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11 Employees Association

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

14 SAN JOSE POLICE OFFICERS'
15 ASSOCIATION,

16 Plaintiff,

17 v.

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

23 Defendants.

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

) (Hon. Patricia M. Lucas, Dept. 2)

) **SJREA'S POST-TRIAL BRIEF**

) Due Date: September 10, 2013

) Dept.: 2

) Complaint Filed: June 6, 2012

24 AND RELATED CROSS-COMPLAINT
25 AND CONSOLIDATED ACTIONS.
26
27
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2 **I. INTRODUCTION**

3 At the trial, the City did not produce any evidence that contradicted the factual
4 assertions upon which our legal arguments were based that were contained in the Pre-Trial
5 Brief we had submitted on behalf of the San Jose Retired Employees Association (“SJREA”).
6 Consequently, this Post-Trial Brief will read much like our Pre-Trial Brief except for reference
7 to additional evidence presented at trial that buttressed our claims, citations to applicable
8 evidence and additional explanations and elaborations where appropriate.

9 In its lawsuit, SJREA, seeks injunctive, declaratory and writ relief on behalf of affected
10 retirees (“Affected Retirees”) of the Federated Employees Retirement Plan (the “Federated
11 Plan”, Exhibit 602, REA000170-000442), as well as qualifying spouses, domestic partners and
12 other eligible beneficiaries of Affected Retirees and eligible beneficiaries of deceased
13 employees (“Affected Beneficiaries”). SJREA contends that certain provisions of “The
14 Sustainable Retirement Benefits and Compensation Act” (“Measure B”, Exhibit 700,
15 POA007036-007052) enacted by the voters of the City of San Jose (the “City”) on June 5, 2012
16 impair vested contractual rights of Affected Retirees and Affected Beneficiaries, in violation of
17 the “Contract Clause” of the California Constitution (Article I, Section 9). SJREA also asserts
18 that Measure B violates (a) the Separation of Powers provision contained in Article III, Section
19 3 of the California Constitution and (b) the California Pension Protection Act, which appears in
20 Article XVI, Section 17 of the California Constitution.

21 In particular, SJREA claims that Section 1510-A of Measure B (Exhibit 700,
22 POA007048) impaired vested rights of Affected Retirees and Affected Beneficiaries to a
23 specified annual Cost Of Living Adjustment (“COLA”) as set forth in the City’s Municipal
24 Code by converting this unconditional entitlement into one that is subject to reduction by
25 temporary elimination in the event the City Council simply declares a fiscal and service level
26 emergency, irrespective of whether one actually exists.

27 Likewise, SJREA asserts that Section 1512-A of Measure B (Exhibit 700, POA007049)
28 impaired vested rights of Affected Retirees and Affected Beneficiaries to participate in the

1 City's medical and dental insurance plans and to receive a specified payment that would cover
2 all or a portion of the monthly premiums by promulgating that these entitlements are no longer
3 vested rights but, instead, are subject to the City's "power to amend, change or terminate [those
4 benefits]."

5 Further, the uncontradicted evidence demonstrates that the San Jose Municipal Code
6 ("SJMC") (a) established a Supplemental Retiree Benefit Reserve ("SRBR") and (b) mandates
7 that, under certain specified circumstances, excess earnings be allocated to the SRBR from
8 which the City Council is to exercise its discretion to provide supplemental benefits to retirees.
9 (Exhibit 602, REA000293-000295) Section 1511-A of Measure B (Exhibit 700, POA007048)
10 discontinued the SRBR, whereupon the City transferred all of the funds contained therein to the
11 General Retirement Trust Fund (Reporter's Transcript ("RT") 603:5-28; 692:27-693:21;
12 935:22-27). These actions impaired the vested entitlements of Affected Retirees and Affected
13 Beneficiaries to have those SRBR funds and future excess earnings separated from the general
14 fund of the Retirement Association to be available for distribution in order to supplement
15 retirement allowances in high inflationary times at the discretion of City Council.

16 Finally, the evidence established that Section 1504-A of Measure B (Exhibit 700,
17 POA007039) impaired the existing entitlement of Affected Retirees and Affected Beneficiaries
18 to have the City Council exercise its discretion, **without any requirement of voter approval**,
19 to provide additional benefits over and above those specifically granted under the Federated
20 Plan (including the SRBR) by limiting the ability of the City Council to provide those
21 enhancements only to situations where there has been voter approval.

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1 **II. ARGUMENT**

2 **A. A Long Line Of California Authorities Clearly And Unequivocally**
3 **Establish That Public Employees Have Vested Contractual Rights To**
4 **Pension Benefits**

5 Article I, Section 9 of the California Constitution¹ states:

6 A bill of attainder, ex post facto law, or law impairing the obligation of
7 **contracts may not be passed.** (Emphasis added.)

8 For many decades, reported decisions of the California Supreme Court and its Courts of
9 Appeal from all appellate districts have repeatedly and consistently held that, as soon as an
10 individual commences rendering services for a public agency, he/she has earned as a part of the
11 consideration in return for performing those services deferred compensation in the form of a
12 vested contractual right to the retirement benefits that then exist for similarly situated
13 employees (*i.e.*, those which would be provided if he/she qualified for retirement at that time).
14 See, *e.g.*, *Kern v. City of Long Beach* (1947) 29 Cal.2d 848. “. . . [W]here services are rendered
15 under a pension statute, the pension provisions become a part of the contemplated
16 compensation for those services and so in a sense a part of the contract of employment itself.”
17 (*Id.* at 851-852.) In other words, pension benefits are a form of deferred compensation.
18 (*Wallace v. City of Fresno* (1953) 42 Cal.2d 180, 184-185.) That deferred compensation
19 matures into an unconditional entitlement when the individual satisfies the conditions precedent
20 to qualifying for retirement benefits.

21 Under California law, there is a strong preference for construing governmental pension
22 laws as creating contractual rights for the payment of benefits. (See *Allen v. City of Long*
23 *Beach* (1955) 45 Cal.2d 128; *Terry v. City of Berkeley* (1953) 41 Cal.2d 698.) Where it is
24 feasible to do so the enactment of a governmental pension plan should be construed as
25 guaranteeing full payment to those entitled to its benefits with the provision of adequate funds

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28 ¹ Article I, Section 9 of the California Constitution mirrors Article I, Section 10, Clause 1, (the “Contract Clause”) of the United States Constitution. However, SJREA is not attacking Measure B on the grounds that it violates the Federal Constitution.

1 for that purpose. (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351; see also *Carman v.*
2 *Alvord* (1982) 31 Cal.3d 318, 332.)

3 The right to pension benefits vests upon acceptance of employment. (*Betts v. Board of*
4 *Administration* (1978) 21 Cal.3d 859, 863; *Miller v. State of California* (1977) 18 Cal.3d 808,
5 815-816; and *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 852.) As an integral part of
6 the agreed-upon compensation, a pension right, once vested (even though not yet matured),
7 may not be destroyed by a public employer without impairing a contractual obligation, in
8 violation of Article I, Section 9 of the California Constitution. (*Carman v. Alvord* (1982) 31
9 Cal.3d 318, 325; *Betts v. Board of Administration, supra*, 21 Cal.3d 859, 863; and *Frank v.*
10 *Board of Administration* (1976) 56 Cal.App.3d 236, 242.)

11 Further, where additional or improved retirement benefits are provided during
12 employment, the employee earns a vested right to those enhanced benefits. (*Betts v. Board of*
13 *Administration, supra*, 21 Cal.3d 859, 867; *Abbott v. San Diego* (1958) 165 Cal.App.2d 51,
14 518.) Additionally, benefits entitled a survivor of a public employee are an element of the
15 compensation owed to the public employee and thus may not be impaired. (*Packer v. Bd. of*
16 *Retirement of the Los Angeles County Peace Officers' Retirement System* (1950) 35 Cal.2d 212,
17 215.)

18 While vested pension rights may be modified **prior to retirement**, those modifications
19 must be reasonable and “changes in a pension plan which would result in disadvantage **to**
20 **employees** should be accompanied by comparable new advantages.” (Emphasis added; *Allen*
21 *v. City of Long Beach, supra*, 45 Cal.2d at 131; see also *Abbott v. City of Los Angeles* (1958) 50
22 Cal.2d 438, 488-89.) Thus, even permissible amendments which must be accompanied by
23 comparable new advantages only can occur with respect to **employees, not retirees**.

24 This concept was clearly recognized in *Allen v. Board of Administration of the Public*
25 *Employees Retirement System* (1983) 34 Cal.3d 114, 120, when, after quoting the above
26 language from *Allen v. City of Long Beach* and *Abbott v. City of Los Angeles*, the Supreme
27 Court observed:

28 As to retired employees, the scope of continuing governmental power may be

1 **more restricted, the retiree being entitled to the fulfillment of the contract**
2 **which he already has performed without detrimental modification.**

[Citation.] (Emphasis added.)

3 Therefore, **once an individual has retired**, the former employer cannot make any
4 modifications to the pension plan that would result in a disadvantage to that individual. This
5 proposition previously had been solidified by the California Supreme Court in *Terry v. City of*
6 *Berkeley, supra*, 21 Cal.2d 698, 702-03. That opinion emphasized that any changes that are
7 permissible before retirement cannot occur once an individual has actually retired, where the
8 employee had “rendered the called-for performance; . . . had done everything possible to entitle
9 him to the payment of the pension and all conditions precedent to the obligation of the city
10 were fulfilled upon the determination that he be retired as a result of the service-connected
11 disability.” Thus, it would be a clear impairment of a vested right even to attempt to make that
12 trade after retirement has occurred.²

13 Finally, the evidence established that the Employee Handbooks (Exhibits 636,
14 REA0006000-000681, 653, REA000978-000993, 655, SJ002296-002374, 706, REA000001-
15 000084, and 707, REA000085-000169) furnished to City employees that describe their terms
16 and conditions of employment illustrate clearly the City’s recognition of the state of the law
17 regarding the vesting of retirement benefits in existence at the time employees rendered service.
18 For example, in the 1979 Plan Handbook (Exhibit 653, REA000978-000993), in Chapter 4 –
19 “Vesting,” it states:

20 “Vesting” is the term used to describe a right which is yours once you have
21 reached or attained this status. Some systems measure this condition by length
22 of service or by your retirement contributions. If you were an employee of the
23 City on or before June 30, 1975, you became a member of the retirement system
24 when your contributions, including those contributions to the cost-of-living
25 fund, had reached \$500. When this happened, you became a “full-fledged”
26 member with valuable *vested* rights, one of which allowed you to leave City
employment and later to return without loss of length of service credits to a
future retirement, provided you allowed your accumulated contributions to

27 ² Before the trial actually commenced, an attorney for the City appeared to take the position that Measure B
28 provides employees with some comparable advantage. (RT 24:6-17.) While the SJREA strongly disagrees that
Measure B provides any comparable advantage, based on *Allen v. Board of Administration of the Public*
Employees Retirement System and Terry, that issue is irrelevant to retirees.

1 remain on deposit. This vested right is continued to those members who became
2 members prior to July 1, 1975, but not granted to those becoming members later.
(Exhibit 653, REA000990, Italics in original.)

3 What the Handbook explained is that employees who became members prior to July 1,
4 1975 acquired a **vested right** “to leave City Employment and later to return without loss of
5 length of service credits to a future retirement, provided [they] allowed [their] accumulated
6 contributions to remain on deposit.” Most significantly, the Handbook also recognizes that,
7 because this benefit was not provided to individuals who became members after July 1, 1975,
8 those persons did not acquire that particular vested right, thereby communicating that City
9 employees earn vested contracted rights to those pension benefits **in existence during their**
10 **employment.**

11
12 **B. Affected Retirees And Affected Beneficiaries Have Vested Rights To**
13 **Retirement Benefits Granted In The San Jose Municipal Code Which Have**
14 **Been Impaired By Measure B.**

15 Article XV, Section 1500 of the City Charter (Exhibit 701, POA007114) requires the
16 City Council to establish and maintain a retirement plan for all officers and employees of the
17 City. The City Council has complied with those mandates. Among the benefits to which the
18 Affected Retirees and Affected Beneficiaries earned vested rights during employment pursuant
19 to the SJMC are: (1) COLAs (Chapter 3.44, Exhibit 602, REA000429-000441); (2) entitlement
20 to medical and dental insurance coverage and premium subsidies (Chapter 3.28, Parts 16 and
21 17; Exhibit 602, REA000396-000403); (3) the right to fund, and receive discretionary
22 distributions from, the SRBR (Section 3.28.340; Exhibit 602, REA000293-000295); and (4) the
23 right to have the City Council provide additional or improved benefits to retirees without voter
24 approval (see e.g. RT 555:3-10).

25 The passage of Measure B impairs those vested rights as follows:

- 26
- 27 • Section 1510-A of Measure B (Exhibit 700, POA007048), entitled “Emergency
28 Measures to Contain Retiree Cost of Living Adjustments,” imposes a

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contingency whereby the City can suspend COLAs for up to five years solely by declaring a fiscal and service level emergency, where no such contingency previously existed, a thereafter restore the COLA only on a prospective basis.

- Section 1511-A of Measure B (Exhibit 700, POA007048), entitled “Supplemental Payments to Retirees,” discontinues the SRBR, transfers its funds to the general Retirement Fund so as to reduce the City’s future funding obligations and eliminates future transfers of excess earnings to the SRBR, thereby removing the possibility of providing any future supplemental payments to retirees.
- Section 1512-A of Measure B (Exhibit 700, POA007049), entitled “Retiree Healthcare,” impairs retirees’ rights to medical and dental insurance coverage and premium subsidies from the City’s medical and dental plans by re-characterizing those already earned vested contractual rights as non-vested rights, that are subject to the City’s “power to amend, change or terminate [those benefits].”
- Section 1504-A of Measure B (Exhibit 700, POA007039), entitled “Reservation of Voter Authority,” adds an additional requirement that did not previously exist with respect to the entitlement to discretionary additional or improved benefits from the City Council by requiring voter approval prior to any such exercise of discretion.

As we previously demonstrated, Article I, Section 9 of the California Constitution forbids the passage of laws **impairing** the obligation of contracts. Therefore, an analysis as to whether an impairment has occurred must begin with the definition of the word “impair.” “In construing [an enactment], we begin by examining ... language, giving the words their usual and ordinary meaning, because words of [an enactment] ordinarily provide the most reliable indication of ...intent.” (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.)

Black’s Law Dictionary, Abridged 8th Edition, defines impair as: “To diminish the

1 value of property or a property right. This term is commonly used in reference to diminishing
2 the value of a contractual obligation to the point that the contract becomes invalid or a party
3 loses the benefit of the contract.” In contrast, it defines abrogate, which term does **not** appear
4 in Article I, Section 9, as “To abolish (a law or custom) by formal or authoritative action; to
5 annul or repeal.” The two words are related, but are differentiated by degree. **To impair is to**
6 **lessen**, while to abrogate is to destroy.

7 It must be emphasized that, in order to find that vested rights have been impaired, no
8 showing is required that the Affected Retirees and Affected Beneficiaries have **presently**
9 suffered monetary loss. Subjecting vested rights to **an increased risk of detriment** is
10 sufficient to impair the vested contractual rights of the Affected Retirees and Affected
11 Beneficiaries.

12 In *Teachers’ Retirement Bd. v. Genest* (2007) 155 Cal.App.4th 1012 (“*TRB*”), the
13 Teachers’ Retirement Board challenged legislation that sought to reduce the State’s obligation
14 to fund the Supplemental Benefit Maintenance Account of the Teachers’ Retirement Fund
15 (“SBMA”) by \$500 million. By an earlier statute, the Legislature had granted retirement
16 association members a vested right to have the State make an appropriation equal to 2.5 percent
17 of the total of the creditable compensation of the immediately preceding calendar year upon
18 which members’ contributions are based for purposes of funding the SBMA. (*Id.* at 1022.)
19 The challenged bill provided for an actuarial valuation to be made every four years of the
20 anticipated liability of the SBMA. If the valuation disclosed that the funds in the SBMA would
21 be insufficient, then money would be appropriated from the General Fund to cover the shortfall.
22 (*Id.* at 1023.)

23 The Court summarized that what the Legislature had done was to replace a \$500 million
24 obligation with a contingent obligation to transfer the sum to the SBMA over a 33 year period,
25 conditioned upon a determination by an actuary establishing that this sum or any portion
26 thereof is needed to meet the purchasing power protection benefit obligations in any year
27 between 2006 and 2036. If any actuary were to determine that the SBMA was able to provide
28 80 percent purchasing power protection until July 2036, (and the operative period was not

1 extended) then the \$500 million the Legislature deducted from its obligation to fund the SBMA
2 would never be reimbursed. (*Id.* at 1024.)

3 The Court determined that reducing the income stream available to pay the
4 supplemental benefits by \$500 million **increased the risk** to members that SBMA funds would
5 be insufficient to make the supplemental benefit payments in the future. Consequently, it held
6 that, because the challenged bill did not provide some comparable new advantage, it
7 substantially impaired contractual rights in violation of the State and Federal Constitutions.
8 (*Id.* at 1039.)

9 Likewise, the conduct of an employer in delaying the payment of its required retirement
10 contributions or refraining from making them altogether **impairs the vested rights** of affected
11 individuals to a **fiscally sound retirement system**. (See *Board of Administration v. Wilson*
12 (1997) 52 Cal.App.4th 1109 and *Valdes v. Cory* (1983) 139 Cal.App.3d 773.)

13 In *Valdes*, the Court invalidated as unconstitutional certain 1982 legislative
14 amendments affecting the method of funding by the Public Employees' Retirement System
15 ("PERS") under the Public Employees' Retirement Law ("PERL"). One provision prohibited
16 payment of previously appropriated state-employer contributions from the state General Fund
17 to the PERS fund for three months and reverted those monies to the unappropriated surplus of
18 the General Fund. (*Id.* at 778.) Another provision ceased school-employer contributions for
19 the same three months and provided a mechanism for their reversion to the unappropriated
20 surplus of the General Fund. (*Ibid.*) The legislation also required the PERS Board to transfer
21 an amount equal to that which would otherwise be paid by state and school employers as their
22 three-month contributions to PERS from the "reserve against deficiencies" portion of the PERS
23 fund to its unallocated portion. (*Ibid.*) The legislation further mandated a retroactive reduction
24 of previously appropriated employer contributions by some school employers for the previous
25 fiscal year and directed the PERS Board to make commensurate adjustments or refunds from its
26 reserve against deficiencies. (*Id.* at 778-79.)

27 The Opinion noted that the employees suffered no out-of-pocket losses from the
28 suspension of employer contributions because PERS benefits are defined by statutory formula

1 at the time of employment. (*Id.* at 785.) Nevertheless, the Court emphasized (*ibid.*) that
2 “Authority is not lacking, however, for the proposition that employee pension beneficiaries
3 have a vested interest in the integrity and security of the source of funding for the payment of
4 benefits. (Citations.)”

5 Accordingly, the Court decided that the state employers were contractually bound in a
6 constitutional sense to pay the withheld appropriations to the PERS fund, since explicit
7 language in the retirement law constituted a contractual obligation on the part of the state as
8 employer to abide by its continuing obligation to make the statutorily set payment of monthly
9 contributions. (*Id.* at 787, 783-789.) The Opinion further stated (at 786):

10 When instead the Legislature directs that funds held in trust for the exclusive
11 benefit of the members and beneficiaries of PERS be used to satisfy the state’s
12 contractual obligations to make monthly contributions to the retirement fund so
13 that monies regularly appropriated for that purpose can irretrievably be
14 redirected to balance the state budget, the effect is that...vested rights of PERS
15 members are impaired.

16 The Court (at pp. 789-90) concluded “ . . . that the Legislature’s rescission of existing
17 appropriations for employer contributions, theoretically representing the ‘employer’s ongoing
18 share of the actuarial equivalent of amounts necessary to fund current and future benefits due
19 covered employees’ (citation omitted), **substantially impairs public employees’ assurance
20 that they will ultimately receive the retirement benefits to which they become entitled**
21 (citation omitted).” (Emphasis added.)

22 Likewise, in *Wilson v. Board of Administration, supra*, 52 Cal.App.4th 1109, 1118, the
23 Court struck down as an impairment of employees’ vested rights an enactment which
24 threatened employees’ assurance of receiving earned benefits after retirement. *Wilson* involved
25 an enactment calling for “in arrears” pension financing, as distinguished from a “level
26 contribution” system. Under the “level contribution” system, payments flowed to the
27 retirement fund as liability was incurred for future pension obligations. Under the “in arrears”
28 system, contributions would not be paid during the same fiscal year that employee services
were rendered. (*Id.* at 1121-1122.)

///

1 **1. COLAs**

2 On or about April 1, 1970, the City Council passed Ordinance No. 15118 (Exhibit 606,
3 REA000445-000473) which enacted Chapter 9, Article II, Part 6 of the SJMC, providing
4 COLAs for retirement allowances and survivorship allowances based upon percentage changes
5 in the applicable Consumer Price Index. (Exhibit 606, REA000448.) The Affected Retirees
6 who were employed on or after that date, their Affected Beneficiaries, and those persons who
7 became Affected Beneficiaries on or after such enactment who met the eligibility requirements
8 set forth in Chapter 9, Article II, Part 6 of the SJMC earned a vested contractual right to the
9 COLAs described therein. As is apparent from Exhibit 602, REA000429-000441, which shows
10 the previous numbering, the SJMC sections providing for COLAs are currently found in SJMC
11 Chapter 3.44.

12 On or about February 7, 2006, the City Council passed Ordinance No. 27652, which
13 added Section 3.44.160 to Chapter 3.44 of the SJMC and provided for fixed three percent
14 annual COLAs. (Exhibit 630, REA000561.) Section 3.44.160 of the current SJMC states in
15 pertinent part at paragraph (a)(1):

16 Each retirement allowance and each survivorship allowance which is payable
17 under Chapter 3.24 or Chapter 3.28 in any subject year which begins on or after
18 April 1, 2006, together with any increases or decreases in the amount of any
19 such allowance which were previously made pursuant to this Chapter 3.44, shall
20 be increased by three percent per annum in lieu of the increase otherwise
provided in this chapter. The first such three percent increase shall be made on
April 1, 2006. (Exhibit 602, REA000441)

21 Prior to 2006, it provided for an annual COLA based upon the percentage increase in
22 the applicable Consumer Price Index published by the United States Department of Labor with
23 a “cap” of three percent. (Exhibit 606, REA000447.)

24 Throughout this time, employees funded a portion of this benefit by paying
25 contributions that, in part, were designed to fund an annual three percent COLA. Even prior to
26 the passage of Ordinance No. 27652, the employees’ contribution rate attributable to the COLA
27 was based on an actuarial assumption that the COLA would increase 3% annually. (RT
28 353:12-24; see also, Exhibit 651, REA000781, which shows that employees contributed 1.61%

1 of their income towards COLAs.)

2 Section 1510-A of Measure B impairs the vested rights of Affected Retirees and
3 Affected Beneficiaries to receive COLAs because it adds a contingency whereby the City can
4 suspend COLAs upon its mere declaration of a fiscal and service level emergency, where no
5 such contingency previously existed. Section 1510-A states:

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

10 (a) Cost of living adjustments (“COLAs”) shall be temporarily suspended
11 for all retirees in whole or in part for up to five years. The City Council shall
12 restore COLAs prospectively (in whole or in part), if it determines that the fiscal
13 emergency has eased sufficiently to permit the City to provide essential services
protecting the health and well-being of City residents while paying the cost of
such COLAs. (Exhibit 700, POA007048.)

14 By adding a contingency whereby the City Council can now suspend the three percent
15 COLA for up to five years and then restore it only on a prospective basis simply by declaring a
16 fiscal emergency, Section 1510-A has weakened and diminished the value of the vested rights
17 of Affected Retirees and Affected Beneficiaries. Just as in *TRB*, *Valdes* and *Wilson*, the
18 Affected Retirees and Affected Beneficiaries need not wait to see whether the City ever
19 declares a fiscal emergency before an impairment takes place, any more than the plaintiffs in
20 those cases needed to wait for a reduction of benefits before a substantial impairment could be
21 asserted.

22 In its Opening Brief, the City argues (at pp. 24-25) that “[t]he law of vested rights
23 acknowledges that even vested rights may be suspended in the event of an emergency”, citing
24 to *Valdes* (at 790-791.) The City’s argument is problematic for several reasons. First, the City
25 would not have needed to place Section 1510-A on the ballot if it was only intended to permit
26 the City to do that which is already allowed. By taking that action, the City must be regarded
27 as having intended to expand its power to impair vested rights in situations where an **actual**
28 fiscal emergency did not exist.

1 Most importantly, “the law of vested rights” requires much more than the mere
2 **declaration** of fiscal emergency, which is all that is needed under Section 1510-A, before the
3 City can suspend COLAs to which the Affected Retirees have earned a vested right. For
4 example, in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23
5 Cal.3d 296, the California Supreme Court issued a peremptory writ of mandate directing
6 several municipal entities to pay their officers and employees the salary increases provided in
7 various collective bargaining contracts despite a contention by the municipal entities that the
8 existence of a fiscal emergency allowed them to impair the agreements without running afoul
9 of the Contracts Clauses of the United States and California Constitutions.

10 The California Supreme Court relied on the United States Supreme Court case of
11 *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, stating (at 308):

12 The court recognized that the contract clause was not an absolute bar to
13 subsequent modification of a state’s own financial obligations, but held that in
14 determining whether such a modification is justified, complete deference to a
15 legislative assessment of reasonableness and necessity **is not required because**
16 **the government’s self-interest is at stake.** It stated, “[A] governmental entity
17 can always find a use for extra money, especially when taxes do not have to be
18 raised. **If a State could reduce its financial obligations whenever it wanted**
19 to spend the money for what it regarded as an important public purpose, the
20 Contract Clause would provide no protection at all... [A] State cannot refuse to
21 meet its legitimate financial obligations simply because it would prefer to spend
22 the money to promote the public good rather than the private welfare of its
23 creditors ... [A] State is not completely free to consider impairing the
24 obligations of its own contracts on a par with other policy alternatives.
25 Similarly, a State is not free to impose a drastic impairment when an evident and
26 more moderate course would serve its purposes equally well. (Emphasis
27 added.)

28 The *Sonoma* Opinion relied on another United States Supreme Court decision, *Home*
Building & Loan Association v. Blaisdell (1934) 290 U.S. 398, 434, which articulated the
following five factors to be considered when balancing the language of the Contracts Clause
against the State’s interest in exercising its police power: Whether the Act (1) was an
emergency measure; (2) was one to protect a basic societal interest, rather than particular
individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions;

1 and (5) was limited to the duration the emergency. (See also *Energy Reserves Group v. Kansas*
2 *Power & Light* (1983) 459 U.S. 400, 412; *United Firefighters of Los Angeles City v. City of Los*
3 *Angeles* (1989) 210 Cal.App.3d 1095, 1109.)

4 The *United Firefighters* Opinion stressed (at 1112-13), that any asserted emergency
5 impairments of a pension benefit cannot be implemented to repair errors and omissions where
6 the governmental entity failed to conform to sound actuarial practices, referencing the *Sonoma*
7 Court's appreciation of that concept (at 23 Cal.3d 313.) Finally, the Court of Appeal also noted
8 (at 1113) that any emergency impairment in the pension benefit context had to bear a material
9 relation to the theory of a pension system and its successful operation.

10 Therefore, both California and Federal authorities require a far more significant
11 showing by a municipality trying to justify the impairment of a vested contractual right than a
12 mere "declaration" of fiscal emergency. By reducing the City's legal burden to a "declaration,"
13 Section 1510-A has substantially impaired the vested contractual rights of the Affected
14 Retirees.³

15 2. City's Medical and Dental Plans

16 Pursuant to SJMC Chapter 3.28, Part 16 (Exhibit 602, REA000396-000400), which
17 became effective on or about September 18, 1984 with the passage of Ordinance No. 21763
18 (Exhibit 711, AFSCME003875-003884), Affected Retirees who were employed on or after that
19 date, their Affected Beneficiaries, and those persons who became Affected Beneficiaries on or
20 after such enactment, became eligible to participate in the City's medical plan with respect to
21 which the Federated Plan pays all or a prescribed portion of the premium upon and following
22 their retirement or, in the case of a survivor, following the death of the member.

23 As with the COLAs, during their employment with the City, employees contributed a
24 percentage of their income to the funding of the medical and dental plan benefits. (See for
25

26 ³ SJREA also anticipates that City will assert a ripeness defense with respect SJREA's challenge of Section
27 1510-A. As just demonstrated, the City's attempt to reduce the showing required before it impairs vested rights is
28 a substantial impairment in and of itself. Therefore, the matter is certainly ripe for judicial determination. The
City has previously acknowledged in a Complaint it filed in Federal Court that an actual controversy had arisen
with respect to the following sections of Measure B: 1503-A, 1504-A, 1505-A, 1506-A, 1507-A, 1509-A, **1510-A**,
1511-A and 1514-A. (Exhibit 632, REA000951.)

1 example, Exhibit 651, REA000781, which shows that employees contributed 1.02% of their
2 income towards the medical benefit and .23% of their income to the dental benefit.)

3 Section 3.28.1970 of the SJMC states in pertinent part:

4 A. A member, as specified in Section 3.28.1950, above, is eligible to
5 participate in a medical insurance plan sponsored by the city provided that the
6 member satisfies the following requirements:

- 7 1. The member retires for service or disability pursuant to the
8 provisions of this chapter; and
- 9 2. The member applies for medical insurance coverage at the time of
10 his or her retirement in accordance with the provisions of the medical insurance
11 plan, and agrees to pay any applicable premiums. (Exhibit 602, REA000398.)

12 Thus, those Affected Retirees who were employed on or after the enactment of the
13 City's medical plan, their Affected Beneficiaries and those persons who became Affected
14 Beneficiaries on or after such enactment who met the minimum requirements set forth in the
15 Federated Plan earned a vested contractual right to participate in the City's medical plan
16 following the Affected Retirees' retirement or, in the case of a survivor, following the death of
17 the member.

18 Pursuant to SJMC Chapter 3.28, Part 17 (Exhibit 602, REA000400-000403) which
19 became effective on or about June 3, 1986 with the passage of Ordinance No. 22261 (Exhibit
20 610, REA000474-000481), Affected Retirees who were employed on or after that date, their
21 Affected Beneficiaries, and those persons who became Affected Beneficiaries on or after that
22 date who met the requirements set forth therein, became eligible to participate in the City's
23 dental plan with respect to which the Federated Plan pays all of the premium upon and
24 following their retirement or, in the case of a survivor, following the death of the member.

25 Section 3.28.2020 states in pertinent part:

26 A. A **member**, as specified in Section 3.28.2000 above, is eligible to
27 participate in a dental insurance plan sponsored by the city provided that the
28 member satisfies the following requirements:

1. The **member** terminates city employment pursuant to the retirement
provisions of this chapter; and
2. At the time of his or her retirement, **the member** is enrolled in one of

1 the dental insurance plans sponsored by the city. (Emphasis added; Exhibit 602,
2 REA000401-000402.)

3 Thus, those Affected Retirees who were employed on or after the enactment of the
4 City's dental plan, their Affected Beneficiaries, and those persons who became Affected
5 Beneficiaries on or after such enactment who met the minimum requirements set forth in the
6 Federated Plan, earned a vested contractual right to participate in the City's dental plan
7 following the Affected Retirees' retirement or, in the case of a survivor, following the death of
8 the member.

9 Section 1512-A impairs the vested rights of Affected Retirees and Affected
10 Beneficiaries to health and dental insurance coverage and premium subsidies by converting
11 what were vested contractual rights into non-vested rights. In that regard, Section 1512-A of
12 Measure B states in pertinent part:

13 (b) Reservation of Rights. No retiree healthcare plan or benefit shall grant
14 any vested right, as the City retains its power to amend, change or terminate any
15 plan provision." (Exhibit 700, POA007049.)

16 On its face, Section 1512-A, paragraph (b) of Measure B impairs the vested rights of
17 Affected Retirees and Affected Beneficiaries by turning them into non-vested rights.⁴ Just as
18 with Section 1510-A, which impairs Affected Retirees' and Affected Beneficiaries' right to
19 COLAs, the alteration of the right to health care and dental coverage and premium
20 contributions from vested to non-vested rights increases the risk that such rights will be reduced
21 or abrogated and, thus, is in itself an impairment.

22 3. The SRBR

23 On or about June 3, 1986, the City Council enacted SJMC Section 3.28.340 (Exhibit
24 602, REA000293-000295) with the passage of Ordinance No. 22263 (Exhibit 614,
25 REA000482-000486) which established the SRBR within the San Jose Federated Employees
26 City Retirement Fund (the "Fund"). In a May 6, 1986 Memorandum from Fran Galloni, then

27 _____
28 ⁴ The fact that the City deemed it necessary to include this conversion in Measure B is perhaps the strongest
evidence that these retiree medical and dental benefits already earned were regarded by the City as, and are, vested
rights.

1 Director of Personnel of the City, to the Honorable Mayor and City Council, Galloni wrote:

2
3 I am recommending two benefits – Dental and SRBR – increases for Federated
4 retirees. These two are very similar to the ones already approved by Council for
5 Police and Fire retirees. The SRBR is comparable to the one percent per year
6 that was granted to the Police and Fire. The benefit level is much lower, but it is
7 what the Federated Board requested. Even though the benefit level is lower, **it is**
8 **a program which will be a permanent part of the Federated Retirement**
9 **System.** (Emphasis added; Exhibit 638, REA000683.)

10 The purpose of the SRBR was to provide additional payments or other benefits to
11 retired members, survivors of members, and survivors of retired members. (SJMC Section
12 3.28.340(E)(1); Exhibit 602, REA000294.) As evidenced by the frequent occurrence of the
13 word “shall” throughout SJMC Section 3.28.340, that provision contains mandatory language
14 requiring the funding of the SRBR. Further, it contains mandatory language for the exercise of
15 discretion by the City Council as to whether to make a distribution from the SRBR upon a
16 recommendation from the Board of Administration for the Federated Plan (the “Board”). In
17 that regard, SJMC Section 3.28.340(B)(2) states:

- 18 a. The board **shall** credit to the supplemental retire (sic) benefit reserve all
19 interest payable pursuant to subsection C. below and that portion of the excess
20 earnings determined pursuant to subsection D. below.
- 21 b. Distributions from the supplemental retiree benefit reserve **shall** be made in
22 accordance with subsection E. below. (Emphasis added; Exhibit 602,
23 REA000293.)

24 SJMC Section 3.28.340(C)(2) reads in pertinent part:

25 Interest **shall** be credited to the supplemental retiree benefit reserve at the
26 actuarially assumed annual rate adopted by the board pursuant to Section
27 3.28.200 or at the actual rate of return earned by the retirement fund during the
28 applicable fiscal year, whichever is lower. Interest credited to the supplemental
retiree benefit reserve **shall** be calculated as though the transfer of excess
earnings required by subsection D. had been made on July 1 of the calendar
year, regardless of the actual date such transfer is made. (Emphasis added;
Exhibit 602, REA000294.)

SJMC Section 3.28.340(D)(2) provides in pertinent part:

If the balance remaining in the income account is greater than zero, the board
shall by written resolution declare that balance to be the excess earnings for the
applicable fiscal year, **shall** transfer ten percent of the excess earnings to the

1 supplemental retiree benefit reserve, and shall transfer the remaining ninety
2 percent of the excess earnings to the general reserve. (Emphasis added; Exhibit
3 602, REA000294.)

4 SJMC Section 3.28.340(E)(2) provides in pertinent part:

5 Upon request of the city council or on its own motion, the board **may** make
6 recommendations to the city council regarding the distribution, **if any**, of the
7 supplemental retiree benefit reserve to retired members, survivors of members,
8 and survivors or retired members. The city council, after consideration of the
9 recommendation of the board, **shall determine** the distribution, **if any**, of the
10 supplemental retiree benefit reserve to said persons. (Emphasis added; Exhibit
11 602, REA000294-295.)

12 Like the COLA, employee contributions were calculated to fund their portion of the
13 SRBR. (See for example, Exhibit 645, SJ002166, which shows that employees contributed
14 .06% of their income in order to fund the SRBR.) Therefore, those Affected Retirees who were
15 employed on or after the establishment of the SRBR and those persons who became
16 beneficiaries on or after its establishment who met the eligibility requirements set forth in
17 SJMC Section 3.28.200, *et seq.* earned vested rights to (a) the funding and maintenance of the
18 SRBR pursuant to the terms set forth in SJMC Section 3.28.340 as well as (b) the exercise of
19 discretion by the City Council as to when to provide distributions from the SRBR.

20 The City argued at trial that, because the City Council retained discretion as to **when** to
21 make **distributions**, Affected Retirees and Affected Beneficiaries could not have acquired a
22 vested right to the funding and discretionary distributions from the SRBR. (RT 65:8-27.) The
23 City's arguments were misplaced as they require the Court to overlook the mandatory language
24 occurring throughout SJMC Section 3.28.340.⁵

25 Based upon the mandatory language appearing above, the City has absolutely no
26 discretion with respect to the establishment and funding of the SRBR. Further, pursuant to
27 SJMC Section 3.28.340(B)(2)(b), the City Council must exercise its discretion from time to
28 time as to whether it would then be appropriate to distribute those **earmarked** funds.

⁵ The City also pointed out that due to the discretion it retained to make distributions, no one could have relied on any distributions from the SRBR. (RT 66:3-10.) There is no authority for the proposition that a specific finding of reliance is required to establish a vested right.

1 Consequently, the only discretion the City maintains is **when** to provide distributions from the
2 SRBR.

3 The term “if any” in the SJMC Section 3.28.340(E)(2) shows that, following any given
4 motion or recommendation made by the Board or the City Council, the City Council is not
5 required to authorize a distribution. However, as evidenced by the presence of the word “shall”
6 in SJMC Section 3.28.240(E)(2), upon any such motion or recommendation, retired members
7 and their survivors are **entitled to a determination** by the City Council as to **whether** it will
8 authorize the particular recommended distribution at that time. This conclusion is supported by
9 the fact that, in contrast to SJMC Section 3.28.240(E)(2), the phrase “if any” does not appear in
10 SJMC Section 3.28.340(A)(2)(b).

11 Just because the City Council has “discretion to ‘determine the distribution,’ it does not
12 mean that a contractual obligation does not arise. Under California law, an obligation under a
13 contract is not illusory if the obligated party’s discretion must be exercised with reasonableness
14 or good faith. (*Storek and Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44,
15 61; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806, ‘the implied covenant of
16 good faith is also applied to contradict an express contractual grant of discretion when
17 necessary to protect an agreement which otherwise would be rendered illusory and
18 unenforceable’.)

19 California Constitution, Article 16 Section 17, provides in pertinent part:

- 20 (a) . . . **The assets of a public pension or retirement system are trust funds**
21 and shall be held for the exclusive purposes of providing benefits to
22 participants in the pension or retirement system and their beneficiaries and
23 defraying reasonable expenses of administering the system. (Emphasis
added.)

24 Thus, the SRBR is a separate trust whose beneficiaries are retired members and their
25 survivors. Under the terms of the Federated Plan, the governing body of the City, its City
26 Council, is the trustee, charged with making distributions from the trust to the retired members
27 and their survivors at times within their discretion. Therefore, it is instructive to analyze
28 Measure B’s impact on the SRBR using the law of trusts.

1 California Probate Code Section 16080 provides: "Except as provided in Section
2 16081, a discretionary power conferred upon a trustee is not left to the trustee's arbitrary
3 discretion, but shall be exercised reasonably." California Probate Code Section 16081 states:

4 (a) Subject to the additional requirements of subdivisions (b), (c), and (d), if a
5 trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a
6 trustee, the trustee shall act in accordance with fiduciary principles and shall not
act in bad faith or in disregard of the purposes of the trust.

7 (b) Notwithstanding the use of terms like "absolute," "sole," or "uncontrolled"
8 by a settlor or a testator, a person who is a beneficiary of a trust that permits the
9 person, either individually or as trustee or cotrustee, to make discretionary
distributions of income or principal to or for the benefit of himself or herself
pursuant to a standard, shall exercise that power reasonably and in accordance
with the standard.

10 Most importantly, California Probate Code Section 16082 states: "Except as otherwise
11 specifically provided in the trust instrument, a person who holds a power to appoint or
12 distribute income or principal to or for the benefit of others, either as an individual or as a
13 trustee, may not use the power to discharge the legal obligations of the person holding the
14 power."

15 Section 1511-A of Measure B states:

16 The Supplemental Retiree Benefit Reserve ("SRBR") **shall be discontinued,**
17 **and the assets returned to the appropriate retirement trust fund.** Any
18 supplemental payments to retirees in addition to the benefits authorized herein
19 shall not be funded from plan assets. (Emphasis added; Exhibit 700,
POA007048-007049.)

20 The passage of Section 1511-A of Measure B, which abolishes the SRBR, impairs the
21 vested rights of the Affected Retirees and Affected Beneficiaries to the funding of, and
22 discretionary distributions from, the SRBR. Measure B abolishes the trust and allows the City
23 to convert the funds for its own purposes. The City has already transferred all of the funds
24 contained therein to the General Retirement Trust Fund (RT 603:5-28; 692:27-693:21; 935:22-
25 27). During trial, Assistant City Manager Alex Gurza conceded that, by transferring the SRBR
26 funds to the General Retirement Trust Fund, the City's actuaries could take this money into
27 account when establishing the City's future contribution rates, which would decrease as a
28

1 result.⁶ (RT 935:1-21.) Both Debra Figone and Alex Gurza concurred that transferring the
2 SRBR funds to the General Retirement Trust Fund saved **the City** approximately \$13 million.
3 (RT 693:5-21; 935:28-936:14.) Certainly, no trustee could justify such conduct. The City
4 Council, as trustee for the SRBR funds, cannot lawfully do what no other trustee in the state of
5 California could do, *i.e.*, abolish a trust and convert the funds of that trust for **its own use**.

6 Furthermore, the failure to contribute funds pursuant to a mandatory prescribed formula
7 has been found to be an impairment of a vested right. (*TRB, supra*, 155 Cal.App.4th at 1022.
8 and *Valdes v. Cory, supra*, 139 Cal.App.3d at 781.) Likewise, in our case, Section
9 3.28.340(A)(2)(a) of the SJMC similarly requires the City to contribute funds to the SRBR
10 pursuant to a mandatory prescribed formula as set forth in paragraphs C and D. Here too, funds
11 are being shifted from a specific fund that was to be used only to make supplemental benefits to
12 retirees and their beneficiaries. As Measure B abolishes the SRBR, it necessarily precludes
13 funds from being contributed to the SRBR. Further, Measure B makes it a certainty that the
14 funds which **were** to be used solely for retirees and their beneficiaries will not be available for
15 that purpose, thereby impairing retirees' vested rights. As in *Valdes*, those funds are now
16 **improperly** being used to enable the employer to reduce the amount of retirement
17 contributions it is required to make.

18 Consequently, Measure B impairs the rights of Affected Retirees and Affected
19 Beneficiaries to have the SRBR funded and maintained by the City and to have the City
20 Council periodically exercise its discretion in good faith as to whether and to what extent those
21 funds should be distributed to retirees and eligible beneficiaries on that particular occasion.⁷

22
23 ⁶ However, the freezing of distributions from the SRBR, which occurred for the three years prior to the passage
24 of Measure B, would not (and did not) reduce the City's contribution rates in any way (RT 934:22-28.)

25 ⁷ At trial, the City offered a series of "Tentative Agreements" whereby various recognized employee
26 organizations tentatively agreed to eliminate the SRBR. (See for example, Exhibit 5712, GURZA000745)
27 However, at least two witnesses, John Robb (RT 152:13-25) and Alex Gurza (RT 930:10-932:8), testified that
28 recognized employee organizations bargain only on behalf of active employees, **not retirees**. Additionally, Gurza
conceded that no labor organization ratified any such **tentative** agreement and, therefore, no binding contract ever
materialized. (RT 889:6-14.)

The City also introduced a letter from Bob Leininger, President of SJREA, dated October 28, 2011 (Exhibit
6070) where he offered to compromise the SRBR in order to avoid having Measure B put on the ballot.
Apparently, this letter was offered to show that SJREA did not believe retirees had a vested right to the SRBR.

1 Various City officials have previously acknowledged that the SRBR is not dependent on
2 the health of the Federated Plan or the City. In a January 18, 2011 Memorandum from Alex
3 Gurza, then Director of Employee Relations for the City, to the Mayor and City Council, he
4 wrote:

5 The SRBR provides a "13th" check, which is a cash payment to retirees payable
6 under certain circumstances in addition (sic) their regular monthly checks.
7 When the retirement plans investment income exceeds their expected returns,
8 10% of those "excess" earnings are credited to the SRBR. Under the current
9 definition, "excess" earnings can be declared and transferred to the SRBR even
10 if other actuarial assumptions have not been met and even if the plans are
11 significantly underfunded, as they currently are. (Exhibit 642, SJ001334.)

12 Mayor Chuck Reed wrote the following in an October 13, 2010 Memorandum to the
13 Rules and Open Government Committee:

14 The Supplemental Retiree Benefit Reserves allows for supplemental benefits or
15 a 13th check to retirees as a bonus when the plan's investment returns exceed
16 expected returns. Apparently, this can take place even when the plan is vastly
17 underfunded and despite major losses in prior years that have not been made up
18 by recent gains. I understand the Federated Plan may transfer funds and issue
19 checks for SRBR payments even though the plan has a significant underfunded
20 liability. Given the current state of both plans and the unfunded liabilities in
21 excess of \$2 billion, I am recommending that the City Council direct staff to
22 amend our ordinance to suspend this program.

23 Because that transfer is required and not discretionary, the Affected Retirees and
24 Affected Beneficiaries acquired a vested right to the funding and maintenance of the SRBR
25 irrespective of the Federated Plan's funding status.

26 **b. Neither the difficulty of funding the SRBR nor the City's**
27 **historic failure to properly fund the SRBR affect the creation**
28 **of vested rights.**

29 Mr. Bartel testified that, in his view, historically the SRBR was not properly funded
30 (RT 966:27-967:12), which factor had the effect of driving up future contribution rates. (RT

1 968:25-969:4.) He recognized that the SRBR was initially funded (RT 974:20-975:5),⁸ though
2 in his view, there was “little rigor” in the calculation of what the impact on contribution rates
3 would be. (RT 966:27-967:12.) Thomas Lowman, the expert called by the Sapien plaintiffs,
4 testified that, while benefits such as the SRBR are “difficult to value” (RT 293:6-14), there is
5 no standard violated by the existence of the SRBR. (RT 297:15-298:2.) Though Bartel
6 described the SRBR as a flawed system, even he had to apply the caveat “unless it is
7 appropriately funded.” (RT 963:18-24). Bartel conceded that his opinion does not relate to
8 whether the benefit provided under the SRBR is flawed, just that the cost of the benefit was not
9 properly considered by the actuaries who advise the retirement board. (RT 974:7-12.) Bartel
10 also acknowledged that the City was not alone in offering an SRBR. (RT 973:22-974:6.)

11 The difficulties in properly accounting for the SRBR from an actuarial perspective do
12 not influence whether the rights concerning the SRBR are vested or not. The City did not offer
13 any authority for that proposition in its Pre-Trial Brief and SJREA is unaware of any such
14 authority. The point is academic, but even if the City were making a fiscal emergency
15 argument with respect to impairing the rights to the SRBR, pursuant to the *Sonoma* (at 313) and
16 *United Firefighters* (at 1112-13) Opinions, the City could not justify its fiscal emergency with
17 evidence that its actuaries had poorly accounted for the SRBR.

18 **4. The Right To Have The City Council Provide Increased Benefits To**
19 **Retirees And Beneficiaries Without The Approval Of The Voters.**

20 A city council’s decision regarding a pension system that does not impair vested rights
21 must be upheld unless expressly prohibited by the city charter. (*Grimm v. City of San Diego*
22 (1979) 94 Cal.App.3d 33, 38.) Thus, the City Council, as the City’s governing body, possessed
23 the inherent authority to provide additional pension benefits to Affected Retirees and Affected
24 Beneficiaries after retirement. In fact, the City’s own enactments conclusively establish that
25

26 ⁸ The Federated City Employees Retirement System Annual Reports for 1985-1986 and 1986-1987 show the
27 employees and the City each contributing a percentage of income to fund the SRBR, (over and above the 10% of
28 excess earnings mandated by SJMC 3.28.340). (Exhibit 650, REA000717 and Exhibit 651, REA000781.)
Federated City Employees’ Retirement System Resolution No. 2002 (Exhibit 645, SJ002165-SJ002167) also
illustrates that members were then contributing .06% of their income and the City contributed .17% of income in
order to fund the SRBR. (Exhibit 645, SJ002166.)

1 the City Council has historically elected to provide retirees and beneficiaries of deceased
2 retirees with additional or improved benefits at times it has done so for active employees. This
3 was confirmed at trial by the testimony of City Auditor Sharon Erickson who related that at
4 least some of the new benefits the City provided were retroactively applied to people who had
5 already retired.⁹ (RT 555:3-10.)

6 For example, in 1970, when the COLA began, the implementing Ordinance (15118)
7 specifically called for percentage increases in monthly allowances for individuals who had
8 retired as far back as 1939. (Ordinance 15118, Section 2904.400, Exhibit 606, REA000461-
9 000462.)

10 With regard to medical insurance, Section 3.28.1950 describes the universe of persons
11 eligible to receive medical insurance coverage and subsidies under the City's plan. It states in
12 pertinent part:

13 Subject to the provisions of this chapter, a **member** may be entitled to medical
14 insurance coverage in an eligible medical plan as specified in Section 3.28.1970
15 if the member satisfies the requirements of Subsection A., Subsection B., or
16 Subsection C.

17 A. The **member** is retired for service or disability under the provisions
18 of this chapter and at the time of such retirement meets any of the following
19 requirements:

- 20 1. Is entitled to credit for fifteen or more years of service.
(Emphasis added; REA000397.)

21 The word "member" is broadly defined in the SJMC and clearly demonstrates an intent
22 to include both active and retired members. Had the drafters of that provision intended to
23 confine its application only to active employees when they retire (and their beneficiaries), they
24 would have mirrored the approach taken in Section 1500 *et seq.* of the City Charter by using
25 the words "officers or employees" or a similar description.

26 The term "member" is defined in SJMC Section 3.28.030.15., which states:
27

28 ⁹ Further, she testified that only in a small number of instances, if ever, were these new benefits granted by the voters, as opposed to the City Council. (RT 555:11-556:3.)

1
2 “Member” means a person who becomes a member of this system pursuant to
3 the provisions of Part 4 of this chapter whose membership shall not have been
4 terminated pursuant to the provisions of this chapter. No other persons are
5 members.

6 The term “member” includes persons who retired prior to September 18, 1984, when
7 the medical insurance benefits were first adopted. (Exhibit 711, AFSCME003875-003884.)
8 SJMC Section 3.28.400, included in Part 4 of Chapter 3.28, states:

9 Each person who on June 30, 1975, was an officer or employee of the city
10 holding an office or position entitling him or her to membership in this
11 retirement plan pursuant to the provisions of Chapter 3.24 and who, in addition,
12 was a member of the retirement plan that date, shall become and be subject to
13 the provisions of this Chapter 3.28 upon its becoming effective if he or she
14 continues to hold that office or position to and through July 1, 1975, and, in
15 addition, continues to be a member of the Chapter 3.24 retirement system until
16 the effective date of this chapter. Upon becoming subject to the provisions of
17 this chapter, each such person ceases to be a subject to the provisions of Chapter
18 3.24 and he or she, and all other persons or estates that might have any rights
19 under Chapter 3.24 because of the person’s coverage under Chapter 3.24, cease
20 to have any rights under Chapter 3.24 but shall thereafter be governed by and
21 have only such rights as are provided by this Chapter 3.28 system.

22 Therefore, all individuals who retired after July 1, 1975 are considered members of the
23 Chapter 3.28 retirement system and would also be eligible for the medical insurance benefit
24 described in SJMC 3.28.1950.

25 Furthermore, with respect to participation in the City’s medical plan, Ordinance No.
26 21763 (Exhibit 711, AFSCME003875-003879), adopted in 1984 granted retired members of
27 the 1951-1975 version of the Federated Plan (SJMC Chapter 3.24, specifically Part 23; Exhibit
28 602, REA000269-000271) entitlement to medical coverage after retirement. As a result, retired
members who had retired well before the enactment of Ordinance No. 21763 received retiree
medical coverage through the City’s medical plan.

Similarly, Ordinance No. 22261(Exhibit 610, REA000475-000478), adopted in 1986,
references the broad term “member,” which includes all individuals retiring after July 1, 1975.
Additionally, it granted retired members of the 1951-1975 version of the Federated Plan (SJMC

1 Chapter 3.24 specifically Part 24; Exhibit 602, REA000271-273) entitlement to post-retirement
2 dental coverage. As a result, members who had retired well before the enactment of Ordinance
3 No. 22261 received dental coverage through the City's dental plan.

4 As we previously illustrated (at 16:22-19:10), as to the SRBR, SJMC Section
5 3.28.340(E)(2) provides in pertinent part:

6 Upon the request of the city council or on its own motion, the board may make
7 recommendations to the city council regarding the distribution, if any, of the
8 supplemental retiree benefit reserve to **retired members, survivors of**
9 **members, and survivors or retired members.** The city council, after
10 consideration of the recommendation of the board, shall determine the
11 distribution, if any, of the supplemental retiree benefit reserve to said persons.
12 (Exhibit 602, REA000294-000295.)

13 There is no limitation anywhere in the SJMC that those retired members must have
14 retired after 1986, when the SRBR was implemented, in order to qualify for distributions from
15 the SRBR. Furthermore, the City Council's Resolution No. 71780 (Exhibit 649, REA000684-
16 000691, which set forth the methodology for distributions from the SRBR in 2003, defined
17 "retiree" as "a person who has retired from the Federated City Employees Retirement System
18 under the provisions of the System. 'Retiree' does not include any person who has separated
19 from City service but is not receiving a benefit from the Federated Plan." (Exhibit 649,
20 REA000689.) Again, there is no limitation that a retiree must have retired after a certain date,
21 despite the existence of a different limitation.

22 Though it pertains to the Police and Fire Retirement System, Exhibit 639 (SJ001106-
23 SJ001108), a Memorandum from Edward F. Overton, the Director of Retirement Services,
24 attaches a chart showing sample distributions to retirees. (Exhibit 639, SJ001108.) The chart
25 shows that an individual named MacLean, who has been retired for 44 years, is projected to
26 receive a distribution from the SRBR. This is further evidence for the City's longstanding
27 practice of extending newly granted benefits to persons who had already retired.

28 Thus, as to COLAs, medical and dental plan coverage, and the SRBR, persons who
retired before these benefits were enacted have always received these benefits and all
improvements related to these benefits. As a result, individuals (*i.e.*, Affected Retirees) who
were employed while those benefits or improvements were voluntarily bestowed upon retirees

1 and dependents of deceased retirees thereby acquired a vested right to be eligible for like
2 voluntary benefits or improvements after they retired if the City Council exercised its **sole** and
3 inherent discretion to provide them.

4 Section 1504-A of Measure B, entitled “Reservation of Voter Authority,” added an
5 obstacle that did not previously exist with respect to the distribution of additional benefits to
6 Affected Retirees and their beneficiaries by requiring voter approval prior to any such
7 distribution. In that regard, Section 1504-A of Measure B, entitled “Reservation of Voter
8 Authority,” states in pertinent part:

9 **Neither the City Council**, nor any arbitrator appointed pursuant to Charter
10 Section 1111, **shall have the authority** to agree to or **provide any increase in**
11 **pension and/or retiree health care benefits without voter approval**, except
12 that the Council shall have the authority to adopt Tier 2 pension benefit plans
13 within the limits set forth herein. (Emphasis added; Exhibit 700, POA007039.)

14 Requiring a vote of the people will make it much more difficult for Affected Retirees
15 and Affected Beneficiaries to receive any future improvements or benefits from the City
16 Council, should it desire to provide them. This change substantially impairs the vested rights of
17 the Affected Retirees and Affected Beneficiaries.

18 **C. Any Right That The City Charter Reserved To The City Council To Modify**
19 **The Federated Plan Did Not Empower It To Impair Or Otherwise Reduce**
20 **Vested Benefits Of Individuals Who Already Had Retired Or Their**
21 **Beneficiaries.**

22 The City’s major response to this lawsuit is that City employees never obtained vested
23 rights due to the existence of a so-called “reservation of rights” clause contained in Section
24 1500 of the City Charter, which reads:

25 Except as hereinafter otherwise provided, the Council shall provide, by
26 ordinance or ordinances, for the creation, establishment and maintenance of a
27 retirement plan or plans for all officers and employees of the City. Such plan or
28 plans need not be the same for all officers and employees. Subject to other
provisions of this Article, the Council may at any time, or from time to time,
amend or otherwise change any retirement plan or plans or adopt or establish a
new or different plan or plans for all or any **officers or employees**. (Emphasis
added; Exhibit 701, POA007114.)

Similar specific language referencing only officers or employees appears in City

1 Charter Section 1503, which states:

2 Any and all retirement system or systems, existing upon adoption of this
3 Charter, for the retirement of officers or employees of the City, adopted under
4 any law or color of any law, including but not limited to those retirement
5 systems established by Parts 1, 2 and 4 of Chapter 9 of Article II of the San Jose
6 Municipal Code, are hereby confirmed, validated and declared legally effective
7 and shall continue until otherwise provided by ordinance. The foregoing
8 provisions of this Section shall operate to supply such authorization as may be
9 necessary to validate any such retirement system or systems which could have
10 been supplied in the Charter of the City of San Jose or by the people of the City
11 at the time of adoption or amendment of any such retirement system or systems.
12 However, subject to other provisions of this Article, the Council shall at all
13 times have the power and right to repeal or amend any such retirement system or
14 systems, and to adopt or establish a new or different plan or plans for all or any
15 **officers or employees**, it being the intent that the foregoing sections of this
16 Article shall prevail over the provisions of this Section. (Emphasis added;
17 Exhibit 701, POA007115-007116.)

18 Because these provisions clearly limit any such empowerment to actions that affect only
19 officers or employees, as distinct from **retired members**, who are neither officers nor
20 employees, the City's "reservation of rights" argument has no bearing on the retirement
21 entitlements already possessed by individuals who were retired at the time Measure B took
22 effect or their eligible beneficiaries (*i.e.*, Affected Retirees and Affected Beneficiaries).
23 Consequently, it does not provide authorization for the alterations contained in Measure B
24 which are the subject of the SJREA lawsuit.

25 Under general settled canons of statutory construction, we ascertain the
26 Legislature's intent in order to effectuate the law's purpose. [Citation.] We must
27 look to the statute's words and give them their "usual and ordinary meaning."
28 [Citation.] The statute's plain meaning controls the court's interpretation unless
its words are ambiguous. If the plain language of a statute is unambiguous, no
court need, or should, go beyond that pure expression of legislative intent.
(*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, quoting *Kobzoff v. Los
Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal. 4th 851, 861; see
also 58 Cal.Jur.3d, Statutes, §§ 83-88, 171.)

We seek to ascertain the Legislature's intent so that we may effectuate the law's
purpose. Our goal is to interpret the language of the statute --not to insert what
has been omitted or omit what has been inserted. We look first to the language
of the statute itself, read as a whole, seeking to harmonize parts of a statutory
scheme. **If the words contained in the statute are reasonably free from**

1 **ambiguity and uncertainty, we look no further than those words to**
2 **ascertain the provision's meaning.** [Citation.] (Emphasis added; *Bettencourt*
3 *v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1100.)

4 In construing the statutory provisions a court is not authorized to insert
5 qualifying provisions not included and may not rewrite the statute to conform to
6 an assumed intention which does not appear from its language. The court is
7 limited to the intention expressed. [Citations.] (*Mares v. Baughman* (2001) 92
8 Cal.App.4th 672, 677, quoting *People v. One 1940 Ford V-8 Coupe* (1950) 36
9 Cal.2d 471, 475; see also 58 Cal.Jur.3d, *supra*, §§ 90-91.)

10 “When we interpret a statute, we must avoid an interpretation that would render terms
11 surplusage. Instead, we seek to give every word some significance, leaving no part useless or
12 devoid of meaning.” *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th
13 1064, 1081. “While every word of a statute must be presumed to have been used for a purpose,
14 **it is also the case that every word excluded from a statute must be presumed to have been**
15 **excluded for a purpose.**” (Emphasis added; *Arden Carmichael, Inc. v. County of Sacramento*
16 (2001) 93 Cal.App.4th 507, 516; see also 2A N. Singer, *Statutes and Statutory Construction*
17 (6th ed. 2000), § 46:06.)

18 An application of these clear principles of statutory construction compels the conclusion
19 that any reserved power to amend does not extend **to benefits already provided to retirees or**
20 **their eligible beneficiaries.**

21 Moreover, most significantly, Measure B itself clearly articulates an intent **not** to reduce
22 or impact any benefits already possessed by retirees at the time of its enactment. In particular,
23 Section 1502-A, entitled “Intent,” expressly states in its fourth and fifth paragraphs:

24 * * *

25 * * *

26 * * *

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

This Act is **not intended to reduce the pension amounts received by any**
retiree or to take away any cost-of-living increases paid to retirees as of the
effective date of the Act. (Emphasis added; Exhibit 700, POA007037-007038.)

1 This unequivocal intent **not** to reduce, or even impact, the retirement benefits provided
2 to individuals who were retired at the time Measure B took effect, or their eligible
3 beneficiaries, is also reflected in the Argument submitted in favor of Measure B that was signed
4 by the City's Mayor, among others. In particular, the fourth paragraph of the proponents'
5 Argument states:

6 * * *

7 * * *

8 * * *

9 Measure B would protect retirement benefits already earned by current
10 employees but would reduce the cost to the city by making changes going
11 forward. **It would not cut current payments to retirees.** . . . (Emphasis
added; Exhibit 605, REA000442.)

12 It is well-established that in construing voter initiative language "we refer to other
13 indicia of voter's intent, particularly the analyses in arguments contained in the official
14 pamphlet." (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Birkett* (1999) 21 Cal.4th
15 226, 243.) During trial, the City's lead attorney, Arthur Hartinger, conceded: "So I think we all
16 agree that when you are looking at the interpretation of retirement provisions, you have to
17 effectuate the intent of the voters at the time, and you have to – one instrument in doing that or
18 one means of doing that is looking at the voter pamphlets." (RT 52:8-13.)

19 From the foregoing, it is abundantly apparent that any rights the City might possibly
20 have reserved under Sections 1500 *et seq.* of the City Charter to amend or change any
21 retirement plan or establish a new or different plan **only** pertained to current officers or
22 employees. Nothing in the City Charter or any other lawful enactment in any way stated that
23 the retirement benefits awarded to **retirees** could thereafter be amended or changed or that any
24 benefits earned by current employees could be amended or changed **after they retired.**

25 Furthermore, the language of section 1502-A of Measure B set forth above clearly
26 reveals that the City and its electorate understand that retirees have previously earned benefits
27 that must be preserved. Yet, if the City's construction of the so-called "reservation of rights"
28 clause were adopted, there would be no such thing as a **preserved** "previously earned benefit"

1 because **all** benefits would be subject to change by the City.

2 **D. Even If City Charter Section 1500 et seq. Was Not Construed To Be**
3 **Inapplicable To Retirees, It Cannot Be Interpreted To Empower The**
4 **Impairments Set Forth In Measure B.**

5 Taken to its logical conclusion, the City’s “reservation of rights” position means that a
6 municipality can avoid the vested rights doctrine and eliminate all pension benefits earned by
7 the Affected Retirees and Affected Beneficiaries. Until the drafting of Measure B, the City
8 never believed it was entitled to do this, as evidenced by the fact that no Employee Handbooks
9 distributed to Plan employees have stated that any rights discussed therein are subject to a so-
10 called “reservation of rights” clause.¹⁰ (See Exhibits 636, REA000600-000681, 653,
11 REA000978-000993, 655, SJ002296-SJ002374, REA000001-000084, REA000085-000169.)
12 Were the City allowed to do so, it would render its contract with its employees illusory.

13 Words of promise which by their terms make performance entirely optional with
14 the “promisor” ... do not constitute a promise. Although such words are often
15 referred to as forming an illusory promise, they do not fall within the present
16 definition of promise. They may not even manifest any intention on the part of
17 the promisor. Even if a present intention is manifested, the reservation of an
18 option to change that intention means that there can be no promisee who is
19 justified in an expectation of performance.” (Rest.2d Contracts, § 2, com. e, p.
20 10; accord, id., § 77, com. a, p. 195; 1 Corbin on Contracts (rev. ed. 1993) §
21 1.17, p. 47.) “One of the most common types of promise that is too indefinite
22 for legal enforcement is the promise where the promisor retains an unlimited
23 right to decide later the nature or extent of his or her performance. This
24 unlimited choice in effect destroys the promise and makes it illusory.” (1
25 Williston on Contracts (4th ed. 2007) § 4:27, pp. 804–805, fns. omitted; accord,
26 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 230–231, pp.
27 264–266.) (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal. App. 4th
28 1425, 1438-1439.)

In *Legislature v. Eu* (1991) 54 Cal.3d 492, the California Supreme Court struck down

¹⁰ In addition, authorized City employees have made representations that employees’ have vested rights to pension benefits. For example, in Exhibit 214, George Rios, an attorney for the City cautioned the arbitrator about awarding pension benefits because “Unlike other employment benefits, such as salary (which may be linked to inflation or the consumer price index), retirement benefits in a defined benefit plan are not subject to the fluctuating economy. Once a retirement benefit has been installed in the retirement plan, the employee who meets the eligibility requirements has a vested right in the benefit upon retirement and it generally cannot be removed from the Federated Plan unless a benefit of equal or greater value is given.” (Exhibit 214, p. 2 of the Opening Brief.)

1 an initiative provision (“Prop 140”) which would have terminated the Legislators’ Retirement
2 Law (“LRL”) as to certain legislators, thereby imposing significant limitations on legislators’
3 previously earned pension rights. Specifically, a section was to be added to Article IV of the
4 California Constitution to provide that the State will contribute the employer’s share to the
5 Federal Social Security system on behalf of participating legislators “elected to or serving in
6 the Legislature on or after November 1, 1990,” but “[n]o other pension or retirement benefit
7 shall accrue as a result of service in the Legislature, such service not being intended as a
8 career occupation.” (Emphasis added; *Id.* at 502-503.)

9 The individuals challenging Prop 140 claimed that it impaired vested rights to pension
10 benefits, whereas its supporters relied on pre-existing language in Article IV, Section 4 of the
11 California Constitution, which provided in pertinent part that “**The Legislature may, prior to
12 their retirement, limit the retirement benefits payable to Members of the
13 Legislature . . .**” (Emphasis added; *Id.* at 528-529.)

14 The Court held that this provision in the Constitution which seemingly allowed the
15 Legislature to limit retirement benefits (Article VI, Section 4) did not prevent the creation of
16 vested rights. Specifically the Court stated (at 529):

17 That provision, seemingly empowering the Legislature to exercise some
18 measure of control over the pension rights of its own members prior to their
19 retirement, may create some uncertainty as to the full amount or extent of a
20 legislator's pension rights during his term of office. **But the provision neither
21 states nor implies that these rights are thus deemed inchoate and
22 unprotected from impairment by the initiative process. Significantly, we
23 have never suggested that the mere existence of article IV, section 4,
24 precludes legislators from acquiring pension rights protected by the state or
25 federal contract clauses.** (Emphasis added; *Cf. Allen v. Board of
26 Administration, supra*, 34 Cal.3d at pp. 119-120.)

27 The Opinion (at 529-530) proceeded on the basis that, consistent with established
28 appellate authority, the limiting language contained in Article IV, Section 4 of the California
Constitution permitted only reasonable modifications to the pension system during the
employment relationship provided the employees receive “comparable new advantages” in
return for any substantial reduction in benefits. The Opinion concluded (at 530) that incumbent

1 legislators had a vested right to earn additional pension benefits through continued service,
2 despite the “potential but unexercised limitations contemplated by article IV, section 4, of the
3 state Constitution.”

4 The so-called “reservation of rights” clause in the City Charter similarly neither states
5 nor implies that any rights provided pursuant to City Charter Section 1500 are inchoate or
6 unprotected from impairment. Therefore, it does not operate to preclude the creation of vested
7 rights. Even in *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, a case relied upon
8 by the City, the Court in analyzing the LRL conceded: “We have no doubt that incumbent
9 members of the Legislature at the time of the adoption of Proposition 140 had contractually
10 vested pension rights under the LRL which would be protected under the contract clause. (*Id.*
11 at 700, fn. 6.)

12 In *Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, the
13 Court analyzed a claim by the city of Santa Ana that any rights or obligations created by a
14 contract with the Southern California Gas Co. were subject to a reservation of rights provision
15 contained in that contract. Specifically, the city contended (at 893) that Section 8(a) of the
16 1938 Franchise allegedly subjects the gas company’s rights to all ordinances “heretofore or
17 hereafter adopted . . . in the exercise of [Santa Ana's] police powers Read in conjunction
18 with sections 8(b) and 9, Santa Ana contends the gas company expressly acknowledged that its
19 rights under the 1938 Franchise could be altered by future police power ordinances.”

20 The Court rejected the city’s contention, stating (at 893):

21 Santa Ana cannot avoid Contract Clause analysis merely by establishing that the
22 trench cut ordinance is an otherwise legitimate exercise of police power. While
23 the 1938 Franchise may acknowledge the need for further regulation pursuant to
24 Santa Ana's police power, it does not enable Santa Ana to adopt ordinances that
25 compromise its material terms. (Citations.) We cannot read the 1938 Franchise
26 in a way that reserves to Santa Ana the power to unilaterally alter the terms of
27 the agreement. Such an interpretation is “absurd;” section 8(a) “cannot be
28 applied as broadly and retrospectively as its literal language may suggest.”
(Citations) (*See also Energy Reserves Group, Inc. v. Kan. Power & Light Co.*,
459 U.S. 400, 412 n.14, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983), “When a State
itself enters into a contract, it cannot simply walk away from its financial
obligations.”)

1 Like the contract in *Southern California Gas Co.*, the City cannot walk away from its
2 contractual obligations to its former employees by relying on the so-called “reservation of
3 rights” clause. If the Court was unwilling to enforce a “reservation of rights” clause in a
4 contract where the parties had negotiated the language, it makes no sense that such a provision
5 could be enforced as to the Affected Retirees and Affected Beneficiaries who did not negotiate
6 the language in the City Charter.

7 **E. In Enacting Section 1500 et seq. Of The City Charter, The Voters Expressly**
8 **Limited The Ability To Amend The Retirement Plan To The City Council.**

9 A close reading of Section 1500 of the City Charter reveals that all powers granted
10 therein are granted to the City Council.

11 Except as hereinafter otherwise provided, the **Council** shall provide, by
12 ordinance or ordinances, for the creation, establishment and maintenance of a
13 retirement plan or plans for all officers and employees of the City. Such plan or
14 plans need not be the same for all officers and employees. Subject to other
15 provisions of this Article, **the Council** may at any time, or from time to time,
16 amend or otherwise change any retirement plan or plans or adopt or establish a
17 new or different plan or plans for all or any officers or employees. (Emphasis
18 added; Exhibit 701, POA007114.)

19 In the unlikely event this Court should determine that this language authorizes the
20 reduction or elimination of previously prescribed benefits, it must nevertheless decide that
21 Measure B is unlawful. Any empowerment granted by Section 1500 *et seq.* was given
22 exclusively to the City Council, not the voters. Because the electorate, which enacted Section
23 1500 *et seq.*, confined the ability to make Plan amendments to the City Council, as opposed to
24 reserving that right, the reductions and impairments are unlawful because they were
25 promulgated by the voters, not the City Council.

26 The fact that Section 1500 *et seq.* used the specific term “Council,” as opposed to
27 broader language such as “legislative body” or “governing body,” creates a strong inference
28 that the intent of the voters in enacting that provision was to confine that empowerment to that
particular body. (*De Vita v. County of Napa* (1995) 9 Cal.4th 763, 776; *Committee of Seven
Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501.)

The language confining any ability to amend to the City Council that appears in Section

1 1500 is consistent with the pre-existing Charter provisions. In 1961, Section 78(b) of the City
2 Charter provided in relevant part:

3 ...the **Council** in its discretion may at any time, or from time to time, by
4 ordinance, amend or otherwise change the retirement plan or plans established
5 pursuant to said Section 78a or any retirement plan or plans established pursuant
6 to said Section 78a, or adopt or establish a new or different plan or plans for
eligible members of the police or fire departments of the City of San Jose.
(Exhibit 2, POA005619.)

7 The 1961 ballot argument in favor of Charter Section 78(b) stated in pertinent part:

8 The purpose of this amendment is to enable the **City Council** to take legal steps
9 to provide survivor benefits for your policemen's and firemen's families . . .
10 SURVIVOR BENEFITS ARE PROHIBITED AT PRESENT IN THE CITY
11 CHARTER! In order to allow the **City Council** to adopt reasonable benefits, it
is necessary to amend the City Charter. In other words, this amendment merely
12 unties the hands of your **City Council**...

13 Two years ago, a very long, detailed plan was presented and defeated.
14 Opponents of this plan argued this matter should be referred to the City Council
15 for action and not included as mandatory provisions of the City Charter. This
16 amendment will do just that. This amendment will allow the **City Council** to
have legal authority to act on survivor benefits by ordinance and thereby provide
17 protection for widows and orphans. (Emphasis added; Exhibit 5203,
SJRJN000386.)

18 It is clear, both from the language of Section 78b and from the ballot argument in favor
19 of that Section, that the power to adopt and amend pension plans was specifically conferred by
20 the voters on the City Council. Nothing in the subsequent 1965 enactment departed from that
21 limited grant of authority.

22 **F. Section 1515-A Of Measure B Violates The Separation Of Powers Doctrine**

23 Section 1515-A(b) of Measure B, entitled "Severability," states in pertinent part:

24 (b) If any ordinance adopted pursuant to the Act is held to be invalid,
25 unconstitutional or otherwise unenforceable by a final judgment, the matter shall
26 be referred to the City Council for determination as to whether to amend the
ordinance consistent with the judgment, or whether to determine the section
27 severable and ineffective." (Exhibit 700, POA007051-007052.)

28 No analysis of vested rights is required to determine that Section 1515-A constitutes a

1 violation of the separation of powers among the legislative, executive, and judicial branches
2 under Article III, Section 3 of the California Constitution as the challenge to Section 1515-A is
3 a facial challenge. A facial challenge, as opposed to an “as applied” challenge, asks the Court
4 to consider only the text of the measure itself. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th
5 1069, 1084.

6 In *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245,
7 267, the California Supreme Court discussed the factors a Court is to consider when
8 determining whether the valid portion of a statute struck down in part may remain.

9 A severability clause, although not conclusive, “normally calls for sustaining the
10 valid part of the enactment The final determination depends on whether
11 ‘the remainder . . . is complete in itself and would have been adopted by the
12 legislative body had the latter foreseen the partial invalidation of the statute’
13 [citation]” (quoting from *Metromedia, Inc. v. City of San Diego* (1982) 32
14 Cal.3d 180, 190.

15 As it is within the exclusive jurisdiction of the Courts to make the determination as to
16 whether any parts of any Ordinance adopted pursuant to Measure B are severable, it is a
17 violation of the separation of powers doctrine to grant that power to the City Council.

18 **G. Section 1513-A Of Measure B Violates Article XVI, Section 17 Of The**
19 **California Constitution.**

20 Section 1513-A of Measure B, entitled “Actuarial Soundness (for both pension and
21 retiree healthcare plans),” states in pertinent part:

22 (c) In setting the actuarial assumptions for the plans, valuing the liability of
23 the plans, and determining the contributions required to fund the plans, the
24 objectives of the City’s retirement boards shall be to:

25 (i) achieve and maintain full funding of the plans using at least a median
26 economic planning scenario. The likelihood of favorable plan
27 experience should be greater than the likelihood of unfavorable plan
28 experience; and

(ii) ensure fair and equitable treatment for current and future plan
members and taxpayers with respect to the costs of the plans, and
minimize any intergenerational transfer of costs. (Exhibit 700,
POA007050.)

1 By enacting Section 1513-A, paragraph (c) of Measure B, the City has violated Article
2 XVI, Section 17(b) of the California Constitution, which states:

3 The members of the retirement board of a public pension or retirement system
4 shall discharge their duties with respect to the system **solely in the interest of,**
5 **and for the exclusive purposes of providing benefits to, participants and**
6 **their beneficiaries,** minimizing employer contributions thereto, and defraying
7 reasonable expenses of administering the system. A retirement board's **duty to**
8 **its participants and their beneficiaries shall take precedence over any other**
9 **duty.** (Emphasis added.)

10 As set forth in the San Jose Police Officers' Association's Pre-Trial Brief (at 28:18-28),
11 the purpose of Section 17 is to prevent "meddling" with pension funds in times of perceived
12 distress. (*State ex rel. Pension Obligation Bond Committee v. All Persons Interested in Matter*
13 *of Validity of Cal. Pension Obligation Bonds* (2007) 152 Cal.App.4th 1386, 1392.)

14 Section 1513-A, paragraph (c) of Measure B compromises the Board's fiduciary duties
15 to Affected Retirees and Affected Beneficiaries by compelling the Board to consider the
16 interests of the City's residents and taxpayers on an equal basis with plan participants and their
17 beneficiaries. However, the last sentence of Article XVI, Section 17(b) of the Constitution
18 mandates that the Board's "duty to the participants and beneficiaries shall **take precedence**
19 **over any [possible] other duty**" (emphasis added), including any obligation toward residents
20 and taxpayers to minimize employer contributions.

21 At trial, the City argued that Section 1513-A, paragraph (c) could be reconciled with
22 Article XVI, Section 17(b) because the City subsequently passed an ordinance, Exhibit 5301
23 (Ordinance No. 29198), which "indicates and directs the Board of Retirement to discharge its
24 duties in a manner consistent with the California Pension Protection Act." (RT 64:10-65:1.)

25 Initially, Ordinance No. 29198 only pertains to the Police and Fire Retirement System.
26 However, even if it also pertained to the Federated System, the plain language of Section 1513-
27 A, which became a part of the City's Charter, and thus takes precedence over the Municipal
28 Code, mandates that the Board consider the interests of the City's residents and taxpayers on an
equal basis with plan participants and their beneficiaries. However, a retirement board, which
owes a fiduciary duty to a retirement plan's beneficiaries, may not be guided by the interest of

1 any third parties. (*City of Sacramento v. Public Employees Retirement System* (1991) 229
2 Cal.App.3d 1470, 1493-1494.) Thus, the mandate contained in Section 1513-A cannot be
3 reconciled with the Pension Protection Act. Furthermore, the City cannot nullify its Charter
4 through its Municipal Code. Therefore, Section 1513-A, paragraph (c) is invalid and must be
5 set aside.

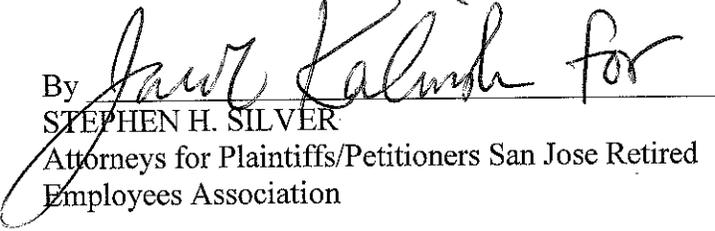
6 **III. CONCLUSION**

7 For all of the reasons set forth above, SJREA respectfully urges the Court to render its
8 judgment (a) enjoining the City from in any way implementing or enforcing Sections 1504-A,
9 1510-A, 1511-A, 1512-A(b), 1513-A(c) and 1515-A of Measure B; (b) declaring that (1)
10 Sections 1504-A, 1510-A, 1511-A(c) and 1512-A(b) of Measure B unconstitutionally impair
11 vested contractual rights of Affected Retirees and Affected Beneficiaries in violation of the
12 Contract Clause of the California Constitution, (2) Section 1515-A of Measure B violates
13 Article III, Section 3 of the California Constitution; and, (3) Section 1513-A of Measure B
14 contravenes Article XVI, Section 17(b) of the California Constitution; and (c) issue its
15 Peremptory Writ of Mandate commanding the City to return to the SRBR all monies previously
16 transferred from it to another retirement fund or account.

17 Respectfully submitted,

18 SILVER, HADDEN, SILVER, WEXLER & LEVINE

19
20 Date: September 9, 2013

21 By  for
STEPHEN H. SILVER

22 Attorneys for Plaintiffs/Petitioners San Jose Retired
23 Employees Association
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On September 10, 2013, I served the documents described as follows on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth on the attached service list:

1. SJREA'S POST-TRIAL BRIEF

[By Electronic Mail] I caused the document(s) to be transmitted to the addressee(s) via electronic mail at the addresses listed on the attached Service List.

[By Mail] I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it would be deposited with the U.S. Postal Service with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 10, 2013, at Santa Monica, California.

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

MICHELE R. JOHNSON


SIGNATURE

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