. The actuarial numbers?

20 A. The forecasted cost at the time. And that's  
21 because in subsequent reports, what we found is employees  
22 are living longer and so on. Those can all change your  
23 estimate of what the benefit would cost. So at the given  
24 point in time when benefit enhancements were approved,  
25 counsel or other parties may have had estimates to the  
26 cost. By the time we reached the end of this project, we  
27 were not sure that those estimates of cost that they had  
28 been given were entirely accurate.

1 Q. In your audit report, the increased unfunded  
2 liability as a result of the benefit enhancements, did you  
3 identify who picked that up, who paid for that?

4 A. The bulk of that -- some of that is paid by  
5 employees. The bulk of it is paid by the City, and that's  
6 why, in previous graphs, you see the City's contribution  
7 rate going up so steeply.

8 Q. Some of it was paid by the employees who received  
9 the benefit enhancements?

10 A. Yes.

11 Q. Then you have a couple other bullet points here  
12 you identified as other changes down below the graph. Are  
13 these benefit enhancements that dropped down here?

14 A. Those are all benefit changes since the charter.  
15 And I believe the next slide we'll go through charts about  
16 the charter minimums. Since the charter vote in 1965,  
17 these were other changes that had taken place.

18 Q. I was going to ask you to explain two of them.  
19 What's the guaranteed three percent COLA? Can you explain  
20 what that benefit enhancement was that added to our  
21 unfunded liability.

22 A. The original charter didn't include a COLA. The  
23 COLA had come in very quickly thereafter in the history of  
24 the pension plan. But the guaranteed COLA was brought  
25 into place for police and fire in 2002, and in 2006 for  
26 Federated.

27 Q. The COLA is a cost of living adjustment; right?

28 A. Yes. I have been told that COLA isn't really the

1 correct word for that because it's a guaranteed  
2 adjustment.

3 Q. And your audit conclusions were that that benefit  
4 enhancement, the three percent guaranteed COLA, that added  
5 to the unfunded liability?

6 A. Correct.

7 Q. And then the supplemental retiree benefit, what  
8 we've called here SRBR, what was your conclusion about  
9 that benefit enhancement -- adding to the unfunded  
10 liability?

11 A. That one was added in 1986 for Federated; in 2001  
12 for police and fire. It basically takes excess earnings.  
13 So any time the pension fund earning is more than it was  
14 expected to earn, it banks that money, pays it out to  
15 retirees as a 13th paycheck.

16 Q. Your finding, did that add to the funded  
17 liability, that benefit?

18 A. Correct.

19 MR. PLATTEN: Objection. Leading.

20 THE COURT: Sustained.

21 BY MR. SPELLBERG:

22 Q. What effect did it have -- what effect did the  
23 supplemental retiree benefit have with regard to unfunded  
24 liability?

25 A. We believe this also added to the unfunded  
26 liability.

27 Q. That's one of the conclusions in the report?

28 A. Yes.

1 Q. If we go to -- it's going to be two pages further  
2 in 5101. Bates number 1523 is what we're on. What are  
3 the major drivers of pension costs? What did you mean by  
4 that comment?

5 A. We had looked at what were costs going up. We had  
6 looked at what were the major causes of that. We had  
7 audited pensionable earnings and determined that although  
8 there were some improvements that could be made to the way  
9 the City tracked pensionable earnings, that is the amount  
10 of earnings that any employee gets, and that how that  
11 information is transferred over to the pension system,  
12 through that we knew that we didn't have issues with  
13 pensions spiking in San Jose, the same way some other  
14 jurisdictions had, but we did want to know what were the  
15 major drivers of these costs that were going up so  
16 steeply.

17 Q. What's causing everything to rise? That's what  
18 we're talking about; right?

19 A. Right.

20 Q. This is the next page, 1524 of 5102. The title is  
21 Cost Components of the Current Plans.

22 A. Correct.

23 Q. You have the top line is Federated, the second  
24 line is police and fire?

25 A. Yes.

26 Q. Let's just go through -- you've got them color  
27 coded here -- since that won't come through on the  
28 exhibit. Federated is 44, police and fire is 50, and then

1 it corresponds to a box called charter minimum. Can you  
2 tell us what that is, please.

3 A. The charter minimum was basically for police and  
4 fire. It was 50 percent at age 55 with 20 years of  
5 service, and Federated was basically the same thing. It  
6 was two percent per year times 25 years plus one percent  
7 per year thereafter. So those were the basic charter  
8 minimums that we included in this analysis.

9 Q. So that's the minimum amount that a employee would  
10 receive who retires with a pension?

11 A. Right. Under the charter as adopted. So the  
12 charter set the floor.

13 Q. So the 44 and 50 percent, this is -- that's a  
14 percentage of the total amount being paid to a  
15 hypothetical Federated employee and the total amount paid  
16 to a hypothetical police and fire employee?

17 A. On average, correct. Or a percent of the total  
18 cost of the plan as well.

19 Q. Then moving across, we have for Federated 26  
20 percent in a red box, COLA, 28 percent for police and  
21 fire, and if you look at the second box at the bottom,  
22 it's called COLA. Can you tell us what is the  
23 significance of the 26 and 28 percent there, please.

24 A. So this is the guarantee -- this is the guaranteed  
25 three percent cost of living adjustment that happens every  
26 year.

27 Q. So what do you mean by that? What does this  
28 percentage mean in sort of practical dollars or practical

1 application?

2 A. So as a layperson, to me it means that 25 -- more  
3 than 25 percent of the cost of the benefit is related to  
4 this three percent COLA. What was startling to us was how  
5 expensive this benefit is.

6 Q. The benefit is the COLA you're talking about?

7 A. Is a guaranteed COLA. So it's a guaranteed three  
8 percent increase whether -- so it's not a floating CPI.  
9 It's a guaranteed increase.

10 Q. Why do you say it was startling? What was the  
11 startling part?

12 A. Well, it wasn't till we remembered the rule of 72  
13 and thought about, yeah, if you have a three percent  
14 increase, your money is going to double, so pensions will  
15 double in this case in 24 years with a three percent COLA.

16 Q. That's because the three percent compounds on  
17 three percent each year?

18 A. Correct.

19 Q. So what I think you're saying is that there's a  
20 significant part of what's being paid to our hypothetical  
21 employees on average just attributable to the COLA?

22 MR. ADAM: Objection. Leading.

23 MR. PLATTEN: Objection. Leading.

24 THE COURT: Sustained.

25 BY MR. SPELLBERG:

26 Q. What do the 26 and 28 percent mean in the scheme  
27 of 100 percent being paid to our hypothetical employee?

28 A. So it means that of a hypothetical employee, that

1 COLA is going to add that much in cost over the total life  
2 of their pension. For some retirees already, that line  
3 has been crossed where they're receiving more money in  
4 COLA than they are in original pension benefit. For  
5 others, the COLA will take some years for it to double  
6 their pension benefit.

7 Q. But this is the average taking both extremes;  
8 right?

9 A. Yes.

10 Q. Then we've got two, at least on the screen there,  
11 light green boxes, four percent and then six percent  
12 following COLA section. If we go to the third box at the  
13 bottom on the index, it says one year final average  
14 salary. What's the significance of those two?

15 A. So that's the change from a three-year average to  
16 a one-year average. So, again, between the two plans, it  
17 addresses four to six percent to the total cost of the  
18 plan to have moved from a average of three years to the  
19 highest final year.

20 Q. And is that -- did your audit find that's a  
21 benefit enhancement going from the three years to the one  
22 year?

23 A. Yes.

24 Q. So what we have here is what's been added to our  
25 cost of our average employee?

26 A. Yes.

27 Q. And then the next box over is four percent and  
28 four percent. If we look down below, that box says SRBR.

1 What's that all about?

2 A. That is the supplemental benefit that's provided  
3 to retirees when the funds earned interest over the  
4 assumed rate of return. Our concern with that was it  
5 needed to be paid out according to the rules that we saw,  
6 whether or not the plan was underfunded or overfunded.

7 Q. That is also a benefit enhancement; right?

8 A. Correct.

9 Q. Then the last two boxes for our top line of  
10 Federated employee, 22 percent, our police and fire 12  
11 percent. What's that final box?

12 A. That's everything else beyond what was in the 1965  
13 charter. So that would include the retirement age for  
14 police and fire which dropped to 50. Again, the charter,  
15 it said 55. It includes the formula enhancements, the  
16 enhancements to the maximum benefit, survivorship  
17 benefits. So it's everything else.

18 Q. Let's go to the next slide, Ms. Erickson. In  
19 5102, we're going to Bates number 1527, and it's titled  
20 Rising Pension Costs Threaten the City's Ability to  
21 Maintain Service Levels.

22 The top part here, the top bullet point, fiscal  
23 year 2010 to 2011, can you tell us -- we can all read it.  
24 What's the import of that, Ms. Erickson?

25 A. That was the situation we were in when we issued  
26 this audit report. So we had just been through the City  
27 Council in June of 2010, had adopted the 2010-'11 budget.  
28 It had closed -- the City Council had been forced to close

1 a \$118.5 million deficit. 52 million of that was  
2 increased retirement costs. We saw dramatic cuts to  
3 services, layoffs. Employees began -- pay was beginning  
4 to be cut by employees and other employee concessions.

5 Q. What kind of cuts to services were being  
6 experienced at this time as a result of this?

7 A. We saw --

8 MR. ADAM: Objection. Relevance, your Honor.

9 MR. PATERSON: Join by AFSCME.

10 MR. MCBRIDE: Join.

11 MR. SILVER: Join.

12 THE COURT: Overruled.

13 BY MR. SPELLBERG:

14 Q. You may answer. What kind of service cuts?

15 A. We saw cuts to police and fire. They were pretty  
16 much across the board in the City. We began -- the City  
17 began closing down community centers, library hours were  
18 reduced, street conditions, streets, pavement was not  
19 addressed.

20 Q. The problems with pavement was not addressed?

21 A. Correct.

22 Q. Infrastructure -- what was happening to the  
23 infrastructure?

24 A. The first thing you looked at, the first thing  
25 that gets cut is your infrastructure investments. The  
26 City began also cutting -- when you cut services at the  
27 City, you're cutting the number of employees. So there  
28 were beginning to be dramatic reductions in the number of

1 employees in all departments.

2 Q. Then the second part of the slide, we go down to  
3 fiscal year 2011-2012. This 2011-2012 deficit, this was  
4 not in your original; right?

5 A. Correct. This is one of the updates that we made  
6 to this report in the subsequent year after we issued the  
7 report. Again, we issued the report in September of 2010,  
8 and the budget then -- the budget deficit that was cured  
9 by the City Council in June of 2011 was \$115 million  
10 deficit. Again, we saw increased retirement costs were a  
11 major factor in that totaling almost \$61 million.

12 Q. That's an increase from the 2010-2011 budget of 52  
13 million. You're talking about this number down here,  
14 almost 61 million?

15 A. Yes. I was going to say, so at that point we saw  
16 even more dramatic reductions in City services to the  
17 point now where we see increased potholes in city streets  
18 because the City can't afford to keep up the maintenance  
19 on those streets. We still have decreases in fire and  
20 police staffing. Our parks department has been -- the  
21 staffing has been cut by 47 percent. We only have 11 out  
22 of 53 community centers running, and our libraries are  
23 down to four days a week.

24 Q. There's one more slide I want to show you.

25 THE COURT: Before you leave this one, the word  
26 "increased" underneath the fiscal year '11-'12; is that  
27 right? Or should that -- is that actually the increase in  
28 the cost, or is that a statement of the costs?

1 THE WITNESS: I was going to double-check to the  
2 figures that we looked at before. The increase between --  
3 yes. The increase between 2010-2011 to 2011-2012, yes,  
4 that was the increase.

5 THE COURT: What you're saying is that this 60.9  
6 million is the delta between '10-'11 and '11-'12?

7 THE WITNESS: Correct. What we had paid the  
8 previous years.

9 THE COURT: Is that true for the 52 million also?

10 THE WITNESS: For the prior year -- actually, I  
11 don't believe that's true for the prior year. So the  
12 prior year it went from 107 to 137. So 30 of that was  
13 retirement cost.

14 THE COURT: Okay. Are you planning to move to  
15 another slide?

16 MR. SPELLBERG: Yes, I am.

17 THE COURT: This would be a good time to take our  
18 morning break. We will be in recess for ten minutes.

19 MR. ADAM: Your Honor, can I suggest as we try to  
20 hammer out this stipulation a longer break?

21 THE COURT: We're off the record on this.

22 (Recess.)

23 THE COURT: Ms. Erickson, you're still under oath.

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

25 BY MR. SPELLBERG:

26 Q. Ms. Erickson, we have been working our way through  
27 the PowerPoint that's Exhibit 5102, and I'm going to jump  
28 ahead a couple slides to the audit recommendation. Let me

1 ask you. As part of the function of the City auditor,  
2 when you prepare an audit report, is there typically a  
3 section on recommendations?

4 A. Yes. Every audit is required to have a section on  
5 recommendations. Any time we have a finding, we are  
6 required to provide recommendations.

7 Q. You say required. Is that an accounting standard  
8 or auditing standard?

9 A. Yes. Under the auditing standards.

10 Q. So this audit report on the Federated and police  
11 and fire pension systems likewise have recommendations;  
12 right?

13 A. Correct.

14 Q. So I'd like to skip ahead on Exhibit 5102 to Bates  
15 number 1531, the audit recommendations. It's correct, is  
16 it not, Ms. Erickson, that there's two pages of audit  
17 recommendation in your report; correct?

18 A. That's correct. There were a total of six  
19 recommendations.

20 Q. I put up the first page of the audit  
21 recommendations. Can you tell us what these are.

22 A. The first recommendation was to explore  
23 prohibiting benefit enhancements without voter approval  
24 and retroactive pension benefit enhancements that create  
25 unfunded liabilities.

26 Q. What was the point of that recommendation? Why  
27 was that made?

28 A. The point of having an auditor's office is

1 accountability to the public. It's a key part to me of  
2 our democracy. We felt that in this case the taxpayers  
3 would be putting the burden for any unfunded liabilities  
4 and that those should go for voter approval.

5 Q. So that was recommendation number one?

6 A. Yes.

7 Q. Then what was the second recommendation?

8 THE COURT: Can I ask about this so I understand  
9 the text before the comma? Is the text after the comma,  
10 "and explore prohibiting retroactive pension" an  
11 enhancement?

12 THE WITNESS: Yes.

13 BY MR. SPELLBERG:

14 Q. The second box there has a series of suggestions  
15 under one umbrella. Can you explain those for us.

16 A. We recommended the City Council pursue one or more  
17 of a combination of those cost containment strategies.  
18 That included additional cost sharing with employees,  
19 eliminating -- or eliminating SRBR transfers or  
20 distributions when the plans were unfunded, negotiating  
21 prospective changes with existing employees, establishing  
22 a second tier for new employees, and consider joining  
23 CalPERS to reduce administrative costs.

24 Q. These were all recommendations that went to the  
25 City Council about how to deal with the problems  
26 identified in the audit report?

27 A. Correct.

28 Q. Then the second page of the audit recommendations

1 is Bates page 1532. What were your other suggestions?

2 A. We recommended actuarial audits every five years  
3 if the pension plan actuary had not changed to assure that  
4 assumptions were reasonable on a go-forward basis. We  
5 recommended that the administration propose an ongoing  
6 budget for actuarial services so that we could be  
7 confident the administration was fully aware of the cost  
8 of any benefit enhancement or any benefit that might be  
9 negotiated. We recommended providing annual updates to  
10 the City Council by the retirement boards themselves on  
11 the status of the plans and forecast of the pension costs  
12 that hadn't been being done at that time, and we  
13 recommended that the pension plans distribute an annual  
14 summary of the plan's financial condition to all plan  
15 members.

16 Q. Now, these recommendations -- so there were six  
17 recommendations. Four on this page, two on the previous  
18 page, although there's a number of subparts. Did the City  
19 Council implement any of these recommendation since your  
20 report is 2010, we're now in the middle of 2013?

21 A. When we presented our report, the City Council  
22 voted to accept the audit report and recommendations. So  
23 that action by itself doesn't change anything. It doesn't  
24 start in motion a lot of stuff. But what ended up  
25 happening was the first -- these two bullets and then the  
26 first four sub bullets ended up making their way into  
27 Measure B.

28 Q. So let's talk -- what's the first bullet up here?

1 A. Yes. The benefit enhancement.

2 Q. And you say the second bullet, the first four  
3 subparts?

4 A. First four of those, the CalPERS option didn't  
5 make its way into Measure B.

6 Q. When you say made its way into Measure B, what do  
7 you mean? I don't need sections of Measure B, but what do  
8 you mean?

9 A. They were addressed by Measure B.

10 Q. These recommendations that were made here?

11 A. Yes.

12 Q. So the first two recommendations and then the  
13 first four of the sub-part of the recommendation number  
14 two?

15 A. Yes.

16 Q. On this first page anyway, the one recommendation  
17 that didn't make its way into Measure B was the joining  
18 CalPERS; right?

19 A. Correct.

20 Q. Now, what about on the second page of the  
21 recommendations, was four? Were any of those adopted or  
22 made their way into Measure B?

23 A. They did not make their way into Measure B. They  
24 are accepted audit recommendations. My office follows up  
25 on open audit recommendation every six months, and we  
26 continue to follow up on these.

27 Q. And when you say that from the first page of  
28 recommendations that most of these made their way to

1 Measure B, were you responsible, you and your office  
2 responsible for having those recommendations make their  
3 way into Measure B?

4 A. No.

5 Q. Were you involved in drafting or preparing  
6 Measure B at all?

7 A. No.

8 Q. Ms. Erickson, I'm going to shift to a different  
9 topic.

10 THE COURT: You're leaving 5102?

11 MR. SPELLBERG: I am leaving 5102.

12 THE COURT: What is the date on which you prepared  
13 5102?

14 THE WITNESS: The audit report itself was -- we  
15 prepared it -- it was issued in September of 2010.

16 THE COURT: I see that on the first page of 5102.  
17 But as to 5102 itself, when was that prepared?

18 MR. SPELLBERG: That's the PowerPoint.

19 THE WITNESS: The PowerPoint. You know, I believe  
20 this is the most -- this latest version may have been  
21 prepared as late as March of 2011. That was the latest  
22 date I could find where we were doing those employees  
23 talks.

24 THE COURT: Thank you, Mr. Spellberg. Go ahead.

25 MR. SPELLBERG: Your Honor, I just need to shift  
26 over here.

27 BY MR. SPELLBERG:

28 Q. I want to go to another topic, Ms. Erickson. You

1 had told us earlier this morning that your office does  
2 audits on any number of City programs or City agencies; is  
3 that right?

4 A. That's right.

5 Q. Did there come an occasion where your office  
6 performed an audit on the disability system, the San Jose  
7 disability system?

8 A. Yes. The disability retirement system.

9 Q. Can you tell us how that audit came about. How  
10 was it triggered? Give us the background.

11 A. Our office has done a series of audits in the  
12 City's workers' compensation system. In the last one of  
13 those audits that we issued in 2009, I believe it was in  
14 April of 2009, we had found multiple claims. We had found  
15 high workers' comp claims and multiple claims and claims  
16 in the final year of employment, and we determined that we  
17 really should look at the City's disability retirement  
18 system that those claims were potentially feeding into.

19 Q. The workers' comp claims were potentially feeding  
20 into the disability system?

21 A. Correct.

22 Q. Is it fair to say that as a result of the audit of  
23 the workers' comp system, that went into the risk list,  
24 the disability system?

25 A. Yes.

26 Q. Was an audit ultimately approved and performed of  
27 the City disability system?

28 A. Yes.

1 Q. Can you describe for us how that was performed.  
2 What sort of work was done?

3 A. It was the same kind of format as the previous  
4 audit that I described. We began by looking at history.  
5 We always do benchmarking as part of our audits. In this  
6 case, we also pulled a sample of claims, disability,  
7 retirement. I'm sorry. Disability retirements to look at  
8 those retirements as well.

9 Q. Was that just like the pension? Did that  
10 disability audit, did that end up the end product being a  
11 report about your audit?

12 A. That's correct.

13 Q. Could you look at the binder you have in front of  
14 you, Exhibit 5103, please.

15 A. Yes.

16 Q. Can you tell us what 5103 is.

17 A. It's a copy of our disability retirement audit.  
18 It's entitled Disability Retirement Program in Need of  
19 Reform. We issued this report in April 2011.

20 Q. We were just speaking about the disability system  
21 audit. This is the report that came out of that audit?

22 A. Yes. So every audit where we have findings, we're  
23 required to prepare a written public report of those  
24 findings. We do post these on the web.

25 Q. It says this is a report that went to the San Jose  
26 City Council; right?

27 A. That's correct.

28 Q. Is this report prepared in the normal course of

1 business of your office as the City auditor?

2 A. Yes.

3 Q. Is it kept and maintained in the normal course of  
4 business in your office as the City auditor?

5 A. Yes.

6 Q. Have you looked at it to assure that this is a  
7 true and accurate copy of the report that was prepared and  
8 kept in your office?

9 A. Yes.

10 Q. And it is?

11 A. Yes.

12 MR. SPELLBERG: Your Honor, we'd move 5103 into  
13 evidence.

14 MR. PLATTEN: Objection. Relevance.

15 MR. ADAM: Same objection for the POA, your Honor.

16 MR. SILVER: Objection. It's irrelevant  
17 completely to our case.

18 MR. PATERSON: AFSCME joins.

19 THE COURT: Overruled. 5103 is in.

20 (Defendants' Exhibit 5103, previously marked for  
21 identification, was received in evidence.)

22 BY MR. SPELLBERG:

23 Q. With this exhibit, Ms. Erickson, you likewise  
24 reached a number of conclusions, did you not?

25 A. Yes.

26 Q. And like the other one we just looked at, there's  
27 a number of graphs and charts in the report that depict  
28 some of the findings; is that right?

1 A. That's correct.

2 Q. And I've just put up on the screen, this is a  
3 graph that's in the report, is it not?

4 A. Yes, it is.

5 Q. So I'm going to --

6 MR. SPELLBERG: Your Honor, it's Exhibit 5103,  
7 Bates page 1550.

8 BY MR. SPELLBERG:

9 Q. I have some questions, Ms. Erickson, about this.  
10 So let's start one step back. What was the concern about  
11 the disability program that was triggering the audit?  
12 What was the concern that you were looking for?

13 A. What we had seen in our previous audits of the  
14 workers' compensation system was the high rate of claims  
15 in the police and fire departments.

16 Q. When you say "high rate of claims," what do you  
17 mean by that?

18 A. We saw a high rate of workers' compensation  
19 injuries in those departments, and the question was why.  
20 So was it because it was an unsafe workplace? What was  
21 the reason?

22 MR. PATERSON: Your Honor, may I renew my  
23 objection as to the Federated plan members that AFSCME  
24 represents?

25 MR. SILVER: Join in that objection too, your  
26 Honor.

27 THE COURT: What is this an objection to?

28 MR. PATERSON: The basis of the audit report

1 appears to be --

2 THE COURT: What are you objecting to?

3 MR. PATERSON: Relevance, your Honor.

4 THE COURT: That's the legal basis for your  
5 objection. What are you objecting to?

6 MR. PATERSON: It's admission in the case --

7 THE COURT: Are you objecting to a question?

8 MR. PATERSON: Sorry. The exhibit, your Honor,  
9 and the line of testimony. The testimony relating to the  
10 exhibit and the exhibit, your Honor.

11 THE COURT: Well, the ruling is still the same.  
12 You've provided me no basis to change the ruling, so the  
13 ruling is the same.

14 MR. PATERSON: May I offer the basis, your Honor,  
15 which is that the systems are different as they apply to  
16 police and fire, which is one plan, and the disability  
17 provisions in that plan. And as to miscellaneous for the  
18 Federated system, we've had testimony that AFSCME members  
19 are exclusively enrolled in the Federated system.

20 THE COURT: It sounds like you disagree with the  
21 testimony, so you'll have a chance to cross-examine  
22 Ms. Erickson. The relevance objection is still overruled.

23 Go ahead.

24 BY MR. SPELLBERG:

25 Q. So you were telling us, Ms. Erickson, that when  
26 you looked at the workers' compensation program, you were  
27 looking to see if we have an unsafe workplace or whether  
28 there were some other reasons?

1 A. Right.

2 Q. That segued into the review of the disability  
3 system?

4 A. Correct.

5 Q. So what I put up is the chart -- the graph,  
6 rather -- from page 1550 of Exhibit 5103. Can you tell us  
7 what this is intended to depict.

8 A. Any time we're doing an audit, it's difficult to  
9 find precisely the right kind of information. This  
10 information was available from the state controller's  
11 office, and what we did here was pull out systems that  
12 could tell us for sworn employees what percent of total  
13 retirement pay. So total pensions was related to  
14 disability retirement. So we were searching for ways to  
15 see if San Jose's rate was truly higher than other  
16 jurisdictions.

17 Q. So where did this information come from? I think  
18 you just told us.

19 A. We prepared it based on the state controller's  
20 reports. So it's information submitted to the state  
21 controller on an annual basis by independent retirement  
22 systems.

23 Q. You said you were looking -- which segments of  
24 employees were you looking at with this --

25 A. This is showing over time, so it's showing eight  
26 years' worth of data. I believe it's eight years' worth  
27 of data for each of these different systems. These are  
28 sworn employees only. It's showing that over 50 percent

1 of San Jose's pension payments were actually disability  
2 pension payments, compared to, say, Los Angeles that was  
3 down around 20 percent.

4 Q. So each different colored bar on this graph  
5 represents a different year; is that correct?

6 A. Correct.

7 Q. So this is historical data for sworn personnel  
8 from these different cities as to the percentage of  
9 pension being paid to disability; is that correct?

10 A. Correct.

11 Q. San Jose is the highest?

12 A. Correct.

13 Q. What did you make of this information that San  
14 Jose was over 60 percent, at least in early years, and  
15 still over 50 percent as of 2008?

16 A. It confirmed our fear based on our workers' comp  
17 reviews that workers' comp claims -- where San Jose had a  
18 high rate of workers comp claims. That was also true in  
19 the disability retirement system for our sworn employees.

20 Q. Higher than other comparable metropolitan areas?

21 A. Than other jurisdictions, yes.

22 Q. Did you look to see, gee, maybe we have an unsafe  
23 workplace?

24 A. You know, we determined that it was not an unsafe  
25 workplace. We found no evidence that it was unsafe. We  
26 did have recommendations for improving safety and wellness  
27 as part of this review.

28 Q. So this is sort of -- this is the finding, that we

1 have very high disability rates?

2 A. Right.

3 Q. So then I'd like to go to our next slide, which is  
4 Bates number 1560 of Exhibit 5103.

5 MR. PLATTEN: Again, Bates stamp?

6 THE COURT: 1560.

7 MR. PLATTEN: Thank you.

8 BY MR. SPELLBERG:

9 Q. Ms. Erickson, this is a chart in the audit report;  
10 correct?

11 A. That's correct.

12 Q. Where did this information come from? You've got  
13 request for disability, police and fire and Federated, and  
14 then whether it's denied and percentages. Where did the  
15 information come from?

16 A. So we compiled that information off of board  
17 agendas and minutes of both police and fire and Federated  
18 board retirement meetings.

19 Q. This is just historical data; is that correct?

20 A. That's correct.

21 Q. Then you calculated the percentages of the  
22 approvals on each side?

23 A. That's correct.

24 Q. What it shows is that since 2000 -- so it's a  
25 ten-year period of time?

26 A. That's right.

27 Q. 405 police and fire applied for disability during  
28 that period, 25 are denied, so an approval of 94 percent?

1 A. That's correct.

2 Q. With Federated, it's 108, 30 denied, 72 percent  
3 approval?

4 A. That's right.

5 Q. Did you compare these percentages with other  
6 jurisdictions where employees are asking for disability  
7 retirements?

8 A. Yeah. At least one other jurisdiction found that  
9 the approval rates were generally 80 to 82 percent. So,  
10 again, police and fire was a higher approval than we saw  
11 in other jurisdictions and certainly than we saw in  
12 Federated.

13 Q. Where it's 94 here, you were saying it's 80 to 82  
14 percent in other jurisdictions?

15 A. Right. What concerned us at the time we were  
16 launching the audit, the recent history was the string of  
17 years where it was 100 percent approval.

18 Q. Why was this concerning? You're talking about  
19 this column here, the percent approved for police and  
20 fire. You're saying that was concerning?

21 A. Yes.

22 Q. Why?

23 A. We were concerned that whether or not the system  
24 was working independently objectively as we felt it should  
25 as an approval system for these retirements. So we would  
26 have expected -- we're always looking for outliers when  
27 we're doing an audit, and we saw approval rates were just  
28 really high compared to in those same years when police

1 and fire had an approval rate of 100 percent, Federated  
2 had an approval rate where two out of only four claims  
3 that were submitted that year, two of them were denied.

4 Q. You say you wanted to see a system that was  
5 independently objectively run?

6 A. Yes.

7 Q. Were you concerned that that was not happening  
8 when you saw this data?

9 A. When we looked at the composition of the  
10 retirement boards, we were concerned that the board  
11 included Retired Employees and active employees who had no  
12 medical expertise being asked to make decisions, putting  
13 them in the awkward position of being asked to make  
14 decisions on a medical basis, sometimes very technical,  
15 about current or former co-workers.

16 Q. So the board had people that were making decisions  
17 about their friends and current or former co-workers?

18 MR. ADAM: Objection. Leading.

19 THE COURT: Sustained.

20 BY MR. SPELLBERG:

21 Q. Why was that concerning?

22 A. You know, when we looked around at other  
23 disability retirement systems, they frequently had a panel  
24 of medical experts who would make the determinations.  
25 When we ourselves sat and listened to some of these cases,  
26 we realized that it would take a medical expert to  
27 understand the basis for the disability claim.

28 Q. This ten-year period where we have 405 police and

1 fire asking for service -- sorry -- for disability  
2 retirements and 94 percent approved, so it's probably 380,  
3 385, how does that translate on a per person basis of  
4 police and fire that were receiving disability at that  
5 time?

6 A. Well, at that time, we have about -- we had about  
7 2005 members of the police and fire plan at that time.  
8 About 1800 retirees, compared to Federated where there  
9 were about 4,000 actives and about 3,000 retirees.

10 Q. So the numbers you looked at, did you determine  
11 how many, say, police officers that retired, how many --  
12 out of ten police officers, how many received a disability  
13 retirement?

14 A. So, again, what we did was we pulled the pay  
15 records so that -- the pension records at a given point in  
16 time, and we found that -- make sure I get these numbers  
17 right -- 52 percent of police and fire employees, police  
18 and fire retirees, so, cumulatively, were drawing a  
19 disability retirement pension.

20 MR. ADAM: Your Honor, could I interrupt? The  
21 witness appears to be looking at a different document on  
22 her lap. Can I confirm what that is?

23 THE COURT: Fair enough.

24 BY MR. SPELLBERG:

25 Q. Miss Erickson, what do you have there?

26 A. I'm looking at page 10 of the audit report, which  
27 is -- if I understand your system right, is SJ 1550. It's  
28 this table right up above on the disability retirement

1 report.

2 Q. You're looking at the same retirement  
3 disability -- you're looking at the same disability audit  
4 report. That exhibit is 5103?

5 A. Yeah.

6 MR. ADAM: This is not one of the exhibits. This  
7 is a different copy, looks like, with highlights.

8 MR. SPELLBERG: It's an exhibit in evidence.

9 THE COURT: She's looking -- she has a document in  
10 addition to the marked exhibit on the witness stand that  
11 she's looking at which appears to me to be a different  
12 document with highlighting. So that means that it needs  
13 to be marked and counsel need to have a chance to look at  
14 it.

15 MR. SPELLBERG: That's fine, your Honor. Can I do  
16 that after I finish the examination?

17 THE COURT: No. I'd like you to do that now,  
18 please. Do you have a suggestion for the number?

19 MR. SPELLBERG: Yes, your Honor. We're getting  
20 that right now. We're trying to find our last number.  
21 6066 is our recommendation, your Honor.

22 Your Honor, should I provide this to counsel  
23 before I continue?

24 THE COURT: Yes.

25 (Defendants' Exhibit 6066 was marked  
26 for identification.)

27 MR. ADAM: Your Honor, can I ask a couple  
28 questions of the witness related to the nature of the

1 written comments on her exhibit?

2 THE COURT: Why shouldn't that be deferred to  
3 cross?

4 MR. ADAM: That's fine.

5 THE COURT: Go ahead.

6 BY MR. SPELLBERG:

7 Q. So there's no mystery, what was just marked as  
8 6066, Ms. Erickson, can you tell us what that is, please,  
9 for the record.

10 A. That's my personal copy of the draft of the final  
11 audit report with my notes to myself summing up some of  
12 the numbers and so on.

13 Q. You highlighted some sections in it as well?

14 A. Yes.

15 MR. PLATTEN: I would like to request, before I  
16 commence my cross-examination of the witness, that counsel  
17 provide us with a copy of 6066 for use.

18 THE COURT: Okay. Let's see where we are. I  
19 think --

20 MR. SPELLBERG: I have no objection to that, your  
21 Honor. It's just more logistics about getting it done.

22 THE COURT: We're not going to take a break  
23 especially for that purpose. We'll see where we are.

24 Counsel, have you completed your review of 6066?

25 MR. PATERSON: I do not want to hold things up,  
26 but if I have a chance later, that's fine.

27 THE COURT: Very good. Please hand it to  
28 Mr. Spellberg. If you wish, you may approach the witness

1 and give her that, and let's have the next question,  
2 please.

3 MR. SPELLBERG: Yes, your Honor. Thank you.

4 BY MR. SPELLBERG:

5 Q. Ms. Erickson, I'm going to return 6066 to you.

6 Ms. Erickson, where I was in my questioning, this  
7 percentage of 94 percent approval over the ten-year period  
8 of disability requests by police and fire, how does that  
9 break down? To one in three police officers? One in  
10 four? I'm trying to find out a percent -- 52 percent  
11 total you've told us. How does it break down between  
12 police and fire?

13 A. It was 2 out of 3 fire personnel compared to 1 out  
14 of 3 police compared to 1 out of 16 non-sworn.

15 Q. And did you find that to be a high percentage in  
16 light of your review of other jurisdictions?

17 A. Yes.

18 Q. And with those findings, did you -- like with the  
19 pension audit report, did you make recommendations?

20 A. Yes, we did.

21 Q. So I'm going to go to Bates 1573 of Exhibit 5103.  
22 What I put on the screen, and that page I've just given  
23 you, Ms. Erickson, those are the recommendations, are they  
24 not?

25 A. That's correct.

26 Q. Those are the recommendations in the audit report  
27 for the disability?

28 A. That's correct.

1 Q. Like the pension, you're required, under auditing  
2 standards, to provide recommendations when you conduct an  
3 audit?

4 A. Yes.

5 Q. Let's go through them quickly. What's your first  
6 recommendation?

7 A. So the --

8 MR. ADAM: Objection to the relevance of these  
9 recommendations, your Honor.

10 MR. PLATTEN: Sapien joins.

11 MR. PATERSON: AFSCME joins.

12 MR. SILVER: We join too, your Honor.

13 THE COURT: What's your offer of proof?

14 MR. SPELLBERG: A number of these recommendations  
15 made their way into Measure B just as with the pension.

16 THE COURT: Objection overruled.

17 MR. PLATTEN: Your Honor, separate objection in  
18 terms of foundation. This witness has already testified  
19 that she had nothing to do with promulgating Measure B, so  
20 there's no connection between these recommendations and  
21 Measure B other than mere coincidence.

22 THE COURT: What's the legal basis for your  
23 objection?

24 MR. PLATTEN: No foundation.

25 THE COURT: Overruled.

26 BY MR. SPELLBERG:

27 Q. Ms. Erickson, let's briefly go through these.  
28 What was recommendation number one?

1           A.    The first recommendation was to improve the City's  
2 wellness program.  Actually, let me correct that.  It was  
3 the -- we were specific.  The fire department's wellness  
4 program.

5           Q.    What was recommendation number two?

6           A.    So recommendations two, three, four, and five did  
7 find their way into Measure B.  So recommendation two  
8 addressed the process by which disability retirements were  
9 being approved.  The first part of that was an independent  
10 disability committee made up of individuals with  
11 experience in disability and workers' comp law.

12          Q.    Let me stop you a second.  That's point number one  
13 under recommendation two?

14          A.    Right.  Correct.

15          Q.    You're saying that made its way into Measure B?

16          A.    Yes, I believe so.

17          Q.    What was that intended to correct?  What was the  
18 concern that that recommendation was intended to address?

19          A.    That was intended to address the problem of having  
20 current and former employees deciding on the pensions  
21 of -- potentially deciding on the pensions of co-workers.

22          Q.    And then so continuing with recommendation number  
23 two.

24          A.    Recommendation number two was to provide a process  
25 so that the committee's decision could be appealed to a  
26 hearing officer.

27          Q.    And did that recommendation make its way into  
28 Measure B?

1 A. I believe so.

2 Q. Then what about item number three on your  
3 recommendation two?

4 A. This was that the City should have its own legal  
5 counsel to advocate for its interest. When we observed  
6 the disability hearings, the retiree had counsel but the  
7 City did not have counsel to advocate for its interests.

8 Q. This point, point three, did that find its way  
9 into Measure B?

10 A. I believe it's addressed by Measure B in a  
11 slightly different fashion.

12 Q. Recommendation number three, what was that?

13 A. This was to consider amending the charter to  
14 clarify the purpose of a disability retirement. That the  
15 purpose would be to provide a stable source of income from  
16 employees who are incapable of engaging in any gainful  
17 employment but not yet eligible to retire in terms of age  
18 or years of service, and to limit disability retirement  
19 benefits to employees who are incapable of engaging in  
20 gainful employment.

21 Q. Why did you make this recommendation? What was  
22 the issue you found in your audit report that led to this  
23 recommendation?

24 A. What we found was a number of -- in the cases that  
25 we reviewed, we found a number of people who had been  
26 working on full duty right up until the date before they  
27 retired on a service retirement, then coming in later to  
28 convert to a disability retirement. We found other

1 employees who were working on modified duty up until the  
2 day before they retired out.

3 Q. Why was that concerning?

4 A. It was not clear to us that that was the intent of  
5 the benefit, was to provide a lifetime tax-free pension to  
6 an employee who had already determined to retire out of  
7 the City and had been capable of work the day before they  
8 left.

9 Q. Then recommendation number four, you told us, made  
10 its way into Measure B. What's that recommendation?

11 A. This was to require the declaration to apply for a  
12 disability retirement at the same time as the application  
13 for the service retirement is filed. This was actually in  
14 the original City Charter or the charter going back. We  
15 recommended the muni code be clarified to conform to that.  
16 That was not the practice. Some people would retire out  
17 on a disability retirement and come in maybe four years  
18 later -- excuse me -- would retire out on a service  
19 retirement and then up to four years later, come in to  
20 convert that retirement to a disability retirement.

21 Q. That was concerning for what reasons?

22 A. We were concerned that it was part of, we felt,  
23 the environment that surrounded the disability retirement  
24 system where it was seen as a tax benefit.

25 Q. As opposed to a benefit for somebody who's truly  
26 disabled?

27 A. Correct.

28 Q. And then recommendation number five, which you

1 told us made its way into Measure B, what was that?

2 A. This was to take steps to amend the muni code to  
3 impose a retirement benefit offset for sworn employees who  
4 are receiving disability payments at the same time. For  
5 non-sworn Federated employees, there's already an offset.  
6 So if you are a non-sworn employee, you were disabled,  
7 receiving a workers' comp benefit, say a permanent  
8 disability payment, your pension is offset for the amount  
9 of that workers' comp permanent disability payment.

10 Q. Offset meaning reduced? Your disability pension  
11 is reduced because you're already receiving it as a worker  
12 comp benefit?

13 A. Correct.

14 Q. That's just Federated?

15 A. That was Federated. What we found were police and  
16 fire people were receiving both. They were receiving both  
17 a tax-free disability retirement benefit, at the same time  
18 they were receiving permanent disability payment through  
19 the workers' comp system.

20 Q. This recommendation five was to correct that so it  
21 was comparable to the Federated where if you are receiving  
22 a double benefit, there's the offset?

23 A. That's correct.

24 Q. And that made its way into Measure B?

25 A. I believe so.

26 Q. The recommendation number six, that did not make  
27 its way into Measure B?

28 A. No.

1 Q. For completeness, why don't you tell us what that  
2 is.

3 A. This is to take steps to collect outstanding  
4 balances from retirees who had been paid a sick leave pay  
5 out. What we were worried about here was that employees  
6 would be incentivized to keep their sick leave and use up  
7 all of the disability benefits that they had because these  
8 benefit -- because you could be paid out for these  
9 benefits. In fact, they're supposed to be reduced so if  
10 you are paid a sick leave pay out. So at the end of your  
11 employment, you could be paid at 100 percent of pay for  
12 the sick leave accumulated that you -- it would not --  
13 excuse me. It is reduced after -- when you go -- the  
14 disability retirement is approved --

15 Let me back up. The system is -- so that can be  
16 up to four years after you've actually retired. So the  
17 employee would have collected the sick leave payout. It  
18 would have been converted to a disability retirement. I  
19 don't think there was any major concern about this. Our  
20 concern was just, get that money paid back. So at the  
21 point you go for a disability retirement, that sick leave  
22 payout should have been reduced. In some cases, employees  
23 owed the City substantial amounts of money for that.

24 Q. They kept generating their sick leave balance even  
25 though they were disabled and not working?

26 MR. PLATTEN: Objection. Leading.

27 THE COURT: Sustained.

28 BY MR. SPELLBERG:

1 Q. Go ahead and explain.

2 A. They had been paid their sick leave balance at the  
3 time of their retirement when they retired out on service  
4 retirement. Later when they converted to a disability  
5 retirement, that sick leave payout should have been  
6 reduced.

7 Q. I see.

8 A. It had not, and the City was having trouble  
9 collecting those funds because it was up to four years  
10 later. So we are recommending that the reduction take  
11 place at the time -- the system, as we pictured it, you  
12 would apply for a disability retirement while you were  
13 still an employee as required by the charter. Your sick  
14 leave payout could be reduced by the set amount at that  
15 time instead of having to go through this onerous process  
16 to collect the money four years later.

17 Q. I got it.

18 That recommendation number six, that was not  
19 included in Measure B, as far as you know?

20 A. As far as I know, no.

21 Q. The last couple questions, Ms. Erickson, were you  
22 asked to -- you told us you weren't at all involved in  
23 drafting Measure B; right?

24 A. No.

25 Q. Were you asked to do either of these audits in  
26 preparation for the City, drafting and submitting  
27 Measure B to the voters?

28 A. No.

1 Q. Did your audited reports, as far as you knew when  
2 you prepared them, did they have -- strike that.

3 Was Measure B even an idea at the time that these  
4 audit reports were prepared?

5 MR. ADAM: Objection, your Honor. Calls for  
6 speculation.

7 MR. PLATTEN: Sapien --

8 MR. SPELLBERG: Fair. I'll withdraw.

9 BY MR. SPELLBERG:

10 Q. Was there a discussion about drafting and  
11 submission to Measure B to the voters at all when these  
12 audit reports were done?

13 MR. PLATTEN: Objection. Relevancy and lacks  
14 foundation. She's already testified that she was not  
15 involved in drafting Measure B.

16 THE COURT: Question just asks for her knowledge.  
17 Overruled.

18 THE WITNESS: So at the time we issued the pension  
19 sustainability report, the council, I believe, had already  
20 decided to put Measure W on the ballot. That allowed for  
21 a second tier. To my knowledge, Measure B was not  
22 contemplated at that time when we issued the disability  
23 report. The council, as I recall, took immediate action  
24 to incorporate some of the -- to direct staff to  
25 incorporate some of the recommendations into ballot  
26 language that was then being proposed.

27 MR. SPELLBERG: That's all the questions I have,  
28 your Honor. Thank you.

1           MR. SILVER: At this time, I would like to move to  
2 strike the entire testimony of the witness with respect to  
3 the case presented by the Retiree Employees' Association.

4           Her testimony regarding the status of the City's  
5 financial condition, the status of the retirement system,  
6 and certainly the disability experience have nothing to  
7 do -- that testimony has nothing to do with any of the  
8 issues involved in our case. And our case is a separate  
9 case within this consolidated action.

10          MR. PLATTEN: Plaintiffs Sapien, Mukhar, and  
11 Harris move to join.

12          MR. ADAM: As does the POA, your Honor.

13          MR. PATERSON: As does AFSCME.

14          THE COURT: Denied.

15          POA?

16          MR. ADAM: Thank you.

17  
18                                   CROSS-EXAMINATION

19 BY MR. ADAM:

20          Q. Ms. Erickson, do you have what was marked as  
21 Exhibit 6066, your own version of the audit, I believe,  
22 with your handwritten notes?

23          A. Yes.

24          Q. Can I ask when you made those notes?

25          A. Over the course of time.

26          Q. Over how long, would you say?

27          A. If I could, first off, apologize for bringing this  
28 into court. I was so nervous about my testimony that I

1 wanted to make sure I got the numbers right.

2 Q. You don't have to apologize. You just have to  
3 answer a couple questions. I just want to establish who  
4 made the notes and when. All the notes are yours?

5 A. Yes, all the notes are mine.

6 Q. Over what period of time did you make those notes?  
7 Were these notes made in preparation for your testimony  
8 today?

9 A. Some of them were, yes.

10 Q. So these are notes that have been made over  
11 different periods of time?

12 A. Yes.

13 Q. Is there anyone else's notes in the document?

14 A. No. I don't believe so.

15 Q. Did you prepare these notes during any meetings  
16 with counsel?

17 A. Not during any meetings.

18 Q. After meetings with counsel?

19 A. Could have been, yes.

20 Q. Can I direct your attention to -- this would be  
21 Exhibit 5102. It's a document that's marked on the bottom  
22 right-hand corner 1533.

23 A. Yes.

24 Q. You indicated you're familiar with a lot of  
25 documents that are produced in the City; correct?

26 A. Some.

27 Q. Are you familiar with the City Manager's recent  
28 budget proposal?

1 A. For 2013-14?

2 Q. Yes.

3 A. Yes.

4 Q. Are you familiar with what I believe is a  
5 five-year budget projection document also from the City  
6 Manager?

7 A. Generally, yes.

8 Q. So you were concerned about -- I'm looking at the  
9 second bullet point on 1533. Do you see that?

10 A. Yes.

11 Q. You were concerned about rising pension costs  
12 threatening the City's ability to maintain service levels?

13 A. Yes.

14 Q. Isn't it true in the current City Manager's budget  
15 proposal for fiscal year 13-14, that the City is actually  
16 now restoring services that were cut in prior years?

17 MR. SPELLBERG: Objection. Beyond the scope of  
18 direct.

19 THE COURT: Overruled.

20 BY MR. ADAM:

21 Q. You can answer.

22 A. Yes. Thankfully, the City is able to restore some  
23 services.

24 Q. Are you aware that there's recently been a  
25 significant increase in projected property tax revenues  
26 for the City?

27 A. There has been an increase, yes.

28 Q. Didn't Ms. McQuire, who's in the City's financial

1 office, recently raise projection by more than \$10  
2 million?

3 MR. SPELLBERG: Objection. Beyond the scope of  
4 direct.

5 THE COURT: Overruled.

6 BY MR. ADAM:

7 Q. You can answer.

8 A. I believe that is the case, yes. If I can  
9 clarify. She's in the budget office.

10 Q. Thank you. I appreciate that.

11 Looking back to 1531. You mentioned one of the  
12 proposals was that the City consider joining CalPERS; is  
13 that correct?

14 A. That's correct.

15 Q. And the justification for that was to reduce  
16 administrative costs?

17 A. That's correct.

18 Q. Do you have any recollection as to annually how  
19 much the administrative costs you believe could be saved?

20 A. It was several million dollars. I was just going  
21 to say CalPERS, because it's so large, has a lower  
22 administrative cost than some of the other smaller  
23 systems. We did find that the San Jose system had a  
24 comparable administrative cost to other smaller pension  
25 systems or systems our size.

26 Q. In other words, you were aware that before  
27 Measure B passed, that the Police Officers' Association  
28 and the fire fighters had also proposed that San Jose move

1 to CalPERS?

2 MR. SPELLBERG: Objection. Irrelevant. Beyond  
3 the scope.

4 THE COURT: Overruled.

5 BY MR. ADAM:

6 Q. You can answer.

7 A. I'm not sure I was aware of that.

8 Q. Now, Mr. Spellberg asked you about the costs of  
9 the COLA. Do you recall that testimony?

10 A. Yes.

11 Q. Now, you're somewhat familiar with other pension  
12 systems; correct?

13 A. Somewhat.

14 Q. Is a COLA a common feature amongst public employee  
15 pension systems in California?

16 A. It's my understanding, yes.

17 Q. And isn't it true that without a COLA, the pension  
18 that an employee receives on the date he or she retires  
19 would simply stay flat for the duration of their pension?

20 A. That's correct.

21 THE COURT: I guess I'm a little bit confused  
22 about these questions about whether -- because  
23 Ms. Erickson said that this isn't really a COLA. So would  
24 you clarify that.

25 BY MR. ADAM:

26 Q. Let me try to confirm that. You testified, as the  
27 judge just pointed out, that you didn't believe it's  
28 really a COLA. Do you recall that testimony?

1 A. Yes.

2 Q. And isn't it true that the reason you don't  
3 believe it's a COLA is because, unlike the cost of living,  
4 which is tracked by the Bureau of Labor Standards and  
5 rises and falls, this number is, in fact, guaranteed and  
6 would not change? Is that the reason why you don't  
7 believe it should be called a COLA?

8 A. That's correct.

9 Q. Now, you're familiar with the current cost of  
10 living levels that the Bureau of Labor Statistics puts  
11 out, are you not?

12 A. To a certain extent, yes.

13 Q. So even during the economic downturn -- I'll  
14 define that as from 2007 through 2012 -- isn't it true  
15 that the cost of living has continued to increase in the  
16 San Francisco Bay Area?

17 A. I believe so.

18 Q. And isn't it true that it's increased at an annual  
19 rate in excess of two percent most of those years?

20 A. I don't have those figures in front of me.

21 Q. Do you recall Mr. Spellberg asking you about the  
22 cost --

23 THE COURT: I still am a little bit unclear about  
24 Ms. Erickson's answer to your question about whether a  
25 COLA is a feature in most other systems. And if you can  
26 clarify whether that's a adjustable COLA or a guaranteed  
27 adjustment.

28 BY MR. ADAM:

1 Q. What's your familiarity, Ms. Erickson, with COLAs  
2 as they exist in other California public employee pension  
3 systems?

4 A. It's my understanding that San Jose's is different  
5 than many systems in being a guarantee. But I believe  
6 you've got actuaries coming on the witness stand who can  
7 give you probably a better idea about what other systems  
8 are doing.

9 Q. You're not the person to answer that question.

10 Mr. Spellberg talked to you about the rising cost  
11 of post employment benefits including pensions to the  
12 City. Do you recall that?

13 A. Yes.

14 Q. And he referred you to a chart, and I believe you  
15 testified that for every dollar that the City pays for a  
16 current employee, its pension costs are approximately 76  
17 cents per dollar. Do you recall that? Did I articulate  
18 your testimony correctly?

19 A. Yes. Those were the figures that I attained from  
20 the June 30, 2012, actuarial reports.

21 Q. Now, that's 76 cents per employee. That doesn't  
22 go to cover that particular employee's pension costs, does  
23 it?

24 A. That's correct.

25 Q. It's an accounting methodology, isn't it?

26 A. It is the City's annual required contribution to  
27 cover its pension cost.

28 Q. But in this hypothetical one dollar example, a

1 chunk, part of the 76 cents is actually going to cover the  
2 cost of people who are no longer employed by the City;  
3 isn't that correct?

4 A. That is correct.

5 Q. That's a sizeable amount, is it not?

6 A. I don't know how much of it is people who are not  
7 currently part of the system. All of us probably have  
8 some unfunded liability associated with the system.

9 Q. I apologize. I have another question for you on  
10 the COLA. I want to take you back to the COLA. You  
11 testified about being surprised at the cost of the COLA as  
12 a percentage of the total cost of the pension system; is  
13 that correct?

14 A. Yes.

15 Q. Isn't it true that the employees give a specific  
16 contribution to cover that COLA?

17 A. Some employees do, yes.

18 Q. Which employees do not?

19 A. Again, you're going to have to -- I don't have  
20 that in front of me.

21 Q. Do police officers pay for COLA?

22 A. I believe they pay at least a portion, yes.

23 Q. One of your recommendations in your audit was that  
24 the City implement a second tier of retirement benefits  
25 for new employees; is that correct?

26 A. We recommended the City Council consider a variety  
27 of options. One of those options was a second tier,  
28 correct.

1 Q. Has that happened for police officers?

2 A. You know, I'm probably not the best person to talk  
3 about the current level of benefits.

4 Q. I'll refer you to page 1530 of Exhibit 5102. You  
5 acknowledged, did you not, that there were legal  
6 restrictions on the ability of the City to change pension  
7 plans for current employees?

8 A. Again, I'm probably not your best person to answer  
9 this question in a roomful of lawyers.

10 MR. PATERSON: Your Honor, I would move to strike  
11 as nonresponsive. If the witness doesn't know, she can  
12 say that, but this answer didn't appear to be responsive.

13 THE COURT: The motion to strike is granted.

14 BY MR. ADAM:

15 Q. Ms. Erickson, I'm asking you to look at 1530 of  
16 5102.

17 A. Yes.

18 Q. At the top we have what I'll call a square bullet.

19 A. Yes.

20 Q. Under it we have a smaller round bullet.

21 A. Yes.

22 Q. That smaller round bullet states, "Maneuverability  
23 to change plans for current employees is limited under  
24 current law."

25 A. Correct.

26 Q. That's a conclusion you reached in your audit, is  
27 it not?

28 A. Yes.

1 Q. That same conclusion was also contained in the  
2 audit itself, was it not?

3 A. Yes.

4 Q. Can I refer you to page 64 of your audit.

5 MR. SPELLBERG: The Bates number or regular  
6 number?

7 MR. ADAM: It's Exhibit 5101, and it's the Bates  
8 number 64.

9 BY MR. ADAM:

10 Q. Do you have the page, Ms. Erickson?

11 A. Yes.

12 Q. And about a third of the way down the page there's  
13 what appears to be a second title beginning "perspective  
14 changes to retirement plans." Do you see that?

15 A. Yes.

16 Q. Can I ask you to read what appears to be a  
17 heading.

18 A. "Perspective changes to retirement plans are  
19 allowable in exchange for commensurate benefits."

20 MR. ADAM: Nothing further, your Honor.

21 THE COURT: Mr. Platten, do you want to defer your  
22 examination or go ahead?

23 MR. PLATTEN: I would prefer to defer.

24 THE COURT: AFSCME?

25 MR. PATERSON: Thank you, your Honor.

26  
27 CROSS-EXAMINATION

28 BY MR. PATERSON:

1 Q. Ms. Erickson, my name is Teague Paterson. I  
2 represent AFSCME. I'll do my best not to overlap  
3 Mr. Adam's questioning, but bear with me.

4 I would like to turn you to what's been marked as  
5 5101. And you mentioned, I believe, in your direct  
6 testimony a number of documents that you relied upon in  
7 crafting that. I believe one of them was various CAFRs or  
8 some of the CAFRs; is that right?

9 A. Yes, that's correct.

10 Q. What's that?

11 A. The Compressive Annual Financial Report, both --  
12 there is a separate report for the City, one for the  
13 Federated system, one for the police and fire system.

14 Q. And those are generated by whom?

15 A. So they're generated by the systems, audited by  
16 auditors who are under the direction of our office.

17 Q. You find those to be reliable sources of  
18 information?

19 A. Yes.

20 MR. SPELLBERG: Your Honor, can I ask counsel keep  
21 his voice up. I can't hear him.

22 THE COURT: Please.

23 MR. PATERSON: I don't have the benefit of the  
24 microphone. Would it be --

25 THE COURT: No. It would be better if you kept  
26 your voice up.

27 MR. PATERSON: Thank you, your Honor.

28 BY MR. PATERSON:

1 Q. You mentioned -- what other reports or documents?

2 A. You know, if I could refer you to page 18, 19, and  
3 20 of our report, that's the -- if I get this right, the  
4 Bates stamp number. That is the full detail of our audit  
5 scope and methodology which includes a listing of the  
6 various documents we used. So we used the City's  
7 operating budgets, financial statements, actuarial reports  
8 and so on.

9 THE COURT: So you're referring to 5101?

10 THE WITNESS: Yes.

11 BY MR. PATERSON:

12 Q. You find those to be reliable sources of  
13 information?

14 A. They are the information that we used.

15 Q. Do you use them because they are reliable?

16 A. You know, I'm hesitating because part of the  
17 information we use is testimony from various people. So  
18 we are interviewing folks who are running these systems.  
19 We are looking at records and the pension -- in the  
20 pension database itself. So there are any number of  
21 records. We do test, to the extent we feel is necessary  
22 to, so that we feel we can rely on that information for  
23 the purposes of issuing our audit report. I can't certify  
24 that every piece of information that we looked at was  
25 absolutely accurate.

26 Q. With respect to those reports you referenced, you  
27 wouldn't rely on them if they weren't accurate, though,  
28 would you?

1           A.    We wouldn't rely on information in those reports  
2 that we didn't think was accurate, that's correct.

3           Q.    Thank you.  And you also referenced, with respect  
4 to your analysis of the disability retirement program,  
5 state comptroller's reports.  What are those?

6           A.    So those are reports that are submitted by  
7 jurisdictions to the state controller's office on an  
8 annual basis.

9           Q.    Is that required under state law to do that?

10          A.    I believe so.

11          Q.    Where did you obtain those from?

12          A.    You know, I do not recall whether it was printed  
13 documents.  The controller's office typically prints  
14 copies of these reports or a summary of those.  Or whether  
15 they were online.  It is possible that my staff requested  
16 them separately from each of the entities that we  
17 reviewed.

18          Q.    I see.  But they are available online?

19          A.    I am not sure.

20          Q.    In terms of your approach to Exhibit 5101, as I  
21 understand it, you are attempting to ascertain the City's  
22 liability for its pension obligations.  Is that a fair  
23 statement?

24          A.    We were -- when we do a risk assessment of the  
25 City's programs, we're looking for high risk areas.  This  
26 was a place where the City was spending a lot of money and  
27 we hadn't audited thoroughly in some time.

28          Q.    Do you view these pension obligations -- these

1 payments to pension obligations as liabilities of the  
2 City?

3 A. Some are liabilities of the City, but some are  
4 also payable by employees.

5 Q. You referred to the -- you used the term  
6 insolvency with respect to the obligations to pay into the  
7 pension system. Were you referring to the insolvency of  
8 the City?

9 A. So what I was referring to was in direct answer to  
10 a question that asked if those funded levels dipped  
11 significantly lower. I was asked what the result would  
12 be, and it would be insolvency for the plans themselves.

13 Q. I see. So if the plans were insolvent, would the  
14 City have an obligation to make contributions so benefits  
15 would be paid out of those plans?

16 MR. SPELLBERG: Objection. Lack of foundation;  
17 calls for a legal conclusion.

18 THE COURT: It does appear to call for legal  
19 conclusion.

20 MR. PATERSON: She testified to the insolvency of  
21 the plans. I'm trying to ascertain what it means when it  
22 becomes insolvent.

23 THE COURT: Sustained.

24 BY MR. PATERSON:

25 Q. In your report, and I'm referring to 5101, you  
26 mentioned that City employees do not participate in the  
27 federal Social Security program; is that correct?

28 A. That's correct.

1 Q. And then later you mention that for those  
2 employees who may have earned Social Security benefits  
3 through other employment or perhaps through their spouse,  
4 they may be reduced on the level of benefit they receive  
5 in the City's retirement plan; is that correct?

6 A. I know that the benefit can be reduced. I'm not  
7 sure if it's on the City side or the Social Security side.  
8 I wouldn't be the right person to ask that question.

9 Q. But you do understand that there is an offset?

10 A. Correct.

11 Q. And are you familiar with the term "windfall  
12 elimination provision"?

13 A. Vaguely, yes.

14 Q. What's your understanding of that provision?

15 A. I would not be the person to answer that question.

16 Q. Is that a term that applies when you are having  
17 public pension for non-Social Security covered service and  
18 you have other Social Security benefits and they use the  
19 term "windfall elimination provision"?

20 MR. SPELLBERG: Objection. Lack of foundation.

21 THE COURT: Overruled.

22 THE WITNESS: That's my --

23 BY MR. PATERSON:

24 Q. On page Roman numeral ii, little i on your report  
25 on 5101, you refer to --

26 MR. SPELLBERG: What's the Bates number?

27 MR. PATERSON: I don't have the Bates number with  
28 me. It was the fourth page of the exhibit.

1 BY MR. PATERSON:

2 Q. You referred to declining ratios of employees to  
3 retirees and beneficiaries creates a risk of higher  
4 contribution rates. Do you recall that?

5 A. Yes.

6 Q. Do you know what the current ratio -- let me  
7 withdraw that question.

8 When you made that statement, are you making a  
9 distinction between benefited and non-benefited employees?

10 A. Yes. Because we're taking those numbers from the  
11 pension plan's CAFRs. So those are members of the plan.

12 Q. Thank you. So it's true, isn't it, that there are  
13 also employees of the City who don't participate in either  
14 of these pension systems?

15 A. That's correct.

16 Q. When we talk about the declining ratio of  
17 employees, we're talking about active employees enrolled  
18 in the plan versus retirees or deferred vested members of  
19 the plan?

20 A. That's correct.

21 Q. And so when you say declining ratios employees to  
22 retirees, are you including deferred vested as well in  
23 this calculation?

24 A. No, we did not include deferred vested. We  
25 included actives to retirees.

26 Q. And the point is that when that ratio between  
27 employees and retirees gets smaller, there is less  
28 percentage of payroll to contribute towards those

1 benefits?

2 A. That's correct.

3 Q. It's also true that deferred vested members,  
4 meaning members who are entitled to some pension when and  
5 if they apply for it or their survivor applies for it, are  
6 also not part of that payroll computation in terms of  
7 pension contributions?

8 A. That's correct.

9 Q. Do you know the current ratio of benefit employees  
10 to retirees and deferred vested members?

11 A. It's below one to one in the last pension CAFRs,  
12 which would have been on June 30, 2012. I believe it was  
13 .83 to one.

14 Q. So the record is clear, .83 members, active  
15 members -- let me finish the question if you don't mind.  
16 .83 active members to retirees?

17 A. Correct.

18 Q. Then there's also deferred vested members out  
19 there?

20 A. Correct.

21 Q. Does that change in the ratio affect the unfunded  
22 liabilities of the plan?

23 MR. SPELLBERG: Objection. Lack of foundation.

24 THE COURT: Overruled.

25 THE WITNESS: Does that -- that means I answer;  
26 right?

27 THE COURT: Yes.

28 BY MR. PATERSON:

1 Q. For the record, the witness was motioning, and I  
2 was not sure what she meant, and she explained it.

3 A. I'm sorry. Now I've forgotten the question.

4 Q. It appears I may have as well. Just kidding. The  
5 ratio -- as that ratio declines, is there an impact on the  
6 plan's unfunded actuarial level?

7 A. You know, I would prefer that an actuary answer  
8 that question. Our concern was pretty clearly what you  
9 had mentioned before, was that it could drive up costs for  
10 current employees.

11 Q. You have fewer employees shouldering the burden?

12 A. Correct.

13 Q. That burden has increased because there's more  
14 retirees out there?

15 A. Correct. And an unfunded liability associated  
16 with all of the above.

17 Q. Thank you. You also stated that the granting the  
18 retroactive benefit enhancements is another reason for the  
19 increase in unfunded liability. With respect to the  
20 Federated system, what time period were you referring to?

21 A. So we were looking at from -- so that the  
22 difference was between the charter benefits and the time  
23 that we looked at. So we concluded that over that time,  
24 the benefits had been enhanced.

25 Q. What time period?

26 A. We were not able to quantify that.

27 Q. What time period?

28 A. That would have been since 1965 when the charter

1 was adopted.

2 Q. And you didn't quantify the cost of any of these  
3 benefit improvements in terms of their contribution to  
4 unfunded liability. Is that a fair statement?

5 A. That's correct.

6 Q. I want to turn to page 3 of your report. I don't  
7 have the Bates number, and I'm referring to Exhibit 5101,  
8 but it's chapter one, page 3. There's a diagram, which is  
9 in your report listed as an Exhibit 2. It's a chart that  
10 appears to show the retirement other post-employment  
11 benefit payments for the combined plans over a period from  
12 1991 to, it appears, 2010; is that right?

13 A. Yes.

14 THE COURT: This is Bates number 13.

15 BY MR. PATERSON:

16 Q. Each of those dollar amounts are taken from the  
17 CAFR associated with the particular year; is that correct?

18 A. That is correct. I'm hesitating because some of  
19 the early years they did not have a CAFR. They had an  
20 annual report. Basically, the same thing.

21 Q. Thank you. That's distinct to that comptroller's  
22 annual report?

23 A. Correct. These were publications of the  
24 retirement systems.

25 Q. So the amounts that you have here are the dollar  
26 amounts paid in, for example, 1991, as indicated in the  
27 report from 1991?

28 A. Yes.

1 Q. So these dollar amounts have not been adjusted for  
2 inflation?

3 A. No.

4 Q. On page 4, you indicate that the average in 2009,  
5 the average annual pension -- let me withdraw the  
6 question.

7 We're on a fiscal year here when we refer to  
8 years; right?

9 A. Yes.

10 Q. When it says 2009, we're talking about which year?

11 A. Fiscal 2008-2009.

12 Q. Thank you. So in 2009, the average annual pension  
13 benefit paid to retirees and beneficiaries was \$34,500 in  
14 the Federated plan. Do I understand that correctly?

15 A. That's correct.

16 Q. How was that computed?

17 A. That was taken from the CAFR. The exhibit right  
18 below that shows the breakdown of those pension amounts by  
19 range.

20 Q. That's taken directly from the CAFR. Did you  
21 compute that average, or is that an average contained  
22 within the CAFR itself?

23 A. I believe it's in the CAFR, but I believe -- it's  
24 in the CAFR.

25 Q. Just so I can understand this correctly. On page  
26 6 of the exhibit -- sorry. On page 6 of the report marked  
27 as 5101, you have a chart that's labeled Exhibit 5, and it  
28 indicates the City and employee share or contributions; is

1 that correct?

2 A. Yes, that's correct.

3 Q. And these -- and then the numbers at the bottom  
4 are percentages. Percentage of what?

5 A. Percentage of pay.

6 Q. Is the ratio here with respect to pension, is that  
7 3/11ths or is that more than 3/11ths?

8 A. This is the total contribution, so it would  
9 include the normal cost as well as the unfunded liability.

10 Q. Only the normal cost with respect to employees'  
11 3/11ths of the normal cost?

12 A. Except for those employees who pay a portion of  
13 the unfunded liability.

14 Q. Which employees are those?

15 A. I believe it's police and fire.

16 Q. You don't know for sure, do you?

17 A. No. You should check with somebody on the current  
18 level of benefits.

19 Q. Maybe someone will, but you don't know, do you?

20 On page 8 you reference --

21 THE COURT: Mr. Paterson, we'll take our break at  
22 this time. We'll be in recess until 1:30.

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

25 THE COURT: Anything before we resume  
26 Mr. Paterson's cross?

27 MR. ADAM: Yes, your Honor. I'm waving a document  
28 here. We're very close. We just have a few more

1 documents between AFSCME and the City to work out. But we  
2 have stipulations as to admissibility of probably in  
3 excess of 100 documents and a similar number of  
4 stipulations as to authenticity. So we've made  
5 significant progress over the lunch hour.

6 We have a written stipulation. There are  
7 handwritten edits. There is one section at the end that  
8 needs to be completed between AFSCME and the City. Then  
9 my suggestion would be the parties sign it, copy it, and  
10 we can -- overnight, we can type up a clean version. But  
11 this would be an operative document. I think the  
12 plaintiffs would feel better because their documents will  
13 either be admitted or authenticated. And I believe that  
14 may take care of needing any witnesses to authenticate any  
15 documents on the plaintiffs' side. I'll defer to  
16 Mr. Paterson because he's still in discussions with the  
17 City.

18 The Court looks puzzled.

19 THE COURT: I'm a tiny bit alarmed by your  
20 statement that over 100 additional documents are coming  
21 into evidence. I assume that somebody is going to tell me  
22 in closing argument what these documents mean and that  
23 you're not just throwing them into the record hoping that  
24 I will discern their significance when it really is your  
25 job to tell me what the significance is.

26 MR. ADAM: These are almost entirely MOAs,  
27 charters, resolutions, ordinances, official memoranda from  
28 Retirement Board or from the City. These are pretty much

1 all the official documents. The parties --

2 THE COURT: Let me be clear. I'm very pleased  
3 that you made this effort and that your effort has been  
4 largely successful, but I do request that if you're  
5 putting all these documents into evidence, you take  
6 advantage of the opportunity in your written closings to  
7 tell me what they mean because otherwise I may not be able  
8 to discern what you think is important about the large  
9 volume of paper you're giving me.

10 MR. ADAM: Understood.

11 MR. PATERSON: Absolutely, your Honor.

12 MR. HARTINGER: I think we all agree in terms of  
13 having a very, very complete record, going wherever this  
14 goes is important, but we understand your concern.

15 THE COURT: Mr. Paterson, what did you want to  
16 add?

17 MR. PATERSON: I wanted to add that subject to the  
18 City's agreement, we are willing to release Ms. Busse on  
19 the basis that the City will say on the record now that  
20 they're willing to stipulate to at least the authenticity  
21 of the documents that the retirement system has already  
22 stipulated to. Is that my understanding?

23 MR. HARTINGER: That is correct, your Honor. The  
24 City is prepared to stipulate to the authenticity of  
25 documents that the retirement system itself stipulated to  
26 in a agreement between Mr. Paterson and the retirement  
27 system's counsel. So on that basis, we're prepared -- or  
28 Mr. Paterson is prepared to release Ms. Busse.

1 THE COURT: Very good. Then she is --

2 MR. ADAM: That's true as to POA 22, as well. The  
3 Kaldor memo that we looked over with Ms. Freeman before  
4 the lunch hour.

5 MR. HARTINGER: Now I have to refresh my  
6 recollection as to what that is.

7 MR. PATERSON: While they do that, your Honor, the  
8 stipulation I referred to has been filed with the Court  
9 and was ordered by you, so it's in the record already, the  
10 retirement system stipulation.

11 MR. HARTINGER: I'm sorry. I didn't hear that.

12 THE COURT: I didn't either.

13 MR. PATERSON: I want to clarify for the record  
14 that the stipulation that Mr. Hartinger referred to, we've  
15 already filed with the Court. It's already part of the  
16 record. I want to make that clear.

17 THE COURT: If you're asking me to confirm that,  
18 then you'll have to provide the exact title of the  
19 document.

20 MR. HARTINGER: That was just a document between  
21 Mr. Paterson and the retirement systems.

22 THE COURT: Apparently he's asking me to confirm  
23 it's been filed, so he has to give me the exact title of  
24 the document. Anything else?

25 MR. ADAM: One other stipulation, your Honor, is  
26 the POA number 24 -- sorry, 22. POA number 22, there is a  
27 stipulation as to the authenticity of the cover memorandum  
28 and the first exhibit, which is a one-page table. The

1 second exhibit, which is Ms. Devencenzi's memo from 1997,  
2 will be withdrawn. So there's a stipulation that is  
3 authentic. The parties will also stipulate that the --  
4 Mr. Kaldor -- K-A-L-D-O-R -- who prepared the memorandum,  
5 is an elected fire fighter's representative on the police  
6 and fire retirement plan board.

7 MR. HARTINGER: I think the additional piece of  
8 the stipulation is that in case that's not clear,  
9 Mr. Kaldor is an active fire fighter in the City of San  
10 Jose, employed by the City of San Jose, and a member of  
11 the Fire Fighters' Union.

12 MR. ADAM: So stipulated.

13 THE COURT: I'm looking at what has been marked as  
14 Exhibit 22, and you're saying, Mr. Adam, that you want the  
15 Court to consider as withdrawn and not a part of Exhibit  
16 22 the portion that starts at the third page?

17 MR. ADAM: Yeah. The Court has already, I  
18 believe, ruled that's inadmissible.

19 THE COURT: The record is not very clear with what  
20 you're asking me to do with 22.

21 MR. ADAM: 22, the City has -- is willing to  
22 authenticate the memorandum itself. It's authenticating  
23 the document, but the parties are agreeing that Exhibit B  
24 to the document should be withdrawn since, as a separate  
25 document, the Court has already ruled that it's  
26 inadmissible.

27 THE COURT: So now Exhibit 22 is just two pages?

28 MR. ADAM: Correct.

1 THE COURT: There's a stipulation that those two  
2 pages are authentic?

3 MR. HARTINGER: That's correct. Along with the  
4 factual stipulation that accompanied it, your Honor.

5 THE COURT: Is someone moving 22 into evidence?

6 MR. ADAM: We've got a number of documents on the  
7 POA's side that we'll have to move into evidence.

8 THE COURT: Okay.

9 MR. ADAM: I think that's true for the other  
10 plaintiffs as well.

11 THE COURT: So we'll do that later.

12 Then anything else before we move back to  
13 Ms. Erickson's testimony?

14 MR. HARTINGER: Not for the City, your Honor.

15 THE COURT: So just to remind everyone, I'm still  
16 anxiously awaiting Exhibit 6062 and 6063 and the chart  
17 pleadings.

18 MR. HARTINGER: Your Honor, this morning I marked  
19 those.

20 THE CLERK: I have them.

21 THE COURT: Okay.

22 MR. HARTINGER: I haven't yet distributed them to  
23 opposing counsel, so I'll do it at this time, your Honor.

24 MR. PATERSON: Your Honor, we have produced a  
25 document; however, I think we will have to revise it as a  
26 result of the dismissal of one of our causes of action  
27 this morning.

28 THE COURT: Is it otherwise ready?

1 MR. PATERSON: I don't have it on hand at this  
2 moment, your Honor.

3 THE COURT: If anybody has it, then I will accept  
4 it pending receipt of a revised version to reflect a  
5 dismissal of the bill of attainder claim.

6 MR. HARTINGER: Your Honor, we have a chart.  
7 We're refining it. We hope to have it to you by tomorrow.

8 THE COURT: Okay. Go ahead, Mr. Paterson.

9 MR. PATERSON: Thank you, your Honor.

10  
11 CROSS-EXAMINATION (RESUMED)

12 BY MR. PATERSON:

13 Q. Ms. Erickson, thank you for suffering through. If  
14 you don't mind, would you please turn to page 21 of what  
15 we marked as Exhibit 5101, which is your pension  
16 sustainability report.

17 MR. SPELLBERG: Sorry. What page?

18 MR. PATERSON: Page 21 of the document.

19 THE WITNESS: I'm sorry. Page 21 of the document  
20 or the stamp?

21 MR. PATERSON: I'm not referring to stamps. I'm  
22 referring to the page that is on the original document.

23 THE WITNESS: Thank you.

24 THE COURT: 1501.

25 BY MR. PATERSON:

26 Q. In that chart on that page there's an Exhibit 13  
27 which shows a chart and projections with respect to  
28 unfunded liability for pension and health benefits; is

1 that correct? Sorry. As a percentage of payroll; is that  
2 correct?

3 A. This is contribution rates. This isn't just  
4 unfunded. This is the total contribution rate.

5 Q. Right. Thank you. Which includes the amortized  
6 portion of the unfunded?

7 A. It would include some portion of that as well.

8 Q. Is it true that between 1980 and 2006, it looks  
9 like, that contribution rate remained static?

10 A. I'm not sure static is the word I'd use, but they  
11 varied between 10 and 30-some percent, that's correct.

12 Q. In 1980, it was 20 percent, and in 2006, it was 20  
13 percent -- or 2007, it was 20 percent?

14 A. Yes.

15 Q. And then it goes up quite dramatically? Yes?

16 A. Yes.

17 Q. Why?

18 A. Well, as I tried to explain earlier, some of that  
19 was we have fewer employees that you're dividing these  
20 unfunded liabilities over. So the normal cost for those  
21 employees would be similar to what the previous cost had  
22 been, but the unfunded liability would be amortized across  
23 fewer employees.

24 The other thing was just the growth in the  
25 benefits that we talked about before. So contribution  
26 rates were growing. What happened in 2006 were benefit  
27 enhancements, 2008 were benefit enhancements. Those are  
28 rolling through as well as the investment losses and the

1       downturn of 2008, '9. As those losses rolled through, all  
2       of that contributes to increased contribution rates.

3       Q.    In 2006, what was the benefit enhancement that  
4       you're referring to?

5       A.    So in 2006 -- I'm going back to the earlier  
6       section of the report where we gave a timeline. So I'm  
7       looking at page 13 of our report where -- or page number  
8       23 for the Court. In 2006, the benefit formula for police  
9       members changed. On the Federated side, the COLA was  
10      changed to a guaranteed three percent annual.

11      Q.    And did you calculate or do you know in terms of  
12      this dramatic increase in unfunded liabilities between  
13      2006 and 2015, what portion is attributable to that change  
14      in 2006 with respect to the guaranteed COLA?

15      A.    No. We came to no conclusion on apportioning  
16      those costs. You may be able to ask an actuary later on.

17      Q.    The dynamic you discussed in terms of reducing  
18      payroll and unfunded liabilities -- and I'm looking at  
19      page 25 of your report -- you say that in that  
20      environment, pension contribution rates can become  
21      volatile when there are swings and asset values arising  
22      from investment gains and losses. Is that because a  
23      larger portion of the unfunded liabilities are spread  
24      across a smaller payroll? Is that what that volatility is  
25      referring to?

26      A.    That's correct.

27      Q.    Would that also apply to funding retiree health  
28      care where you are paying a portion, an amortized portion

1 of the unfunded liabilities associated with retiree health  
2 care?

3 A. Yes.

4 Q. If you turn to page 30 of your report, you state  
5 that total compensation includes base pay and benefits,  
6 including retirement contributions. When you say  
7 retirement contributions, are you talking about the  
8 employee's contribution or the employer's contribution or  
9 both?

10 A. I'm sorry. I didn't follow where you are.

11 Q. That's fine. Page 30, underneath that heading  
12 that begins with "the City has." Do you see what I'm  
13 referring to?

14 A. Right.

15 Q. The second paragraph below that heading, second to  
16 the last sentence.

17 A. If you could repeat the question.

18 Q. Absolutely. You referred to total compensation.

19 A. Yes.

20 Q. It includes base pay and benefits?

21 A. Yes.

22 Q. And benefits includes retirement contributions?

23 A. Yes.

24 Q. Are you referring to employer, employee, or both  
25 contributions?

26 A. I believe it -- as I recall, it included the  
27 employer contribution.

28 Q. Does that include the employer's normal cost

1 contributions or its amortized portion of the unfunded  
2 liability as well?

3 A. Both.

4 Q. On page 35 of Exhibit 5101, you refer to a concept  
5 known -- or referred to you by intergenerational or  
6 interperiod equity.

7 A. Yes.

8 Q. My understanding of that concept is that as a  
9 matter of policy, it's inequitable to make future  
10 taxpayers on the hook for liabilities incurred today. Is  
11 that an accurate summary?

12 A. Yes.

13 Q. With respect to employees, is it also inequitable  
14 to make current employees pay for the liabilities of  
15 previous employees?

16 MR. SPELLBERG: Objection. Calls for legal  
17 conclusion.

18 MR. PATERSON: It's not a legal conclusion, your  
19 Honor.

20 THE WITNESS: In the first case --

21 THE COURT: Just a second.

22 MR. SPELLBERG: I would object on relevance as  
23 well.

24 THE COURT: That will be sustained.

25 BY MR. PATERSON:

26 Q. If you require employees to pay -- I believe you  
27 testified that if you -- employees pay towards unfunded  
28 liabilities, they are paying towards the value of benefits

1 that are already being paid to retirees or will be paid to  
2 retirees in the future; is that correct?

3 MR. SPELLBERG: Object. I think it misstates her  
4 testimony.

5 THE COURT: Overruled. Ms. Erickson can correct  
6 it if it does.

7 THE WITNESS: Can you repeat that, please.

8 BY MR. PATERSON:

9 Q. An employee today that has to contribute, let's  
10 say, 16 percent towards a pension system's accrued  
11 unfunded liabilities is paying a portion of the  
12 liabilities associated with retirees, deferred vested, as  
13 well as actives; is that correct?

14 A. To the extent that an employee is paying a portion  
15 of the unfunded liability, that liability could be  
16 associated with that employee or some other employee or  
17 some retiree.

18 Q. That would be the case for retiree health where an  
19 employee is also paying a portion of the amortized value  
20 of the unfunded liabilities?

21 A. To the extent -- sorry to equivocate, but if I'm a  
22 long-term employee, there's a chance that I have some  
23 unfunded liability associated with my benefit. To the  
24 extent that I'm a newer employee, haven't accrued an  
25 unfunded liability, then, yes, the rest of that would be  
26 for someone else as you put it.

27 Q. Thank you. On page 40 of your report, there's two  
28 charts. I'm referring to Exhibit 25 specifically. When I

1 say Exhibit 25, I mean that's how it's designated in your  
2 report. And this appears to reflect the investment  
3 returns each year of the Federated system?

4 A. That's correct.

5 Q. And I note that between 2007 to 2010, there's  
6 quite a stark drop.

7 A. That's correct.

8 Q. And is that a result of the recent market crash  
9 and what is commonly called the great recession?

10 A. That is what -- that is what I understand, yes.

11 Q. And as a result of those investment losses, they  
12 were accrued unfunded liabilities? Yes?

13 A. Yes.

14 Q. My understanding of your testimony regarding your  
15 review of the disability retirements under the Federated  
16 system was that they were not -- they were not more or  
17 less than the other plans you looked at. Is that a fair  
18 statement?

19 A. That's correct.

20 Q. I believe in your report, you also indicate that  
21 there's -- that there have been more retirements and  
22 there's expected to be many more because people are  
23 starting to reach retirement age when you look at the  
24 makeup of the workplace; is that correct? Do you recall  
25 that?

26 A. I don't recall where it is specifically, but that  
27 is absolutely generally true. A portion of the  
28 workforce -- in other work that we have done, a portion of

1 the workforce is eligible to retire now, and a larger  
2 portion of the workforce will be eligible to retire within  
3 the next three to five years.

4 Q. I also understand from your report that you  
5 indicated there are a lot of open positions, positions  
6 that have not been filled, so as people retire, those  
7 positions remain open?

8 A. To the extent that they are not filled, that is  
9 correct. There are a lot of open positions that are being  
10 recruited for, it's my understanding.

11 Q. And so if those positions are filled, the  
12 percentage of contributions -- sorry -- the contributions  
13 measured as a percentage of payroll will decrease?

14 A. You know, I think that's a question better put to  
15 an actuary who could explain how these contribution rates  
16 are smoothed over time. That's the whole point of hiring  
17 an actuary, to estimate these costs.

18 Q. Does that mean you don't know the answer to the  
19 question?

20 A. I would prefer not to speculate.

21 Q. So you don't know?

22 MR. SPELLBERG: Objection. Asked and answered.

23 THE COURT: Sustained.

24 MR. PATERSON: I have no further questions.

25 THE COURT: Mr. Platten, do you want to question  
26 now?

27 MR. PLATTEN: Yes, that would be preferable.

28

## CROSS-EXAMINATION

1  
2 BY MR. PLATTEN:

3 Q. Ms. Erickson, let's begin by looking at 5101.  
4 We're going to bounce around a little bit in that exhibit.  
5 Let's start, if you would -- I don't have the Bates  
6 number, but it is the document -- page 37 of 5101. That's  
7 the document in Chapter 4 that contains Exhibit 23, your  
8 little chart about benefit enhancements. Are you with me?

9 A. Yes.

10 Q. Now, you lay out the benefit enhancements that  
11 occur from 1980 to 2010 here and talk about it in terms of  
12 retroactive benefit enhancements. By retroactive, I take  
13 it you mean the benefit itself isn't retroactive but it  
14 picks up prior service cost which creates an unfunded  
15 actuarial liability if there were not sufficient assets in  
16 the plan to pay for them; is that correct?

17 A. Yes.

18 Q. So we begin with the chart at 1980, shows a  
19 maximum retirement benefit of 75 percent. This is  
20 referring now to the police and fire retirement plan;  
21 correct?

22 A. Correct.

23 Q. Actually, that five percent maximum had been in  
24 place for some period of time; correct?

25 A. That's correct.

26 Q. Since the initiation of the plan in 1961?

27 A. I believe that's correct.

28 Q. So no benefit enhancements at all, '61, '71, '81,

1 '91, until you get to 1996; correct?

2 A. I would need to look at the chronology that we put  
3 in the front of our report to confirm that.

4 Q. Please do. If you can point out the page to us so  
5 we can all look with you.

6 A. It's page 12 through 14 of our report, I believe.  
7 So for police and fire, I believe you went back to 1961,  
8 and what we showed here was the benefit was 50 percent of  
9 contributions at that time. So in 1968 --

10 Q. 66 percent?

11 A. Yeah. I believe it was 66 percent.

12 Q. 1970, 75 percent?

13 A. Correct.

14 Q. '75 to '80 to '85 to '95, 75 percent. Then in  
15 1996, the benefit maximum was enhanced from 75 to 80  
16 percent?

17 A. Correct.

18 Q. That was the result of an interest arbitration  
19 between the Police Officers' Association, the Fire  
20 Fighters' Union, and the City; is that correct?

21 A. We did not include that in our report, so I can't  
22 verify that.

23 Q. If it was the result of negotiations or an  
24 interest arbitration, you would agree, would you not, that  
25 the City would have been represented by legal counsel?

26 A. Yes.

27 MR. SPELLBERG: Objection. Beyond the scope of  
28 direct and lack of foundation.

1 THE COURT: The witness gave her answer.

2 Go ahead.

3 BY MR. PLATTEN:

4 Q. Do you have any reason to believe the City did not  
5 have access to legal counsel when that benefit enhancement  
6 took place?

7 MR. SPELLBERG: Calls for speculation.

8 THE COURT: Overruled.

9 THE WITNESS: I have no reason to believe that,  
10 but I was not a part of those discussions.

11 BY MR. PLATTEN:

12 Q. In preparing this audit report, you didn't  
13 investigate one way or another how the benefit  
14 enhancements came about?

15 A. In general, no. We did know some of them were  
16 through arbitration.

17 Q. So you have no reason to believe that at the time  
18 the benefit enhancement was made, the City didn't have  
19 access to hire a consulting actuary?

20 MR. SPELLBERG: Objection. Calls for speculation;  
21 lack of foundation.

22 THE WITNESS: I believe that the City -- that the  
23 retirement plans had actuaries through this time period.  
24 I am not aware of what the City had.

25 BY MR. PLATTEN:

26 Q. Do you recall this period of time, 1995, through  
27 legislation at the state level, the CalPERS maximum  
28 retirement benefit for police officers and fire fighters

1 have been increased from 75 percent final average salary  
2 to 80 percent final average salary?

3 A. I'm not aware of state timeline.

4 Q. You didn't take a look at any of the state maximum  
5 limits at any point in time to compare and contrast them  
6 to the CalPERS plan for police officers and fire fighters  
7 to San Jose?

8 A. Let me clarify this way. We did realize that once  
9 some of those benefits had been enhanced, San Jose  
10 followed behind. So San Jose was not enhancing  
11 benefits -- I believe we said this in the report -- was  
12 not enhancing benefits on its own. These were commonly  
13 held benefits across the State of California.

14 Q. So you would agree, would you not, that it was  
15 important for San Jose to remain competitive for the  
16 purpose of recruiting and retaining City employees with  
17 benefits comparable to the majority of benefits in the  
18 state?

19 MR. SPELLBERG: Objection. Lack of foundation;  
20 calls for speculation. Beyond the scope.

21 THE COURT: It's beyond the scope of direct.

22 BY MR. PLATTEN:

23 Q. Well, are you aware of the City policy, as you  
24 explained to us, that the state benefits had increased in  
25 this period of time for the City to maintain benefits  
26 comparable to those enjoyed by public employees throughout  
27 the state?

28 MR. SPELLBERG: Same objection.

1 THE COURT: Overruled.

2 THE WITNESS: Yes. I understand that the City  
3 benefits were in concert with benefits being offered  
4 elsewhere. I really cannot comment on whether or not that  
5 makes the City a better or worse employer than anyone  
6 else.

7 BY MR. PLATTEN:

8 Q. Do you believe that would help the City recruit  
9 and retain employees?

10 MR. SPELLBERG: Objection. Irrelevant.

11 THE COURT: Sustained.

12 BY MR. PLATTEN:

13 Q. Until 19 -- in 2000, the maximum benefit for  
14 police officers and fire fighters was increased to 85  
15 percent; correct?

16 A. Correct.

17 Q. That's reflected on this page 37 of 5101. That  
18 was the result of an agreement between the City and the  
19 labor organizations; correct?

20 A. I cannot make a call to that. I can testify that  
21 the benefit was raised. I don't know the mechanism.

22 Q. Do you have any reason to believe that that  
23 increase did not result from an arm's length agreement  
24 between the City and the labor organizations?

25 MR. SPELLBERG: Objection. Lack of foundation.  
26 She just testified.

27 THE COURT: Sustained.

28 BY MR. PLATTEN:

1 Q. Do you have any knowledge or did you investigate  
2 and produce in your report as to whether any of these  
3 vested enhancements that are reflected on page 37 were the  
4 result of coercion, fraud, or duress?

5 MR. SPELLBERG: I'm going to object as compound.  
6 It's beyond the scope. Irrelevant.

7 THE COURT: Overruled.

8 THE WITNESS: We did not determine how these  
9 benefits were granted. I can tell you my assumption was  
10 they were negotiated. But we did not verify how these  
11 benefits were granted or the specific mechanism.

12 BY MR. PLATTEN:

13 Q. So that was not of concern to you at all?

14 A. You know --

15 MR. SPELLBERG: Objection. That's argumentative.

16 THE COURT: Sustained.

17 BY MR. PLATTEN:

18 Q. You have no reason to believe that the benefits  
19 were granted for any improper purpose; is that correct?

20 MR. SPELLBERG: Objection. Irrelevant and asked  
21 and answered.

22 THE COURT: Sustained.

23 BY MR. PLATTEN:

24 Q. Now, if the benefit enhancements were the result  
25 of a collective bargained agreement between the City and  
26 these labor organizations, do you know if the City could  
27 have proposed for any of these benefit enhancements that  
28 they have prospective effect on?

1 MR. SPELLBERG: Objection. Beyond the scope of  
2 direct. Lack of foundation.

3 MR. PLATTEN: We have been presented, your Honor,  
4 with testimony that these enhancements have caused great  
5 distress to the City's fiscal condition. I think we're  
6 entitled to examine the witness on how the enhancements  
7 came about.

8 THE COURT: The objections are beyond the scope of  
9 direct and lack of foundation. Anything else?

10 BY MR. PLATTEN:

11 Q. You did not do any --

12 THE COURT: You're withdrawing the question?

13 MR. PLATTEN: Yes.

14 BY MR. PLATTEN:

15 Q. You did not do any investigation with respect to  
16 whether or not the City could have proposed that benefit  
17 enhancements be prospective?

18 A. Historically, no, we did not. We did not question  
19 the benefit levels or whether the benefit levels were good  
20 or bad. We looked at the impact to those benefit levels  
21 and the costs associated with those.

22 Q. Let's talk about the cost of living, three percent  
23 cost of living. Was that guaranteed three percent the  
24 result of an offer by the City to the labor organizations?

25 MR. SPELLBERG: Objection. Lack of foundation.

26 THE COURT: There is no foundation that she knows.  
27 You want to rephrase the question?

28 BY MR. PLATTEN:

1 Q. Are you aware how it came about that the plan was  
2 changed to guarantee a three percent annual pension  
3 increase?

4 A. No, I'm not. I think there will be witnesses who  
5 can better testify to how these benefits came about.

6 Q. You're not aware as to whether or not the City  
7 could have agreed to that benefit on a prospective only  
8 basis?

9 MR. SPELLBERG: Objection. Asked and answered.

10 THE COURT: I think she's just answered that.  
11 That's a subset of what she just answered. Sustained.

12 BY MR. PLATTEN:

13 Q. You testified a little bit about the Supplemental  
14 Retirement Benefit Reserve, SRBR. Do you recall that?

15 A. Yes.

16 Q. Did you do any investigation to determine how that  
17 particular benefit was put in place either in the  
18 Federated plan or in the police retirement plan?

19 A. No. Above and beyond the date -- above and beyond  
20 signing the date when the benefit was.

21 Q. You have no knowledge whether or not the City has  
22 an actuarial valuation as the cost of that particular  
23 benefit for either plan before implementing?

24 MR. SPELLBERG: Objection. Beyond the scope. I  
25 think it's asked and answered.

26 THE COURT: Overruled.

27 That means you can answer.

28 THE WITNESS: I don't recall a separate valuation.

1 We were looking in the annual valuations. I don't recall  
2 seeing any separate valuation that might have been  
3 performed as part of a benefit discussion.

4 BY MR. PLATTEN:

5 Q. Let's talk a little bit about the actuarial  
6 accrued liability and funding ratios. You testified about  
7 that. Are you aware that under the plans designed, either  
8 plan, when the funding ratio exceeds 100 percent, that the  
9 City gets an offset to their normal cost contribution?

10 A. You know, there's been some discussion about the  
11 normal cost offset. The way the rates are calculated, the  
12 City is still obliged to pay its normal cost. When the  
13 funds are overfunded, there is a credit against prior UAL  
14 amounts that the City has taken. Those -- that happened  
15 back when the City was over -- when the plans were  
16 overfunded.

17 Q. In those years when the plan is overfunded, that  
18 means the City puts in actual dollar amounts that are less  
19 than the normal cost contribution by virtue of the offset;  
20 correct?

21 A. You know, it's a question of -- they had put in  
22 prior -- in prior years they had put in more than what was  
23 required. If we were to go back and true it up -- these  
24 estimates, as I understand it -- again, you'll have an  
25 actuary on the stand, I think, at some point. These  
26 estimates are rolling estimates.

27 Q. I understand. My question was -- I don't think  
28 you answered it -- on those occasions when the plan was

1 funded greater than 100 percent, the City actually put in  
2 dollars to the plans less than the normal cost  
3 contribution; correct?

4 MR. SPELLBERG: I'm going to object. Lack of  
5 foundation.

6 THE COURT: Overruled.

7 THE WITNESS: Yes. There was an offset against  
8 the normal cost, but the City was obliged to pay the  
9 normal cost.

10 BY MR. PLATTEN:

11 Q. Did you do any investigation in coming to your  
12 report explaining what the City did with that additional  
13 monies that it did not have to put into the pension plans?

14 A. No.

15 Q. Now, are you aware that the boards of  
16 administration to the two plans have reviewed and provided  
17 reports suggesting that this lack of contribution in high  
18 funded years cost the plan significant asset growth?

19 MR. SPELLBERG: Objection. Facts not in evidence;  
20 beyond the scope of direct.

21 THE COURT: Sustained.

22 BY MR. PLATTEN:

23 Q. Are you aware that the boards have analyzed this  
24 issue at all?

25 A. Yes.

26 Q. Are you aware of their conclusions?

27 MR. SPELLBERG: Objection. Beyond the scope of  
28 direct.

1 THE COURT: Overruled.

2 THE WITNESS: So I believe it was subsequent to  
3 issuance of our audit report, the police and fire board  
4 did ask for an analysis from the retirement department's  
5 actuaries who provided that information. I don't recall  
6 the dollar amounts.

7 BY MR. PLATTEN:

8 Q. Do you recall if it was in excess of \$90 million?

9 MR. SPELLBERG: Objection. Calls for hearsay;  
10 lack of foundation.

11 THE COURT: Sustained.

12 BY MR. PLATTEN:

13 Q. I believe this is Bates stamp 1527. Rising  
14 pension costs threaten ability to maintain service levels.  
15 Is that a portion of your report? I'm sorry. That may be  
16 5102. I'm sorry, Ms. Erickson. 5102, 1527. This is the  
17 PowerPoint presentation.

18 A. Yes.

19 Q. This chart is based on assumptions, not revenue  
20 generations stays static or stays the same?

21 A. No. This was based on the budget office's current  
22 estimates of revenue which were at that time -- it was  
23 based on their estimate. So those numbers fluctuate.

24 Q. Those numbers fluctuate based on experience;  
25 correct?

26 A. These were taken -- so the budget deficit was  
27 taken from the initial budget estimates put out by the  
28 City's budget office.

1 Q. That would have been at the depth of the great  
2 recession; correct?

3 A. For 2010-'11, they would have put out those  
4 estimates probably in January of 2010.

5 Q. This does not assume any increase revenue by the  
6 passage of any additional tax measures; correct?

7 MR. SPELLBERG: Objection. Lack of foundation.

8 THE COURT: Overruled.

9 THE WITNESS: I don't believe so.

10 BY MR. PLATTEN:

11 Q. So if there has or if there will be additional tax  
12 measures, the revenue would be increased over the  
13 projections that are reflected on this page?

14 A. These were the actual budgets that have been  
15 adopted by the City. So the City Council was forced to  
16 make decisions to cut 118 million in the proposed budget  
17 in 2010-'11, and then they cut another 11 -- in '11-'12,  
18 another 15 million.

19 Q. That was your chart. And neither of those years  
20 did the City put a tax measure before the voters; is that  
21 right?

22 MR. SPELLBERG: Beyond the scope of direct, your  
23 Honor.

24 THE COURT: Sustained.

25 MR. SPELLBERG: Irrelevant.

26 BY MR. PLATTEN:

27 Q. Your figures don't include any increased tax  
28 revenue; correct?

1           A.    The budget document for those years did include  
2           some increases and decreases in revenue.  I do not believe  
3           as part of the budget process -- and, again, perhaps the  
4           City Manager could answer that -- that any -- that  
5           increase the -- that new taxes were -- you know, I  
6           shouldn't even -- I'm speculating.

7           Q.    You were doing fine.  Let me see if I can --

8           THE COURT:  Next question.

9           BY MR. PLATTEN:

10          Q.    Let me see if I can refine.  The chart didn't  
11          assume any increased revenue as a result of an increased  
12          sales tax or property tax measure?

13          A.    In these -- this PowerPoint we're talking about,  
14          correct.

15          Q.    Yes.

16          A.    No.  During the budget in those periods, a sales  
17          tax measure was not part of the proposed budget.  It's my  
18          understanding that would have been a separate action by  
19          the City Council.

20          Q.    That was never a recommendation of your entire  
21          report, was it?

22          A.    No.

23          Q.    Matter of fact, you didn't recommend anything with  
24          respect to increase in revenues; correct?

25          A.    No, we did not.

26          Q.    Now, on 1531 Bates stamp, 1531 of 5102, you talked  
27          a little bit about the audit recommendation.

28          MR. SPELLBERG:  What Bates number?

1 MR. PLATTEN: 1531, I believe it is.

2 BY MR. PLATTEN:

3 Q. Your audit recommendations. Let me go back one  
4 second before we talk about that particular document. In  
5 your report, you list up front the various individuals you  
6 spoke with; correct?

7 A. Correct.

8 Q. You didn't speak with any of the labor  
9 organization representatives; correct?

10 A. I don't believe so.

11 Q. Other than the management employees that are  
12 identified by their offices, you didn't speak to any of  
13 the plan members, any individual employees; correct?

14 A. I should disclose that I am a member of the  
15 Federated plan as are all of my staff.

16 Q. Understood. Excepting the management people that  
17 you've identified in the report, all of them, I take it,  
18 are members of one or the other plans, one of two plans;  
19 correct?

20 A. We did not do any deliberate outreach to either  
21 labor organizations or members of the plans, that's  
22 correct.

23 Q. Did anyone from the retirement board that you  
24 spoke with express a concern to you either the plans were  
25 on the board of insolvency -- brink of possible  
26 insolvency?

27 A. No.

28 Q. Before you issued your pension sustainability

1 report, Exhibit 5101, that was reviewed by the City  
2 Manager and her office?

3 A. Yes.

4 Q. She signed off -- or her office signed off on it?

5 A. Her office signed off on a response to the audit  
6 report.

7 Q. It was also reviewed before you issued it by City  
8 staff in the office of employee relations?

9 A. I believe so.

10 Q. But it wasn't reviewed or signed off by any member  
11 of either Retirement Board administration?

12 A. No.

13 Q. It wasn't reviewed or commented on by any member  
14 of any labor organization, representative of any labor  
15 organization?

16 A. That is correct. I'm trying to remember when the  
17 boards actually prepared their responses to the audit  
18 report. I believe it was subsequent to us publishing it.  
19 So once we published the report, if it goes outside of  
20 City staff, it becomes a public document, and we wanted to  
21 retain the right to be able to make any corrections for  
22 factual errors in the report up until the time we  
23 published.

24 Q. Now, you also went through in explaining in the  
25 report -- forgive me. I'm not sure I've got the page  
26 correctly. It's somewhere in the area of Bates stamp 1512  
27 in Exhibit 5102, the PowerPoint. You talked about the  
28 increase in contributions by the City 2010-2011 to \$137

1 million, et cetera?

2 A. Yes.

3 Q. 2014 projected \$222 million?

4 A. Correct.

5 Q. That's one of the many projections that have been  
6 made by the City in official documents about what the City  
7 projects as its pension costs; correct?

8 MR. SPELLBERG: Your Honor, object. Lack of  
9 foundation. Irrelevant.

10 THE COURT: Overruled.

11 BY MR. PLATTEN:

12 Q. Correct?

13 A. No. These were not projections. These were  
14 actual contributions. And the 222 number comes out of the  
15 actuary -- the Retirement Board as actuarial reports.

16 Q. There have been other projections made by the City  
17 concerning contribution increases; correct?

18 A. Absolutely.

19 Q. Those projections have been looked at by other  
20 auditors?

21 A. That's correct.

22 Q. Auditors from the State of California?

23 A. That's correct.

24 Q. These are auditors who process the same  
25 certifications as you do?

26 A. That's correct.

27 Q. Same level --

28 MR. SPELLBERG: We object. It gets into a ruling

1 in motion in limine, which occurred after Measure B.

2 THE COURT: I'm sorry. What are you referring to?

3 MR. SPELLBERG: Your ruling on the motion in  
4 limine about the state audit report. That's been  
5 excluded.

6 MR. ADAM: That's not true, Counsel.

7 MR. PLATTEN: There's no motion in limine order on  
8 that that I am aware of, your Honor.

9 THE COURT: Okay. Next question.

10 BY MR. PLATTEN:

11 Q. The state auditors possess the same certification  
12 as you do, operate under the same rules of responsibility  
13 as yours?

14 A. Yes.

15 Q. And state auditors performed a report, did they  
16 not, on projections made by the City concerning the cost  
17 of contributions by fiscal year 2015; correct?

18 A. That's correct.

19 Q. And state auditors determined that those  
20 projections were not actuarial valuated; isn't that right?

21 MR. SPELLBERG: We object. Hearsay; lack of  
22 foundation.

23 BY MR. PLATTEN:

24 Q. Let me ask that the witness turn to Plaintiffs'  
25 Exhibit --

26 THE COURT: The question withdrawn?

27 BY MR. PLATTEN:

28 Q. -- POA 28 or 226 for Sapien. It's in a different

1 binder, Ms. Erickson. Do you find --

2 MR. PLATTEN: May I approach, your Honor?

3 THE COURT: Yeah.

4 MR. PLATTEN: The book doesn't appear to be here,  
5 your Honor. I found it.

6 THE COURT: You want the witness to look at  
7 Exhibit 226; is that right?

8 MR. PLATTEN: Yes.

9 BY MR. PLATTEN:

10 Q. Let me know when you're ready.

11 MR. SPELLBERG: 28 on the POA?

12 MR. PLATTEN: I believe so.

13 BY MR. PLATTEN:

14 Q. I'd like to direct your attention, ma'am, to the  
15 cover letter dated August 21, 2012, addressed to governor  
16 of California and the president pro tempore, the senate  
17 speaker of the assembly.

18 THE COURT: I think you're referencing the third  
19 page of the exhibit.

20 MR. PLATTEN: I believe that's correct, your  
21 Honor.

22 BY MR. PLATTEN:

23 Q. Directing your attention to the second paragraph,  
24 second sentence, ma'am. Do you agree that state auditors  
25 determine that the retirement cost projections reported in  
26 San Jose's official documents in 2011 were not supported  
27 by accepted actuarial methodologies, nor were the  
28 underlying assumptions vetted in proof by the boards of

1 San Jose's two retirement boards?

2 MR. SPELLBERG: Your Honor, objection. Lack of  
3 foundation. Ms. Erickson's report is 2010. It's  
4 obviously talking about something different. It's  
5 hearsay.

6 THE COURT: It does appear that you are asking her  
7 to read from the exhibit. Is that what you're asking her  
8 to do?

9 MR. PLATTEN: No. I'm asking if she agrees that  
10 the state auditor's report made that finding.

11 MR. SPELLBERG: Your Honor, there's no foundation.  
12 It's a 2011 document. Ms. Erickson testified about a 2010  
13 document.

14 THE COURT: So what's your objection?

15 MR. SPELLBERG: It's irrelevant, and there's no  
16 foundation and it's hearsay. And the first two  
17 objections, your Honor, because this is talking about a  
18 2011 document, not Ms. Erickson's report.

19 THE COURT: Is there something on here saying --

20 MR. PLATTEN: Your Honor, the witness has  
21 testified that she's aware that projections were made,  
22 she's aware of the state audit report. I'm simply asking  
23 her to confirm that this is the finding that was made by  
24 the state auditor with respect to cost projections.

25 THE COURT: It will be better if you ask her that  
26 question.

27 MR. PLATTEN: I'm sorry, your Honor. Would you  
28 repeat the question. I apologize.

1 THE COURT: Hearsay objection has been made. It  
2 appears that you're offering this for the truth of the  
3 out-of-court statements, so I'm inquiring whether there's  
4 some non-hearsay purpose that I might not be aware of.

5 MR. PLATTEN: Yes. This goes to a finding of bad  
6 faith by the City, number one. Number two, I'm only  
7 offering it for purposes of the notice that this was --  
8 the City was aware that this has happened. I'm not  
9 offering it for the truth of the matter asserted.

10 THE COURT: Notice to this witness is not  
11 relevant. Objection sustained.

12 BY MR. PLATTEN:

13 Q. Did you take any steps, Ms. Erickson, to ensure  
14 that any cost projections made by the City prospectively  
15 will be done through an actuarial valuation?

16 MR. SPELLBERG: Overbroad; vague and ambiguous.

17 THE COURT: Overruled.

18 THE WITNESS: I'm hesitating because we did -- I  
19 don't believe we made any specific recommendations about  
20 cost projections. We did clearly recommend that the City  
21 have actuaries on retainer so that the City could review  
22 on its own the actuarial reports that were coming from the  
23 board's actuary and be well aware of any cost implications  
24 for any changes that would be made or for any growth in  
25 the unfunded liability.

26 BY MR. PLATTEN:

27 Q. But you promulgate or participate in putting  
28 together the City's response to the state auditor's

1 report?

2 MR. SPELLBERG: Objection. Irrelevant; lack of  
3 foundation; beyond the scope of direct.

4 THE COURT: Those objections are well taken.  
5 What's the point of this?

6 MR. PLATTEN: Let me rephrase.

7 THE COURT: Question is withdrawn.

8 BY MR. PLATTEN:

9 Q. You've told us you are aware of the state  
10 auditor's report; correct?

11 A. That's correct.

12 Q. And you told us you made certain recommendations  
13 in your pension sustainability report concerning the use  
14 of actuarial in the future; correct?

15 A. Correct.

16 Q. You told us you took no steps with respect to the  
17 state auditor's report beyond the pension sustainability  
18 you report that you've already described to ensure in the  
19 future cost projections were supported by actuarial  
20 valuations; is that correct?

21 MR. SPELLBERG: We object. The question is  
22 incomprehensible. Sustainability report occurred -- it  
23 couldn't be in response.

24 THE COURT: That appears to be correct.  
25 Sustained.

26 BY MR. PLATTEN:

27 Q. Did you take any steps, other than pension  
28 sustainability report, to recommend to the City that any

1 future cost projections with respect to pension  
2 contributions be supported by actuarial valuations?

3 A. I believe the answer is no.

4 Q. Now, again, getting back to 5102, the section that  
5 reads that benefit payments have been graded in  
6 contributions since 2001. I don't think you need to look  
7 at the document. I wanted to tell you that's the issue.  
8 The fact that that's the case does not affect unfunded  
9 liability; correct?

10 A. No, it does not.

11 Q. You talked further on that document with respect  
12 to health rates and pension rates, and you use the term  
13 that for every dollar that we pay in salary, you have to  
14 pay a certain percentage. I want to clarify. The  
15 payments that are made in pension are not based on all  
16 compensation that the employees receive; isn't that  
17 correct?

18 A. That's correct.

19 Q. It's based only on what was commonly referred to  
20 as pensionable compensation?

21 A. That's correct.

22 Q. So there are monies that employees may receive for  
23 services performed for which they do not pay nor does the  
24 City pay a contribution pension plan?

25 A. That's correct. For example, overtime is not  
26 pensionable.

27 Q. And, similarly, none of that time is used to  
28 compute final average salary for the purpose of computing

1 the pension benefit?

2 A. That's correct.

3 Q. The lone exception to that with respect to  
4 overtime is fair labor standard act overtime that is  
5 automatically paid as a result of the employee's work  
6 schedule; is that correct?

7 A. That's correct.

8 Q. Of course, unlike Social Security benefits when  
9 you talk about the cost of living, even though it's not  
10 tied to anything, the three percent cost of living is  
11 capped at three percent, whereas Social Security cost of  
12 living is not capped; correct?

13 MR. SPELLBERG: I'm going to object. Vague and  
14 ambiguous as to what we're talking about.

15 THE COURT: I don't fully understand that  
16 question. Perhaps Ms. Erickson does.

17 MR. PLATTEN: I'll rephrase.

18 THE COURT: Go ahead. Question is withdrawn.

19 BY MR. PLATTEN:

20 Q. The three percent -- we refer to it as a COLA.  
21 You have some disagreement as to whether it's a COLA or  
22 not because it's guaranteed.

23 A. Correct.

24 Q. That three percent is capped; correct?

25 A. Correct.

26 Q. You don't know whether or not that guaranteed  
27 three percent is a result of a proposal by the City to the  
28 unions or not?

1 A. That's correct.

2 Q. And compared to Social Security, the cost of  
3 living adjustment that is enjoyed under Social Security is  
4 not capped in any way; correct?

5 A. I wouldn't be able to comment on that. I don't  
6 know.

7 Q. You talked about pension spiking. Do you recall  
8 that conversation?

9 A. Yes.

10 Q. Could you define that term so we're all on the  
11 same page with regards to what it means.

12 A. So the concern there would be, for example, in  
13 some jurisdictions an employee can earn overtime.  
14 Overtime would be pensionable, and an employee could spike  
15 a pension in the final year of service that would increase  
16 the pension for the rest of their lives.

17 Q. That has not been a problem, you said, in San Jose  
18 because --

19 A. So San Jose does not allow certain types of those  
20 practices. We did have some concerns about the final year  
21 versus final three years. But in general, in San Jose, we  
22 have not found similar issues in San Jose to what has been  
23 found in other jurisdictions.

24 Q. Going back to your testimony with respect to the  
25 increased contributions that the City has made in each of  
26 those past three to four fiscal years, '10, '11, '12, et  
27 cetera. In each of those years, the City has returned --  
28 excuse me -- in each of those years, the City has begun

1 the fiscal year with a balanced budget; correct?

2 A. Yes. The City is required under its charter to  
3 begin the year with a balanced budget.

4 Q. In each of those years, the City has ended up with  
5 a general fund positive balance; correct?

6 A. Yes. I believe if you count beginning and ending  
7 fund balances, yes.

8 Q. Let's turn to the disability report now. What I'd  
9 like to do is have you look at City Exhibit 6066. That's  
10 your document with the notes on it. Take your time.  
11 Again, in this report, you have a section that explains  
12 the documents that you reviewed and to whom you spoke;  
13 correct?

14 A. Yes.

15 Q. And you did not speak to any of the  
16 representatives of the labor organization prior to  
17 preparing the report; correct?

18 A. I am hesitating because at some point between the  
19 workers' comp audit that we had done previously, the  
20 disability retirement report, and a subsequent report on  
21 fire department injuries, we did reach out to various  
22 members of the police and fire unions.

23 Q. Let's take a look --

24 A. But I cannot recall who and when.

25 Q. Let's take a look at page 8 of your exhibit.  
26 6066. This is where you list everything that you looked  
27 at to prepare the report; correct?

28 A. Correct.

1 Q. It does not list that you spoke with any  
2 representatives of any labor organizations; correct?

3 A. Yes. I'm hesitating because there may have been  
4 an informal conversation that wasn't a documented  
5 interview.

6 Q. At any rate, it's not listed in the report?

7 A. Correct.

8 Q. And you did no investigation concerning what the  
9 staffing levels were in San Jose in the San Jose Fire  
10 Department compared to other local agencies?

11 A. That's correct. Not as part of this review.

12 Q. You did no investigation as to the staffing levels  
13 for the San Jose Police Department as compared to other  
14 agencies?

15 A. Not as part of this review.

16 Q. You did no investigation as to staffing levels for  
17 any other department for employees in the Federated  
18 retirement system for preparing purposes of this report?

19 A. Not as part of this review. As part of an annual  
20 report that we do on City services, we do monitor staffing  
21 levels against other jurisdictions in California.

22 Q. So you have no information as to whether or not  
23 the San Jose Fire Department, as an example, is one of the  
24 lowest staffed fire departments in the United States for  
25 cities of this size?

26 MR. SPELLBERG: Objection. Facts not in evidence.

27 THE COURT: Sustained.

28 BY MR. PLATTEN:

1 Q. You did no investigation as to the staffing levels  
2 of the City of San Jose Fire Department; correct?

3 A. No, we did not.

4 Q. So you have no knowledge of what the staffing  
5 levels are here compared to cities of similar size and  
6 population?

7 A. You know, I'm hesitating because I'm trying to  
8 remember what we've included in our annual service efforts  
9 and accomplishments report. In general, we have found in  
10 every city department we look at that San Jose staffing  
11 levels are below those of other jurisdictions.

12 Q. Would that lead you to consider that might be an  
13 explanation for high levels of disability?

14 A. We had done previous reviews of workers'  
15 compensation, and the purpose of this review was really to  
16 look at the systemic problems in the system itself.

17 Q. But nothing in this report reflects any comments  
18 concerning staffing levels within the City of San Jose for  
19 any of the departments?

20 A. You know, I believe we did cite a 2007 City study  
21 on staffing levels.

22 Q. What did that study show?

23 A. So that study did not -- it did not come to any  
24 conclusion, as I remember, on fire department staffing.  
25 It did conclude that calls for service in the police  
26 department were lower than some other averages in the  
27 state.

28 Q. So, again, nothing in the report explained

1 staffing levels within the San Jose Fire Department to  
2 comparable agencies?

3 A. That's correct.

4 Q. Now, let's talk about the system that's in place  
5 currently under the plan for retirement disability. You  
6 had your nice chart up there showing the percentages of  
7 approvals and denials and the police and fire plan and  
8 Federated plan.

9 Did you do any investigation that determined that  
10 any pension benefit for disability purpose was granted  
11 fraudulently?

12 A. We did find one instance where an employee's  
13 disability benefit did not appear to be work related.

14 Q. One out of all these hundreds of cases?

15 A. Out of the ones that we reviewed, correct.

16 Q. And did the City take action in a court of law to  
17 challenge the basis of that disability award?

18 A. I don't know.

19 Q. Do you know if the City is in any way prevented  
20 from challenging decisions by either Retirement Board on a  
21 disability retirement application in a court of law?

22 MR. SPELLBERG: Objection. Lack of foundation.

23 THE COURT: Sustained.

24 BY MR. PLATTEN:

25 Q. Did you do any investigation as to whether or not  
26 the City had challenged either in the Federated plan or  
27 the police and fire department plan any grant of a  
28 disability retirement?

1 A. No.

2 Q. Is the City prevented from having an attorney  
3 appear before the retirement board and oppose an  
4 application by an employee for a disability retirement?

5 MR. SPELLBERG: Objection. Lack of foundation.

6 THE COURT: Sustained.

7 BY MR. PLATTEN:

8 Q. Did you do any investigation to determine whether  
9 the City was prevented from having legal counsel appear to  
10 oppose applications for disability retirement benefits in  
11 either plan?

12 MR. SPELLBERG: Same objection. Irrelevant;  
13 beyond the scope.

14 THE COURT: Sustained.

15 BY MR. PLATTEN:

16 Q. Did you do any investigation to determine whether  
17 or not either retirement plan had the benefit of a City  
18 paid physician's opinion with respect to disability  
19 retirement applications?

20 A. Yes.

21 Q. Does the City, in fact, hire pneumatical  
22 physicians for the purpose of reviewing and commenting on  
23 and giving an opinion on any application for disability  
24 retirement?

25 A. The physician is actually paid by the retirement  
26 boards.

27 Q. Does that physician report to the boards and offer  
28 his or her opinion concerning the bona fides of every

1 disability retirement application?

2 A. Yes.

3 Q. Did you do any investigation to determine what the  
4 average age was for employees who had applied and received  
5 or been denied disability retirement benefits?

6 A. We did in our report. There are -- some of the  
7 tables do include averages, but, no, we did not calculate  
8 average ages.

9 Q. Did you compare that to the average ages in any of  
10 the agencies that you used to compare with?

11 A. No, we did not.

12 Q. The report does not state the definition of a  
13 disability in any other system but for the City of Los  
14 Angeles, I believe; is that correct?

15 A. I thought we included a few others. It's by no  
16 means a comprehensive list.

17 Q. You did note the definition of a disability in Los  
18 Angeles was different than that in San Jose; is that  
19 right?

20 A. Yes.

21 Q. And you did note that the definition of a  
22 disability under CalPERS was different than San Jose; is  
23 that correct?

24 A. That's correct.

25 Q. Did you not make any other notation in the report  
26 concerning San Diego or any other independent retirement  
27 plan within the State of California?

28 A. That's correct.

1 Q. So your report does not discuss or analyze what  
2 the difference is in the definition of disability would be  
3 in each plan with respect to the comparative value?

4 A. Can you repeat the question.

5 Q. I will. Your report does not offer any analysis,  
6 how the differences in the definition of a disability may  
7 affect the outcome in any of the plans compared to San  
8 Jose?

9 A. We did not draw a direct link, but I think the  
10 reader can infer that LA has a different definition and  
11 they have a much lower rate of disability retirement.

12 Q. Did you investigate whether, in any of the other  
13 plans, let's take as an example Los Angeles, that an  
14 individual who's otherwise qualified for a service  
15 retirement at the time he or she is granted a disability  
16 benefit is reported as a service retiree and not as a  
17 disabled retiree?

18 A. I am not aware of that.

19 Q. Are you familiar with the fact that evidence  
20 concerning that differentiation in Los Angeles was  
21 produced in an interest arbitration between the Fire  
22 Fighters' Union and the City in 1990 before Arbitrator  
23 Norman Brand?

24 MR. SPELLBERG: Objection. Lack of foundation;  
25 facts not in evidence.

26 THE COURT: Sustained.

27 BY MR. PLATTEN:

28 Q. Did you do any investigation as to disability

1 benefit proposals between the parties in any binding  
2 interest arbitration?

3 A. No.

4 Q. Did you do any investigation in any of the  
5 evidence produced in any of those binding interest  
6 arbitration hearings with respect to disability retirement  
7 benefits?

8 A. No.

9 Q. Now, you also proposed, as one of your  
10 recommendations, that disability retirement benefits be  
11 offset by workers' compensation benefits; correct?

12 A. Correct.

13 Q. Did you do any investigation to determine that  
14 that proposal had been made by the City in a binding  
15 interest arbitration and rejected?

16 MR. SPELLBERG: Objection. Facts not in evidence;  
17 lacks foundation.

18 THE COURT: Sustained.

19 BY MR. PLATTEN:

20 Q. Did you do any investigation as to whether or not  
21 any binding interest arbitrator had ever ruled on a  
22 similar proposition or proposal by the City to either the  
23 fire fighters or the San Jose Police Officers'  
24 Association?

25 A. I don't believe so, no.

26 Q. One of your recommendations is based upon the  
27 fact -- I believe you testified that members of the boards  
28 of administration of both plans lack medical expertise.

1 Am I correctly recalling your testimony?

2 A. Yes.

3 Q. But members of the boards do owe a fiduciary duty  
4 to the plans; correct?

5 A. Correct.

6 Q. That fiduciary duty includes, does it not, making  
7 determination with respect to eligibility to disability  
8 retirement benefits?

9 A. Yes.

10 Q. We've spent the last few days here in the  
11 courthouse. I'm standing next to a jury box.

12 THE COURT: Go right to the question.

13 BY MR. PLATTEN:

14 Q. Are you aware, Ms. Erickson, that jurors from the  
15 street are often required to decide complicated medical  
16 issues in jury trials?

17 MR. SPELLBERG: Your Honor, we object. It's  
18 argumentative.

19 THE COURT: Sustained.

20 BY MR. PLATTEN:

21 Q. You talked about the fact that there was a tax  
22 advantage to employees if they received a disability  
23 retirement benefit as opposed to a service retirement  
24 benefit; correct?

25 A. That's correct.

26 Q. But in either case -- in either case, the benefit  
27 amount is the same; isn't that right?

28 A. That's correct.

1 Q. So there is no additional cost to the City if an  
2 individual is qualified for and receives a disability  
3 retirement than if the individual had received a service  
4 retirement?

5 A. That's correct. The cost is borne by state,  
6 federal taxpayers.

7 Q. So it has no impact with respect to contribution  
8 rates; correct?

9 A. That's correct.

10 Q. Now, you talked about a recommendation that would  
11 limit or eliminate -- I'm not sure which -- the ability of  
12 the individual to retire on service and later on apply for  
13 conversion to disability retirement; correct?

14 A. That's correct.

15 Q. Isn't that the result that in many cases an  
16 individual has not yet got sufficient medical evidence to  
17 show permanent and stationary condition at the time the  
18 individual wishes to retire?

19 MR. SPELLBERG: Objection. Foundation. Calls for  
20 speculation.

21 THE COURT: Sustained.

22 BY MR. PLATTEN:

23 Q. Did you do an investigation of that?

24 MR. SPELLBERG: Objection, your Honor.  
25 Irrelevant.

26 THE COURT: Overruled.

27 THE WITNESS: I'm sorry. The question is?

28 BY MR. PLATTEN:

1 Q. Did you look at whether or not, as a matter of  
2 fact, that the delay was often a result in the  
3 individual's medical status not yet being determined to be  
4 permanent and stationary?

5 A. Yes. That is my understanding of the reason. If  
6 that conflicted and that was allowed under the municipal  
7 code, that conflicted with the City Charter.

8 Q. Has the City ever brought an action to declare  
9 that an unlawful action by the board to convert a service  
10 retirement to disability retirement?

11 MR. SPELLBERG: Objection. Lack of foundation.

12 THE COURT: Sustained.

13 BY MR. PLATTEN:

14 Q. Did you do any investigation to determine whether  
15 or not the City had engaged in any legal action to  
16 overrule decisions by the boards of administration to  
17 retroactively convert a service retirement to disability  
18 retirement?

19 MR. SPELLBERG: Objection. Irrelevant.

20 THE COURT: Overruled.

21 THE WITNESS: I have no knowledge of that.

22 BY MR. PLATTEN:

23 Q. Did any board member that you spoke with tell you  
24 that he or she felt that they were incompetent to  
25 determine whether or not an individual qualified for  
26 disability retirement benefit?

27 MR. SPELLBERG: Objection. Calls for hearsay.

28 THE COURT: Overruled.

1 THE WITNESS: So after the audit was issued, I  
2 have had conversations, particularly with the newer  
3 members of the board who are brought on to the board  
4 because they're investment professionals, and I believe  
5 they've expressed this in public sessions that their  
6 expertise is not medical.

7 BY MR. PLATTEN:

8 Q. When you did your report, did any board member  
9 that you spoke with so tell you?

10 A. Not that I recall.

11 MR. PLATTEN: May I have one moment, your Honor?

12 Thank you, ma'am.

13 THE COURT: Retirement Board?

14 MR. SILVER: Thank you.

15  
16 CROSS-EXAMINATION

17 BY MR. SILVER:

18 Q. Afternoon, Ms. Erickson. My name is Stephen  
19 Silver. I'm representing the retired Federated employees  
20 in San Jose, and I'm going to ask you what I hope are a  
21 very few questions that relate to narrow issues in our  
22 lawsuit.

23 I hope I have the right documentation, but if you  
24 can refer to Exhibit 5102, and I believe it's the chart  
25 where you identified the cost components of the current  
26 plans. I have it on page 17.

27 THE COURT: 5102 is the PowerPoint.

28 MR. SILVER: Right. The PowerPoint. I believe --

1 page 11.

2 THE WITNESS: Is it 1524?

3 BY MR. SILVER:

4 Q. Unfortunately, my copy doesn't have any Bates  
5 stamps, but it's entitled Cost Components of the Current  
6 Plan.

7 A. Yes. It's 1524, I believe.

8 Q. If that's what you say.

9 Again, I believe it was your testimony that what  
10 you were ascertaining was how the plan had changed from  
11 its inception when it was put into the charter and the  
12 present time or at least the time you prepared your  
13 investigation; is that correct?

14 A. Well, this chart explains the cost components of  
15 the plan as it existed at the time we issued the audit, so  
16 it was not a historical look; it was the cost components.  
17 Then -- what we did was we ran how much of that was -- how  
18 much of the current cost at that time was related to the  
19 original charter provision compared to other benefits that  
20 had happened subsequent to that, to 1965.

21 Q. With respect to the Federated plan, 56 percent of  
22 the plan at that particular time was related to benefits  
23 that did not exist at the time -- at the original time; is  
24 that correct?

25 A. Yes.

26 Q. Now, in the last box you have, it shows 22  
27 percent. I assume that those are just various benefits  
28 that you accumulated together that weren't large enough to

1 identify separately; is that correct?

2 A. That's correct.

3 Q. During the course of your audit, did you discover  
4 any instances where these benefits that were provided  
5 after the original charter were awarded by the City  
6 Council to individuals who had already retired?

7 A. It was our understanding that at least some of  
8 these benefits were retroactively applied.

9 Q. To people who had already retired?

10 A. Yes.

11 Q. That was done by the City Council; is that  
12 correct?

13 A. I don't know who it was done by.

14 Q. Do you know whether it was done pursuant to a vote  
15 of the electoral in any situation?

16 A. I don't believe so, but you would have to check me  
17 on that.

18 Q. Would it be fair to say that if it happened, it  
19 was only on a very small number, if any, of those  
20 instances? Would that be correct?

21 MR. SPELLBERG: Vague and ambiguous.

22 THE COURT: She just said that you'd have to check  
23 her. Do you want to rephrase the question?

24 BY MR. SILVER:

25 Q. Again, my question is, if it occurred pursuant to  
26 a vote of the electorate, it would have been in a rare  
27 instance. Is that your understanding?

28 A. Yes. That's my understanding. I think you'll

1 have other witnesses who can testify as to how these  
2 benefits are made.

3 Q. I just wanted your understanding. Thank you.

4 If you can refer to the page where you have your  
5 audit recommendations. And, again, according to my copy,  
6 it would be page 15 of this exhibit. I don't know what  
7 the Bates stamp number is because I don't have it.

8 MR. ADAM: 1530.

9 THE WITNESS: I'm showing 1531 and 1532.

10 BY MR. SILVER:

11 Q. I want the page that starts with, "Explorer  
12 prohibiting pension enhancements."

13 A. Yes.

14 Q. Directing your attention to the second part of  
15 that that says, "Pursue one or a combination of pension  
16 costs containment strategies." Would it be fair to say  
17 that you -- among the proposals were the idea of causing  
18 there to be changes for existing employees and for new  
19 employees. Would that be correct?

20 A. Yes.

21 Q. And other than -- did you recommend exploring any  
22 changes with respect to then current retirees?

23 A. Our recommendation regarding the SRBR certainly  
24 would apply to current retirees.

25 Q. Other than the SRBR, did you recommend any other  
26 changes that would apply to current retirees?

27 A. No.

28 Q. Now, let's talk about the SRBR for a moment. What

1 did you mean when you said eliminating or limiting SRBR  
2 transfers, just that part of it?

3 A. So as we discussed in the full text of the  
4 recommendation on page 67 of our full audit report --

5 Q. Excuse me. I don't have -- I wasn't given a copy.

6 A. The full phrasing of that recommendation was  
7 eliminating --

8 THE COURT: Can we get an identification of the  
9 exhibit you're referring to.

10 THE WITNESS: It's 1501. The stamp is 77.

11 THE COURT: 5101?

12 THE WITNESS: Yes.

13 THE COURT: The Bates number is 72?

14 THE WITNESS: 77.

15 So the full text there reads: "Eliminating the  
16 supplemental retirement benefits reserves SRBR or at least  
17 prohibiting transfers in and distribution of excess  
18 earnings," quote, unquote, "when the plans are  
19 underfunded."

20 BY MR. SILVER:

21 Q. What did you mean by the words "prohibiting  
22 transfers in"? Adding new money?

23 A. Adding new money into the reserves themselves.

24 Q. At the time you made this proposal, were you aware  
25 of the provisions of the Federated plan regarding the  
26 SRBR?

27 A. Yes.

28 Q. And were you aware of the language in the

1 Federated plan that mandated that these transfers be made  
2 whenever there were excess earnings?

3 MR. SPELLBERG: Objection. It misstates the  
4 federated plan. Fact not in evidence. It calls for a  
5 legal conclusion.

6 MR. KALINSKI: It is in evidence, your Honor.

7 MR. SPELLBERG: It is in evidence. Misstates.

8 THE COURT: Could you tell us what exhibit you're  
9 referring to.

10 MR. SILVER: That will be difficult, your Honor.

11 MR. KALINSKI: It would be in Exhibit 602.

12 MR. SILVER: Exhibit 602.

13 THE COURT: Do you want the witness to look at  
14 602?

15 MR. SILVER: Yes, please, your Honor.

16 MR. KALINSKI: Bates stamp 293.

17 THE WITNESS: I'm sorry. What part of 602?

18 BY MR. SILVER:

19 Q. Let's start with Bates stamp 293. Let me ask you  
20 a new question. When you made your recommendation --  
21 before you made your recommendation, had you reviewed  
22 Section 3.28.340 of the San Jose Municipal Code?

23 A. Yes.

24 Q. Were you aware of the contents of subsections --  
25 particularly subsection B, C, and D?

26 A. Yes.

27 Q. And were you aware that the word "shall" was used  
28 in terms of the obligation to transfer excess earnings for

1 ten percent of excess earnings into the SRBR?

2 A. I was aware of the word "shall."

3 Q. Did you form any opinion as to what the word  
4 "shall" required?

5 MR. SPELLBERG: Objection. Calls for a legal  
6 opinion.

7 THE COURT: It does appear to call for a legal  
8 opinion. Sustained.

9 BY MR. SILVER:

10 Q. Prior to making your recommendation, did you  
11 discuss your recommendation with any attorney employed by  
12 the City of San Jose?

13 A. You know, we probably did, but I cannot recall the  
14 specific instance.

15 Q. Do you recall any discussion with any attorney  
16 from the City of San Jose about the impact of your  
17 recommendation on this particular provision of the  
18 municipal code?

19 MR. SPELLBERG: Objection, your Honor. The legal  
20 conclusion, and it's attorney-client privilege.

21 THE COURT: Sustained.

22 MR. SILVER: I have no further questions, your  
23 Honor.

24 THE COURT: Any redirect?

25 MR. SPELLBERG: No. Thank you very much, your  
26 Honor.

27 THE COURT: Thank you. You can step down. You're  
28 excused. You're free to stay or go.

1           Who will be the next witness?

2           MS. ROSS: Ms. Debra Figone, your Honor. It's  
3 going to take me a minute to set up.

4           THE COURT: Ms. Figone, please face the clerk and  
5 raise your right hand.

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: I do.

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

13          THE WITNESS: Debra Figone; D-E-B-R-A, capital F,  
14 as in Frank, I-G-O-N-E.

15          MS. ROSS: Your Honor, may I approach and make  
16 sure we have the correct notebooks?

17          THE COURT: Sure.

18

19                                   DEBRA FIGONE

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

22                                   DIRECT EXAMINATION

23 BY MS. ROSS:

24           Q. Good afternoon, Ms. Figone.

25           A. Good afternoon.

26           Q. Could you please tell us what your position is  
27 with the City of San Jose.

28           A. Yes. I'm the City Manager for the City of San

1 Jose.

2 Q. How long have you been City Manager?

3 A. I've been City Manager since July 23rd, 2007. So  
4 six years.

5 Q. And before you were City Manager of San Jose, what  
6 other public positions did you hold?

7 A. Yes. I've held public positions for over 44  
8 years. Prior to San Jose, I was the town manager for the  
9 town of Los Gatos for about seven years. I was the  
10 Assistant City Manager for the City of San Jose for about  
11 six years. I was the director of general services and the  
12 assistant director for a period of four years, assistant  
13 town manager for the town of Los Gatos for three and a  
14 half years, spent six years in the City of San Jose budget  
15 office, and ten years in the department of parks and  
16 recreation.

17 Q. In your career, how many City budgets have you  
18 worked to formulate?

19 A. As a City Manager and an Assistant City Manager,  
20 it's been over 20. And if I factor in my time in the  
21 budget office and as a department head, assistant  
22 department head, it's been over 30.

23 Q. In San Jose, what is the role of the City Manager?

24 A. The role of the City Manager is specified in the  
25 City Charter. It is the chief administrative officer of  
26 the City appointed by the mayor and City Council. It has  
27 a variety of duties listed in the charter, but  
28 essentially, I am responsible for all the day-to-day

1 operations of the City. I'm the appointing authority for  
2 City employees and officials who do not appoint -- report  
3 to the other council appointees, but it is a super  
4 majority of the workforce. I'm also responsible for the  
5 City's budget and finances, and as I said, all matters  
6 associated with day-to-day operations and implementation  
7 of the council's public policy.

8 Q. And as part of your role as City Manager, do you  
9 periodically make reports to the City Council?

10 A. Absolutely.

11 Q. What kinds of reports do you make?

12 A. Well, we'll report on, again, matters of public  
13 policy. We'll formulate recommendations in order to enact  
14 programs or to be responsive to council policy guidance,  
15 and so those reports can come forward for a variety of  
16 reasons.

17 Q. What is the size of the City of San Jose workforce  
18 right now?

19 A. Currently, we're at about 5600 what we call  
20 full-time equivalencies, and we have -- so that's the size  
21 of the workforce.

22 Q. What is the approximate size of the City budget?

23 A. The 13-14 fiscal year budget, which just became  
24 effective July 1st, is \$2.6 billion operating net capital.

25 Q. Within the office of the City Manager, what are  
26 the primary divisions?

27 A. There are a few. The budget office, the officer  
28 of employee relations, the officer of economic

1 development, intergovernmental relations. We have a  
2 communications office. Those would be the primary ones.

3 Q. You've talked about the City Manager being a  
4 position that's in the San Jose charter. How does the  
5 role of the City Manager compare with the role of the City  
6 Council and the mayor?

7 A. Yes. Well, we have a council manager form of  
8 government. And so if you think about the role of the  
9 mayor and the council like that of a board of directors,  
10 they are elected by the people to serve as the board of  
11 directors for the structure. They then hire a  
12 professional public manager, which is the City Manager, to  
13 run the administrative branch of the City.

14 Q. We've heard some testimony also about the various  
15 retirement boards. What is the role of the retirement  
16 boards in San Jose City government?

17 A. The retirement boards are fiduciaries of our  
18 retirement plans. They are appointed ultimately by the  
19 mayor and council to serve in that function. Being a  
20 fiduciary, they're responsible for the administration of  
21 the plans, the investments of the plans, and they are  
22 supported by the director of retirement services who  
23 serves as what is called the secretary to the boards.

24 Q. Do they have a role in setting the contribution  
25 rates required from the City for pension and retiree  
26 health benefits?

27 A. Absolutely. That's a key function of the boards.

28 Q. Just to kind of put things in perspective, could

1 you give us just a brief description of the timeline over  
2 the year for the creation of the City budget.

3 A. The budget seems like a year-round process. There  
4 are some key milestones, however. We do a forecast  
5 typically in February of the current fiscal year that  
6 looks ahead at what the fiscal situation will look like  
7 the following year, which is actually the year we would  
8 budget for, and begin to compare a budget, then four years  
9 beyond that. That's the forecast part of that. That  
10 typically happens in February. That then kind of  
11 positions the context for what we are going to be  
12 establishing a budget within.

13 So that then the mayor, whose role under the  
14 charter is to provide a budget message, which is a policy  
15 direction to the City Manager, that typically comes out in  
16 March and is adopted by the full council. Once that is  
17 adopted, it becomes policy guidance for the manager to  
18 formulate the proposed budget, which are the charter  
19 required of the City Manager, to propose by May 1st.

20 And then between May 1st, the time it's published,  
21 and the time the budget is adopted, by June 30, there are  
22 deliberations by the council. Again, the mayor's role is  
23 to take the manager's proposed budget, take the input  
24 that's resulted from the deliberations and all the  
25 proceedings, and formulate perhaps amendments to the  
26 manager's proposed budget that goes before council and  
27 ultimately is adopted and enacted as the adopted budget.

28 Q. Who actually adopts the City budget?

1 A. The mayor and City Council.

2 Q. Is there any particular requirement attached to  
3 the budget?

4 A. We must have an adopted, balance budget in place  
5 by the end of the fiscal year.

6 Q. When is the end of the fiscal year?

7 A. Our fiscal year goes from July 1st to June 30 each  
8 year.

9 Q. In connection with this budget process, do you  
10 generally prepare any kinds of charts or presentations for  
11 the City Council?

12 A. Yes.

13 Q. Would you please look at what's been premarked as  
14 Exhibit 6016, which I believe is in binder number six.

15 THE COURT: This might be a good time to take our  
16 afternoon break, so we'll be in recess for ten minutes.

17 (Recess.)

18 THE COURT: Ms. Figone, you're still under oath.

19 BY MS. ROSS:

20 Q. Ms. Figone, before the break, I asked you to look  
21 at what's been premarked as Exhibit 6016. Can you tell us  
22 what this document is.

23 A. Yes. It's a representation of \$670 billion in  
24 cumulative general fund shortfalls that were balanced over  
25 the period of 2002-3 through 2012-13 with an update for  
26 the current fiscal year.

27 Q. And why is this document created?

28 A. This is a document that's been created now for

1 quite some time by our budget office as a way to present  
2 the historical perspective on the general fund shortfalls  
3 and results of those shortfalls that the City has been  
4 working through for over the last decade.

5 Q. What do you use the document for?

6 A. We use it to keep in front of the City Council and  
7 the public, really the paths that we've been on for over a  
8 decade. It's again used in the course of budget  
9 presentations.

10 Q. And how is it prepared?

11 A. It is prepared by our budget office by pulling the  
12 general fund shortfall gap that had to be balanced in that  
13 particular fiscal year, and then the number of positions,  
14 all funds have had to be cut, and then the resulting  
15 effects on our workforce with the balance of the positions  
16 that remain.

17 Q. Is it documents prepared in the normal course of  
18 the operations of the budget office?

19 A. Yes, it is.

20 Q. And is this document kept in the normal course of  
21 business by the budget office?

22 A. Yes, it is.

23 Q. And is this a true and accurate copy of the data  
24 that is kept in the normal course of business?

25 A. Yes.

26 Q. Have you personally verified this data?

27 A. Yes, I have.

28 MS. ROSS: Your Honor, we move Exhibit 6016 into

1 evidence.

2 MR. ADAM: Objection, your Honor, from the POA, as  
3 to relevance.

4 MR. PLATTEN: Joined by Sapien, Mukhar, and  
5 Harris.

6 MR. SILVER: Objection on behalf of the retired  
7 employees. Completely irrelevant to the issues in our  
8 case.

9 MR. PATERSON: AFSCME joins too.

10 THE COURT: Ms. Ross, would you address the  
11 objections.

12 MS. ROSS: Your Honor, one of the issues in the  
13 case is the City's motive and intent in presenting  
14 Measure B to the voters, and one of the elements of that  
15 is the City's fiscal situation and concern about remedying  
16 that fiscal situation, and this is evidence of, in fact,  
17 the City's fiscal situation and, of course, what the City  
18 Council was told about the fiscal situation, and the City  
19 Council is the entity that put Measure B on the ballot.

20 MR. SILVER: None of that explanation pertains to  
21 the issues in our case.

22 MR. PLATTEN: Same with regards to Sapien, Mukhar,  
23 and Harris, your Honor.

24 MR. ADAM: And the POA, your Honor.

25 THE COURT: Based on the cross-examination of  
26 Ms. Erickson, I don't see how this objection should be  
27 sustained. I'll overrule the objection.

28 MR. SILVER: With respect to our case, I didn't

1 cross-examine Ms. Erickson on anything but the very narrow  
2 issues related to our case.

3 THE COURT: Go ahead, Ms. Ross.

4 MS. ROSS: Thank you, your Honor.

5 BY MS. ROSS:

6 Q. Ms. Figone, so let's look at this document  
7 entitled 670 million in cumulative general fund shortfalls  
8 balanced through 2012-2013. What does the first column of  
9 this document detail under total general fund shortfall?

10 A. Yes. This presents the annual general fund  
11 shortfall that ultimately the council had to resolve each  
12 of these fiscal years.

13 Q. What do you mean when you say ultimately the  
14 council had to resolve it?

15 A. Well, when we had a projection what the shortfall  
16 was going to be for any given fiscal year, then the City  
17 Manager's proposed budget brought forward a proposed  
18 budget that would resolve that shortfall, and ultimately,  
19 then, the council would adopt the budget that would  
20 include remedies for that particular shortfall.

21 Q. When you say remedies for shortfall, do you mean  
22 budget cuts?

23 A. Budget cuts.

24 Q. Then what is the -- what does the second column  
25 here, City wide position changes all funds, what does that  
26 tell us?

27 A. That column tells us the number of positions in  
28 all of the City funds, not just the general funds that

1 were cut, corresponding to the number in the left. And  
2 so, for example, the first negative 36 would indicate that  
3 we -- the City cut 36 positions that year, all funds.

4 Q. And what does the right-hand column tell us, City  
5 wide positions all funds?

6 A. That would tell us the number of positions that  
7 then remained after that 36 positions was cut.

8 Q. Now, going down to --

9 THE COURT: Can I just ask to clarify. First  
10 column after the list of years says total general fund  
11 shortfall. That's got numbers in parenthesis. So that's  
12 not a negative shortfall. That's a shortfall; right? I  
13 want to make sure I'm understanding this correctly.  
14 There's a shortfall in 02-03 of 46.3 million.

15 MS. ROSS: And the requirement that that amount be  
16 cut from whatever revenues the City has in order to  
17 balance the budget.

18 THE COURT: Okay. I was finding the reference of  
19 shortfall a little confusing given the parenthesis, but  
20 now I understand.

21 BY MS. ROSS:

22 Q. Ms. Figone, do you want to elaborate a little bit  
23 on your use of the term shortfall? Is the 46.3 million,  
24 in fact, the amount that had to be cut to balance the  
25 budget?

26 A. Correct. The general fund was short \$46.3 million  
27 when compared to the revenues available.

28 Q. And when you recommend budget cuts, what are you

1 recommending? What kinds of cuts are you recommending  
2 generally?

3 A. Well, we would recommend reducing services or  
4 lowering costs in some ways, so it doesn't always mean a  
5 service goes away. It could mean that the service is  
6 provided in another way but at a lower cost, modified in  
7 some way. So it could be any range of things.

8 Q. Does it include laying off employees?

9 A. Yes. Eventually it did as we look at this  
10 ten-year period.

11 Q. If you would look down here at the subtotal,  
12 \$670 million. What does that signify?

13 A. This says that over in the cumulative, over this  
14 period from 2002-3, 2012-13, the City had to cut \$670  
15 million from the general fund.

16 Q. And then if we look at the next column under the  
17 subtotal, 1,959, what does that number mean?

18 A. That means we reduced our workforce by that  
19 number. So almost 2,000 positions.

20 Q. And when you say you reduced the workforce, how  
21 was the workforce reduced?

22 A. By cutting positions that were in the workforce.  
23 Some of them vacant and some of them filled. But that is  
24 the result over this ten-year period or so that we cut  
25 2,000 positions from our workforce.

26 Q. When you say you cut some of the positions that  
27 were filled, what does that mean?

28 A. That means if there was a position that had an

1 employee in the position and it wasn't vacant and that  
2 position was cut, then that individual -- there are rules,  
3 and so I won't get into a lot of detail about bumping and  
4 so forth, but in essence someone would end up conceivably  
5 without a job.

6 Q. And when you look at this final column, city-wide  
7 positions, all funds, how do you compare the top number,  
8 7,745, with the 5,651?

9 A. So this says that the beginning of this period  
10 that is shown, so 2002-3, we had just a little over 7400  
11 positions under the City, and by this point in time, we  
12 now have just a little over 5600 positions in the City.

13 Q. If you look at the period 2010-'11 and 2011-12,  
14 this period has the highest number attached to it as a  
15 shortfall. What was happening during that period?

16 A. Yes. Actually, I would -- if I might actually  
17 direct your attention to 2009-10 as really the beginning  
18 of three very, very difficult years for our workforce and  
19 for our community. And so what you see over those  
20 three-year periods are year after year of very significant  
21 shortfalls totaling about 300, 318 million or so dollars  
22 and about 16 -- 15, 1600 positions. So these were very,  
23 very significant years that we've had to work through.

24 Q. And for 2013-2014, there's the \$10.4 million  
25 number that's not a negative. What does that signify?

26 A. Well, from my perspective, it was a bit of relief,  
27 certainly. Not as much as what we need. And what it  
28 means is that after year after year after year of cuts,

1 concessions, layoffs, we finally reached a point where we  
2 were able to bring forward a budget that didn't require  
3 cutting with a very modest \$10 million cushion. There are  
4 some innerworkings of how that happened. Nonetheless, it  
5 is not a negative.

6 Q. Is this 2013-2014, is that this year's budget?

7 A. Yes.

8 Q. Again, are you in negative territory there?

9 A. We are. It is, again, very small compared to what  
10 we have been through, but it is a negative.

11 Q. When you returned to San Jose in 2007 as City  
12 Manager, were you given any direction in terms of  
13 addressing the fiscal problems of the City?

14 A. Yes. By the time I entered in July of 2007, the  
15 2007-8 budget had already been adopted by the council.  
16 And before my arrival, they had established as a very key  
17 objective, resolving -- eliminating, I should say, the  
18 structural deficit within -- then it was viewed to be a  
19 three-year period of time. So that became a very  
20 important goal of my literally walking in the door.

21 Q. Did you create a plan?

22 A. Yes, I did. It was a structural deficit  
23 elimination plan.

24 Q. Can you explain to us briefly what that plan  
25 consisted of.

26 A. Yes. The plan consisted of a variety of  
27 strategies, primarily falling under three categories:  
28 cost savings, revenue increases, and service reductions

1 and eliminations. And the plan was the result of almost a  
2 year-long process involving a variety of stakeholders and  
3 professional staff work to generate ideas, cost them out,  
4 and then present strategies to the mayor and City Council.

5 Q. Was your plan successful?

6 A. Actually, many of the elements of the plan were  
7 implemented. As we expected, some were just not that  
8 feasible, at least in a short period of time. However, we  
9 did find that as things got worse, there weren't enough  
10 strategies in that plan to really deal with what we were  
11 experiencing.

12 Q. And so were you tasked with formulating yet  
13 another plan?

14 A. Yes. In 2011, as I remember, I was asked to bring  
15 forward another plan which was called the fiscal reform  
16 plan.

17 Q. And just briefly, what were the basic elements of  
18 the fiscal reform plan?

19 A. Again, the elements fell into the same types of  
20 categories: cost savings, revenue enhancements, service  
21 reductions and eliminations. But this time given the now  
22 a couple-year plus experience the council had and we all  
23 had with how difficult it was to resolve these issues, the  
24 council direction was a bit more specific in terms of a  
25 budget savings target, keeping retirement costs down, and  
26 trying to work to bring services back to the January 1,  
27 2011, levels.

28 Q. Now, you mentioned retirement costs. How were

1 they implicated in your yearly budgets?

2 A. Well, the retirement costs are basically budgeted  
3 based on the rates that the Retirement Board had set. And  
4 so once those rates are set, and they are typically in  
5 time for the proposed budget, those rates are plugged in,  
6 so to speak, and the calculations are done, and the  
7 resulting budgetary requirement is reflected in the  
8 proposed budget.

9 Q. And approximately what percentage of your budget  
10 were the retirement costs during this 2011 time period?

11 A. Actually, I couldn't be specific about that time  
12 period. I can tell you in the 2013-14 budget, all funds,  
13 it's about 275 million, about 211 million in the general  
14 fund representing about 22 percent or so of the general  
15 fund currently.

16 Q. Does that number concern you, 22 percent of the  
17 general fund?

18 A. It's 1/5th of the general fund, and so it is  
19 significant in terms of the capacity to provide other  
20 services and have the workforce that we need in order to  
21 serve the residents of our community.

22 Q. Were the costs of retirement benefits a factor in  
23 the budget shortfalls that we looked at with Exhibit 6016?

24 A. Yes. As we have looked at retirement costs over  
25 time and other documents that are raised in particular  
26 from our boards, the retirement costs have increased over  
27 time, and there is a steeper rise towards the more  
28 difficult years that we have worked through.

1 Q. So let's go back to the fiscal reform plan. What  
2 were the basic revenue raising strategies of that plan?

3 A. We had revenue raising strategies -- actually, in  
4 the structural deficit elimination plan, some of those  
5 were continued as ideas in the fiscal reform plan. Over  
6 that period between the two plans, some of the ideas we  
7 found just weren't that feasible.

8 In the fiscal reform plan, however, we do have  
9 revenue raising ideas such as increasing the sales tax and  
10 modernizing our business license tax to name a couple.

11 Q. And what were the other elements of the fiscal  
12 reform plan besides raising revenue?

13 A. Yes. Cost savings. And so, again, as a strategy  
14 that's both plans, those would include efficiencies,  
15 consolidating departments, lowering the cost of personnel,  
16 because we are a service organization and our primary  
17 costs are associated with our people and member services.  
18 So many dimensions of cost savings that we pursued.  
19 Within those cost savings were areas to explore for saving  
20 costs of the retirement system and other benefit  
21 structures. And then in the area of service reductions  
22 and elimination, which, unfortunately, often became the  
23 default as we were faced with having to balance a budget  
24 and maybe not having some strategies implemented quickly  
25 enough, we've had to take significant service reductions.

26 Q. In 2011, when you began to see the significant  
27 service reduction, did you prepare presentations for the  
28 City Council that detailed the service reductions?

1           A.    Yes.  The service reduction had been happening  
2           over, in particular, this very difficult three-year  
3           period, and so in the fall of 2011, as I remember in  
4           September, we actually pulled together a few charts just  
5           to get them a snapshot of a sampling, quite frankly,  
6           because there were many, many cuts of some of the key  
7           service areas that had been reduced and what the result  
8           was in terms of the service.

9           Q.    Were the charts that you prepared for this purpose  
10          presented to the City Council?

11          A.    Yes, they were.  We've actually used them in other  
12          presentations and updated them periodically.

13          Q.    How were those charts prepared?

14          A.    They were prepared by our budget office, by  
15          actually pulling samples of the budget proposals that were  
16          ultimately adopted by the council.

17          Q.    And were these presentations prepared in the  
18          normal course of the business of the budget office?

19          A.    Yes.

20          Q.    And were they kept on file as business records of  
21          the budget office?

22          A.    Yes.

23          Q.    Were they periodically updated?

24          A.    Yes.

25          Q.    And I'm going to ask you to look at page 5113.  Is  
26          this a true and accurate copy of one of the budget  
27          balancing presentations that you gave to the City Council?

28                THE COURT:  You mean Exhibit 5013?

1 MS. ROSS: Yes, your Honor. Exhibit 5113.

2 MR. ADAM: Which of your six binders would that  
3 be?

4 THE COURT: Binder one.

5 THE WITNESS: May I answer?

6 BY MS. ROSS:

7 Q. Have you located Exhibit 5113?

8 A. Yes.

9 Q. What is 5113?

10 A. 5113 is a document that has a slide that shows  
11 budget balancing service reduction, elimination, and its  
12 focus is on police and fire.

13 Q. And was this document prepared in the normal  
14 course of the budget office business?

15 A. Yes.

16 Q. And is it kept on file as a business record?

17 A. Yes.

18 Q. And is it -- does it accurately reflect the data  
19 that was compiled by the budget office?

20 A. Yes.

21 Q. And have you confirmed the information on this  
22 document?

23 A. Yes.

24 MS. ROSS: Your Honor, we offer City Exhibit 5113  
25 into evidence.

26 MR. SILVER: Your Honor, same objection with  
27 respect to our case. It has no relevance.

28 MR. PLATTEN: Sapien and Mukhar, Harris join in

1 that objection.

2 MR. ADAM: POA joins as well.

3 MR. PATERSON: AFSCME joins.

4 THE COURT: Overruled. 5113 is received.

5 (Defendants' Exhibit 5113, previously marked for  
6 identification, was received in evidence.)

7 BY MS. ROSS:

8 Q. Ms. Figone, the title of this is Budget Balancing  
9 Service Reduction Eliminations. What areas of City  
10 government is this related to?

11 A. Yes. This relates to the police and fire area.

12 Q. And there are some graphs on the right-hand side,  
13 and there is a graph that is entitled Sworn Police. What  
14 does that graph tell us?

15 A. This tells us that between the period 2008-9,  
16 where we had 1395 sworn police on our force, to 12 --  
17 excuse me -- 2012-13 were down to 1109, which is down 21  
18 percent from our peak.

19 Q. And how were those reductions made?

20 A. Well, they were made by actually cutting the  
21 services and the people who provide the services that are  
22 somewhat highlighted on the left side in the bullet. So  
23 we put police officer positions and a variety of units,  
24 police school liaison program. This is not a sworn  
25 position, but we've reduced crime prevention. So we  
26 actually had to take out of the budget the positions that  
27 would, through our officers, provide those services to the  
28 public.

1 Q. Were these positions not filled, or were there  
2 layoffs involved?

3 A. There were layoffs. To the degree possible, we  
4 always try to go to the vacant position first to avoid  
5 layoffs, but it just became impossible as we got into this  
6 period.

7 Q. And looking at the graphs above sworn fire, what  
8 do those graphs tell you?

9 A. Again, similarly, we had to reduce our fire force.  
10 So the slide shows -- the graph shows we were at 758  
11 positions in 2007-8, and at 2012-13, we were at 678, down  
12 11 percent.

13 Q. How were those reductions done?

14 A. Again, did a variety of things. Department tried  
15 to be very creative by reducing overtime, which then  
16 caused us to have to brownout stations, but there was as  
17 much of a objective as possible to avoid layoffs. We  
18 reduced the number of staff on our truck companies by one.  
19 So there were a variety of mechanisms, ultimately  
20 resulting in the reduction of these positions.

21 Q. Would you look now at what's marked as City  
22 Exhibit 5114. Do you have that in front of you?

23 A. Yes, I do.

24 Q. What is this exhibit?

25 A. Again, it is a budget balancing service reduction  
26 elimination exhibit, but it gives us a snapshot of  
27 services in what we would call the neighborhood services  
28 area. In particular, libraries, park, park maintenance,

1 code enforcement, those types of programs.

2 Q. Is this one of the presentation slides that you  
3 prepared to keep the City Council informed about the  
4 situation?

5 A. Yes.

6 Q. And was this prepared in the normal course of the  
7 budget office operations?

8 A. Yes.

9 Q. And is it kept on file as a business record of the  
10 budget office?

11 A. Yes.

12 Q. Is it periodically updated?

13 A. Yes.

14 Q. Does it accurately reflect the cuts that occurred?

15 A. Yes.

16 Q. Have you verified the information?

17 A. Yes.

18 MS. ROSS: Your Honor, we offer City Exhibit 5114.

19 MR. ADAM: Same objection on relevance, your  
20 Honor, for the record.

21 MR. PLATTEN: Sapien, Mukhar, and Harris  
22 plaintiffs join the objection.

23 MR. SILVER: Same objection we have been making.  
24 Not relevant to our case.

25 MR. PATERSON: AFSCME joins.

26 THE COURT: Overruled. 5114 is received.

27 (Defendants' Exhibit 5114, previously marked for  
28 identification, was received in evidence.)

1 BY MS. ROSS:

2 Q. So, Ms. Figone, you said this is service reduction  
3 eliminations in yet another area. What area is this?

4 A. We typically call it our neighborhood services  
5 area.

6 Q. And what does it tell you about what happened with  
7 the libraries?

8 A. So the library graph shows the reduction in branch  
9 hours where the libraries are open per week. In 2007-8,  
10 our libraries were open 51 hours a week. As of 2012-13,  
11 they're open 34 hours a week. So, generally, we went from  
12 six or seven days a week to four days per week.

13 Q. And what about the bottom graph, parks,  
14 recreation, and neighborhood services, department  
15 staffing? What happened there?

16 A. Again, this gives us a snapshot of where the  
17 staffing was in our parks and recreation neighborhood  
18 services department in 2002-3 at 878 positions, down 45  
19 percent from this peak in 2012-13, to 480 positions.

20 Q. Did these reductions involve layoffs?

21 A. Yes, they did.

22 Q. Do you remember approximately how many layoffs  
23 were involved?

24 A. I don't remember. There was a lot of disruption,  
25 and people did lose their jobs. The most significant  
26 number the City has ever seen.

27 Q. I have another slide I would like you to look at.  
28 It's City Exhibit 5115. Could you tell us what this

1 exhibit is.

2 A. Yes. This is, again, another budget balancing  
3 service reductions and eliminations exhibit, and it  
4 reflects services in what we would call transportation and  
5 street-related services.

6 Q. Is this also a slide that was part of your  
7 presentation to the City Council?

8 A. Yes.

9 Q. And was it prepared in the normal course of budget  
10 office operations?

11 A. Yes.

12 Q. Is it kept in the normal course of business at the  
13 budget office?

14 A. Yes.

15 Q. Is it periodically updated?

16 A. Yes.

17 Q. Is it a true and accurate rendition of the budget  
18 decisions that were made?

19 A. Yes.

20 Q. Is the information in it accurate?

21 A. Yes.

22 MS. ROSS: Your Honor, the City offers Exhibit  
23 5115.

24 MR. ADAM: Objection, your Honor. The POA, on  
25 relevance grounds, but also at a certain point we're  
26 starting to get cumulative here. We'd moved from library  
27 reductions to pavement conditions.

28 MR. PLATTEN: Plaintiff Sapien, Mukhar, and Harris

1 join the objections.

2 MR. SILVER: Retired Employees object on the same  
3 grounds as before. No relevance to our case.

4 MR. PATERSON: AFSCME joins. And I'd like to pose  
5 a Section Code 352. Evidence is becoming more prejudicial  
6 than it is relevant to this case.

7 THE COURT: How many more exhibits of this nature  
8 are you going to present?

9 MS. ROSS: I have one more.

10 THE COURT: Objection is overruled. 5115 is  
11 received.

12 (Defendants' Exhibit 5115, previously marked for  
13 identification, was received in evidence.)

14 BY MS. ROSS:

15 Q. Ms. Figone, could you tell us what this Exhibit  
16 5115 illustrates.

17 A. It illustrates the types of reductions that were  
18 taken, the cuts, if you will, in the area of  
19 transportation, so traffic maintenance programs, street  
20 maintenance programs, sidewalk repairs, island landscaping  
21 and traffic calming services, for example. The graph  
22 shows that we've now moved from sealing residential and  
23 arterial streets in 2001 to, as the graph shows in miles,  
24 169 miles of residential and 67 in arterial. Now in  
25 2012-13, we are not sealing residential streets, and we're  
26 only planning to seal 44 miles of arterial streets.

27 Q. What does average pavement condition index mean?

28 A. There is an index in the pavement management world

1 which would -- is an indicator of the condition of the  
2 City's streets and pavement condition, because pavement of  
3 roads over time, if it's not sealed or repaired, it only  
4 gets more expensive because it deteriorates. So this  
5 shows that on a scale of 100, which would be excellent,  
6 the City in 2003-4 was at 68, which is okay. Not great.  
7 2012-13 went down further, but if the current spending  
8 trend continues, by 2019-20, it's estimated by the staff  
9 that we'll be at a pavement index of about 46, which is  
10 quite poor.

11 Q. I have one last slide I'd like you to look at,  
12 City Exhibit 5116 on service reductions, eliminations. Is  
13 it also a slide that you used to educate the City Council  
14 about the cuts that were occurring?

15 A. Yes.

16 Q. And was it prepared in the normal course of the  
17 budget office operations?

18 A. Yes.

19 Q. Was it kept on file as a business record?

20 A. Yes.

21 Q. Is it a true and accurate rendition of the cuts  
22 that occurred?

23 A. Yes.

24 Q. Has it been kept up to date?

25 A. Yes.

26 Q. Have you verified the information on it?

27 A. Yes.

28 MS. ROSS: Your Honor, we offer City Exhibit 5116.

1 This is our last exhibit of this nature.

2 MR. ADAM: I'll just state relevance, your Honor.

3 MR. SILVER: Same, objection, your Honor,  
4 relevance.

5 MR. PLATTEN: Same objection.

6 MR. PATERSON: AFSCME joins.

7 THE COURT: Overruled. 5116 is received.

8 (Defendants' Exhibit 5116, previously marked for  
9 identification, was received in evidence.)

10 BY MS. ROSS:

11 Q. Ms. Figone, if you can tell us briefly what this  
12 slide represents.

13 A. Yes. This represents a sampling of what we could  
14 call the extra strategic support. Those are internal  
15 support services to the rest of the organizations such as  
16 finance, human resources, information technology,  
17 organizational management, and leadership and support.  
18 Again, it shows that no area was spared during this  
19 period. And so the staffing reductions and information  
20 technology are shown on the right going from 131 positions  
21 in 2002-3 to 92 in 12-13, and human resources from 75 in  
22 2002-3 to 54 in 12-13, down respectively, each of those  
23 operations, 30 and 28 percent.

24 Q. The exhibits that we just went through, do they  
25 describe the situation of the City right now in terms of  
26 its services?

27 A. I would say yes. We're at quite unacceptable  
28 levels.

1 Q. When you say the City is at unacceptable levels of  
2 services, what do you mean?

3 A. What I mean is we do not have the capacity in our  
4 5600-person workforce to adequately serve the residents of  
5 our City, just under a million people. And, in fact, we  
6 are not at the level that the council would like us to get  
7 back to which is January 1st, 2011, which we all know was  
8 not adequate but at least would be a starting point.

9 Q. What level are you at right now historically?  
10 What historical level are you at?

11 MR. ADAM: Objection. Vagueness. Level of what?

12 THE COURT: Sustained.

13 BY MS. ROSS:

14 Q. Is there a level of the City budget and City  
15 staffing from the past that corresponds to the current  
16 level of the City budget and staffing?

17 MR. ADAM: Same objection, your Honor.

18 THE COURT: Overruled.

19 THE WITNESS: The way we've talked about it  
20 publicly and as I've made presentations is the number of  
21 staff, the 55, 5600 positions is about the same level that  
22 we were at in 1988-89 when we had 200 to 250,000 fewer  
23 residents.

24 BY MS. ROSS:

25 Q. I'd like to turn to another topic and ask you  
26 about a statement that was made at one point about a \$650  
27 million projected City cost for retirement. Did you ever  
28 hear that number used?

1 MR. PLATTEN: Objection. Relevancy. Exact  
2 grounds raised when we attempted to cross-examine  
3 Ms. Erickson on this issue.

4 THE COURT: I think there was a different issue  
5 with the question posed to Ms. Erickson. Overruled.

6 MS. ROSS: Your Honor, we made a motion that this  
7 evidence not come in, and it was opposed.

8 THE COURT: I overruled the objection. Do you  
9 want me to change my mind?

10 MS. ROSS: No. Thank you, your Honor.

11 BY MS. ROSS:

12 Q. So when did you first hear this figure of \$650  
13 million used in connection with a projection of City costs  
14 for retirement?

15 A. It was at a study session on February 14, 2011, as  
16 I remember, and the study session was between our City  
17 Council and our senior staff discussing the budget cycle  
18 we were about to enter and some of the issues that we were  
19 facing.

20 Q. What is the purpose of a study session?

21 A. Study sessions are not regular council meetings,  
22 and they can be more formal or informal, and the purpose  
23 is to allow the council to study, quote, unquote, a  
24 particular topic that they either are interested in and  
25 have asked us to bring forward or the administration  
26 believes we should be discussing with council.

27 Q. And what's the format for the study session?

28 A. The format in particular for this study session --

1 and we've typically had these with the council about the  
2 same time frame each year -- are ideally more like a round  
3 table, whether or not there's a table. But they're not  
4 always from the days, so to speak, in that formality, so  
5 it's kind of a free-flowing exchange, even though there's  
6 an agenda. They're open to the public. They're  
7 structured to them. They're designed to help build  
8 knowledge, for example, in certain cases.

9 Q. So the study session is where you first heard the  
10 \$650 million figure?

11 A. Yes.

12 Q. And who used that figure?

13 A. The then director of retirement services, Russell  
14 Crosby.

15 Q. What is the role of the director of retirement  
16 services?

17 A. The director of retirement services is a  
18 department head over the department of retirement. In  
19 this case, the director also serves as the secretary to  
20 the retirement plans and is responsible for the  
21 appropriate administration of the plans in support of the  
22 boards and so oversees the operations of the retirement  
23 department.

24 Q. Does the director of retirement services work with  
25 actuaries for the retirement system?

26 A. Yes, they would be responsible for contracting  
27 with the actuary, ensuring the boards have the data and  
28 the structure that they need to make their fiduciary

1 decisions.

2 Q. And to your recollection, what gave rise to the  
3 use of the \$650 million statement?

4 A. Well, there was a conversation at this particular  
5 study session which was globally about budget, the budget  
6 problems we were facing, but had a very specific  
7 conversation going on about retirement. Retirement costs,  
8 what causes the cost to rise, actuarial valuation, what do  
9 those mean. So there were questions posed to the director  
10 of retirement about how valuations work. In fact, we had  
11 planned to and we did present some of the elements of a  
12 valuation. In fact, it was one of the slides at our  
13 presentation.

14 And so in that dialog, we actually had also talked  
15 about some of the cost that we would expect to rise and  
16 what that was looking like. I think that our number was  
17 about 400 million by 15-16. And out of that discussion,  
18 the director was asked about estimates and how that  
19 valuation would work.

20 Q. Was there concern during that discussion that the  
21 assumptions that had been used by the actuaries were not  
22 correct or had not been correct in the past?

23 A. No. That did not really come up during that  
24 conversation.

25 Q. Was there any conversation about the assumptions  
26 that had been used?

27 A. I don't remember discussions about assumptions per  
28 se. I do remember the director in response to a question

1 and the direction -- the questioner offering his  
2 perspective on how bad things could get because, in his  
3 belief, some of the actuarial still wasn't at the right  
4 levels. So he was talking about if the valuations had, as  
5 he called them, all the dials set at the right level, that  
6 things could get worse.

7 Q. Was this study session taped?

8 A. Yes, it was.

9 Q. Have you made a tape of Mr. Crosby's comments?

10 A. Yes, we have. In fact, we've included it as a  
11 link in several documents.

12 Q. And have you provided a copy of that tape for us  
13 here today?

14 A. Yes.

15 Q. Have you reviewed that tape?

16 A. Yes.

17 Q. And is that -- let me go back. Is the taping of  
18 the study sessions done in the normal course of City  
19 business?

20 A. Yes. It's a public record.

21 Q. And is it kept as a official City record?

22 A. Yes.

23 Q. And is it available on the City's website?

24 A. Yes.

25 Q. In your review of the tape that you made today, is  
26 that a true and accurate rendition of what Mr. Crosby said  
27 at the study session?

28 A. Yes.

1 MS. ROSS: Your Honor, we have the tape, and we  
2 have a transcript, and we would like to mark -- the tape  
3 has already been premarked as Exhibit 5110. And we'd like  
4 to mark the transcript as 6067, which is our next in  
5 order.

6 (Defendants' Exhibit 6067 was marked  
7 for identification.)

8 THE COURT: Refresh my memory if I'm mistaken.  
9 There was a motion. It was denied. That was when there  
10 was an intent issue in the case. Where are we going with  
11 this?

12 MS. ROSS: Your Honor, we still have an intent  
13 issue in this case because under the right to petition  
14 cause of action, which is being pursued by both AFSCME and  
15 the POA, one of the elements is whether the City had a  
16 legitimate public purpose in what it did. And the  
17 allegation, I believe, is that the City did not have a  
18 legitimate public purpose, and that somehow their figures  
19 were used for illegitimate purpose, and so we are trying  
20 to explain the genesis of the \$650 million statement.

21 MR. SILVER: Again, everything Ms. Ross said has  
22 no bearing whatsoever on the retirees' case. It's  
23 completely irrelevant to that case. I think it should be  
24 excluded at least with respect to our case.

25 MR. PLATTEN: Same with respect to Sapien, Mukhar,  
26 and Harris plaintiffs, your Honor. I also note we have  
27 not seen what's been identified as City's Exhibit 6067  
28 before. My quick perusal doesn't reflect the \$650 million

1 figure, so I'm not exactly sure.

2 MS. ROSS: It's at the end.

3 MR. PLATTEN: I don't see 650 printed.

4 THE COURT: I think you have to add 400 and 250 to  
5 get 650.

6 MS. ROSS: Yes, your Honor.

7 THE COURT: Finish the offer of proof, though. I  
8 understand what you said about the right to petition  
9 claims, but where are we going with this?

10 MS. ROSS: Your Honor, we're simply trying to show  
11 the origins of the \$650 million statement. It has been  
12 alleged that the \$650 million figure somehow had an origin  
13 that was improper or was used improperly, and so we're  
14 simply trying to show this is where the \$650 million  
15 statement came from. We're trying to show the source, who  
16 was the director of retirement services, and so just to  
17 have an accurate record of the origin of the statement and  
18 the context of the statement, which is very important  
19 because it was a projection made in an informal setting,  
20 sort of a brainstorming setting.

21 And it's my understanding that some of the parties  
22 do intend to continue to use the \$650 million statement in  
23 support of their claim, their right to petition claim, and  
24 if that's true, then we're entitled to show the origins of  
25 the statement.

26 THE COURT: Okay. Anything else from the  
27 plaintiffs?

28 MR. ADAM: Nothing, your Honor.

1 MR. PLATTEN: Nothing, your Honor.

2 THE COURT: Nobody is going to tell me that  
3 they're not pursuing evidence and argument approaches that  
4 Ms. Ross has referenced?

5 MR. SILVER: Your Honor, my clients aren't.

6 THE COURT: Right. I understand that you don't  
7 have a right to petition claim. I understand that.

8 MR. ADAM: Your Honor, POA is not objecting to  
9 this piece of evidence, but I would not agree with the  
10 characterization of our theory of the case that Ms. Ross  
11 just articulated.

12 THE COURT: I'm not expecting you to agree with  
13 her characterization of the case, but I'm not hearing  
14 anybody saying that they're not using that fact -- they're  
15 not presenting evidence, they're not using that fact for  
16 argument.

17 Is there anything you want to add, Mr. Paterson?

18 MR. PATERSON: It's probably redundant at this  
19 point, but I was going to say AFSCME disagrees with the  
20 summary of the law that Ms. Ross indicates to your Honor,  
21 but we're not going to object to the document.

22 THE COURT: So it does appear, then, that this is  
23 a piece of evidence that is relevant to rebut the right to  
24 petition claim, so I will allow it.

25 How do you propose to proceed?

26 MS. ROSS: Your Honor, we'd like to play the clip.  
27 It's longer than just Mr. Crosby's statement because we  
28 wanted to show the context of the statement and what led

1 him to make the statement. So the statement he makes is  
2 actually at the very end of the clip, and as your Honor  
3 said, he was adding 250 million to the projection of 400  
4 million which is how he got to the \$650 million.

5 THE COURT: Are you offering 5110?

6 MS. ROSS: Yes, I am, your Honor.

7 THE COURT: So I'm understanding the statements  
8 and objections that have just been made to relate to that.  
9 So I'm overruling that and receiving 5110.

10 (Defendants' Exhibit 5110, previously marked for  
11 identification, was received in evidence.)

12 THE COURT: So the next thing you want to do is  
13 play it?

14 MS. ROSS: Yes, we do, your Honor.

15 THE COURT: May we have a stipulation that the  
16 court reporter need not transcribe the audio?

17 MR. ADAM: So stipulated, your Honor.

18 MR. PLATTEN: So stipulated, your Honor.

19 MR. PATERSON: Yes, your Honor.

20 MS. ROSS: Yes.

21 MR. SPELLBERG: So stipulated.

22 THE COURT: Go ahead.

23 (Video played and not reported.)

24 MR. ADAM: Your Honor, for clarity of the record,  
25 can I point out that the video we watched appeared to  
26 begin -- or the video appeared to not encompass all of the  
27 transcript. It appeared to begin on the second to last  
28 page, about halfway down where Crosby starts by saying,

1 "Correct, and as well," through the end of the transcript.

2 THE COURT: All right. Any other comments on the  
3 transcript 6067? I agree with Mr. Adam's observation.

4 Any other questions for Ms. Figone?

5 BY MS. ROSS:

6 Q. Ms. Figone, was there a point in time -- let's  
7 back up. What was the date of Mr. Crosby's statements  
8 about the 400 million plus 250 million more?

9 A. February 14, 2011.

10 Q. Was there a time when the issue of the use of the  
11 \$650 million statement prompted you to attempt to inform  
12 the City Council about the origins of the statement?

13 A. Yes. Almost a year later, 2012, I believe,  
14 February 9, the memo was dated.

15 Q. What prompted you to communicate with the council?

16 A. Well, we actually got somewhat surprised by an NBC  
17 11 News story on the \$650 million statement, and there  
18 were implications to the news story that was misleading of  
19 the council, and I don't remember all the elements, but it  
20 was very, very controversial, and so I felt it was  
21 important to convey to the council and the public really  
22 the fact of the matter and try to set the context.

23 As I remember it, I think we included a link to at  
24 least this segment as well as copies of what was talked  
25 about in the study session. It was quite a significant  
26 packet, as I remember.

27 Q. Is it part of your job as City Manager to keep the  
28 City Council informed about controversial issues involving

1 City government?

2 A. Yes. Oftentimes we'll trigger what we call  
3 information memos or do what we can to respond to what we  
4 might be hearing in the public about what the City is  
5 doing.

6 Q. And do sometimes you take the initiative and  
7 author such a memo?

8 A. Yes. That was this case.

9 Q. And sometimes you're asked to author a memo?

10 A. Sometimes, yes.

11 Q. If you would look at what's been marked as City  
12 Exhibit 5111. Do you see that exhibit?

13 A. Yes.

14 Q. What is this exhibit?

15 A. This exhibit is the memo that I just referred to  
16 that I issued in response to the NBC Bay Area News story.

17 Q. And what information were you conveying to the  
18 City Council at this point?

19 A. We were trying to do a few things. We were trying  
20 to convey that now there was this controversy, and we were  
21 trying to communicate the context for those statements and  
22 reminding them of their study session just about a year  
23 ago, and because some of the claims were -- this was a  
24 very heated time, you need to remember. We were  
25 negotiating with our employees. There were concessions.  
26 There was a lot of upset in the organization. We tried to  
27 set the record straight that the 650 number drove 10  
28 percent pay cuts or council direction and labor

1 negotiations. None of that was true, but it was kind of  
2 swirling out there.

3 So we wanted to basically show the chronology of  
4 the unfolding of decisions, in particular, around the \$400  
5 million projection, which we did use, and later, in fact,  
6 had verified by Cheiron actuary. They actually said the  
7 number could be 431. So we were trying to set the record  
8 straight about the origin of the 650 and the fact that it  
9 wasn't used in any of the council direction on the actions  
10 we were engaged in at that point in time.

11 Q. Did you author this February 9, 2012, memo?

12 A. It is my signature. I was very involved with it.  
13 Of course, my staff helped me pull it together.

14 Q. And it has a number of exhibits attached to it.  
15 Did you -- are all those exhibits that are part of  
16 Exhibit 5111, are they all part of the memorandum that you  
17 submitted to the City Council?

18 A. Yes. There are attachments.

19 Q. And was this memorandum prepared by you in the  
20 ordinary course of your duties as City Manager?

21 A. Yes.

22 Q. And is this memo kept on file by the City as a  
23 public document?

24 A. Yes, it is.

25 Q. And is what we have here as Exhibit 5111 a true  
26 and accurate copy of your memorandum and the attachments?

27 A. Yes.

28 Q. Have you looked at this memo and determined that

1 the information in it is accurate?

2 A. Yes.

3 MS. ROSS: Your Honor, we move Exhibit 5111 into  
4 evidence.

5 MR. SILVER: Same objection, your Honor.  
6 Relevance with respect to our case.

7 MR. ADAM: No objection from the POA.

8 THE COURT: The relevance objection is overruled.  
9 The exhibit is received, 5111.

10 (Defendants' Exhibit 5111, previously marked for  
11 identification, was received in evidence.)

12 BY MS. ROSS:

13 Q. Ms. Figone, I want to follow up on your comments  
14 about the \$400 million projection and just ask you a few  
15 questions about that.

16 What time period -- during what time period were  
17 you given the \$400 million projection that you referenced,  
18 and what was it a projection for?

19 A. We were, of course, engaged in a lot of problem  
20 solving and scenario playing around the devastating  
21 problems that we were trying to confront, and so we were  
22 projecting the potential retirement costs over a five-year  
23 period, and so the \$400 million number is a total that was  
24 projected at that point in time. Things have since  
25 changed for 15-16.

26 Q. So that was not a current number? That was a  
27 projected number?

28 A. It was a projected number.

1 Q. And what is the -- what's your understanding of  
2 projections of future retirement system costs?

3 A. Well, the projections are not the budgeted number  
4 for the year that we're budgeting. However, good  
5 management practices would indicate that we should be  
6 looking down the road, and so that's really how we used  
7 forecasting and projections. In particular, when you're  
8 in a severe budget crisis, you just can't respond that  
9 quickly, and so at least having an idea of what might be  
10 out in front of you is important.

11 Q. Where did the \$400 million figure come from?

12 A. It came from the calculations performed by the  
13 staff actuary in our retirement services department.

14 Q. Did the City subsequently do anything to verify  
15 that 400 million?

16 A. Yes, we did ask the board's actuary, Cheiron, to  
17 take a look at our numbers, and Cheiron came back with a  
18 number that was 431 million.

19 Q. When was that?

20 A. That was about the same time period. Maybe it  
21 lagged a bit. I don't exactly remember.

22 Q. Was that about early July 2011?

23 A. It may have been.

24 Q. And what actions were you taking during 2011 as a  
25 result of the budget issues that you were facing?

26 A. 2011 was a particularly difficult year. We were  
27 seeking ten percent compensation reduction from all of our  
28 employees. Council directed that I deliver a fiscal

1 reform plan that we've already talked about. And what we  
2 were trying to do was to put as many strategies, in  
3 particular, unfortunately, the ten percent compensation  
4 reductions, in order to avoid a more devastating year the  
5 next year.

6 Q. When you mentioned the ten percent compensation  
7 reductions, did that apply to all employees?

8 A. Yes, it did.

9 Q. And are those compensation reductions in effect  
10 today?

11 A. They still are in effect. Although I must say  
12 that we are negotiating with our bargaining units and, in  
13 fact, have settled with, I know, at least one, to add back  
14 two percent.

15 Q. Were there any other actions that you were  
16 involved in in 2011 in connection with the City's budget  
17 problems?

18 A. Well, I've brought forward a proposed budget that  
19 resulted in a very significant shortfall, and there were  
20 other activities going on. I'm not really sure, other  
21 than the ten percent and the fiscal reform plan, what more  
22 I might comment on.

23 Q. And was there a point in time when you were  
24 working on a declaration of emergency?

25 A. Yes. Thank you. I was. We were working on a  
26 evaluation of the condition of the City of San Jose at  
27 that point in time. The council, in fact, had asked us to  
28 be prepared to assist them in declaring a fiscal

1 emergency.

2 The reason that direction was received is we were,  
3 at that point in time, looking at another devastating year  
4 that following year. And so given the three years of  
5 significant shortfalls that had to be balanced, services  
6 would have had to just be drastically cut beyond what we  
7 were where we were at. So the option of declaring a  
8 fiscal emergency was a very real option.

9 Q. And did the City end up declaring a fiscal  
10 emergency?

11 A. No, it did not.

12 Q. Why was that?

13 A. Well, once the boards took into account their  
14 valuations, the value of the ten percent total  
15 compensation reductions, it lowered the projected  
16 retirement costs that were expected to, they caused about  
17 another \$80 million shortfall. At that time, it reduced  
18 the shortfall to what was thought to be about 25 million.

19 And so as I was preparing the fiscal emergency  
20 report -- in fact, just before it was supposed to go to  
21 council, we got that information, and so my recommendation  
22 to council was that we not proceed with the fiscal  
23 emergency.

24 Q. So you did not proceed with the fiscal emergency.  
25 What date was that?

26 A. It was December of 2011.

27 Q. And when was Measure B placed on the ballot?

28 A. It was placed on the ballot for the June 2012

1 election.

2 Q. When did that vote occur?

3 A. The election day of June 2012.

4 Q. When did the City Council make a determination?

5 A. As to putting B on?

6 Q. Yes.

7 A. It has to be 88 days before the election, so it  
8 would have been in March of 2012.

9 Q. What was your view of the City's fiscal situation  
10 at that time that Measure B was placed on the ballot by  
11 the City Council?

12 A. Still unacceptable.

13 Q. Why do you say that?

14 A. Well, we, again, had been through three  
15 devastating years on top of the -- during the full decade  
16 of reductions, and there was no indication that we would  
17 have the sort of revenue relief or enough cost control to  
18 slow down. In particular, the rising cost of pensions  
19 which continued to be a significant driver of our costs.

20 Q. And at the time -- around the time that Measure B  
21 was placed on the ballot, had you issued your budget  
22 forecast for the year?

23 A. Yes. The budget forecast would have been out in  
24 the February time frame.

25 THE COURT: Deputy, I don't think this window is  
26 open. Could you help out.

27 MS. ROSS: Your Honor, this is a logical stopping  
28 point for me, but if you would like me to continue, I

1 will.

2 THE COURT: Stop for the day? No. Keep going.

3 MS. ROSS: I'm just asking since it's 4:30.

4 BY MS. ROSS:

5 Q. Let's go forward to this fiscal year, and I want  
6 to ask you some questions about some retirement-related  
7 expenses that are connected to this year's budget. Were  
8 there -- have there been any changes that have resulted in  
9 the City having some lower costs in connection with  
10 retirement?

11 A. Yes. The current year's budget assumes \$20  
12 million in lower costs than what we were expecting because  
13 of the implementation of the elimination of the SRBR as  
14 well as the implementation of the newer low-price plan or  
15 retiree health care savings. So that resulted in about  
16 \$20 million in savings that we then reprogrammed for  
17 employee compensation for the first time in many years,  
18 and to put towards some services for the public and  
19 actually for our organization.

20 Q. When you say the elimination of SRBR resulted in  
21 lowering City costs, do you understand the mechanism by  
22 which that happened?

23 A. Yes. The boards were able to assume the  
24 elimination at SRBR in time for their valuation that they  
25 then used the rates from, and so that lowered our costs  
26 over what we were projecting, and so it was through the  
27 lower -- the lower rates than what we expected. And so --  
28 similarly with low-price plan.

1 Q. Could you explain how the -- let me back up about  
2 lowest-price plan. Lowest-price plan, do you attribute  
3 the savings in connection with lowest-price plan to  
4 Measure B?

5 A. Clearly, low-price plan is in Measure B, but it  
6 existed before Measure B in the City's municipal code.

7 Q. And so how did the City obtain retirement savings  
8 in connection with lowest-price plan?

9 A. Again, the boards were able to assume the new  
10 lower price plan and its costs in their valuation process  
11 in time for us to use the revised rates in our forecast  
12 and thus in building our budget.

13 Q. So I'd like you to go through what the savings  
14 were used for as specifically as you can. By that I mean  
15 the savings from the lower retirement costs.

16 THE COURT: Can I ask. Before we get to that  
17 question and that objection, may I clarify?

18 So, Ms. Figone, are you saying that the current  
19 cost savings relating to the lowest cost plan are not  
20 attributable to the elimination of Measure B?

21 THE WITNESS: Your Honor, the low-price plan  
22 framework was in our municipal code, and it is also now in  
23 the Measure B.

24 THE COURT: Right. That part I understood. But I  
25 couldn't tell if you were saying -- so my question is  
26 whether the current cost savings relating to the lowest  
27 cost plans are or are not attributable to Measure B?

28 THE WITNESS: Yes. And they are --

1 THE COURT: I asked a compound question. Shame on  
2 me. So which is it? Are they attributable or not?

3 THE WITNESS: They are attributable.

4 BY MS. ROSS:

5 Q. Ms. Figone, when you first explained the lowest  
6 cost plan was in the municipal code, what did you mean by  
7 that?

8 A. What I meant was the retiree health care  
9 provisions, which sets forth the low-price plan and how  
10 the retiree health care works, is in the municipal code  
11 also.

12 Q. And is it your view that the changes to the lowest  
13 cost plan that were made could have been made under the  
14 municipal code?

15 MR. ADAM: Objection. Calls for a legal  
16 conclusion.

17 MR. PLATTEN: Sapien plaintiffs, et al., joins the  
18 objection.

19 MR. PATERSON: AFSCME joins.

20 MR. SILVER: Same here.

21 THE COURT: I think this question is phrased  
22 properly. The objection is overruled.

23 MS. ROSS: Do you want the question read to you or  
24 repeated?

25 THE WITNESS: Yes, please.

26 BY MS. ROSS:

27 Q. I'll repeat the question. Is it your view that  
28 the changes that were recently made in the lowest cost

1 plan are changes that could have been made or could be  
2 made under the municipal code?

3 A. Yes.

4 Q. I would like you to be as specific as possible  
5 about what the City has used the money for that has come  
6 about through savings on its retirement costs.

7 MR. ADAM: Objection, your Honor, to the  
8 relevance.

9 MR. PATERSON: Also object as to lack of  
10 foundation that they have been allocated in some certain  
11 way.

12 THE COURT: So this question goes to current and  
13 future cost savings; right?

14 MS. ROSS: Yes, your Honor. It goes to -- well,  
15 it goes to the City's motive or reason for Measure B and  
16 how it is now using the money that has come about, both  
17 through SRBR changes and also through changes in low cost  
18 plans, although those could have been made under the  
19 municipal code also.

20 THE COURT: Anything else, Mr. Adam?

21 MR. ADAM: Your Honor, as I heard the question,  
22 suggestion implicit in the question is that the money  
23 saved, this \$20 million that's allegedly saved by  
24 Measure B, is specifically directed elsewhere. And in a  
25 budget of hundreds of millions of dollars, I'm not  
26 understanding how that happens.

27 THE COURT: That's a different objection. The  
28 relevance objection is overruled.

1 BY MS. ROSS:

2 Q. Ms. Figone, can you tell us as specifically as  
3 possible what those additional funds are being used for.

4 A. Yes. When I brought forward the recommendation to  
5 use the funds in this proposed or now adopted budget of  
6 \$20 million in the general fund, our recommendation was  
7 that about 11 million or so of those funds be put aside to  
8 begin to add back some salaries, although modest, for our  
9 workforce to the value of about two percent. The balance  
10 of the funds would provide additional, what I would say,  
11 capacity to begin to get some priority things done in the  
12 City. For example, fixing the elevators in the police  
13 administrative building, doing some waterproofing in that  
14 building. Helping us to add back -- we have not had them  
15 before, but to add 21 community service officers in our  
16 police department, helping us to add back some crime  
17 prevention specialists and crime analysts and police. So  
18 this money has given us some capacity to begin to address  
19 some greatly needed areas of service as well as our own  
20 facilities.

21 Q. Ms. Figone, I would like to turn to a new topic.  
22 If you would turn to what's already in evidence as POA  
23 Exhibit 51.

24 Ms. Figone, have you found POA Exhibit 51?

25 A. Yes, I have.

26 Q. And I'd like you to look at the second two pages  
27 of POA 51, which is a memorandum dated March 4, 2008, from  
28 Debra Figone to all City employees and retirees, subject,

1 retiree health care development.

2 A. Yes, I have that.

3 Q. Did you issue this memo?

4 A. Yes, I did.

5 Q. What caused you to issue this memo?

6 A. We were in a period where there was pretty much  
7 agreement that the unfunded liabilities of retiree health  
8 care, the status of the plans, the need to ramp up to full  
9 funding was generally all in play. We were working with  
10 our bargaining units. We were getting educated on the  
11 topic what could be done, and so this was, as I issued  
12 many memos over the course of this long six-year period,  
13 in an attempt to communicate with our employees about  
14 some -- the status of this work. And actually the work,  
15 this memo refers to the previous year where the work  
16 really started to begin. So this was like an update of  
17 where we were at.

18 Q. Now, I'd like you to turn to the second page of  
19 the memo and look at the first paragraph, which is under  
20 the title vested benefit. Do you see that paragraph?

21 A. Yes.

22 Q. In the third sentence, it says: "Because San  
23 Jose's retiree health care benefits are part of the City's  
24 retirement plans, the retiree health care benefit can be  
25 considered a vested benefit similar to the pension benefit  
26 itself."

27 What did you intend to say in that sentence?

28 MR. ADAM: Objection, your Honor. I think the

1 document speaks for itself.

2 MR. PLATTEN: Could I join in the objection, your  
3 Honor.

4 MR. SILVER: We join too, your Honor.

5 THE COURT: Overruled.

6 THE WITNESS: I think it's important to understand  
7 really what the first sentence says, and that is we have  
8 been really exploring and thinking about what are our  
9 options -- how far can we go in dealing with this issue as  
10 we take on this stake holder work and try to solve this  
11 problem. And so as part of that work, we felt it was  
12 important, and the council wanted us to understand maybe  
13 some of the legal issues we might be confronting. So as a  
14 result of getting that information about legal options and  
15 perhaps constraints, we decided that the benefit might be  
16 vested and that's -- I chose my words very carefully in  
17 this memo. So what it says is that the benefit could be  
18 vested at this time, and so that caused us to -- so by the  
19 benefit, and later on it's 100 percent of the low-price  
20 plan, that was the benefit that we had heard might be  
21 vested.

22 BY MS. ROSS:

23 Q. So I'd like to just -- I'd like to clarify that.  
24 How did this statement relate to the lowest priced plan?

25 A. So the benefit itself is 100 percent of the  
26 low-price plan. That is the benefit that we're talking  
27 about, this potential vested benefit, in that context.  
28 100 percent of the low-price plan.

1 Q. And when you say 100 percent of the lowest priced  
2 plan, are you talking about any particular plan?

3 A. No. As the memo says later on, we need to  
4 continue to work together. This is a area that concerns  
5 us all. These costs are shared 50/50 with the employees  
6 and the employer. And in the last paragraph -- excuse  
7 me -- the second to the last paragraph, the last line, we  
8 talk about solutions to mitigate the significant cost of  
9 health care including wellness and plan design changes.  
10 So by plan design, we mean whatever you're offering as  
11 that low-price plan.

12 Q. Could you explain a little more what a plan design  
13 change is.

14 A. It would be whether or not there's a Kaiser plan  
15 one level or Kaiser at another level, a higher deductible  
16 plan, as we've been hearing, or whatever plan design might  
17 be in place as the low-price plan for that period.

18 Q. Did the City -- at this time, was the City  
19 exploring a change to the lowest cost plan?

20 A. Yes. That really appeared as one of the most  
21 viable options for us to lower costs at this point in  
22 time. Again, because of what we had come to find out.

23 Q. How did the City explore changing the plan that  
24 would be the lowest cost plan?

25 A. We, as we typically do, take a look at what's  
26 available on the market. So if we were going through kind  
27 of any sort of review would be to understand what Kaiser  
28 might offer, what Blue Shield might offer, so we would do

1 our research.

2 Q. Did the City, at some point, adopt a new  
3 lowest-price plan?

4 A. Yes, we did.

5 Q. And when was that?

6 A. It was in time to be included in the valuations of  
7 the board's views in setting their rates that we could use  
8 for the 13-14 budget year.

9 Q. When were City employees first informed about the  
10 existence of the new lowest cost plan?

11 A. I couldn't tell you specifically. Typically, they  
12 would be informed through the open enrollment period.  
13 Whether or not there was a special open enrollment, I just  
14 don't remember. Under the normal course, it would be in  
15 the fall before the plan becomes effective, which is  
16 typically January 1st.

17 Q. Did the City begin exploring changing the lowest  
18 cost plan prior to Measure B?

19 A. All options were on the table. That's why this  
20 statement is here. That we knew we would have to explore  
21 lowering costs, and plan design was one way that appeared  
22 to us most viable.

23 MS. ROSS: Thank you, Ms. Figone. Those are all  
24 my questions.

25 MR. SILVER: Your Honor, for the record, we move  
26 to strike all of Ms. Figone's testimony on the grounds  
27 that it is completely irrelevant to the issues presented  
28 in our case. The motion only applies to our lawsuit.

1 MR. PLATTEN: Sapien, Mukhar, and Harris  
2 plaintiffs join in that motion, your Honor.

3 THE COURT: So are you asking for me to have a  
4 different record to decide the case concerning your  
5 clients?

6 MR. PLATTEN: Yeah.

7 THE COURT: I'll reserve that. And you have to  
8 explain to me how that would work. Tomorrow we'll have  
9 cross-examination of Ms. Figone and Mr. Gurza's testimony.

10 MR. SPELLBERG: Yes, your Honor.

11 THE COURT: And more stipulations?

12 MR. ADAM: We hope.

13 MR. PATERSON: Yes, your Honor.

14 THE COURT: In the event that we conclude Mr.  
15 Gurza's testimony before the end of the day tomorrow, will  
16 we be using that time to complete the record in terms of  
17 documents?

18 MR. SPELLBERG: Makes perfect sense, your Honor.

19 THE COURT: Is there anything I should be prepared  
20 for that?

21 MR. ADAM: We have an extra copy of the  
22 stipulation, assuming we're able to get one. Other than  
23 that, I'm not sure there's anything else.

24 MR. HARTINGER: I think it's on us, your Honor.

25 THE COURT: Anything else for today?

26 MR. MCBRIDE: Yes, your Honor. Just a  
27 clarification or to help my memory. What is it  
28 specifically you want in the joint chart in terms of the

1 opening statement document? I realize it's for each of  
2 the 13 points. I realize you want to know each of the  
3 complaints that involve those. Do you want the specific  
4 reference to the paragraphs in the complaint, or is it  
5 simply the causes of action?

6 THE COURT: It looks like you are awaiting  
7 Exhibit 6062, and my request for the chart is unrelated to  
8 this.

9 MR. MCBRIDE: Pardon?

10 THE COURT: My request for the chart is unrelated  
11 to that.

12 MR. MCBRIDE: I thought it was related to the  
13 opening statement document they used. Maybe I'm wrong.

14 MR. HARTINGER: We understood your request, your  
15 Honor, and we have a chart in play. It's being refined,  
16 and we hope to have a copy circulated this evening and to  
17 you tomorrow.

18 THE COURT: Mr. McBride, to answer your question,  
19 the chart, I hope, will tell me the operative dates of  
20 all -- the dates of all the operative pleadings and all  
21 the claims and defenses as to which you are going to ask  
22 for a ruling.

23 Anything else for today?

24 Thank you. We're in recess. 8:45 tomorrow.

25 (Whereupon, the proceedings were adjourned.)  
26  
27  
28

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 24, 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 11, 2013.

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19 ROSE M. RUEMMLER

20 Official Reporter, CSR No. 9053  
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