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1 Defendants City of San José and Debra Figone, in her official capacity (collectively, the
2 “City”), make the following consolidated response to the respective objections and other responses
3 to the Court’s Tentative Statement of Decision (“TSD”) filed by plaintiff San Jose Police Officers
4 Association (“SJPOA”), the individual plaintiffs (“Sapien plaintiffs”), and plaintiff AFSCME
5 Local 101 (“AFSCME”) on January 6, 2014.

6 **I. RESPONSE TO SJPOA OBJECTIONS**

7 The SJPOA asserts four objections to the Court’s Tentative Statement of Decision.

8 **A. SJPOA Objection 1**
9 **Section 1509-A (Disability Retirement)**

10 The SJPOA claims that the Court’s finding regarding “the original purpose of disability
11 retirement” in Section II.E.2 of the decision is “erroneous” because it is based on the City’s intent
12 in creating the disability retirement benefit, as reflected in the 1946 Charter provisions, rather than
13 on “the parties’ mutual intent.” (SJPOA Obj. at 2; TSD at 19:17-21.) It asks the Court to specify
14 that “the original purpose of disability retirement” was “the City’s” and that the “original
15 definition” of disability was also “the City’s.” (SJPOA Obj. at 2-3.)

16 The Court did not err, and there is thus no reason to adopt the SJPOA’s proposed changes.
17 The sentences the SJPOA seeks to change are part of the Court’s analysis of whether Section
18 1509-A “has a material relationship to the successful operation of the system,” as part of the *Allen*
19 pension-right-modification test applied in *Gatewood v. Bd. of Retirement*, 175 Cal.App.3d 311
20 (1985). (TSD at 19:7-26, citing *Gatewood*, 175 Cal.App.3d at 321.) Specifically, in finding that
21 the “eligibility changes in section 1509-A are related to the successful operation of the system,”
22 the Court found that the changes were “loyal to the original purpose of disability retirement: a
23 benefit for those unable to work.” (*Id.* at 19:17-19.) The Court cited evidence introduced at trial
24 to support its finding. (*Id.* at 19:19-21, citing Exh. 5202, at SJ001731.) The SJPOA did not offer
25 evidence at trial to contradict this finding; it did not offer evidence of a different “original
26 purpose.” Moreover, in determining the “purpose” of the disability retirement system here, the
27 Court properly looked to statutory authority (i.e., the Charter). *See, e.g., Walsh v. Bd. of Admin.*, 4
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1 Cal.App.4th 682, 703 (1992) (citing Gov't Code § 20001 in stating, "The purpose of a public
2 pension system is to permit employees who become superannuated or otherwise incapacitated to
3 retire without hardship and to be replaced by more capable employees").

4 As a result, there is no evidentiary basis to narrow or otherwise qualify the original
5 purpose of the disability retirement benefit, and the Court should not adopt the SJPOA's proposed
6 changes.

7 **B. SJPOA Objection 2**
8 **Section 1509-A (Disability Retirement)**

9 The SJPOA takes issue with the Court's finding that Section 1509-A "offers comparable
10 new advantages" under the latter part of the *Allen/Gatewood* pension-right-modification test.
11 (SJPOA Obj. at 3-5; TSD at 19-20.) The Court found that the "countervailing advantage" was a
12 decrease in the amount of time the employee must be disabled before being eligible for retirement
13 –from 'permanent' or 'at least until the disabled person attains the age of fifty-five (55) years' to
14 'at least one year.'" (TSD at 19:17-20:3.) In so doing, the Court specifically addressed the
15 SJPOA's argument that the advantage was "'meager' and may not apply in every case." (*Id.* at
16 20:8-17, citing SJPOA Post-Trial Br. at 17:10-17.) It noted both that the new advantage need not
17 be equivalent and that "'[i]t is enough that a modification does not frustrate the reasonable
18 expectations of the parties to the contract of employment.'" (TSD at 20:9-17, quoting *Lyon v.*
19 *Flournoy*, 271 Cal.App.2d 774, 782 (1969).)

20 Given that the Plaintiffs made a facial challenge to this section of Measure B (TSD at 7:5-
21 8). Plaintiffs must prove that Measure B "'pose[s] a present total and fatal conflict with
22 applicable constitutional prohibitions.'" *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1085 (1995).
23 Accordingly, the SJPOA now asks this Court to find that the new advantage cannot be applied in
24 *any* case, i.e., that "Section 1509-A's changes can *never* be applied legally." (SJPOA Obj. at 3
25 (emphasis in original).) But Plaintiffs cannot meet this high burden because they offered no
26 evidence on this issue at trial, and the cases upon which the SJPOA relies are not on point.

1 Two of the cases the SJPOA cites, for example, are “as-applied” and ultimately do not help
2 the SJPOA with its facial challenge. First, *Abbott v. City of Los Angeles*, 50 Cal.2d 438 (1958),
3 addressed the validity of pension amendments “as applied” to the plaintiffs in that case, and held
4 that substituting a fixed pension system for a fluctuating system was unreasonable because the
5 change did not “bear any material relation to the integrity or successful operation or to the
6 preservation or protection of the pension program applicable to these plaintiffs.” *Abbott*, 50
7 Cal.2d at 447, 455. Here, the Court properly weighed the evidence introduced at trial, and found
8 that, unlike *Abbott*, the changes in Section 1509-A were related to the integrity and successful
9 operation of the disability pension program at issue here. Indeed, the Court’s decision is
10 consistent with the holding in *Lyon* that where “[t]he lawmaking power chose to confine
11 beneficiaries to the gains ‘reasonably to be expected from the contract’ and to withhold
12 ‘unforeseen advantages’ which had no relation to the real theory and objective of the ...
13 provision,” “[s]uch a choice is not the repudiation of a debt, not an impairment of the contract.”
14 *Lyon, supra*, 271 Cal.App.2d at 787.

15 Second, the SJPOA’s citation to *Orange County Employees Ass’n v. Bd. of Admin.*, 39
16 Cal.App.3d 825 (1974), illustrates the importance of the distinction between as-applied challenges
17 and the facial challenge being made here. In *Orange County*, and the earlier case of *Amundsen v.*
18 *Public Employees’ Retirement System*, 30 Cal.App.3d 856 (1973), the plaintiffs brought as-applied
19 challenges to a 1971 amendment that imposed an additional pension requirement of five years of
20 service. In *Orange County*, where the plaintiff’s employment was terminated before he had
21 attained five years of service and thus received no pension at all, the court held the amendments,
22 as applied, were unreasonable to the plaintiff, “who received no new advantage.” *Orange County*,
23 39 Cal.App.3d at 828-829 In *Amundsen*, where the new eligibility requirement delayed the
24 plaintiff’s retirement by a year, the court found not only that the disadvantage was accompanied
25 by comparable new advantages but that the amendments “bear a material relation to the theory of a
26 pension system and its successful operation ..., and appellant makes no contention to the
27 contrary.” *Amundsen*, 30 Cal.App.3d at 858-859. Thus, in the case on which the SJPOA relies,
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1 the courts did not find that the provision at issue was facially invalid, just that it was valid in one
2 instance and not in another.

3 Finally, *Teachers Retirement Board v. Genest*, 154 Cal.App.4th 1012, 1037-38 (2007), is
4 inapposite because the court there found “no advantage at all,” where the purported new advantage
5 “merely substitutes an obligation to make a fixed payment with a conditional promise to make a
6 deferred payment for a limited period of time.”

7 Based on the record in this case, the SJPOA has failed to show that Section 1509-A
8 “pose[s] a present total and fatal conflict with applicable constitutional prohibitions.” *Tobe v.*
9 *City of Santa Ana*, 9 Cal.4th at 1084. Given that the SJPOA failed to meet its burden, the Court
10 should not adopt the SJPOA’s proposed changes.

11 **C. SJPOA Objection 3**
12 **Section 1511-A (SRBR)**

13 The Court held that “there is no constitutional impediment to Section 1511-A,” finding
14 specifically as to the Police and Fire Plan that Section 1511-A remedies “unforeseen burdens” of
15 the SRBR. (TSD at 26-27.) In support of this finding, the Court stated, “the record evidence
16 shows that the reserve was established at a time when the system was fully funded, and the
17 actuaries did not factor in the cost of the ‘skimming’ until years later,” and, “The SRBR was, by
18 its terms, intended to apply to ‘superior investment performance’ by the system – and not to a fund
19 with billions in unfunded liabilities.” (*Id.* at 27:2-6.)

20 The SJPOA takes issue with the Court’s finding that the cost of skimming excess assets
21 “was not taken into account until 2011 when actuaries assigned and subtracted a cost for the
22 SRBR,” and asks the Court to make a factual finding as to “whether the City knew or should have
23 known the cost of removing excess earnings from the SRBR funds.” (SJPOA Obj. at 5-6; TSD at
24 24:4-8, citing Reporter’s Transcript (“RT”) at 290-292, 967-968, 971-972.) The SJPOA’s
25 citations to the reporter’s transcript, however, do not contradict the Court’s findings. The Court’s
26 citations show both sides’ experts testified that “2011 or 2012” was the first time any actuary
27 assigned a normal cost percentage to SRBR (see, e.g., RT at 292:2-12, 968:4-19, 971:28-972:3),
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1 and the SJPOA's citation to the transcript neither addresses this testimony nor suggests a contrary
2 finding. (SJPOA Obj. at 5:27-28, citing RT 310:8-311:2.)

3 Moreover, the SJPOA offers no authority for its apparent assertion that the City's
4 knowledge of the costs is relevant in an "unforeseen burden" analysis. Indeed, as the City already
5 pointed out, the court in *Walsh* noted that the benefit at issue there was "not subjected to
6 comprehensive planning" and therefore "peculiarly susceptible to the possibility of conferring
7 unwarranted windfall benefits to its members and of creating an unreasonable drain on the public
8 fisc." *Walsh*, 4 Cal.App.4th at 702. The lack of "comprehensive planning" in *Walsh* did not
9 preclude the "unforeseen burden" analysis. *Id.* Under the SJPOA's theory, a legislature would
10 only be able to remedy the unforeseen burdens of well-thought-out policies but would have to live
11 in perpetuity with the unforeseen burdens wrought by mistaken policies or management of their
12 predecessors. This would be an absurd result. In any event, the SJPOA did not proffer evidence of
13 poor planning related to the SRBR, and Plaintiffs even elicited testimony from the City's actuary
14 that the City was "certainly not alone in not costing the [SRBR] benefit within the normal cost
15 contributions associated with those plans." (RT at 973:27-974:6.)

16 Given that the SJPOA proffered no evidence or legal analysis supporting either its
17 challenge to the Court's finding or its proposed change to the Tentative Decision, there is no
18 reason to change this aspect of the Court's Tentative Decision.

19 **D. SJPOA Objection 4**
20 **Section 1512-A.3 (Low-Cost Retiree Health Care Plan)**

21 The SJPOA asks the Court to delete the statement that the "City does not contest" that
22 Ordinance 21686, implemented on July 27, 1984, "created an express vested right benefitting
23 police and fire employees hired between July 27, 1984 and July 31, 1998, the implementation date
24 of Ordinance 25615." (SJPOA at 7; TSD at 29:24-30:1.) As explained further below, *the City*
25 *agrees this statement should be deleted because it actually did contest that Ordinance 21686*
26 *created the alleged vested right.* (Oct. 10, 2013, RT at 180:18-181:10 [arguing that City did not
27 obligate itself through the 1984 ordinance to a planned feature that required the lowest-cost plan
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1 element to be applied only to the police and fire plans].)

2 The SJPOA would like the Court to add that “Police Officers, active or retired, who
3 worked between July 27, 1984 and July 31, 1998 have the express, vested right to retiree
4 healthcare benefits based on payment of premiums ‘in the same amount as is currently paid by an
5 employee of the city in the classification from which the member retired.” (SJPOA Obj. at 7.)
6 But the City showed at trial that any changes to this group occurred in 1998, with the adoption of
7 Ordinance 25615 and not as a result of Measure B. Any claim based on a violation of a vested
8 right would have accrued in 1998 and is time-barred. The Court’s vested rights analysis, which
9 considered the testimony of SJPOA witnesses, was correct. Accordingly, the City does not object
10 to deleting the phrase, “The City does not contest that this created an express vested right
11 benefitting police and fire employees hired between July 24, 1984 and July 31, 1998, the
12 implementation date of Ordinance 25615 (the pre-Measure B version of SJMC 3.36.1930).” But
13 there is no justification for changing the Court’s ultimate finding that “with respect to the Police
14 and Fire Plan, Section 1512-A(c) does not impair a vested right and is valid.” (TSD at 29:27-30:2,
15 31:18-19.)

16 **II. RESPONSE TO SAPIEN PLAINTIFFS’ REQUEST FOR STATEMENT OF**
17 **DECISION**

18 The individual plaintiffs in the Sapien, Harris, and Mukhar cases (collectively, “Sapien
19 plaintiffs”) jointly request a Statement of Decision on five “additional controverted issues.”
20 (Sapien Request for Statement of Decision (“Sapien Req.”) at 1.) The Court’s Tentative Decision,
21 however, already addresses four of these issues which were actually put at-issue at the trial. The
22 Sapien plaintiffs provide no basis to add a finding regarding the fifth issue – regarding Section
23 1509-A(e) – which they did not put at-issue in this case.

24 **A. *Sapien Issue 1***
25 **Section 1509-A(c) (Disability Determination)**

26 The Sapien plaintiffs request a statement of decision on whether Section 1509-A(c) is a
27 “legally permissible modification to the plans’ disability retirement provisions,” but the Court
28

1 already found in its Tentative Decision that “Section 1509-A is a permissible modification of
2 disability retirement benefits.” (TSD at 20:18.) Specifically with respect to Section 1509-A(c),
3 the Court found that “Plaintiffs do not have a vested right, or any other right, in the composition of
4 the body that makes disability determinations,” and that “Plaintiffs did not meet their burden of
5 proof with respect to this section.” (*Id.* at 17:18-18:5, citing *Whitmire v. City of Eureka*, 29
6 Cal.App.3d 28, 34 (1972) and *Claypool v. Wilson*, 4 Cal.App.4th 646, 670 (1992).)

7 The Sapien plaintiffs raise the same argument - rejected already by this Court – that they
8 have a vested right to a disability “decision by the ‘fiduciaries’ for the retirement system – the
9 members of the Retirement Board.” (TSD at 17:24-26; Sapien Post-Trial Br. at 13:14-20, 17:9-14;
10 Sapien Req. at 2:8-9.) In support of the argument, they assert that the Court’s reliance on
11 *Whitmire* and *Claypool* was mis-placed. But the Court already heard argument that both cases
12 were “not on point” during the October 10, 2013, hearing, and thereafter rejected this contention
13 by relying on those cases in its Tentative Decision. (Oct. 10, 2013, RT at 139-140.)

14 Regarding *Whitmire*, the Court stated in its Tentative Decision, “where ‘only
15 administrative and procedural changes’ were involved, ordinances restructuring the Commission
16 charged with administering the police and fire retirement system did not violate vested rights.”
17 (TSD at 17:27-18:1, quoting *Whitmire, supra*, 29 Cal.App.3d at 34.) Contrary to the Sapien
18 plaintiffs’ assertion, *Whitmire*’s holding is not limited to the specific ordinances that were at issue.
19 (See Sapien Req. at 2-3.) Rather, the court based its holding on the proposition that “although
20 active and retired members have a vested right to a pension, they do not have a vested right to
21 control the administration of the plan which provides for the payment of pensions.” *Whitmire*, 29
22 Cal.App.3d at 34. *Claypool*’s reliance on *Whitmire* illustrates that this legal premise is not limited
23 to the facts of the ordinances in *Whitmire*. *Claypool*, 4 Cal. App. 4th at 669-670, quoting
24 *Whitmire*, 29 Cal.App.3d at 34. Here, relying on this same quote, the Court correctly concluded in
25 the Tentative Decision that the plaintiffs cannot prove they have a vested right to decide who
26 makes disability determinations under either retirement plan. (See TSD at 18:2-5.)

1 The Pension Protection Act appears to be the Sapien plaintiffs' sole authority for
2 invalidating this section, but the Sapien plaintiffs did not have a Pension Protection Act cause of
3 action nor did they present this theory at trial; this is the first time they have asserted such a claim.
4 (See, e.g., TSD at 4:26-28 [listing only SJPOA, AFSCME, and the Retired Employee Association
5 as having Pension Protection Act claims]; Sapien, Harris, and Mukhar Complaints [do not include
6 Pension Protection Act causes of action].) In any event, there is no "present and total fatal"
7 conflict between Section 1509-A and the Pension Protection Act ("Act"). *Tobe*, 9 Cal.4th at 1084.
8 First, Section 1509-A does not purport to give the referenced panel of medical experts or an
9 administrative law judge any responsibility over the assets or administration of the Federated or
10 the Police and Fire retirement plans, and no evidence was provided to the contrary. See Cal.
11 Const., art. XVI, §17(a). Rather, as the Court noted, Section 1509-A(c) requires only, in response
12 to problems identified in the Audit report, that the panel of independent medical experts make
13 disability determinations. (TSD at 17:7-23.) In addition, the right of appeal to an administrative
14 law judge would presumably be subject to review by Civil Procedure Code section 1094.5. (See
15 Oct. 10, 2013, RT at 141:18-24.)

16 Second, the retirement board's powers of administration are not "without limit," and the
17 City's voters have the authority to correct problems in administration identified in the audit report.
18 *City of San Diego v. San Diego City Employees' Retirement Sys.*, 186 Cal App 4th 69,79-80 (2010)
19 ("the granting of retirement benefits is a power resting exclusively with the City," and the "scope
20 of the board's power as to benefits is limited to administering the benefits set by the City"). (See
21 RT at 467-472, 475-477 [audit report].) The Pension Protection Act was intended to make
22 retirement systems "less of a target for local and state officials looking for a way to balance a
23 budget," but the proponents did not intend to limit judicial review of board decisions. *Singh v.*
24 *Board of Retirement*, 41 Cal. App. 4th 1180, 1192 (1996); see also *Bd. of Retirement v. Santa*
25 *Barbara County Grand Jury*, 58 Cal App 4th 1185, 1188, 1193 (1997) (finding county grand jury
26 could "investigate complaints of delays by the county board of retirement in processing disability
27 retirement applications of county employees"). Just as there was no intent to insulate retirement
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1 boards from judicial or grand jury review for disability retirement determinations, the Sapien
2 plaintiffs have failed to show any intent to insulate retirement boards from voter oversight. To the
3 contrary, the Act specifically provided for voter oversight regarding changes to the composition of
4 retirement boards. Cal. Const., art. XVI, §17(f).

5 The Sapien plaintiffs have failed to provide any legal or evidentiary support to change the
6 Court's finding that they did not meet their burden of proof with regard to Section 1509-A(c).
7 (TSD at 17-18.)

8 **B. *Sapien Issue 2***
9 **Section 1509-A(a) and (b) (Disability Retirement - Definition)**

10 The Sapien plaintiffs request a statement of decision on whether Section 1509-A(a) and (b)
11 are "legally permissible modifications to the plans' disability retirement provisions," but the Court
12 already found in its Tentative Decision that "Section 1509-A is a permissible modification of
13 disability retirement benefits." (TSD at 20:18.) They disagree with the Court's tentative decision
14 here, and with how the Court weighed the evidence, but the Sapien plaintiffs provide no
15 evidentiary or legal basis for the Court to change its decision. (See Sapien Req. at 5-10.) To the
16 extent the Court considers their challenge to the Court's finding that the shortened period of
17 disability is a countervailing advantage, the Sapien plaintiffs raise the same arguments as the
18 SJPOA. Accordingly, the City refers the Court to its response to the "SJPOA Objection 2" at
19 Section I.B above.

20 **C. *Sapien Issue 3***
21 **Section 1509-A(e) (Disability Retirement – Workers' Compensation Offset) –**

22 The Sapien plaintiffs request a statement of decision on whether Section 1509-A(e) is a
23 "legally permissible modification to the Police and Fire plan disability retirement provisions." The
24 Court did not make a finding regarding this section because it was not placed in issue by the
25 parties. (See, e.g., Sapien, Harris, and Mukhar Complaints [do not include challenge to Section
26 1509-A(e)].) Accordingly, there is no basis for the Court to add a specific finding on this sub-
27 section to its Tentative Order.

1 **D. *Sapien Issue 4***
2 **Section 1511-A (SRBR)**

3 The Sapien plaintiffs request a statement of decision on whether Section 1511-A is a
4 “legally permissible modification” to the SRBR provisions of both the Federated Plan and the
5 Police and Fire Plan, but after analyzing the provisions as they related to both plans, the Court has
6 already found in its Tentative Decision that “there is no constitutional impediment to Section
7 1511-A.” (TSD at 22-27.) The Sapien plaintiffs disagree with the Court’s analysis here, and with
8 how the Court weighed the evidence, but provide no evidentiary or legal basis for the Court to
9 change its decision. (See Sapien Req. at 11-12; TSD at 22-27.) They challenge, for example, the
10 Court’s “unforeseen burden” analysis by asserting that the Police and Fire Retirement Plan
11 actuaries “noted that the benefit had a cost beginning with the commencement of the SRBR fund
12 in 2001” and that the benefit “is costed by the plans’ actuaries annually.” (Sapien Req. at 11:27-
13 12:3, citing RT at 245 (Lowman).) The cited testimony, however, simply stated that the SRBR
14 had “some sort of cost that needed to be considered,” and did not state that the actuaries actually
15 costed it annually. (RT at 245.) Rather, as the Court noted, that same witness, along with the
16 City’s actuary, testified that the “cost was not taken into account until 2011 when actuaries
17 assigned and subtracted a cost for the SRBR.” (TSD at 24:6-8, citing RT at 290-92 (Lowman);
18 967-68, 971-72 (Bartel).)

19 The Sapien plaintiffs also assert that “the worldwide stock market decline” was “not
20 unforeseeable,” but that is not the correct inquiry. The SRBR assumed the existence of a healthy
21 market given that “[t]he SRBR was, by its terms, intended to apply to ‘superior investment
22 performance’ by the system...” (TSD at 27:2-6.) The appropriate inquiry, which the Court
23 applied, is whether the “law” at issue – here, the SRBR—“imposes unforeseen advantages or
24 burdens on a contracting party.” (*Id.* at 26:13-17, quoting *Allen v. Bd. of Admin.*, 34 Cal.3d 114,
25 120 (1983).) Here, it did because it siphoned funds from a depleted retirement fund, increasing
26 unfunded liabilities. The Sapien plaintiffs have not shown any error in the Court’s analysis.

27 Finally, to the extent they “incorporate” the arguments of plaintiff San Jose Retired
28 Employees Association on this issue, the City respectfully “incorporates” its response to those

1 arguments. (See Defendants' Response to San Jose Retired Employees Association Request for
2 Statement of Decision and Adoption of Proposals Not Included in Statement of Decision, filed
3 January 8, 2014.)

4 The Sapien plaintiffs have not provided any basis for the Court to alter this portion of its
5 decision.

6 **E. *Sapien Issue 5***
7 **Section 1514-A (Alternative of Wage Reduction)**

8 Finally, the Sapien plaintiffs request a statement of decision on whether Section 1514-A is
9 a "legally permissible modification" to both the Federated Plan and the Police and Fire Plan. But
10 the Court already found in its Tentative Decision that "Plaintiffs' challenge" to Section 1514-A "is
11 unavailing," given that Section 1514-A "simply recites what is already the law: that the City may
12 adjust employee compensation 'to the maximum extent permitted by law.'" (TSD at 32, quoting
13 Section 1514-A.)

14 The Sapien plaintiffs agree that the City has "plenary authority to control employee
15 compensation," but seek to apply the *Allen* pension-modification criteria to this provision simply
16 because it is part of Measure B. (Sapien Req. at 13.) This makes no sense. The only reason to
17 apply the *Allen* criteria is in the case of modification of "pension rights." *Allen v. City of Long*
18 *Beach*, 45 Cal.2d 128, 131 (1955); see *Gatewood*, 175 Cal.App.3d at 320-321 ("Having construed
19 the 1980 amendment of section 31720 as effecting no perceptible change in Gatewood's vested
20 pension rights, we now find review under the *Allen-Abbott* guidelines unnecessary"). The *Allen*
21 criteria is thus not applicable here, and the Sapien plaintiffs have provided absolutely no basis for
22 the Court to change its Tentative Decision regarding the validity of this section.

23 **III. RESPONSE TO AFSCME'S OBJECTIONS AND PROPOSED STATEMENT OF**
24 **DECISION**

25 AFSCME objects solely to this Court's denial of its estoppel claim. The Court found that
26 AFSCME had not met its burden at trial of proving either promissory or equitable estoppel. (TSD
27 at 33-34.) In its brief, AFSCME simply reiterates arguments previously made and rejected by this
28

1 Court.

2 First, the case law AFSCME cites and discusses in its Objections provides the same
3 standard for proving estoppel as the case law upon which this Court relied. Specifically, the Court
4 stated that for equitable estoppel, AFSCME must prove: “(1) a representation or concealment of
5 material facts (2) made with knowledge, actual or virtual, of the true facts (3) to a party ignorant,
6 actually and permissibly, of the truth (4) with the intention, actual or virtual, that the latter act
7 upon it and (5) that the party actually was induced to act upon it.” (TSD, quoting *Walsh, supra*, 4
8 Cal.App.4th at 709.) The cases upon which AFSCME relies state substantially the same burden:
9 “the party to be estopped must be apprised of the facts, ... he must intend that his conduct shall be
10 acted on, or must so act that the other party has a right to believe it was so intended, ... the other
11 party must be ignorant of the true state of facts, and ... he must rely on the conduct to his injury.”
12 *Longshore v. County of Ventura*, 25 Cal.3d 14, 28 (1979), citing *City of Long Beach v. Mansell*, 3
13 Cal.3d 462, 489 (1970); *Crumpler v. Bd. of Admin.*, 32 Cal.App.3d 567, 581 (1973). (See
14 AFSCME Obj. at 2.) Applying this criteria, the Court found that AFSCME did not meet its
15 burden at trial. (TSD at 33-34.)

16 Second, AFSCME contends – as it did in its post-trial brief – that it met its burden by
17 proving at trial that Federated members were “induced” to work for the City, and “forewent the
18 opportunity to participate in the federal Social Security program.” (AFSCME Obj. at 2:12-14,
19 3:25-4:5; AFSCMEs Post-Trial Br. at 73-74.) Citing the evidence produced at trial, however, this
20 Court already found that “AFSCME did not establish that any of its witnesses accepted
21 employment and continued working for the City based on any misrepresentation about benefits.”
22 (TSD at 34.) The Court specifically referenced the testimony of Jeffrey Rhoads who “could not
23 cite to any other job with better pay, or with better benefits, that he had been offered but had
24 rejected in preference for his City job.” (TSD at 34, citing RT 114-118.) AFSCME does not point
25 to any evidence that shows otherwise. (See, e.g., AFSCME Obj. at 3:26, citing RT 05:19-28 [cited
26 evidence simply shows that the City truthfully informed a prospective employee that the City does
27 not contribute to Social Security].)

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1 Third, AFSCME includes a discussion of “privity of estoppel,” asserting that “most of the
2 material inducing employees’ reliance originated from retirement services, a City agency,” and
3 that its “representations may be imputed to the City.” (AFSCME Obj. at 2-4.) Not only did
4 AFSCME fail to produce evidence to support this theory at trial, but it also failed to prove that any
5 City agency induced reliance on any misrepresentation about retirement benefits. Indeed, after
6 reviewing the evidence, the Court held, “AFSCME did not prove at trial that the City
7 misrepresented any fact, or that anyone was actually induced to act.” (TSD at 34.) To the extent
8 AFSCME seeks to use the “privity of estoppel” theory to assert that a City agency may enlarge
9 City retirement benefits in the absence of a requisite ordinance, the Court found already that
10 “AFSCME did not offer any evidence that the City departments that issued various booklets and
11 flyers had any authority to enlarge City retirement benefits.” (TSD at 33-34.) AFSCME did not
12 and could not address the legal authority on which the Court relied in finding that “there is no
13 viable claim for estoppel” where, as here, “the agency making the statement has no authority to
14 grant the benefits promised. (TSD at 33, citing *Medina v. Board of Retirement*, 112 Cal.App.4th
15 864, 869 (2013).) See also *Longshore*, 25 Cal.3d at 28 (“no court has expressly invoked principles
16 of estoppel to contravene directly any statutory or constitutional limitations”).

17 Finally, AFSCME asserts that estoppel should apply to retiree health benefits here, but
18 again, AFSCME did not prove at trial the elements of estoppel related to retiree health.
19 (AFSCME Obj. at 4.) As the Court noted, “Margaret Martinez testified that her own private
20 understanding” of a 2008 Figone memorandum “was that the City was not planning to change
21 healthcare benefits, but she did not claim to have continued employment, or given up more
22 lucrative employment, based on the memorandum.” (TSD at 34.)

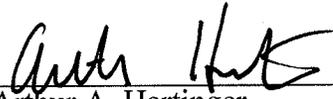
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Given that there is no merit to AFSCME's objections, the Court should not make any changes to Section II.L.1 of its Tentative Decision regarding the estoppel cause of action.

DATED: January 17, 2014

Respectfully submitted,
MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 
Arthur A. Hartinger
Attorneys for Defendants
City of San Jose and Debra Figone, in Her Official
Capacity

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

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

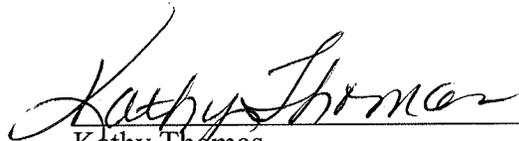
On January 17, 2014, I served true copies of the following documents described as **DEFENDANTS' ERRATA TO CONSOLIDATED RESPONSE TO 1) SAN JOSE POLICE OFFICERS ASSOCIATION'S OBJECTIONS TO TENTATIVE DECISION; 2) SAPIEN PLAINTIFFS' REQUEST FOR STATEMENT OF DECISION; AND 3) AFSCME'S OBJECTIONS TO TENTATIVE DECISION AND PROPOSED STATEMENT OF DECISION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address kthomas@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on January 17, 2014, at Oakland, California.


Kathy Thomas

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SERVICE LIST

1		
2	John McBride Christopher E. Platten Mark S. Renner	Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA
3	WYLIE, MCBRIDE, PLATTEN & RENNER	(Santa Clara Superior Court Case No. 112CV225928)
4	2125 Canoas Garden Ave, Suite 120	AND
5	San Jose, CA 95125	
6	Telephone: 408-979-2920	Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON
7	Fax: 408-989-0932	(Santa Clara Superior Court Case No. 112CV226574)
8	E-Mail: jmcbride@wmprlaw.com	AND
9	cplatten@wmprlaw.com	Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO
10	mrenner@wmprlaw.com	(Santa Clara Superior Court Case No. 112CV226570)
11		
12	Gregg McLean Adam Jonathan Yank Gonzalo Martinez	Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC.
13	Jennifer Stoughton Amber L. West	(Santa Clara Superior Court Case No. 112CV225926)
14	CARROLL, BURDICK & MCDONOUGH, LLP	
15	44 Montgomery Street, Suite 400	
16	San Francisco, CA 94104	
17	Telephone: 415-989-5900	
18	Fax: 415-989-0932	
19	E-Mail: gadam@cbmlaw.com	
20	jyank@cbmlaw.com	
21	gmartinez@cbmlaw.com	
22	jstoughton@cbmlaw.com	
23	awest@cbmlaw.com	
24		
25	Teague P. Paterson Vishtap M. Soroushian	Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)
26	BEESON, TAYER & BODINE, APC	
27	Ross House, 2nd Floor 483 Ninth Street	
28	Oakland, CA 94607-4050	
	Telephone: 510-625-9700	
	Fax: 510-625-8275	
	E-Mail: tpaterson@beesontayer.com;	
	vsoroushian@beesontayer.com;	

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<p>Harvey L. Leiderman Jeffrey R. Rieger REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Telephone: 415-659-5914 Fax: 415-391-8269 E-Mail: hleiderman@reedsmith.com; jreiger@reedsmith.com</p>	<p>Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)</p>
<p>Stephen H. Silver, Esq. Richard A. Levine, Esq. Jacob A. Kalinski, Esq. Silver, Hadden, Silver, Wexler & Levine 1428 Second Street, Suite 200 P.O. Box 2161 Santa Monica, California 90401 shsilver@shslaborlaw.com</p>	<p>Attorneys for Plaintiffs/Petitioners SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT AND ROSALINDA NAVARRO</p>

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