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7 Attorneys for Defendants
8 City of San José and Debra Figone, in Her
Official Capacity

9 **IN THE SUPERIOR COURT FOR THE**
10 **COUNTY OF SANTA CLARA**

11 SAN JOSE POLICE OFFICERS
ASSOCIATION,
12
Plaintiff,
13
v.
14 CITY OF SAN JOSE, BOARD OF
15 ADMINISTRATION FOR POLICE AND
FIRE RETIREMENT PLAN OF CITY OF
16 SAN JOSE, and DOES 1-10 inclusive.,
17 Defendants.

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

*Assigned for all purposes to the Honorable
Patricia M. Lucas*

**DEFENDANT'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
OPPOSITION TO PLAINTIFFS'
MOTIONS FOR ATTORNEYS' FEES**

18
19 AND RELATED CROSS-COMPLAINT
20 AND CONSOLIDATED ACTIONS

Date: September 25, 2014
Time: 9:00 am
Dept: 2, Honorable Patricia Lucas

1 Defendant City of San José hereby requests that the Court take judicial notice pursuant to
2 California Evidence Code Sections 452(a) and (d), and in accordance with California Rules of
3 Court 3.1113(l) and 3.1306(c), of the following material which are true and correct copies of
4 documents filed in the *San Jose Police Officers Association v. City of San Jose et al.*, Case No. 1-12-CV-
5 225926 (and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and 1-
6 12-CV-227864), Santa Clara Superior Court, and attached hereto:

7 1. Stipulation And Order Re Bifurcation Of Motions For Attorney's Fees, Signed By
8 Judge Patricia M. Lucas On September 8, 2014;

9 2. Judgment in Consolidated Cases entered April 30, 2014;

10 3. Statement of Decision in Consolidated Cases entered February 20, 2014;

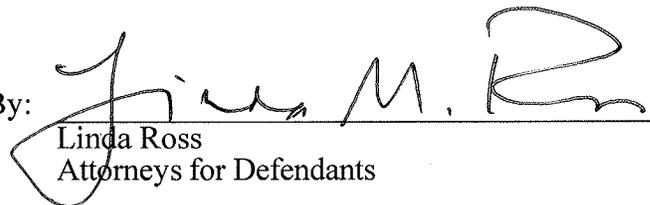
11 4. Order Denying Motion for Attorneys' Fees in *City of San Jose v. San Jose Police*
12 *Officers Association, et al.*, United States District Court Case No. 5:12-CV-02904-LHK, entered
13 September 9, 2013.

14 5. Trial Transcript, *San Jose Police Officers Association, et al. v. City of San Jose*,
15 July 22 – 23, 2013 excerpts.

16
17 DATED: September 12, 2014

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

18
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20 By:


Linda Ross
Attorneys for Defendants

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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 September 12, 2014, I served true copies of the following document described as on the interested parties in this action as follows: **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR ATTORNEYS' FEES**

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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 September 12, 2014, at Oakland, California.

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Kathy Thomas

SERVICE LIST

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

<p>1 Harvey L. Leiderman 2 Jeffrey R. Rieger 3 REED SMITH, LLP 4 101 Second Street, Suite 1800 5 San Francisco, CA 94105 6 Telephone: 415-659-5914 7 Fax: 415-391-8269 8 E-Mail: 9 hleiderman@reedsmith.com; 10 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>16 Stephen H. Silver, Esq. 17 Richard A. Levine, Esq. 18 Jacob A. Kalinski, Esq. 19 Silver, Hadden, Silver, Wexler & 20 Levine 21 1428 Second Street, Suite 200 22 P.O. Box 2161 23 Santa Monica, California 90401 24 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>

23 2328863.1

EXHIBIT 1

COPY

M. OLIVIA

ENDORSED
FILED
SEP 08 2014
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
BY _____ DEPUTY

1 Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
2 Linda M. Ross (SBN: 133874)
lross@meyersnave.com
3 Geoffrey Spellberg (SBN 121079)
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7 Attorneys for Defendant
City of San Jose
8

9 IN THE SUPERIOR COURT FOR THE
10 COUNTY OF SANTA CLARA

11 SAN JOSE POLICE OFFICERS
ASSOCIATION,

12 Plaintiff,

13 v.

14 CITY OF SAN JOSE, BOARD OF
15 ADMINISTRATION FOR POLICE AND
16 FIRE RETIREMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 inclusive,

17 Defendants.

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864]

[PROPOSED] STIPULATION RE
BIFURCATION OF MOTIONS FOR
ATTORNEY'S FEES

Complaint Filed: June 6, 2012
Trial Date: June 17, 2013

18 AND RELATED CROSS-COMPLAINT
19 AND CONSOLIDATED ACTIONS
20

21 WHEREAS the following parties have filed motions for attorney's fees in this matter: San
22 Jose Police Officers Association, American Federation of State, County and Municipal
23 Employees, and San Jose Retired Employees Association;

24 WHEREAS all three parties have brought motions under California Code of Civil
25 Procedure section 1021.5;

26 WHEREAS the threshold determinations to be made by the Court under section 1021.5
27 include whether (1) petitioners were "successful" parties, (2) whether the Court's decision
28 "resulted in an important right affecting the public interest" (3) whether "a significant benefit,

Case No. 112CV225926

STIPULATION RE BIFURCATION OF MOTIONS FOR ATTORNEY'S FEES

1 whether pecuniary or non pecuniary" has been conferred on the general public or a large class of
2 persons," and (4) whether "the necessity and financial burden of private enforcement ... are such
3 as to make the award appropriate," among others;

4 WHEREAS AFSCME has made an additional motion for fees under Code of Civil
5 Procedure section 2033.420 based on the contention that AFSCME proved the truth at trial of a
6 requested admission that the City denied during discovery;

7 WHEREAS these fee motions involve threshold determinations that must be made before
8 the Court makes the additional fact specific determinations required for a fee award, which include
9 the appropriate hourly rates for each attorney and paralegal, whether the hours worked were
10 reasonable, and the degree of success by each party in this litigation, among others;

11 WHEREAS the fee motions as a group involve billings by numerous attorneys and
12 paralegals, involve work that spans a year and a half period for discovery, pretrial, trial and post
13 trial proceedings, and involve total claims of almost \$2 million in fees;

14 WHEREAS a decision on the threshold determinations to be made under Sections 1021.5
15 and 2033.420 may obviate some or all of the burden of litigation over the fact specific
16 determinations of the proper hourly rates and reasonable number of hours expended;

17 WHEREAS the parties desire to avoid any unnecessary litigation and expense;

18 NOW THEREFORE IT IS STIPULATED THAT:

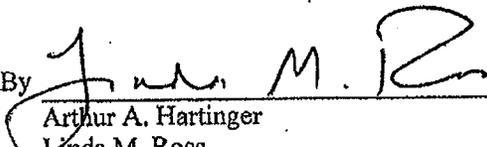
19 1. The fee motions shall be bifurcated with the Court first considering the factors
20 listed in Sections 1021.5 and 2033.420 that govern the entitlement to attorney's fees under those
21 sections; and

22 2. Once the Court has made the determinations in Section 1, the Court shall make a
23 further order on the briefing needed on the appropriate hourly rates for each attorney and
24 paralegal, whether the hours worked were reasonable, any adjustment of hours due to the degree
25 of success of a party, and any other topic that the Court deems necessary.

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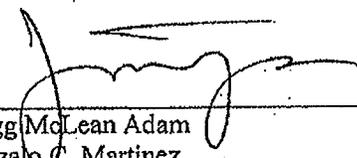
1 Dated: August 22, 2014

MEYERS, NAVE, RIBACK, SILVER & WILSON

2
3 By 
4 Arthur A. Hartinger
5 Linda M. Ross
6 Attorneys for Defendants City of San Jose
7 City of San Jose and Debra Figone

8 Dated: August 19, 2014

CARROLL, BURDICK & McDONOUGH LLP

9
10 By 
11 Gregg McLean Adam
12 Gonzalez C. Martinez
13 Amber L. Griffiths
14 Attorneys for Plaintiff San Jose Police Officers'
15 Association

16 Dated: August ____, 2014

BEESON, TAYOR & BODINE APC

17 By _____
18 Teague P. Paterson
19 Vishtasp M. Soroushian
20 Attorneys for Plaintiff AFSCME Local 101

21 Dated: August ____, 2014

SILVER, HADDEN, SILVER, WEXLER & LEVINE

22 By _____
23 Stephen H. Silver
24 Jacob A. Kalinski
25 Attorneys for Plaintiffs San Jose Retired Employees
26 Association

27
28

1 Dated: August __, 2014

MEYERS, NAVE, RIBACK, SILVER & WILSON

2
3 By _____

4 Arthur A. Hartinger
5 Linda M. Ross
6 Attorneys for Defendants City of San Jose
7 City of San Jose and Debra Figone

8 Dated: August __, 2014

CARROLL, BURDICK & McDONOUGH LLP

9
10 By _____

11 Gregg McLean Adam
12 Gonzalo C. Martinez
13 Amber L. Griffiths
14 Attorneys for Plaintiff San Jose Police Officers'
15 Association

16 Dated: August ²¹ __, 2014

BEESON, TAYOR & BODINE APC

17 By  _____

18 Teague P. Paterson
19 Vishtasp M. Soroushian
20 Attorneys for Plaintiff AFSCME Local 101

21 Dated: August __, 2014

SILVER, HADDEN, SILVER, WEXLER & LEVINE

22 By _____

23 Stephen H. Silver
24 Jacob A. Kalinski
25 Attorneys for Plaintiffs San Jose Retired Employees
26 Association

27
28

1 Dated: August __, 2014

MEYERS, NAVE, RIBACK, SILVER & WILSON

2

3

By

Arthur A. Hartinger
Linda M. Ross
Attorneys for Defendants City of San Jose
City of San Jose and Debra Figone

4

5

6

7

8 Dated: August __, 2014

CARROLL, BURDICK & McDONOUGH LLP

9

10

By

Gregg McLean Adam
Gonzalo C. Martinez
Amber L. Griffiths
Attorneys for Plaintiff San Jose Police Officers'
Association

11

12

13

14 Dated: August __, 2014

BEESON, TAYOR & BODINE APC

15

16

By

Teague P. Paterson
Vishtasp M. Soroushian
Attorneys for Plaintiff AFSCME Local 101

17

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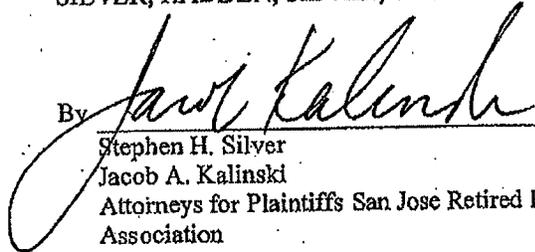
19 Dated: August 21, 2014

SILVER, HADDEN, SILVER, WEXLER & LEVINE

20

21

By


Stephen H. Silver
Jacob A. Kalinski
Attorneys for Plaintiffs San Jose Retired Employees
Association

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ORDER

The forgoing Stipulation Re Bifurcation of Motions for Attorneys' Fees having been reviewed and good cause appearing,

IT IS SO ORDERED

Dated: ~~SEP - 9 2014~~ 2016

Patricia Lucas
JUDGE OF THE SUPERIOR COURT

2316743.1

EXHIBIT 2

1 227864 is the American Federation of State, County, and Municipal Employees, Local
2 101("AFSCME"), representing employees who are members of the 1975 Federated City
3 Employees' Retirement Plan ("Federated Plan"). AFSCME was represented by Teague P.
4 Paterson and Vishtasp M. Soroushian of Beeson, Tayer & Bodine, APC. The plaintiffs in Case
5 No. 1-12-CV-225928 are Robert Sapien, Mary Kathleen McCarthy, Thanh Ho, Randy Sekany,
6 Ken Heredia ("Sapien Plaintiffs"), who are active and retired members of the Police and Fire Plan;
7 the plaintiffs in Case No. 1-12-CV-226570 are Teresa Harris, Jon Reger, and Moses Serrano
8 ("Harris Plaintiffs"), who are active and retired employees of the Federated Plan; and the plaintiffs
9 in Case No. 1-12-CV-226574 are John Mukhar, Dale Dapp, James Atkins, William Buffington,
10 and Kirk Pennington ("Mukhar Plaintiffs"), who are active and retired members of the Federated
11 Plan. The Sapien, Harris, and Mukhar Plaintiffs (collectively, "Individual Plaintiffs") were
12 jointly represented by Christopher E. Platten and John McBride of Wylie, McBride, Platten &
13 Renner. The plaintiff in Case No. 1-12-CV-233660 is the San Jose Retired Employees
14 Association ("SJREA"), represented by Stephen H. Silver and Jacob A. Kalinski of Silver,
15 Hadden, Silver, Wexler & Levine. Defendants City of San Jose ("the City") and Debra Figone,
16 City Manager (collectively, "Defendants"), were represented by Arthur A. Hartinger, Linda M.
17 Ross and Geoffrey Spellberg of Meyers Nave. Real parties in interest Board of Administration for
18 the Police and Fire Plan and the Federated Plan were represented by Harvey L. Liederman and
19 Kerry K. Galusha of Reed Smith, LLP.

20 The City filed a cross-complaint in Case No. 1-12-CV-225926. All Plaintiffs except
21 SJREA were named as Cross-defendants.

22 On October 10, 2013, the parties appeared to respond to additional questions from the
23 Court. On December 20, 2013, a Tentative Decision was filed. On January 31, 2014, the parties
24 appeared on objections to the Tentative Decision. On February 20, 2014, the Statement of
25 Decision was filed.

26 Plaintiffs challenged the following sections of the Sustainable Retirement and
27 Compensation Act, a ballot initiative that amended the San Jose City Charter, approved by the
28 electorate on June 4, 2012 as "Measure B" (hereafter "Measure B"):

- 1 ▪ Section 1504-A (Reservation of Voter Authority);
- 2 ▪ Section 1506-A (Current Employees);
- 3 ▪ Section 1507-A (One Time Voluntary Election Program ('VEP'));
- 4 ▪ Section 1509-A (Disability Retirements);
- 5 ▪ Section 1510-A (Cost of Living Adjustments);
- 6 ▪ Section 1511-A (Supplemental Retirees Benefit Reserve);
- 7 ▪ Section 1512-A (Retiree Healthcare);
- 8 ▪ Section 1513-A (Actuarial Soundness);
- 9 ▪ Section 1514-A (Savings); and
- 10 ▪ Section 1515-A (Severability).

11 Plaintiffs' challenges to these sections of Measure B were facial challenges, except that the
12 challenges to Sections 1512-A(a) and 1512-A(c) were both facial and as-applied. (See Statement
13 of Decision at 7:10-13.)

14 Now therefore, the Court enters judgment as follows, based upon the evidence and
15 argument presented, and consistent with the Statement of Decision, the order dated January 31,
16 2013, granting judgment on the pleadings on SJPOA's seventh cause of action for violation of the
17 Meyers Miliias Brown Act ("MMBA"), and the order dated April 30, 2013, sustaining without
18 leave to amend the demurrer to AFSCME's seventh cause of action for illegal ultra vires tax, fee,
19 or assessment:

20 1. Sections 1504-A (Reservation of Voter Authority), 1509-A (Disability Retirement),
21 including 1509-A(b) (Definition of Disability) and 1509-A(c) (Expert Board), 1511-A
22 (Supplemental Retiree Benefit Reserve), 1512-A(b) (Retiree Healthcare – Reservation of Rights),
23 1512-A(c) (Retiree Healthcare – Low Cost Plan), 1513-A (Actuarial Soundness), 1514-A
24 (Alternative of Wage Reduction), and 1515-A (Severability) are valid, and judgment is entered in
25 favor of Defendants and against Plaintiffs, as to these Sections of Measure B, on each cause of
26 action challenging these Sections. (SJPOA first through eighth causes of action; AFSCME first
27 through eleventh causes of action; Individual Plaintiffs' first through fifth causes of action; SJREA
28 first through third causes of action, all counts.)

1 3. Section 1512-A(a) (Retiree Healthcare – Minimum Contributions) is valid with the
2 phrase “a minimum of” severed from the provision, so that Section 1512-A(a) shall read,
3 “Existing and new employees must contribute 50% of the cost of retiree healthcare, including both
4 normal cost and unfunded liabilities.” With the provision modified, judgment is entered in favor
5 of Defendants and against Plaintiffs, as to this Section of Measure B, on each cause of action
6 challenging this Section. (SJPOA first through third and sixth causes of action; AFSCME first,
7 third through sixth, and eighth through eleventh causes of action; Individual Plaintiffs’ first
8 through fifth causes of action; SJREA first through third causes of action, all counts.)

9 4. Sections 1506-A (Increased Pension Contributions – Current Employees), 1507-A
10 (One Time Voluntary Election Program), 1510-A (Cost of Living Adjustments) are invalid and
11 judgment is entered in favor of Plaintiffs and against Defendants, as to these sections of Measure
12 B, on the causes of action challenging these Sections based on unconstitutional impairment of
13 contract, Cal. Const., art. I, Section 9. (SJPOA’s first cause of action, AFSCME’s first cause of
14 action, Individual Plaintiffs’ second cause of action (as to Sections 1506-A and 1510-A only), and
15 SJREA’s first cause of action (Count I) and second cause of action (as to Section 1510-A only).)

16 5. Judgment is entered in favor of Defendants and against AFSCME on AFSCME’s
17 eighth cause of action, which claimed Promissory and Equitable Estoppel.

18 6. AFSCME has dismissed with prejudice its second cause of action, which claimed
19 Bill of Attainder. (Statement of Decision at 5:16-17.)

20 7. AFSCME’s seventh cause of action, which claimed Illegal *Ultra Vires* Tax, Fee, or
21 Assessment, is dismissed with prejudice pursuant to the order dated April 30, 2013, sustaining
22 Defendants’ demurrer without leave to amend.

23 8. Judgment is entered in favor of Defendants and against the SJPOA and AFSCME
24 on their respective claims for violation of the Freedom of Speech and Right to Petition Clauses,
25 Cal. Const., art. I, Sections 2, 3. (SJPOA’s fourth cause of action, AFSCME’s sixth cause of
26 action.)

27 9. Judgment is entered in favor of Defendants and against the SJPOA and AFSCME
28 on their respective claims for violation of the Bane Act, California Civil Code section 52.1.

1 (SJPOA's first, second, third, fourth, fifth, and eighth causes of action; AFSCME's first, second,
2 third, fourth, fifth, sixth, and seventh causes of action.)

3 10. Judgment is entered in favor of Defendants and against the SJPOA, AFSCME, and
4 the SJREA on their respective claims for violation of the Pension Protection Act, Cal. Const., art.
5 XVI, Section 17. (SJPOA's eighth cause of action, AFSCME's fifth cause of action, Count V of
6 the SJREA's first cause of action, and the Pension Protection Act provision of the SJREA's
7 second cause of action.)

8 11. SJPOA's seventh cause of action, which claimed violation of the MMBA, is
9 dismissed with prejudice pursuant to the order dated January 31, 2013, granting Defendants'
10 motion for judgment on the pleadings.

11 12. Judgment is entered in favor of Defendants and against the SJPOA and the SJREA
12 on their respective claims for violation of the Separation of Powers Doctrine. (SJPOA's fifth
13 cause of action, Count IV of the SJREA's first cause of action, and the SJREA's second cause of
14 action.)

15 13. Judgment is entered in favor of Cross-Defendants and against Cross-Complainant
16 on the City's Cross-Complaint.

17 14. Declaratory relief and injunctive relief are granted, and Defendants are enjoined
18 from implementing or enforcing Sections 1506-A, 1507-A, and 1510-A, and the phrase "a
19 minimum of" in Section 1512-A, with respect to employees and retirees hired before June 5, 2012.

20 15. The Court finds that each party obtained some but not all of its litigation objectives,
21 and therefore concludes that there is no prevailing party. Accordingly, the Court exercises its
22 discretion and orders that each party is to bear its own costs. (Cal. Civ. Proc. Code §1032(a)(4)
23 ("the court, in its discretion, may allow costs or not").)

24 JUDGMENT IS SO ENTERED.

25 Dated: April 29, 2014

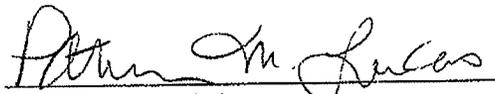

26 Hon. Patricia M. Lucas
27 Judge of the Superior Court
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EXHIBIT 3

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(ENDORSED)
FILED
FEB 20 2014
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
Ann Viscondo

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

SAN JOSE POLICE OFFICERS'
ASSOCIATION,
Plaintiff,
vs.
CITY OF SAN JOSE, et al.,
Defendants.

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

AND CONSOLIDATED ACTIONS AND
RELATED CROSS-COMPLAINT

STATEMENT OF DECISION
(Code of Civil Procedure 632;
Rule of Court 3.1590)

Plaintiffs have challenged the validity of several provisions of the "Sustainable Retirement Benefits and Compensation Act", known as Measure B, a voter-approved amendment to the Charter of the City of San Jose ("the City"). Much like the amici curiae League of California Cities and California State Association of Counties in *Retired Employees Ass'n of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, 1188 ("*REAOC*"), the City here argues that Measure B was "a measured and thoughtful response to an ever-increasing unfunded liability." However, the question before this Court, as was the question before the Supreme Court in *REAOC*, "is one of law, not of policy." The legal question is whether and to what extent Measure B violates vested rights.

1 **I. BACKGROUND AND PROCEDURAL HISTORY**

2 The City is a charter city, with the most recent and operative charter being the 1965
3 Charter. Article XV, section 1500 of the Charter (Ex. 701 at POA007114) requires the City
4 Council to establish and maintain a retirement plan for all officers and employees of the City.
5 The Charter provides for two separate retirement systems (“systems” or “plans”), administered
6 by two different retirement boards: the 1961 Police and Fire Department Plan, covering sworn
7 employees in the City’s police and fire departments, and the 1975 Federated City Employees
8 Retirement Plan, covering “miscellaneous” or “civilian” employees in the City’s workforce.

9 The Charter also specifies certain “minimum benefits” and authorizes the City Council to
10 define the plan benefits and other details concerning plan administration. By ordinances codified
11 in the Municipal Code, the City Council has adopted, and has amended from time to time, the
12 various plan definitions relating to contributions, eligibility, and benefits. As with other defined
13 benefit plans, San Jose pension benefits are generally defined by age, a percentage of final
14 defined salary, and years of service.

15 For many years, the City’s workforce has been mostly unionized, with many employees
16 represented by labor organizations. The labor organizations have collectively bargained with the
17 City over wages, hours and other terms and conditions of employment. When agreements have
18 been reached, they are reduced to writing in labor contracts, referred to as “memoranda of
19 agreements” or “MOAs.” For police and fire employees, the City Charter permits arbitration to
20 resolve bargaining impasses, including disputes about certain pension issues such as pension
21 contribution rates. For civilian employees, bargaining impasses are resolved under the Meyers-
22 Milius-Brown Act, Government Code section 3500, et seq.

23 Beginning in approximately 2008, the City was faced with fiscal challenges precipitated
24 by the recession. Tax and other revenues declined. The City’s retirement costs climbed steeply,
25 driven in part by an overall multi-billion-dollar unfunded liability. In part due to the worldwide
26 stock market decline, the corpus of the retirement funds lost over \$1 billion in a single year. The
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1 unfunded liability was also the result of a larger retiree pool, modified actuarial analyses,
2 enhanced benefits and higher final salaries.

3 Responding to the budget crisis, the City eliminated numerous jobs and reduced City
4 services, including public safety, libraries, community centers, parks and other taxpayer services.
5 The City adopted a fiscal reform plan that called for a variety of cost reduction measures. The
6 fiscal reform plan expressly called for an effort to adjust retirement costs, including a possible
7 charter amendment. The City considered, but did not ultimately adopt, a declaration of fiscal
8 emergency. In March 2010, the City Council voted to place Measure B on the ballot, and on
9 June 5, 2012, approximately 70% of the City's voters enacted Measure B.

10 Measure B contains fifteen sections, and begins with legislative findings. Among other
11 things, the voters found that "[t]he City's ability to provide its citizens with Essential City
12 Services has been and continues to be threatened by budget cuts caused mainly by the climbing
13 costs of employee benefit programs, and exacerbated by the economic crisis." (Section 1501-A)
14 The voters also found that current and projected reductions in service "will endanger the health,
15 safety and well-being of the residents of San Jose." Further, "[w]ithout the reasonable cost
16 containment provided in this Act, the economic viability of the City, and hence, the City's
17 employment benefit programs, will be placed at imminent risk." *Id.*

18 After the election, several lawsuits challenging parts of Measure B were filed on behalf
19 of: (1) the San Jose Police Officers Association ("POA"), representing employees who are
20 members of the 1961 San Jose Police and Fire Department Retirement Plan ("Police and Fire
21 Plan"); (2) the American Federation of State, County, and Municipal Employees, Local 101
22 ("AFSCME"), representing employees who are members of the 1975 Federated City Employees'
23 Retirement Plan ("Federated Plan"); (3) Robert Sapien, Mary Kathleen McCarthy, Thanh Ho,
24 Randy Sekany, and Ken Heredia, who are active and retired members of the Police and Fire Plan
25 (collectively, "Sapien Plaintiffs"); (4) Teresa Harris, Jon Reger, and Moses Serrano, who are
26 active and retired members of the Federated Plan (collectively, "Harris Plaintiffs"); (5) John
27 Mukhar, Dale Dapp, James Atkins, William Buffington, and Kirk Pennington, who are active
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1 and retired members of the Federated Plan (collectively, "Mukhar Plaintiffs"); and (6) the San
2 Jose Retired Employees Association ("REA"). The City also filed its own cross-complaint for
3 declaratory relief. The Sapien Plaintiffs, the Harris Plaintiffs, and the Mukhar Plaintiffs
4 (collectively, "Individual Plaintiffs") were jointly represented at trial.

5 Plaintiffs challenge the following sections of Measure B: Section 1504-A (Reservation
6 of Voter Authority), Section 1506-A (Current Employees), Section 1507-A (One Time
7 Voluntary Election Program ("VEP")), Section 1509-A (Disability Retirements), Section 1510-A
8 (Emergency Measures to Contain Retiree Cost of Living Adjustments), Section 1511-A
9 (Supplemental Payments to Retirees), Section 1512-A (Retiree Healthcare), Section 1513-A
10 (Actuarial Soundness), Section 1514-A (Savings), and Section 1515-A (Severability).

11 The lawsuits were consolidated for trial, and a court trial was held on July 22-26, 2013.
12 The following causes of action went to trial:

13 **Breach of Contract** (POA's Sixth Cause of Action)

14 **Takings Clause**, Cal. Const., art. I, Section 19 (Individual Plaintiffs' Fourth Cause of
15 Action, AFSCME's Third Cause of Action, REA's First Cause of Action, Count II, and Second
16 Cause of Action for Declaratory Relief)

17 **Due Process**, Cal Const., art. I, Section 7 (Individual Plaintiffs' First Cause of Action,
18 AFSCME's Fourth Cause of Action, REA's First Cause of Action, Count III and Second Cause
19 of Action, Declaratory Relief)

20 **Impairment of Contract**, Cal. Const., art. I, Section 9 (POA's First Cause of Action,
21 Individual Plaintiffs' Second Cause of Action, AFSCME's First Cause of Action, REA's First
22 Cause of Action, Count I, and Second Cause of Action for Declaratory Relief)

23 **Freedom of Speech, Right to Petition**, Cal. Const., art. I, Sections 2, 3 (SJPOA's Fourth
24 Cause of Action, AFSCME's Sixth Cause of Action)

25 **Pension Protection Act**, Cal. Const., art. XVI, Section 17 (SJPOA's Eighth Cause of
26 Action, AFSCME's Fifth Cause of Action, REA's First Cause of Action, Count V, Second Cause
27 of Action for Declaratory Relief)
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Promissory and Equitable Estoppel (AFSCME’s Eighth Cause of Action)

Writ of Mandate (AFSCME’s Eleventh Cause of Action)

The City brings the following causes of action for declaratory relief:

Contracts Clause, Article I, Section 10, United States Constitution

Takings Clause, 5th and 14th Amendments, United States Constitution

Due Process Clause, 5th and 14th Amendments, United States Constitution

At trial, the parties reached stipulations concerning the admission of numerous exhibits.

The parties submitted a stipulation on July 26, 2013, confirming the admission and authenticity of numerous exhibits. The parties also entered into the following substantive stipulations:

Severability: All parties agreed that Measure B is severable and that the Court has the authority to adjudicate its legality section by section.

New hires: No plaintiff contends that Measure B is illegal as to future employees. Based on this stipulation, the Court finds that the Measure B sections at issue in this case can proceed as to new employees.

Bill of attainder: AFSCME dismissed with prejudice its second cause of action for bill of attainder.

The POA called four witnesses: Mike Fehr, Pete Salvi and John Robb, current and former POA members, who testified concerning the City’s provision of a subsidy in the amount of the premium for the “lowest cost” plan offered City employees; and Bob Leininger, a Federated plan retiree, who testified that he received a retirement system newsletter in the mail.

AFSCME called three witnesses: Charles Allen, an AFSCME union representative, who testified concerning union negotiations over contributions for retiree healthcare costs; Margaret Martinez, a Federated retiree, who testified concerning “lowest cost plan”; and Dan Doonan, an AFSCME employee called as a “labor economist,” who testified concerning cost of living statistics and other financial topics.

The Individual Plaintiffs called actuary Thomas Lowman as an expert witness, who testified about general actuarial principles of government defined-benefit plans.

1 REA did not call any witnesses.

2 The City called four witnesses: Sharon Erickson, City Auditor, who testified concerning
3 audit reports on the sustainability of the City's pension system and the need for reform in the
4 disability retirement system; Debra Figone, City Manager, who testified concerning City budget
5 shortfalls and service reductions related to increased retirement costs; Alex Gurza, Deputy City
6 Manager and head of the Office of Employee Relations, who testified concerning City and union
7 labor negotiations over employee pension and retiree health contribution rates, labor contracts
8 and City retirement benefits; and John Bartel, an outside actuarial expert who testified
9 concerning the nature of the SRBR.

10 As of the last scheduled day of trial (July 26, 2013), certain outstanding exhibits
11 remained in dispute and so the Court scheduled the further date of August 26, 2013, to complete
12 the receipt of evidence. Certain parties reached a subsequent stipulation dated August 13, 2013,
13 and all parties withdrew objections concerning the final submission of exhibits. Accordingly, the
14 remaining outstanding exhibits were admitted without objection, the additional trial date of
15 August 26, 2013, was vacated, and the evidence was closed.

16 Pursuant to stipulation and order, all parties on September 10, 2013, simultaneously
17 submitted written closing arguments and proposed statements of decision.

18 Despite the fact that the evidence was closed, the City's post-trial brief attached as
19 Exhibit L an unsigned Proposed Statement of Decision in San Francisco Superior Court Case
20 No. CPF-13-512788. On September 16, 2013, the Individual Plaintiffs objected to the
21 submission of Exhibit L; on September 18, 2013, AFSCME also so objected, and on the same
22 date, SJPOA joined in the Individual Plaintiffs' objections. Because the evidence was closed,
23 and the City did not obtain or seek an order to reopen, the Court will not consider Exhibit L.
24

25 The parties appeared on October 10, 2013, to address the Court's questions concerning
26 the proposed statements of decision, and the matter was at that time submitted. Pursuant to Code
27 of Civil Procedure section 632 and Rule of Court 3.1590, the Court issued a tentative decision
28 filed on December 20, 2013. Thereafter the parties filed objections and requests for a different

1 statement of decision, and on January 31, 2014, the parties appeared to address the Court's
2 questions concerning the objections and requests. At the Court's request, on February 4, 2014,
3 AFSCME filed a brief addressing a question from the January 31, 2014 hearing. The City
4 presented a reply letter on February 11, 2014.

5 **II. ANALYSIS OF RECORD EVIDENCE AND THE LAW**

6 **A. Threshold Legal Principles**

7 **1. Presumption of Statutory Validity**

8 "All presumptions favor the validity of a statute. The court may not declare it invalid
9 unless it is clearly so." *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1102 ("*Tobe*") (1995). The
10 parties generally agree that the challenges to all sections of Measure B are facial challenges, with
11 the exception of the challenges to sections 1512-A(a) and 1512-A(c) which are both facial and
12 as-applied. (Reporter's Transcript ("RT") October 10, 2013, at 87:19-90:21.) In the case of a
13 facial challenge, "petitioners must demonstrate that the act's provisions inevitably pose a present
14 total and fatal conflict with applicable constitutional prohibitions." *Tobe, supra*, 9 Cal.4th at
15 1084, quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-81.

16 **2. Pension Benefits as Vested Rights**

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18 "[I]t is presumed that a statutory scheme is not intended to create private contractual or
19 vested rights and a person who asserts the creation of a contract with the state has the burden of
20 overcoming that presumption." *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 697
21 ("*Walsh*"). Generally "legislation in California may be said to create contractual rights when the
22 statutory language or circumstances accompanying its passage 'clearly ... evince a legislative
23 intent to create private rights of a contractual nature enforceable against the [governmental
24 body].'" *REOAC*, 52 Cal.4th at 1187, quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786.
25 "In California law, a legislative intent to grant contractual rights can be implied from a statute if
26 it contains an unambiguous element of exchange of consideration by a private party for
27 consideration offered by the state." *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d
28 494, 505 (enforcing implied contract concerning funding of retirement benefits).

1 "A public employee's pension constitutes an element of compensation, and a vested
2 contractual right to pension benefits accrues upon acceptance of employment. Such a pension
3 right may not be destroyed, once vested, without impairing a contractual obligation of the
4 employing public entity." *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 (Supreme
5 Court issued writ to require Board to set retirement benefits based on statutes in effect during
6 employment); see also *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 ("*Allen/Long*
7 *Beach*") (replacement of fluctuating benefit system based on salary of current occupant of
8 position with a fixed system based on employee's highest salary, and contribution increase,
9 impair vested right). The right to earn a pension vests in the sense that it cannot be destroyed by
10 charter amendment even before retirement. *Kern v. City of Long Beach* (1947) 29 Cal.2d 848,
11 855-856 ("*Kern*") (elimination of pension system impairs vested rights). Charters and municipal
12 codes are valid and enforceable sources of vested property rights. See *International Assn. of*
13 *Firefighters v. San Diego* (1983) 34 Cal.3d 292, 302 (charter, ordinances, and municipal codes);
14 *REAOC, supra*, 52 Cal.4th at 1194 (ordinances).

15
16 The vested rights doctrine does not mean that pension provisions cannot be changed.
17 "Not every change in a retirement law constitutes an impairment of the obligations of contracts,
18 however. [Citation omitted.] Nor does every impairment run afoul of the contract clause."
19 *Allen v. Board of Administration of the Public Employees Retirement System* (1983) 34 Cal.3d
20 114, 119 ("*Allen/Board*") (benefits properly limited by subsequent change which confined
21 benefits to reasonable expectations and avoided windfalls). The protection against impairment of
22 contract "does not exact a rigidly literal fulfillment" (*id.*, at 119-120, quoting *City of El Paso v.*
23 *Simmons* (1965) 379 U.S. 497, 508 ("*Simmons*"). "[A]n employee may acquire a vested
24 contractual right to a pension but [] this right is not rigidly fixed by the specific terms of the
25 legislation in effect during any particular period in which he serves. The statutory language is
26 subject to the implied qualification that the governing body may make modifications and
27 changes in the system. The employee does not have a right to any fixed or definite benefits, but
28 only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he

1 has a vested right to a pension but that the amount, terms and conditions of the benefits may be
2 altered.” *Kern, supra*, 29 Cal.2d at 855.

3 The law imposes restrictions on the employer’s ability to make changes: “An employee’s
4 vested contractual pension rights may be modified prior to retirement for the purpose of keeping
5 a pension system flexible to permit adjustments in accord with changing conditions and at the
6 same time maintain the integrity of the system. [Citations omitted.] To be sustained as
7 reasonable, alterations of employees’ pension rights must bear some material relation to the
8 theory of a pension system and its successful operation, and changes in a pension plan which
9 result in disadvantage to employees should be accompanied by comparable new advantages.
10 [Citations omitted.]... Constitutional decisions ‘have never given a law which imposes
11 unforeseen advantages or burdens on a contracting party constitutional immunity against
12 change.’ [Citation omitted]” *Allen/Board, supra*, 45 Cal.2d at 131. “[T]he propriety of a
13 modification is not dependent upon the ability to strike a precise dollar balance between benefit
14 and detriment. It is enough that a modification does not frustrate the reasonable expectations of
15 the parties to the contract of employment [citation omitted].” *Frank v. Board of Administration*
16 (1976) 56 Cal.App.3d 236, 242 (“*Frank*”).

17 3. The Charter’s Reservation of Rights

18 The City relies on two “reservation of rights” clauses in the Charter which permit the
19 City to “amend or otherwise change” its retirement plans and to “repeal or amend” any
20 retirement system. Specifically, Section 1500 (Exhibit 5216, at SJRJN000062) provides, in
21 pertinent part:

22 Subject to other provisions in this Article, the Council may at any time, or from time to
23 time, amend or otherwise change any retirement plan or plans or adopt or establish a new
24 or different plan or plans for all or any officers or employees....

25 Similarly, section 1503 (Exhibit 5216, at SJRJN000063-64) provides, in pertinent part:

26 However, subject to other provisions of this Article, the Council shall at all times have
27 the power and right to repeal or amend any such retirement system or systems, and to
28 adopt or establish a new or different plan or plans for all or any officers or employees....

 The City argues that these “reservation of rights” clauses preclude the creation of vested

1 rights, relying on the decision in *Walsh, supra*, 4 Cal.App.4th at 700: “The modification of a
2 retirement plan pursuant to a reservation of the power to do so is consistent with the terms of any
3 contract extended by the plan and does not violate the contract clause of the federal constitution.”

4 Plaintiffs argue that the reservation of rights clauses do not preclude their vested rights
5 claims because: (1) the clauses are inapplicable by their own terms; (2) such clauses are not
6 generally enforceable; and (3) the sparse case law does not support the application of these
7 clauses specifically in the pension context to preclude the creation of vested rights.

8 First, Plaintiffs contend that the Charter’s reservation of rights by its own terms applies
9 only to actions *by the Council*, and that Measure B was not an action by the Council but rather by
10 the voters. On this basis, Plaintiffs further argue that *Walsh* does not apply to preclude a claim of
11 contract impairment because Measure B is **not** a “modification of a retirement plan pursuant to a
12 reservation of rights”. In this regard, Plaintiffs rely on *Legislature v. Eu* (1991) 54 Cal.3d 492
13 (“*Eu*”), which held that the Constitutional reservation of rights in favor of the Legislature did not
14 apply to legislation passed by voter initiative rather than by a vote of the Legislature. However,
15 Measure B was **not** legislation passed by voter initiative—but rather is a Charter amendment.
16 The Council performed the tasks with respect to Measure B that the law allows and requires: to
17 place it on the ballot and later to implement it by ordinance (Cal. Const., Art. XI, section 3(b);
18 Ordinance No. 29174, Ordinance No. 29198). But a vote of the people was the proper means to
19 amend the Charter. Plaintiffs’ argument based on *Eu* would compel an anomalous result
20 whereby the people who, through the reservation of rights clauses, gave the Council authority to
21 retain control over pension changes, do not themselves have that power by way of approving a
22 Charter amendment. In any event, the *Eu* court found that the initiative statute was outside the
23 reservation of rights for another reason not pertinent in this case: a reservation of rights to “limit”
24 retirement benefits did not authorize *termination* of those benefits. In this case, the reservation of
25 rights clause reserves the authority to “amend or otherwise change” the City’s retirement plans,
26 which is consistent with Measure B.
27

28 Plaintiffs further contend that the reservation of rights clauses should be interpreted to

1 permit only benefit increases, and not decreases. On its face this is an unreasonable
2 construction: there could be no possible vested rights issue when benefits are simply increased.
3 The “reservation of rights” clauses were added to the Charter in 1965 Charter, at the same time
4 as the “minimum benefits” sections. It is reasonable to conclude that while the minimum
5 benefits specified in the Charter may likely be considered vested, any increases beyond those
6 minimums could be subject to the express right of modification: here, with respect to the pension
7 contributions paid by active employees. To construe the Charter otherwise would render the
8 reservation of rights clauses meaningless, which violates a fundamental rule of construction. See
9 *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 (“an interpretation which
10 would render terms surplusage should be avoided”).

11 With respect to Plaintiffs’ contention that reservation-of-rights clauses are generally not
12 enforceable, the authorities on which Plaintiffs rely are not applicable. *Air Cal, Inc. v. San*
13 *Francisco* (N.D.Cal. 1986) 638 F.Supp.659; *Continental Illinois Nat’l Bank & Trust Co. v.*
14 *Washington* (9th Cir. 1983) 696 F.2d 692; *Southern Cal. Gas Co. v. City of Santa Ana* (9th Cir.
15 2003) 336 F.3d 885. These cases all involve negotiated contracts between public and private
16 entities, with general clauses reserving “police powers”.

17 Finally, Plaintiffs argue that, despite the sweeping language in *Walsh* that modification to
18 retirement benefits made pursuant to a reservation of rights does not violate vested rights, the
19 case does *not* stand for the proposition that a reservation of rights necessarily precludes the
20 creation of vested rights. Indeed, no other authority has been cited for such a broad conclusion.
21 Moreover, the position argued by the City is contrary to the Supreme Court’s language in *Eu*:
22 “Significantly, we have never suggested that the mere existence of [the reservation of rights at]
23 article IV, section 4, precludes legislators from acquiring pension rights protected by the state or
24 federal contract clauses.” *Eu, supra*, 54 Cal.3d at 529. Finally, the language of *Walsh* itself
25 supports Plaintiffs’ argument that the case should be limited to its peculiar facts: in connection
26 with the unique circumstances of the change from a part-time “citizens” legislature to a full-time
27 legislature, members’ salary nearly tripled, and pension benefits tied to the new salary were a
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1 windfall not contemplated under the prior system. In the last sentence of footnote 6, the District
2 Court of Appeal in *Walsh* distinguishes the Supreme Court's ruling in *Eu* with this observation:
3 "The question whether a former member of the Legislature acquired a contractual right to wholly
4 unmodifiable pension benefits when he served during a time when the LRL was neither
5 actuarially funded nor supported by a continuing appropriation, was not a question which was
6 implicated in the *Legislature v. Eu* decision." *Walsh, supra*, 4 Cal.App.4th at 700. Accordingly,
7 this Court concludes that a reservation of rights does not of itself preclude the creation of vested
8 rights.

9 **B. Section 1504-A: Reservation of Voter Authority**

10 Section 1504-A reserves voter authority to "consider any change in matters related to
11 pension and other post-employment benefits," and requires voter approval for any increases to
12 pension or retiree healthcare benefits, other than Tier 2 benefit plans. (Exhibit 5216, at
13 SJRJN000069.)

14 Only the REA challenges this section, claiming that it violates retirees' vested right to
15 have the City Council empowered to grant increases in retirement benefits. This question is
16 purely a facial challenge.

17 Article XI, section 5(b)(4) of the California constitution grants "plenary authority" for a
18 city charter "to provide therein or by amendment thereto" for the "compensation" of city officers
19 and employees:
20

21 It shall be competent in all city charters to provide, in addition to those provisions
22 allowable by this Constitution, and by the laws of the State for: (1) the constitution,
23 regulation, and government of the city police force (2) subgovernment in all or part of a
24 city (3) conduct of city elections and (4) *plenary authority is hereby granted*, subject only
25 to the restrictions of this article, *to provide therein or by amendment thereto*, the manner
26 in which, the method by which, the times at which, and the terms for which the several
27 *municipal officers and employees whose compensation is paid by the city shall be elected*
28 *or appointed, and for their removal, and for their compensation, and for the number of*
deputies, clerks and other employees that each shall have, and for the compensation,
method of appointment, qualifications, tenure of office and removal of such deputies,
clerks and other employees." [Emphases added]

1 Given this plenary authority, a city charter may require electoral approval of the
2 compensation of city officers and employees. See *Munoz v. City of San Diego*, 37 Cal.App.3d 1,
3 4 (1974) (upholding city charter provision that required council member salaries to be decided by
4 the electorate “because it has been constitutionally committed to a political department of
5 government, i.e., the electorate, and not to the courts”). Retirement benefits relate to
6 compensation. *Downey v. Board of Administration*, 47 Cal.App.3d 621, 629 (1975) (“It is clear
7 that provisions for pensions relate to compensation and are municipal affairs within the meaning
8 of the Constitution”). Therefore, Article XI, section 5(b) permits the voters to provide “by
9 amendment” for voter approval of any increases in employee retirement benefits.

10 The REA does not address this authority, nor do they argue that Council implementation
11 is itself a vested right. (REA’s Post-Trial Brief, at 25-28.) Accordingly, the Court finds that
12 Plaintiffs have not met their burden, and that Section 1504-A is valid.

13 **C. Section 1506-A: Increased Pension Contributions**

14 By its terms, Section 1506-A does not apply to retirees, to current employees governed
15 by the Tier 2 Plan, or to current employees who opt into the VEP. With respect to all other
16 current employees, this section provides for increased pension contributions up to 16%, but no
17 more than 50% of the costs to amortize any non-Tier 2 pension unfunded liabilities.

18 Plaintiffs argue that they have an express statutory vested right to have the City pay
19 unfunded actuarially accrued liabilities (“UAAL”), relying on numerous provisions of the SJMC,
20 including sections 3.28.710, 3.28.880, and 3.36.1520A. The City’s primary argument in
21 opposition is that, without more, the Charter’s reservation of rights precludes the creation of a
22 vested right. As discussed above, the Court finds this argument unsupported by law. Second,
23 the City argues that it has the right to regulate compensation and that the parties treated pension
24 contributions as if they were an element of compensation.

25 SJMC section 3.28.710 (Exhibit 5302, at SJRJN000145), applicable to the Federated
26 Plan, provides:
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28 ...[I]f and when, from time to time, the members’ normal rate of contribution is hereafter
amended or changed, *the new rate shall not include any amount designed to thereafter*

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recover from members or return to members the difference between the amount of normal contributions theretofore actually require to be paid by member and any greater or lesser amount which, because of amendments hereafter made to this system or as a result of experience under this system, said member should have theretofore been required to pay in order to make their normal contributions equal three-elevenths of the abovementioned pensions, allowances, and other benefits.... [Emphases added.]

SJMC section 3.36.1520A (Exhibit 5303, at SJRJN000332), applicable to the Police and Fire Plan, provides:

The retirement board shall determine and fix, and from time to time it may change, the amount of monthly or biweekly contributions for current service which must be required of the City of San Jose and of members of this plan to make and keep this plan and the retirement system at all times actuarially sound. For the purpose of this section,... "contributions for current service" for member employed in the police department shall mean the sum of the normal costs for each actively employed member in the police department as determined under the entry age normal actuarial costs method, divided by the aggregate current compensation of such members. *Rates for current service shall not include any amount required to make up any deficit resulting from the fact that previous rates of contribution made by the city and members were inadequate to fund benefits attributable to service rendered by such members prior to the date of any change of rates,* and shall not include any amount required for payment of medical or dental insurance benefits. [Emphases added.]

These provisions are consistent with the prior history requiring that the City pay UAALs. The 1946 Charter amendments expressly allocated UAALs to the City. (Exhibit 1, at POA005584 ("Any actuarial deficiency in the fund shall be made up over a period of years by gifts, waivers, donations, earnings and contributions *by the City.*") (Emphasis added).) The 1961 Charter amendments retained this requirement, but added a provision allowing for increased benefits in exchange for which employees paid UAAL. (Exhibit 2, at POA005619-20.) The 1965 Charter also required an actuarially sound system. (Exhibit 5215, at SJRJN000437.) In 1971, a Council resolution provided that member contributions "shall not include any amount required to make up any deficit resulting from the fact that previous rates of contribution thereto made by the City and by such members were inadequate" (Exhibit 3, at POA005622.) In 1979, the Council enacted Resolution 19690, the precursor to the current SJMC language. (Exhibit 4, at POA005627.)

Moreover, the City acted consistently with its being obligated to pay UAALs. For

1 example, Mr. Gurza's October 23, 2009 memorandum to the Mayor and the Council
2 unambiguously states that: "...[T]he San Jose Municipal Code provides that the City is
3 responsible for 100% of the unfunded liability for the pension benefit." (Exhibit 445, at
4 AFSCME002650 (Emphasis in original).) See also, e.g., Exhibit 401, 1993 Federated System
5 Annual Report, at AFSCME002957: "...[T]he City of San Jose Municipal Code states that part
6 of the pension liabilities under the System is to be shared by the members and the City on a 3:8
7 ratio, part is to be shared on a 42:58 ratio, and *the balance is the responsibility of the City alone.*"
8 (Emphasis added); Exhibit 328, Federated Handbook 1990, at AFSCME001238: contribution
9 rates changes are not retroactive.

10 City ordinances can "manifest[] an express intent" that the City pay for certain
11 obligations for a pension system. *Ass'n of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d
12 780, 789 ("*Wills*"). The City relies on the 2010 Municipal Code changes to argue that the
13 ordinances in effect at the time Measure B was passed authorize additional employee
14 contributions toward unfunded liabilities. But the City overstates the effect of those ordinances
15 which, by their terms, acknowledge that contributions to fund UAALs are ones "that the city
16 would otherwise be required to make...." (Exhibits 5302 (SJMC 3.28.955) and 5303 (SJMC
17 3.36.1525).)

18 The City also attempts to distinguish *Wills* on the ground that it did "not involve a history
19 of pension contribution rates being treated as a component of 'total compensation.'" (City's
20 Post-Trial Brief at 26:10-11.) Specifically, the City argues that because in 2010 some bargaining
21 units proposed additional pension contributions to address UAALs, this conduct is inconsistent
22 with the existence of vested rights. The City does not address how the conduct by only a portion
23 of the bargaining units could affect the rights of employees not members of those units: for
24 example, AFSCME made no such proposal. More significantly, the City provides no authority
25 which supports the remarkable proposition that, under the circumstances of such proposals,
26 pension benefits could be transformed into compensation and that rights thereto would be
27 forfeited by a clear, unmistakable, intelligent and voluntary waiver. The City has not met the
28

1 high burden that the law imposes on proof of such waivers in public employment. *Choate v.*
2 *Celite Corp.* (2013) 215 Cal.App.4th 1460, 1466.

3 Accordingly, Plaintiffs have shown a vested right to have the City pay UAALs; Section
4 1506-A impairs that right. The City argues in the alternative that, even if there is a vested right
5 that is impaired, Section 1506-A is nevertheless valid as it offers a “comparable new advantage”
6 (*Allen/Long Beach*, 45 Cal.2d at 131: “...[C]hanges in a pension plan which result in
7 disadvantage to employees should be accompanied by comparable new advantages.”) The City
8 has not argued that Section 1506-A, although imposing the disadvantage of increased
9 contribution rates, offers a countervailing advantage. Instead, the City’s argument is that
10 increased contribution rates are more advantageous than a wage cut. In other words, the City
11 does not suggest that Section 1506-A offers a comparable new advantage to the law previously
12 in place, but instead that it is a better alternative than a third choice. The logic of this argument
13 is: if the third choice is sufficiently unacceptable, then the challenged law is valid because it is
14 better than the third choice even if it offers no advantage over the previous law.
15

16 At trial, the City conceded that it had no authority for that novel interpretation of the
17 “comparable new advantage” doctrine. Then the City rephrases the doctrine, in imprecise
18 language in post-trial briefing and argument, as “whether the comparable new advantage had to
19 *relate to* a benefit in existence before the comparable new advantage was enacted” (City’s Post-
20 Trial Brief, at 29:12-13 (emphasis added)). Based on this rephrasing, the City then contends that
21 *Claypool v. Wilson* (1992) 4 Cal.App.4th 646 (“*Claypool*”), holds that a comparable new
22 advantage can be “based on” another aspect of the same law that is challenged. This distorts the
23 “comparable new advantage” doctrine, and misreads *Claypool*. In that case, the court of appeal
24 compared the loss of the benefits under the previous law (“loss of potentially higher benefits
25 under the Extraordinary Performance Account Program”) with the effects of the new law.
26 (*Claypool*, 4 Cal.App.4th at 668-69.) *Claypool* provides no support of the City’s illogical
27 formulation of the “comparable new advantage” rule. Thus, the fact that increased employee
28 contributions may be more beneficial to employees than straight pay reductions is irrelevant, and

1 does not render the increased contributions a “comparable new advantage” compared to the pre-
2 Measure B system.

3 Accordingly, Section 1506-A impairs vested rights and is invalid.

4 **D. Section 1507-A: One Time Voluntary Election Program**

5 Section 1507-A provides an alternative retirement plan, expressly contingent on IRS
6 approval, for employees who wish to avoid increased contribution rates. The City argues that the
7 challenge to this section is “a repetition” of the challenge to section 1506-A. (City’s Post-Trial
8 Brief, at 38:7.) Plaintiffs contend that section 1507-A may be unlawful even if section 1506-A is
9 not. Specifically, the POA complains that members wishing to enroll in VEP would not be able
10 to do so in the absence of IRS approval. (POA Post-Trial Brief, at 15: 3-5.)

11 In its Request for a Different Statement of Decision, filed January 6, 2014 (“Request”),
12 the City asked for a “clarification” that section 1507-A is not invalid “except to the extent that
13 the VEP is tied to section 1506-A...”. (Request, at 2:9-10.) The City urges that section 1507-A
14 is “a stand-alone section” (id., at 1:24-25): i.e., because the discrete sections of Measure B are
15 generally severable, section 1507-A is valid notwithstanding the invalidity of section 1506-A.
16 However, this request ignores the language, structure and obvious purpose of section 1507-A: a
17 voluntary alternative to section 1506-A. The City claims that section 1507-A “does not
18 reference” section 1506-A (Request at 2:2)—presumably meaning that section 1507-A does not
19 mention section 1506-A by number. However, section 1506-A is referenced in that sense that it
20 is the program to which section 1507-A is expressly intended to be an “alternative retirement
21 program” into which employees may “opt”. (Section 1507-A, first paragraph.) The City does
22 not explain how section 1507-A could be a voluntary alternative election given the invalidity of
23 section 1506-A. For these reasons, Section 1507-A is also invalid.
24

25 The City also requests that the Court clarify that it “does not intend to interfere or offer
26 any opinion regarding the City’s pending request to the Internal Revenue Service [] for approval
27 of the VEP.” (Request, at 2:11-13.) The City does not identify any portion of the Tentative
28 Decision as giving rise to this concern. The IRS approval was not an issue at trial, nor has it

1 been addressed in this Statement of Decision.

2 **E. Section 1509-A: Disability Retirement**

3 In April 2011, the City Auditor issued a report that concluded that the disability
4 retirement system needed reform. (Exhibit 5103.) The report noted the unusually high number
5 of police and fire employees who retired on disability, the high rate of approvals, and the number
6 of employees granted disability retirement but still able to work. (*Id.*, at SJ001549-50,
7 SJ001553-54, SJ001560-64; RT at 467-69.)

8 Measure B incorporated recommendations from the report: creation of an independent
9 panel with medical expertise to decide disability retirement applications; appeal to a hearing
10 officer; and clarification that the purpose of disability retirement was to provide income for those
11 unable to work but not yet eligible for service retirement. (Exhibit 5103, at SJ001573; RT at
12 477.)

13 **1. Expert Board to Determine Disability**

14 Before Measure B, disability retirement determinations were made by retirement board
15 members consisting of members of the public, as well as employees and retirees who are
16 members of the plan. (Exhibit 5103, at SJ001544-45, SJ001556-58.) Consistent with the
17 Auditor's recommendations, Section 1509-A(c) requires instead that disability determinations be
18 made by an independent panel of medical experts.

19 Relying on the Article 16, section 17 of the California Constitution concerning the
20 fiduciary responsibilities of the board of a public retirement system over "investment of moneys
21 and administration of the system", Plaintiffs claim that they have a vested right to have the
22 "fiduciaries" for the retirement system – the members of the Retirement Board—make the
23 eligibility decision concerning every disability retirement. However, Plaintiffs do not have a
24 vested right, or any other right, in the composition of the body that makes disability
25 determinations. *Whitmire v. City of Eureka*, 29 Cal.App.3d 28, 34 (1972) (where "only
26 administrative and procedural changes" were involved, ordinances restructuring the Commission
27 charged with collecting and disbursing the funds of the police and fire retirement system did not
28

1 violate vested rights), cited in *Claypool, supra*, 4 Cal.App.4th at 670 (“although active and
2 retired members have a vested right to a pension, they do not have a vested right to control the
3 administration of the plan which provides for the payment of pensions”).

4 Following the Tentative Decision, Plaintiffs attempted to distinguish *Whitmire* by
5 claiming that that case does not deal with transferring fiduciary responsibilities outside the board,
6 but this argument begs the question: what is the scope of section 17, and what changes are
7 administrative and therefore allowable? The change of the decision-making body set forth in
8 Measure B appears to be considerably farther from the core purpose of section 17 to protect
9 retirement funds than were the changes allowed in *Whitmire* and *Claypool*.

10 Plaintiffs did not meet their burden of proof with respect to this section.

11 2. Definition of Disability

12 Section 1509-A also changes the eligibility requirements for obtaining a disability
13 retirement by requiring that employees be unable to work. For Federated employees, the
14 employee must be unable to “perform any other jobs described in the City’s classification plan”;
15 for Police and Fire employees, the employee must be unable to “perform any other jobs in the
16 City’s classification plan in the employee’s department.” (Section 1509-A(b).)

17 Plaintiffs claim that the change in the eligibility criteria violates their vested rights
18 because it denies a disability retirement to a worker who can do any job, even a clerk’s job, with
19 no requirement that such job be offered. As the City points out, Plaintiffs’ reliance on *Newman*
20 *v. City of Oakland Retirement Board* (1978) 80 Cal.App.3d 450, is unavailing, as that case
21 involved an officer who had already retired and was collecting a pension, when the department
22 change the eligibility criteria and recalled him. Plaintiffs also rely on *Frank, supra*, 56
23 Cal.App.3d at 245 (allowing benefits under statute in place when employee began working,
24 despite subsequent statutory change before injury), involving new eligibility rules which would
25 have decreased the employee’s benefits by 80%: such “nominal” benefits “obviously never
26 intended to provide self-sufficiency” thwarted the employee’s reasonable expectation.
27

28 The City argues that section 1509-A does not violate the reasonable expectations of

1 employees because it changes *only eligibility and not benefits*. *Frank* is not properly
2 distinguished, as the City claims, as involving only a change in benefits “rather than eligibility”
3 (City’s Post-Trial Brief, at 41:9): in fact, it involves both. The City relies on *Gatewood v. Board*
4 *of Retirement* (1985)175 Cal.App.3d 311, 321 (“*Gatewood*”)(change in statutory definition of
5 disability valid, but writ issued because evidence did not support finding that disability was not
6 service-connected), for the proposition that a statutory change that alters only eligibility
7 requirements “to restore the original purpose of disability retirements” is therefore valid. (City’s
8 Post-Trial Brief, at 41:9-12.) *Gatewood*, although it is helpful to the City, does not stand for
9 such a broad proposition. In that case, the change in the statutory definition of eligibility resulted
10 only in a “semantic, not substantive” difference. *Gatewood, supra*, 175 Cal.App.3d at 316. The
11 City does not, and could not, argue that the eligibility changes in section 1509-A are merely
12 “semantic”. What is instructive about *Gatewood* is the alternative analysis under the
13 *Allen/Board* test: that “any modification of pension rights (1) must be reasonable, (2) must bear a
14 material relation to the theory and successful operation of the pension system, and (3) when
15 resulting in disadvantage to employees, must also afford comparable new advantages.” *Id.*, at
16 320. The constitutionally permissible modification in *Gatewood*, like section 1509-A, “does not
17 eliminate service-connected disability pensions; nor does it reduce benefits.” *Id.*, at 321. The
18 question here is whether section 1509-A “reasonably refine[s] the threshold criteria for award of
19 a service-connected disability” (*id.*), because it has a material relationship to the successful
20 operation of the system and offers comparable new advantages.

21
22 The eligibility changes in section 1509-A are reasonable and related to the successful
23 operation of the system. (Exhibit 5103, at SJ001559-66.) Over time, employees were not placed
24 in alternative positions, thus creating the anomaly, noted by the Auditor, of City employees,
25 retired for disability on substantial pensions, who were still able to work. (*Id.*) The report
26 recommended that the eligibility criteria for disability retirement be modified to provide benefits
27 “to those employees who are incapable of engaging in any gainful employment.” (*Id.*, at 1566.)

28 Section 1509-A also provides a countervailing advantage: a decrease in the amount of

1 time the employee must be disabled before being eligible for retirement -- from "permanent" or
2 "at least until the disabled person attains the age of fifty-five (55) years" to "at least one year"
3 (compare Exhibit 5216 at SJRJN000065 (Charter Section 1504(d)) to Exhibit 5216 at
4 SJRJN000074 (Measure B, Section 1509-A(b)(iii))). Although the City contends that there is
5 another countervailing advantage in the language that it "may" provide contributions to long-
6 term disability insurance for work-related injuries (Exhibit 5216 at SJRJN000074 (Section 1509
7 A(d))), that discretionary term offers only a possible benefit which is not sufficient. *Teachers*
8 *Retirement Board v. Genest* (2007) 154 Cal.App.4th 1012, 1037-38 ("*Genest*").

9 Plaintiffs argued that the "advantage" of reducing the waiting period for eligibility is
10 "meager" and may not apply in every case. (POA Post-Trial Brief, at 17:10-17.) However, the
11 analysis does not require that a new advantage be equivalent: "a precise dollar balance between
12 benefit and detriment" is not necessary. *Frank, supra*, 56 Cal.App.3d at 244. "It is enough that a
13 modification does not frustrate the reasonable expectations of the parties to the contract of
14 employment." *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 782. This is, of course, consistent
15 with the notion that, prior to retirement, "the employee does not have a right to any fixed or
16 definite benefits but only to a substantial or reasonable pension." *Wallace v. City of Fresno*
17 (1954) 42 Cal.2d 180, 183.

18 After the Tentative Decision, Plaintiffs argued that the "countervailing advantage"
19 doctrine is not satisfied, even in the case of a facial challenge, unless there is a new advantage for
20 each and every employee. In this regard, Plaintiffs rely on *Wisley v. City of San Diego* (1961)
21 188 Cal.App.2d 482, 486, which was an action by individuals to recover excess salary
22 deductions and not a facial challenge. Plaintiffs have turned on its head the controlling principle
23 in a facial challenge such as this one: it is not the City's burden to show that every employee will
24 receive a new advantage, but rather Plaintiffs who "must demonstrate that the act's provisions
25 inevitably pose a present total and fatal conflict with applicable constitutional prohibitions."
26 *Tobe, supra*, 9 Cal.4th at 1084.

27
28 Section 1509-A is a permissible modification of disability retirement benefits.

1 **F. Section 1510-A: Cost of Living Adjustments**

2 Section 1510-A provides that, if the Council adopts a resolution declaring “a fiscal and
3 service level emergency”, the City may, for a period of up to five years, suspend all or part of the
4 COLA payments due to all retirees. If the Council later determines that “the fiscal emergency
5 has eased sufficiently to permit the City to provide essential services”, it shall restore COLAs—
6 *prospectively only*. If all or part of the COLA is restored, it shall not exceed 3% for current
7 retirees and current employees and 1.5% for employees who are in VEP or Tier 2.

8 Plaintiffs challenge this provision on the ground that it impairs a vested right to COLA
9 payments. The evidence at trial establishes such a vested right:

10 • In April 1970, the City Council passed Ordinance No. 15118 (Exhibit 606 at
11 REA000445-000473) enacting SJMC Chapter 9, Article II, Part 6, which provided COLAs for
12 retirement allowances and survivorship allowances based upon percentage changes in the
13 applicable Consumer Price Index. (Exhibit 606 at REA000448.) Prior to 2006, the SJMC
14 provided for an annual COLA based upon the percentage increase in the applicable Consumer
15 Price Index published by the United States Department of Labor with a “cap” of three percent.
16 (Exhibit 606 at REA000447.)

17 • In February 2006, the City Council passed Ordinance No. 27652, adding SJMC
18 Section 3.44.160, which provided for fixed three-percent annual COLAs. (Exhibit 630,
19 REA000561.) Section 3.44.160 of the current SJMC states in pertinent part at paragraph (a)(1):
20

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

28 • Throughout this entire time, employees funded a portion of this COLA benefit by
paying contributions that, in part, were designed to fund an annual three-percent COLA. Even
prior to the passage of Ordinance No. 27652, the employees’ contribution rate attributable to the
COLA was based on an actuarial assumption that the COLA would increase 3% annually. (RT

1 353:12-24; see also, Exhibit 651 at REA000781, which shows that employees contributed 1.61%
2 of their income towards COLAs.)

3 The City does not argue that there is no vested right to COLA payments, but responds
4 that the issue is not ripe for adjudication, and that the section is not invalid because it does not
5 prohibit the City from paying back suspended payments when the Council determines the
6 emergency is over. Furthermore, the City argues, even vested rights may be suspended in an
7 emergency, relying on *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 790-91 (“*Valdes*”).

8 The City’s ripeness argument is not well taken. The City cites *San Bernardino Public*
9 *Employees Ass’n v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1226, for the proposition that
10 “where the City has not yet modified retirement benefits, the matter is not ripe for review”
11 (City’s Post-Trial Brief, at 43:19-20). However, here the City has modified benefits, in the form
12 of Measure B. The City’s claim is not well taken that Plaintiffs may not challenge this provision
13 until the City has declared an emergency and then failed to exercise its discretion to make
14 payments it had been obligated to make. *Genest, supra*, 154 Cal.App.4th at 1037-38.

15 The City argues that *Valdes* supports the notion that vested rights can be suspended in an
16 emergency. There are several difficulties with this argument. First, the holding in *Valdes* does
17 not support this proposition, since in that case the Court of Appeal issued peremptory writs
18 directing the State to fulfill its obligations under the pension system despite legislative direction
19 that payments not be made: “We therefore conclude the state has failed to meet its burden of
20 demonstrating that the impairment of petitioners’ rights is warranted by an ‘emergency’ serving
21 to protect a ‘basic interest of society.’” *Valdes, supra*, 139 Cal.App.3d at 791. Second, Section
22 1510-A does not require an emergency to impair these vested rights, but simply a Council
23 resolution declaring an emergency. *Sonoma County Organization for Public Employees v.*
24 *County of Sonoma* (1979) 23 Cal.3d 296, 311 (Supreme Court issued writ directing local entities
25 to pay salary increases despite their contention that the existence of a fiscal emergency allowed
26 them to avoid such obligations: it is “always open to judicial inquiry” whether an emergency
27 exists (quoting *Home Building & Loan Ass’n v. Blaisdell* (1934) 290 U.S. 398, 442)). Third,
28 Section 1510-A does not merely suspend or defer benefits: it gives the City the authority to

1 withhold them altogether. One of the *Valdes* factors to be considered in evaluating whether a
2 legislative impairment of vested rights may be warranted on grounds of necessity, is that: “the
3 enactment is designed as a temporary measure, during which time the vested contract rights are
4 not lost but merely deferred for a brief period, interest running during the temporary deferment.”
5 *Valdes*, 139 Cal.App.3d at 790-91, quoting *Olson v. Cory* (1980) 27 Cal.3d 532, 539. In
6 authorizing denial of benefits rather than mere deferral, Section 1510-A exceeds the scope of
7 what *Valdes* contemplates as potentially allowable.

8 Accordingly, Section 1510-A is unlawful and invalid.

9 **G. Section 1511-A: Supplemental Retiree Benefit Reserve**

10 Section 1511-A discontinues the Supplemental Retiree Benefit Reserve (“SRBR”), and
11 returns its assets “to the appropriate retirement trust fund.” It further provides that “[a]ny
12 supplemental payments to retirees in addition to the benefits authorized herein shall not be
13 funded from plan assets.”

14 The Municipal Code provides for two SRBR plans (Exhibits 5302 and 5303): one in the
15 Federated plan (SJMC 3.28.340), and one in the Police and Fire Plan (SJMC 3.36.580). The
16 purpose of the SRBR was to provide a source of funding for supplemental benefits. (SJMC
17 3.28.340(E)(1); 3.36.580.)

18 The City contends that SRBR distributions are within the discretion of the City, and
19 therefore there can be no vested rights to such distributions and the SRBR may properly be
20 eliminated. Plaintiffs claim that a vested right does exist because distributions from the Fire and
21 Police Plan are mandatory, not discretionary, and that in any event discretion under the Federated
22 Plan to authorize distributions does not warrant elimination of the SRBR altogether. AFSCME
23 and REA make a further argument that section 1511-A violates the Pension Protection Act
24 (California Constitution, article XVI, section 17).

25 As a preliminary matter, the Court rejects Plaintiffs’ challenge with respect to any retiree
26 who “retired prior to the effective date” when the SRBR program came into effect. *Claypool*,
27 *supra*, 4 Cal.App.4th at 660. There could not possibly be a vested right with respect to such
28

1 retirees because they did not perform any work that could possibly create a right to the benefit.

2 *Id.*

3 With respect to other employees, the Court has considered both the language and the
4 history of these Municipal Code provisions. When the Federated SRBR was initially established
5 in 1986, the reserve was designed to allow “the retirees [to] benefit when the money in the fund
6 [of the retirement system] grows because of superior investment performance.” (Exhibit 5701 at
7 SJRJN000493; see also Exhibit 5719.) At that time, the Federated System was fully funded
8 (Exhibit 5700): the concept was that adjustments would be made “based on ...the availability of
9 funds in the retirement system” and the reserve was to be funded by “excess earnings”. (Exhibit
10 5701.) Likewise, when the Police and Fire SRBR was established in 2001, the system was fully
11 funded. (Exhibit 6030.)

12 Excess earnings are, however, not “free”, as both actuarial experts agreed at trial. (RT
13 296 (Lowman) and 965 (Bartel).) “Skimming” excess assets when earnings are high and not
14 returning funds in years in which the system has losses, does in fact have a cost to the system.
15 (RT at 286-87 (Lowman); 964-65 (Bartel).) That cost was not taken into account until 2011
16 when actuaries assigned and subtracted a cost for the SRBR. (RT at 290-92 (Lowman); 967-68,
17 971-72 (Bartel).)

18 The terms of the Federated SRBR reserve to the Council discretion to determine whether
19 any distributions will be made at all (SJMC Section 3.28.340(E)(2)):
20

21 Upon request of the city council or on its own motion, the board **may** make
22 recommendations to the city council regarding the distribution, **if any**, of the
23 supplemental retiree benefit reserve to retired members, survivors of members,
24 and survivors or retired members. The city council, after consideration of the
25 recommendation of the board, **shall determine** the distribution, **if any**, of the
26 supplemental retiree benefit reserve to said persons. (Emphasis added.)

27 Indeed, from 1986 to 1999, the Council did not authorize any SRBR distributions to retirees, but
28 used the SRBR funds to pay for other retirement benefits and considered eliminating SRBR if it
29 became unable to fund new benefits. (Exhibits 5703 and 5704.)

Starting during the technology bubble in 2000 and until 2009, the Council did authorize
distributions. Also during that time, a SRBR was established for the Police and Fire Plan, for

1 employees receiving benefits effective June 30, 2001. (Exhibit 5303, at Section 3.36.580(D)(3).)
2 The board was directed to develop a methodology for distributions: “[u]pon approval of the
3 methodology by the city council, the board shall make distributions in accordance with such
4 methodology.” (*Id.*, at Section 3.36.580(D)(5).) The plan contemplated that there are
5 circumstances in which distributions shall not be made. (*Id.*, at Section 3.36.580(D)(6): “[T]he
6 board shall not transfer or distribute funds in the SRBR if such transfer or distribution would
7 reduce the SRBR principal.”)

8 In 2010, SRBR distributions ceased and have not resumed. (See Section 3.36.580(D)(2),
9 directing that distributions shall not be made in 2010, 2011, 2012 or 2013 prior to June 30,
10 2013.) The Council approved the suspension of distributions beginning in 2010 because of
11 significant unfunded liabilities. (Exhibits 5707-5709, 5717, 5718.)
12

13 Based on this history, Plaintiffs argue that even though the Federated Plan expressly
14 reserves to the Council the discretion to make any distribution at all, the City does not have
15 discretion to eliminate the SRBR altogether. In essence, Plaintiffs argue that they have a vested
16 right to the existence of a segregated reserve which is not required to be distributed. Plaintiffs do
17 not identify any statutory language that would support such an illogical result.

18 While Plaintiffs cite the requirement of SJMC 3.28.070(B)(4) that assets of the SRBR
19 must be allocated to members when the fund is terminated, they do not, and cannot, contend that
20 upon discontinuance of the SRBR, those funds will be used for any purpose other than the
21 retirement system. To the contrary, Section 1511-A expressly provides that “the assets [of the
22 SRBR shall be] returned to the appropriate retirement trust fund.” Plaintiffs claim instead that it
23 is unconstitutional for the City to use the SRBR assets to “offset what it would have otherwise
24 been required to pay into the retirement system for that year.” (AFSCME Post-Trial Brief, at
25 20:24-25.) But using the funds for the retirement system is not the same as using the funds “to
26 [the City’s] own advantage” (*id.*, at 20:25)—given that there is no right to distribution of the
27 funds as SRBR benefits. *Claypool, supra*, 4 Cal.App.4th at 660-61 (funds which offset employer
28

1 obligations are nevertheless committed to fund pension benefits). Plaintiffs have failed to
2 establish a vested right to the existence of a SRBR under the Federated Plan.

3 The related argument based on the Pension Protection Act fares no better. That statute
4 provides that the assets of a pension fund shall be held for the exclusive purpose of providing
5 benefits and defraying expenses of the system. The evidence at trial showed that the SRBR was
6 not a separate “trust” but rather a reserve, and the funds remain available for the benefit of
7 retirees in an “appropriate retirement trust fund.” (Section 1511-A.) *Claypool*, 4 Cal.App.4th at
8 674 (using former supplemental COLA funds to reduce employer contributions to PERS did not
9 violate Cal. Const., art. XVI, § 17, where the funds “continue to be ‘held for the exclusive
10 purposes of providing benefits to participants in the pension or retirement system and their
11 beneficiaries and defraying reasonable expenses of administering the system’”). The fact that
12 this transfer of funds could lead to a decrease in the City’s contribution rates is not equivalent to
13 use of fund assets for an improper purpose. The record does not show a violation of the Pension
14 Protection Act.

15
16 The language in the Police and Fire Plan is materially different from the Federated Plan.
17 The POA points out that the only element of discretion reserved to the City in the Police and Fire
18 Plan is to approve the board’s methodology, which the City did in 2002, and so now nothing is
19 left but for the board to make distributions. The City’s contention that “no retiree [under the
20 Police and Fire SRBR] was guaranteed ... any payment at all” (City’s Post-Trial Brief, at 49:16)
21 is contrary to the language of the Municipal Code.

22 The City argues, in the alternative, that even if there is a vested right to SRBR
23 distributions under the Police and Fire Plan, Section 1511-A is still valid because it remedies
24 “unforeseen burdens” of the SRBR. “Constitutional decisions 'have never given a law which
25 imposes unforeseen advantages or burdens on a contracting party constitutional immunity
26 against change.’” *Allen/Board, supra*, 34 Cal.3d at 120 (quoting *Simmons, supra*, 379 U.S. at
27 515). *Allen/Board* concerned a 1947 statute by which legislators’ pension COLAs were tied to
28 the pay of current legislators. Then, in 1966, when legislative salaries increased dramatically

1 with the transition to a full-time legislature, a new law removed the COLA link to current
2 salaries and replaced it with a COLA based on CPI. The Supreme Court held that the 1966
3 revision was valid notwithstanding vested rights under the 1947 law, because of the unforeseen
4 burdens on the state and undue windfall to retirees of COLA payments based on greatly
5 increased salaries never earned by members not in office but not yet retired in 1966.

6 Plaintiffs respond that there is no “unintended consequence” because the City itself
7 enacted the SRBR. (POA Post-Trial Brief, at 23:3-4.) This argument fails to justify why the rule
8 should not be applied here: if the City had foreseen the unintended consequence of the SRBR
9 “skimming”, it could have written around it, but the same, of course, is true for the failure of the
10 legislature in 1947 to draft around a major increase in incumbent salaries. Plaintiffs further
11 argue that there is no evidence that the parties had a reasonable expectation that the SRBR would
12 be abolished rather than amended. (*Id.*, at 23:21-22.) This argument misses the point: the record
13 evidence shows that the reserve was established at a time when the system was fully funded, and
14 the actuaries did not factor in the cost of the “skimming” until years later. The SRBR was, by its
15 terms, intended to apply to “superior investment performance” by the system—and not to a fund
16 with billions in unfunded liabilities. Finally, Plaintiffs argue that “[e]ven the plaintiffs in
17 *Allen/Board* received a comparable new benefit” (*id.*, at 23:23-24)--but *Allen/Board* does not
18 describe the alternative statutory formulation in those terms, nor does it hold that this is a
19 requirement under the “unforeseen burden” doctrine.
20

21 For these reasons, there is no constitutional impediment to Section 1511-A.

22 **H. Section 1512-A: Retiree Healthcare**

23 **1. Minimum Contributions**

24 Section 1512-A(a) provides: “Existing and new employees must contribute a minimum of
25 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.”

26 With respect to the final phrase of the section relating to the specific inclusion of
27 unfunded liabilities in the cost of retiree healthcare, the City correctly argues that Plaintiffs have
28 not met the heavy burden under *REAOC* to establish an implied vested right. The Municipal

1 Code does not grant employees protection against contribution to unfunded liabilities relating to
2 healthcare benefits (SJMC 3.28.385(C) and 3.36.575(D)). Moreover, the conduct of the parties
3 negates such an implied right: the evidence presented at trial through Mr. Lowman and Mr.
4 Gurza showed that employees have contributed for years to unfunded liabilities for healthcare
5 benefits. (RT 793-794, 853-854; Exhibits 5501-5502, 5504-5508.) The stipulation concerning
6 the effective date of Section 1512-A renders ineffective POA's argument that there has been a
7 violation of the MOA (which will expire before the stipulated effective date).

8 The City does not argue that there is no vested right in the "one to one" ratio, but instead
9 claims that this section "simply moved the existing 'one to one' funding ratio from the Municipal
10 Code into the Charter." (City's Post-Trial Brief, at 54:9-10.) However, this argument is at odds
11 with the plain language of Measure B: it ignores "a minimum of"—which clearly would
12 authorize an employee contribution requirement greater than 50%, which in turn impairs the
13 vested right to have the City pay "one to one".
14

15 At the hearing following the responses to the Tentative Decision, the City invoked
16 *Borikas v. Alameda Unified School District* (2013) 214 Cal.App.4th 135, 166 ("*Borikas*"), to
17 support an argument made for the first time that the Court should sever out the phrase "a
18 minimum of". Because the City had not previously made this argument, the Court offered
19 Plaintiffs an opportunity to address the argument but none accepted this offer. The Court has
20 now reviewed *Borikas* which involved a taxpayer challenge to a parcel tax and sets forth the law
21 as to severing out phrases or words from invalid statutory language. Here as in *Borikas*, there is
22 statutory language allowing severance: specifically, section 1515-A(a). Such language is
23 persuasive, though not conclusive, evidence of the intent of the enacting body: in this case, the
24 voters. *Borikas, supra*, 214 Cal.App.4th at 165. In addition, the parties to this case have
25 explicitly stipulated to severability.

26 In addition to these factors, the Court has also considered whether the phrase is
27 grammatically and functionally separable. *Id.*, at 166. The phrase "a minimum of" is separable
28 in both aspects. Finally, the Court has considered whether the phrase is also "volitionally

1 separable”. Id., at 167. Given the record evidence concerning the history of the relevant charter
2 sections and the statements of findings and intent in Measure B itself, Section 1512-A(a) without
3 the subject phrase “reflects a ‘substantial’ portion of the electorate’s purpose” (id., quoting
4 *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 715), and can and should be saved.

5 Accordingly, the phrase “a minimum of” is severed and section 1512-A(a) is otherwise
6 valid.

7 2. Reservation of Rights

8 Section 1512-A(b) provides: “No retiree healthcare plan or benefit shall grant any vested
9 right, as the City retains its power to amend, change or terminate any plan provisions.”

10 REA argues that this section is invalid because it makes unvested rights out of vested
11 rights: specifically, “the right to health care and dental coverage and premium contributions”.

12 (REA Post-Trial Brief, at 16:17-19.) This assertion overlooks the precise language in Section
13 1512-A(b): i.e., that no *plan* or *benefit* shall create a vested right.

14 Plaintiffs have not argued, and definitely have not proved, that there is a vested right to a
15 particular plan or a particular benefit, as distinct from a vested right to health care and dental
16 coverage in general. The City is correct that “[t]his section does not change the status quo, but
17 rather (1) reflects what vested rights currently exist, since it does not propose to take them away,
18 and (2) declares an intent not to create any new vested rights.” (City’s Post-Trial Brief, at 57:3-
19 5.)
20

21 On this facial challenge, Plaintiffs have failed to prove that there is no application of this
22 section that would be legal. Accordingly, the challenge to this section fails.

23 3. Low Cost Plan

24 Section 1512-A(c) provides: “For purposes of retiree healthcare benefits, ‘low cost plan’
25 shall be defined as the medical plan which has been the lowest monthly premium available to
26 any active employee in either the Police and Fire Department Retirement Plan or Federated City
27 Employees’ Retirement System.”

28 The previous “low cost plan” terms for retiree healthcare benefits under the Federated

1 Plan and the Police and Fire Plan involve different language and different histories, and so are
2 analyzed separately.

3 a. *Federated Plan*

4 Retiree health benefits under the Federated Plan are governed by SJMC 3.28.1980B(1):

5 The portion of the premium to be paid from the medical benefits account, or trust fund
6 established by Chapter 3.52, shall be the portion that represents an amount equivalent to
7 **the lowest of the premiums for single or family medical insurance coverage**, for
8 which the member or survivor is eligible and in which the member or survivor enrolls
9 under the provisions of this part, **which is available to an employee of the city** at such
10 time as said premium is due and owing. [Emphases added.]

11 Plaintiffs advance two arguments as to how Section 1512-A(c) violates a vested right.

12 First, they argue that “members were vested in their right to retiree healthcare free of high
13 deductibles or exorbitant costs” (AFSCME Post-Trial Brief, at 35:13-14): i.e., a vested right to a
14 particular plan. However, the City is correct that plaintiffs had not met their high burden under
15 *REAOC* to provide “clear” and “unmistakable” evidence of an implied vested right preventing
16 the City from changing plan designs.

17 Plaintiffs also argue that the prior language contained an additional limitation that Section
18 1512-A(c) lacks: specifically, that the lowest cost plan must be one “for which the member or
19 survivor is eligible”. (AFSCME Post-Trial Brief, at 35:26-36:8.) Plaintiffs explain that this
20 omission is significant because, under the new language, the member may not be eligible for the
21 lowest cost plan and therefore would not have an option to choose a plan that is fully paid for.

22 In its post-trial brief, the City addressed only the first argument and not this one. (City’s
23 Post-Trial Brief, at 59:5-7.) On January 31, 2014, at the post-Tentative Decision hearing, the
24 City presented a “Revised Request for Different Statement of Decision”, raising new arguments
25 on this issue. AFSCME addressed the City’s Revised Request orally at the hearing, and initially
26 declined but later accepted the Court’s request that AFSCME’s position be stated in a
27 supplemental brief, which was filed on February 4, 2014. The City responded by letter dated
28 February 11, 2014.

The phrase “for which the member or survivor is eligible” in SJMC 3.28.1980B(1)

1 modifies “coverage”—not a particular benefit plan. The word “plan” (referring to a plan of
2 medical coverage, as distinct from the Federated “Plan”) does not appear in the code section.
3 Eligibility for coverage, as described in SJMC 3.28.1970A and B, does not relate to a specific
4 benefit plan and is not evaluated by the status of benefit plans at the time of an individual’s
5 retirement. The contrary interpretation would effectively give an employee or retiree a vested
6 right to a particular benefit plan, which, as explained above, is not supported by the evidence.

7 Accordingly, with respect to the Federated Plan, Section 1512-A(c) does not impair a
8 vested right and is valid.

9 *b. Police and Fire Plan*

10 Implemented on July 27, 1984, Ordinance 21686 (Exhibit 6, former SJMC 3.36.1930)
11 provided that police and fire employees were entitled to retiree healthcare benefits with payment
12 of premiums “in the same amount as is currently paid by an employee of the City in the
13 classification from which the member retired.” Ordinance 25615, the pre-Measure B version of
14 SJMC 3.36.1930, was implemented on July 31, 1998, and provided:

15 For the purposes of this section, “lowest cost medical plan” means that medical plan
16 (single or family coverage as applicable to the coverage selected by the member, former
17 member or survivor):

- 18 1. Which is an eligible medical plan as defined in Section 3.36.1940; and
- 19 2. Which has the **lowest monthly premium of all eligible medical plans then in effect**,
determined as of the time the premium is due and owing. [Emphasis added.]

20 Plaintiffs argue that this language creates “an *express* vested right to the lowest cost plan
21 available to any city employee and an *implied* vested right to the lowest cost plan available to
22 Police Officers.” (POA Post-Trial Brief, at 25:13-15 (emphasis in original).) The City does not
23 dispute the former. Plaintiffs claim that the implied vested right was established by course of
24 conduct and the 1997 Bogue arbitration award which resulted in the revision to the SJMC.

25 Neither of these bases provides the “clear” and “unmistakable” evidence required under
26 *REAOC*. The POA cites language from the Bogue award which does not specify comparability
27 to active police officers as opposed to active city employees (POA Post-Trial Brief, at 26:18-23;
28 Exhibit 35), so that award provides no basis for an implied right. Similarly, SJMC 3.36.1930,

1 amended “to implement the Bogue arbitration decision” also contains no indication that the
2 “lowest cost medical plan” refers only to police and fire employees, but instead refers generally
3 to “the lowest monthly premium of all eligible medical plans then in effect”. (POA Post-Trial
4 Brief, at 26:24-27:3.) The POA claims that the revised code section is “ambiguous” because the
5 ordinance relates only to police and fire employees. But the logical inference to be drawn from
6 the *deletion* of the prior language specifically establishing that the baseline was police officer
7 benefits (“in the classification from which the member retired”) and its replacement with more
8 general language (“all eligible medical plans then in effect”) negates the existence of an implied
9 right.

10 The “course of conduct” argument relies on testimony by retiring officers that they
11 understood their benefits would be tied to those of active officers, but such understanding is not
12 persuasive proof of a course of conduct by the City. More persuasive is the fact that no one from
13 the City told Officer Fehr that his benefit would be tied to the “lowest cost plan” for active
14 officers as opposed to active City employees. (RT 92-93.) The fact that actuarial reports
15 (Exhibits 15-18 and 23) and benefit sheets that related only to the police and fire retirement
16 system did not refer to other employees not covered by that system is of little significance.
17 Lastly, Plaintiffs rely on Exhibit 51, a memorandum from City Manager Debra Figone, as a
18 representation that retiree healthcare benefits are vested rights, but that sheds no light on the
19 specific question of whether the “lowest cost plan” is tied to all City employees or only police
20 and fire employees.

21 Plaintiffs rely on two pleading cases for general propositions concerning evidence that
22 may bear on implied rights. *Requa v. Regents of the University of California* (2012) 213
23 Cal.App.4th 213; *International Brotherhood of Electrical Workers, Local 1245 v. City of Redding*
24 (2012) 210 Cal.App.4th 1114. However, applying the evidentiary standard specified in *REAOC*,
25 Plaintiffs have failed to meet their burden that such an implied right exists. See also *Sappington*
26 *v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949, 953 (“Generous benefits that exceed
27 what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a
28

1 contractual mandate.”).

2 Therefore, with respect to the Police and Fire Plan, Section 1512-A(c) does not impair a
3 vested right and is valid.

4 **I. Section 1513-A: Actuarial Soundness**

5 Section 1513-A requires that pension plans be actuarially sound, minimize risks to the
6 City and its residents, and be prudent and reasonable in light of economic climate, among other
7 things. Plaintiffs assert a facial challenge that this section violates the state Pension Protection
8 Act because it requires the retirement boards to consider the interest of “taxpayers with respect to
9 the costs of the plans” (Section 1513-A(c)(ii).) They contend that the Pension Protection Act
10 requires retirement boards to keep paramount the interests of retirees and beneficiaries.

11 However, the record includes ordinances stating that the actuarial soundness of the
12 Federated and Police and Fire Plans is to be determined consistent with the Pension Protection
13 Act. (Exhibits 5300, 5301.) Thus, Plaintiffs have not shown that this section inevitably poses a
14 “present total and fatal conflict” with the Constitution. *Tobe, supra*, 9 Cal.4th at 1084. Plaintiffs
15 have not met their burden of proof that Section 1512-A is invalid under any cause of action.

16 **J. Section 1514-A : Alternative of Wage Reduction**

17 Section 1514-A provides that, in the event that the Court determines that Section 1506-
18 A(b) is “illegal, invalid or unenforceable”, then the City may accomplish equivalent savings
19 through pay reduction.
20

21 Plaintiffs do not dispute that the City has plenary authority to control employee
22 compensation. Instead, they contend that this provision violates their constitutional rights to free
23 speech and petition because it threatens to reduce “salaries to dissuade successful legal
24 challenges.” (POA Post-Trial Brief, at 47:16.)

25 The logic of Plaintiffs’ argument is lacking. Section 1514-A does not impose “a cost or
26 risk upon the exercise of a right to a hearing... [that] has no other purpose or effect than to chill
27 the assertion of constitutional rights by penalizing those who choose to exercise them.”

28 *California Teachers Ass’n v. State of California* (1999) 20 Cal.4th 327, 338 (imposition of half

1 the cost of administrative hearing to determine propriety of employment termination chilled right
2 of teacher to have such hearing). It simply recites what is already the law: that the City may
3 adjust employee compensation "to the maximum extent permitted by law". Section 1514-A.
4 Plaintiffs' challenge is unavailing.

5 **K. Section 1515-A: Severability**

6 Section 1515-A provides a general severability clause, stating at subsection (b) that if
7 "any ordinance adopted" pursuant to Measure B is "held to be invalid, unconstitutional or
8 otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for
9 determination as to whether to amend the ordinance consistent with the judgment, or whether to
10 determine the section severable and ineffective."

11 Plaintiffs contend that this section violates the separation of powers doctrine because it is
12 the role of the courts, not the Council, to determine whether "the section is severable and
13 ineffective." However, this argument elevates form over substance. The language addresses a
14 circumstance in which a court has entered a judgment, and provides that the Council shall then
15 determine, essentially, whether to revise the ordinance or to treat it as ineffective. Nothing in
16 this language is inconsistent with the common practice of letting government defendants exercise
17 discretion in complying with judgments. *Common Cause v. Board of Supervisors* (1989) 49
18 Cal.3d 432, 445-446 ("although a court may issue a writ of mandate requiring legislative or
19 executive action to conform to the law, it may not substitute its discretion for that of legislative
20 or executive bodies in matters committed to the discretion of those branches").

21 Plaintiffs have not met their burden of proof to show that Section 1515-A is invalid under
22 any cause of action.
23

24 **L. Additional Causes of Action**

25 1. Equitable and Promissory Estoppel

26 AFSCME asserts an "equitable estoppel" claim, which requires proof of: "(1) a
27 representation or concealment of material facts (2) made with knowledge, actual or virtual, of the
28 true facts (3) to a party ignorant, actually and permissibly, of the truth (4) with the intention,

1 actual or virtual, that the latter act upon it and (5) that the party actually was induced to act upon
2 it.” *Walsh, supra*, 4 Cal.App.4th at 709.

3 AFSCME did not meet this burden. First, since AFSCME is relying on statements made
4 outside City ordinances, promissory estoppel will not lie, because in San Jose, the Charter
5 requires that retirement plans must be enacted by ordinance. City Charter Section 1500; *San*
6 *Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys.* (2012)
7 206 Cal.App.4th 594, 610-11 (“When there has been no compliance with the relevant charter
8 provision, the city may not be liable in quasi-contract and will not be estopped to deny the
9 validity of the contract.”). Similarly, there is no viable claim for estoppel when the agency
10 making the statement has no authority to grant the benefits promised. *Medina v. Board of*
11 *Retirement* (2013) 112 Cal.App.4th 864, 869. AFSCME did not offer any evidence that the City
12 departments that issued various booklets and flyers had any authority to enlarge City retirement
13 benefits.

14 But in any event, AFSCME did not prove at trial that the City misrepresented any fact, or
15 that anyone was actually induced to act. In particular, ASFCME did not establish that any of its
16 witnesses accepted employment and continued working for the City based on any
17 misrepresentation about benefits. Jeffrey Rhoads could not cite to any other job with better pay,
18 or with better benefits, that he had been offered but had rejected in preference for his City job.
19 (RT 114-118.) Margaret Martinez testified that her own private understanding of Exhibit 51, the
20 2008 Figone memorandum, was that the City was not planning to change healthcare benefits, but
21 she did not claim to have continued employment, or given up more lucrative employment, based
22 on the memorandum. (RT 322-333.) Even if they had testified as to detrimental reliance, their
23 testimony would not establish a basis for any relief for AFSCME.
24

25 Based on the evidence at trial, AFSCME did not prove its claim for promissory and
26 equitable estoppel.

27 2. Bane Act

28 Both the POA and AFSCME have asserted a violation of the Bane Act, California Civil

1 Code section 52.1 (“Section 52.1” or “Bane Act”), to “seek redress in the Superior Court for
2 violation of constitutional rights.” Neither argued this claim in their post-trial briefs, and they
3 did not prove this cause of action at trial.

4 First, AFSCME and POA do not have standing because Section 52.1 “is limited to
5 plaintiffs who themselves have been the subject of violence or threats.” *Bay Area Rapid Transit*
6 *Dist. v. Superior Court* (1995) 38 Cal.App.4th 141, 142, 144. There is no statutory authority or
7 precedent for conferring associational standing for Section 52.1 claims.

8 Second, Section 52.1 is not a vehicle for redress of constitutional harms. A constitutional
9 violation on its own – without the requisite threat, intimidation, or coercion – does not implicate
10 Section 52.1. *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 957, 959 (“in
11 pursuing relief for those constitutional violations under section 52.1,” plaintiffs must allege the
12 acts “were accompanied by the requisite threats, intimidation, or coercion”).

13 Third, Plaintiffs did not offer any testimony of physical, verbal or written threats or
14 intimidation. They claim coercion because they may be forced to choose between paying more
15 for an existing pension plan or accepting an inferior plan. That would be an economic choice,
16 not the egregious “coercion” contemplated by Section 52.1. *City and County of San Francisco v.*
17 *Ballard* (2006) 136 Cal.App.4th 381, 408 (where plaintiff alleged City coerced him by
18 threatening to impose \$15 million in penalties and “partial demolition” of his building if he did
19 not perform “unrequired construction”, the court found he had “not alleged and the record does
20 not establish any conduct that rises to the level of a threat of violence or coercion” under Section
21 52.1).

22 Based on the evidence at trial, AFSCME and the POA have not proven a violation of the
23 Bane Act under any of their causes of action.

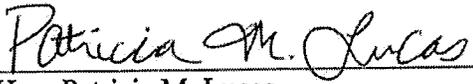
24 **M. City’s Cross-Complaint for Declaratory Relief**

25 The City filed a cross-complaint seeking a declaration that certain provisions of Measure
26 B are lawful under the Federal Constitution. However, the City has not argued that federal law
27 applies to require a different outcome, and in any event, given the foregoing, this Court exercises
28

1 its discretion to find that the relief requested is “not necessary or proper ... under all the
2 circumstances.” *Meyer v. Sprint Spectrum* (2009) 45 Cal.4th 634, 647.

3 Plaintiffs are ordered to prepare a form of judgment consistent with this decision.

4
5 Dated: February 19, 2014


6 Hon. Patricia M. Lucas
7 Judge of the Superior Court
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IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

Endorsed FILED

Date: February 20, 2014

DAVID YAMASAKI

Chief Executive Officer Clerk
Superior Court of CA County of Santa Clara

In Re the Matter of:

San Jose Police Officers' Association VS City of San Jose, et al

By: Ann Vizconde

Ann Vizconde, Deputy

PROOF OF SERVICE BY MAIL OF:
Statement of Decision

Case Number:
1-11-CV 211989

CLERK'S CERTIFICATE OF SERVICE: I certify that I am not a party to this case and that a true copy of this document was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below and the document was mailed at SAN JOSE, CALIFORNIA on: February 20, 2014

David Yamasaki, Chief Executive Officer/Clerk

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EXHIBIT 4

1 motion is suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and
2 accordingly VACATES the hearing set for September 12, 2013, at 1:30 p.m. Having considered
3 the parties' arguments, the relevant law, and the record in this case, the Court DENIES the motion
4 for the reasons stated below.

5 **I. BACKGROUND**

6 On June 5, 2012, San Jose voters passed Measure B, a ballot initiative that in effect reduced
7 the pension benefits of the City's public employees. On that same day, the City filed this action
8 against five unions representing public sector employees. *See* ECF No. 1. The City sought a
9 declaratory judgment stating that portions of Measure B were legal under the Contracts Clause of
10 the U.S. Constitution and several other state and federal laws. *See* ECF No. 33 at ¶ 31.

11 The day after the Measure passed, public sector unions, along with City employees and
12 retirees, filed five challenges to the Measure on state law grounds in state court. *See* ECF No. 97-1
13 at ¶ 4. In August 2012, the City moved in state court to consolidate the five actions and to stay the
14 state court proceedings pending resolution of this federal case. *Id.* at ¶ 6. The state court
15 consolidated the five actions and denied the City's motion to stay the state court proceedings. *Id.*
16 at ¶ 7.

17 Meanwhile, in June through August of 2012, in this federal action, three Defendant unions,
18 including SJPOA, filed motions to dismiss. *See* ECF Nos. 8, 41, 56. In its Motion to Dismiss,
19 SJPOA contended that the City's federal action should be dismissed because the case was unripe,
20 the matter called for an advisory opinion, and the City lacked standing. *See* ECF No. 41 at 4–14.
21 In addition, SJPOA sought a stay or dismissal based on three federal abstention doctrines. *Id.* at
22 14–21. The City filed a consolidated opposition to all three motions to dismiss, and the unions
23 filed a consolidated reply brief. *See* ECF Nos. 60, 72.

24 The motions to dismiss were set for hearing before this Court on October 4, 2012. On
25 September 26, 2012, the City filed a letter to this Court informing the Court of the status of the
26 state court action and stating that the City was seeking to file its federal claims as a cross complaint

1 in the consolidated state court action. *See* ECF No. 76. The letter further stated that if the City
2 were able to file its federal claims as a cross complaint in the consolidated state court action, the
3 City would be able to dismiss its federal case. *Id.* As a result, the City suggested that a
4 continuance of the October 4, 2012 hearing might be appropriate. *Id.* One of the Defendant
5 unions, the Municipal Employees' Federation, AFSCME Local 101 ("AFSCME"), filed a letter
6 opposing any continuance of the hearing. *See* ECF No. 77.

7 In response to the two letters, this Court issued an order on September 28, 2012, indicating
8 that the Court would proceed with the October 4, 2012 hearing unless the parties stipulated to a
9 stay of proceedings pending the state court action or the City voluntarily dismissed the case. *See*
10 ECF No. 79. On October 1, 2012, the City voluntarily dismissed SJPOA and AFSCME without
11 prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). *See* ECF No. 80. This notice
12 of dismissal did not address attorneys' fees. *Id.* A plaintiff may dismiss a case unilaterally under
13 Rule 41(a)(1)(A)(i) before the defendant has answered or filed a motion for summary judgment.
14 SJPOA and AFSCME had not answered, and accordingly, a notice of dismissal was sufficient
15 under Rule 41(a)(1)(A)(i).

16 The next day, the City and the three remaining Defendants filed a stipulation dismissing the
17 case without prejudice under Rule 41(a)(1)(A)(ii). *See* ECF No.90. Under this stipulation, the
18 parties were responsible for their own attorneys' fees and costs. *Id.* After an answer or summary
19 judgment motion has been filed, Rule 41(a)(1)(A)(ii), which allows dismissal by stipulation of the
20 parties, applies. Here, because the three unions had filed answers to the Complaint, the three
21 unions and the City stipulated to dismissal pursuant to Rule 41(a)(1)(A)(ii).

22 Later in October 2012, pursuant to a stipulation with the plaintiffs in the consolidated state
23 court action, the City filed a cross complaint in the consolidated state court action alleging the
24 federal law claims that were dismissed without prejudice in the instant federal case. *See* ECF No.
25 97-1 at ¶ 13. In March 2013, the state court denied a motion for preliminary injunction filed by the
26 plaintiffs in the consolidated state court action. *Id.* at ¶ 14. A bench trial was held in the

1 consolidated state court action in July 2013, and a decision from the state court is pending. *Id.* at ¶
2 15.

3 Meanwhile, on March 11, 2013, SJPOA filed this Motion for Attorneys' Fees pursuant to
4 California Code of Civil Procedure § 1021.5, which provides attorneys' fees to private entities that
5 vindicate important rights affecting the public interest. *See* ECF No. 93. The City filed an
6 opposition on May 7, 2013, contending that federal law on attorneys' fees applies, and that under
7 federal law, SJPOA is not entitled to fees. *See* ECF No. 97 at 4–6. The City further contended that
8 even if California law applied, SJPOA would not be entitled to fees because SJPOA could not
9 satisfy the elements of section 1021.5. *Id.* at 7–11. SJPOA filed a reply on May 21, 2013, in
10 which it contended that state law applied and that the elements of section 1021.5 were satisfied.
11 *See* ECF No. 98.

12 **II. DISCUSSION**

13 The ordinary rule with respect to attorneys' fees in federal courts is that each party bears its
14 own fees and costs. *See Alyeska Pipeline Service Co. v. Wilderness Soc'y.*, 421 U.S. 240, 247
15 (1975). This basic principle, however, does not apply when some statutory or nonstatutory
16 provision explicitly authorizes the court to award attorneys' fees to the prevailing party. *Id.* at
17 260–63.

18 SJPOA contends that California Code of Civil Procedure § 1021.5 is such a provision. *See*
19 ECF No. 93 at 4. However, state law with respect to attorneys' fees applies in federal court only
20 where state substantive law governs the underlying action. *See Champion Produce, Inc., v. Ruby*
21 *Rboinson Co.*, 342 F.3d 1016, 1024 (9th Cir. 2003). That is, a federal court usually applies state
22 attorneys' fees statutes only where the federal court is sitting in diversity jurisdiction or is
23 exercising supplemental jurisdiction over state law claims. *See Cotton v. Slone*, 4 F.3d 176, 180–
24 81 (2d Cir. 1993). In such circumstances, the federal court applies the substantive law of the state
25 to the claim and awards attorneys' fees pursuant to state law. *Id.*

1 In this case, the Court has not applied state substantive law for any purpose, nor have the
2 parties thus far called on the Court to do so. Defendants moved to dismiss based on Article III
3 doctrines and asked the Court to stay based on federal abstention doctrines. *See* ECF No. 9
4 (arguing that this Court should dismiss on *Younger* abstention grounds or, in the alternative, should
5 not entertain the Declaratory Judgment Act claim); ECF No. 41 (seeking dismissal or stay on
6 Article III or federal abstention grounds); ECF No. 57 (contending this Court should abstain under
7 federal law, or in the alternative, decline to exercise supplemental jurisdiction over the state law
8 claims). In fact, SJPOA acknowledges in the instant Motion for Attorneys’ Fees that it sought to
9 dismiss or stay the instant federal action under federal law. As the Motion for Attorneys’ Fees
10 states, “SJPOA filed a motion to dismiss the [Complaint] on Article III justiciability grounds
11 Alternatively, it asked for a stay of dismissal based on three separate federal abstention principles.”
12 ECF No. 93 at 2–3 (footnote omitted). Neither the provisions of Article III nor federal abstention
13 doctrines would have required the Court to apply state law. At no point prior to the attorneys’ fees
14 motion now before the Court has any party asked the Court to apply any state substantive law. In
15 sum, even if the Court had granted Defendants’ motions to dismiss or to stay, any such order would
16 have been based on federal law — not state law.

17 The Court notes that the sole mention of state law in the proceedings thus far has been in
18 the Complaint, where the City sought declaratory judgment that Measure B was lawful under
19 various state laws. *See* ECF No. 33 at ¶ 31. The Court had not, however, exercised jurisdiction
20 over these claims, nor was it obvious that it would. The Court has the power to decline to exercise
21 supplemental jurisdiction over state claims even when it has subject-matter jurisdiction over federal
22 claims arising out of the same facts. *See* 28 U.S.C. § 1367(c). Among the bases for the Court to
23 decline to exercise supplemental jurisdiction are that the “claim raises a novel or complex issue of
24 State law,” the state law claim “substantially predominates” over the federal claim, and that there
25 are “compelling reasons for declining jurisdiction.” *Id.* In its Motion to Dismiss, SJPOA itself
26 raised arguments that suggested that some of these factors were present in the instant federal

1 action. For example, SJPOA contended in its Motion to Dismiss that this Court should refuse to
2 hear the City's Declaratory Judgment Act claim in part because this Court should avoid "needlessly
3 deciding . . . issues of state law in the first instance." ECF No. 41 at 15. Moreover, another
4 Defendant, AFSCME, in its Motion to Dismiss, explicitly argued that this Court should decline to
5 exercise supplemental jurisdiction over the state law claims. ECF No. 57 at 11-13.

6 Accordingly, the Court finds that the case up until this point has been based on federal
7 substantive law — not state law. Furthermore, while there were state law claims raised in the
8 Complaint, the Court had not exercised supplemental jurisdiction over such claims, and Defendants
9 themselves argued that the Court should not exercise such jurisdiction. Therefore, because only
10 federal substantive law has applied in this case, federal attorneys' fees law — and not California
11 Code of Civil Procedure § 1021.5 — applies to this motion.¹

12 Under federal law, SJPOA may not recover attorneys' fees, and SJPOA makes no
13 contention to the contrary. SJPOA cites no federal statute or rule that would permit it to recover
14 attorneys' fees, and in the absence of such a provision, the rule that each party bears its own fees
15 and costs applies. *See Alyeska Pipeline Service Co.*, 421 U.S. at 247. The dismissal in this case
16 was pursuant Federal Rule of Civil Procedure 41(a)(1)(A), which does not permit the Court to
17 impose attorneys' fees. *See* ECF No. 80; *Am. Soccer Co. v. Score First Enterprises, a Div. of*
18 *Kevlar Indus.*, 187 F.3d 1108 (9th Cir. 1999) (reversing award of attorneys' fees after notice of
19
20

21 ¹ *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997), is not to the
22 contrary. That case only stands for the proposition that section 1021.5 applies in federal court
23 where the federal court addresses an issue of state substantive law. In *Carmel*, the Ninth Circuit
24 held that a plan to realign a highway violated state and federal environmental laws. *Id.* at 1160-61
25 (federal); *id.* at 1165 (state). Accordingly, the Ninth Circuit remanded to the district court to
26 determine whether the plaintiffs who were challenging the plan were entitled to attorneys' fees
under state or federal attorneys' fees laws. *Id.* at 1167-68. Similarly, the Court is not persuaded
that *Larsen v. King Arthur Flour Co.*, 2012 WL 2590386 (N.D. Cal. July 3, 2012), is contrary to its
holding. In *Larsen*, the court denied attorneys' fees under section 1021.5 after a voluntary
dismissal under Rule 41(a)(2). The court did not address whether awarding attorneys' fees under
state law would be proper, because it found that the plaintiff was not entitled to fees. *Id.* at *1.

1 dismissal was filed under Rule 41(a)(1)(A)). Therefore, SJPOA's Motion for Attorneys' Fees must
2 be denied.

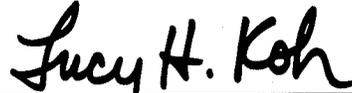
3 **III. CONCLUSION**

4 For the foregoing reasons, the Court DENIES SJPOA's Motion for Attorneys' Fees.

5 **IT IS SO ORDERED.**

6

7 Dated: September 9, 2013



LUCY H. KOH
United States District Judge

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United States District Court
For the Northern District of California

EXHIBIT 5

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
DEPARTMENT 2 HON. PATRICIA LUCAS, JUDGE

---ooOoo---

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

REPORTER'S TRANSCRIPT
OF
TESTIMONY AND PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFF	GREGG MCLEAN ADAM
SAN JOSE POA:	AMBER L. WEST
	GONZALO MARTINEZ
	ATTORNEYS AT LAW
FOR THE PLAINTIFFS	JOHN MCBRIDE
SAPIEN, HARRIS, AND	CHRISTOPHER E. PLATTEN
MUKHAR:	ATTORNEYS AT LAW
FOR THE PLAINTIFF	TEAGUE P. PATERSON
AFSCME LOCAL 101:	VISHTAP M. SOROUSHIAN
	ATTORNEYS AT LAW
	ROSE M. RUEMLER, CSR NO. 9053
	OFFICIAL REPORTER

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

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

6 MR. ADAM: Absolutely.

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

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

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

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

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

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

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

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

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

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

16 A. Yes.

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

19 A. Yes, I am.

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

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

24 Q. What is this letter?

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

1 month.

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

8 MR. SPELLBERG: Objection. Lack of foundation.

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

10 THE WITNESS: Never.

11 BY MR. ADAM:

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

15 A. That's correct.

16 Q. Were you offered a different plan?

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

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

22 A. That's correct.

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

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

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

28 A. Yes, I am.

1 legal conclusion.

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

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

6 BY MR. SOROUSHIAN:

7 Q. You can answer the question.

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

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

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

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

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

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

24 So --

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

26 BY MR. SOROUSHIAN:

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

1 A. Yeah. Available to active police officers.

2 Q. But the actives only received 85 percent under the
3 MOU language you just pointed to?

4 A. Correct.

5 MR. SPELLBERG: Objection. Leading.

6 THE COURT: Overruled.

7 BY MR. ADAM:

8 Q. In approximately 2008, did the association agree
9 with the City to start prefunding retiree medical costs?

10 A. Yes.

11 Q. So during that period of time from 2008 until this
12 year, 2013, how much have police officers been paying
13 towards retiree health care?

14 A. The dollar amounts have been going up annually, so
15 I don't have a specific dollar amount. I can tell you we
16 pay right now 9.51 percent of our gross pay.

17 Q. Has that been increasing in amounts over the four
18 or five years?

19 A. I should preface. Probably our pension will pay,
20 I think, is the figure the City looks at.

21 Q. At the moment, police officers are paying about
22 nine and a half percent pension just to retiree medical?

23 A. Yes.

24 Q. And that amount, that percentage, has been
25 increasing since the agreement was first struck in 2008?

26 A. Yes.

27 Q. And on top of that, what do police officers
28 currently pay for their normal cost of pension benefit?

1 A. I have to use a calculator. I think we're just
2 above 21 percent now total cost, so it would be
3 approximately 21 percent minus the nine and a half.

4 Q. I want to go back to the health care benefits. In
5 Article 8 of the MOA, other than perhaps the premiums for
6 a particular plan increasing in 2012 and 2011, did
7 anything else about the medical benefits for active
8 employees change during the lifetime of the 2011 to 2013
9 contract?

10 A. No.

11 Q. During that same period, the 2011 to 2013
12 contract, did the City ever make a proposal to create a
13 new lower cost medical plan for active police officers?

14 A. Yes.

15 Q. When did that occur?

16 A. I think it was approximately June of 2011.

17 MR. ADAM: I would ask that POA Exhibit 21 be
18 moved into evidence.

19 MR. SPELLBERG: Your Honor, the same reservation.
20 No objection with --

21 THE COURT: That reservation being that if the
22 City or any other party wants to supplement this document
23 to ensure its completeness, you can do so?

24 MR. SPELLBERG: Yes, exactly.

25 THE COURT: That's fine. Received.

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

28 MR. ADAM: Then, your Honor, the remaining

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 2 IN AND FOR THE COUNTY OF SANTA CLARA
 3 DEPARTMENT 2 HON. PATRICIA LUCAS, JUDGE
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 7 SAN JOSE POLICE OFFICERS)
 ASSOCIATION,)
 8 PLAINTIFF,) CASE NO.
 VS.) 1-12-CV-225926
 9 CITY OF SAN JOSE, BOARD OF) SAN JOSE, CA
 ADMINISTRATION FOR POLICE AND) JULY 23, 2013
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 OFFICIAL REPORTER
 28

1 as POA 50.

2 MR. MCBRIDE: 50?

3 MR. ADAM: 50, five zero.

4 BY MR. ADAM:

5 Q. Mr. Salvi, are you familiar with this document?

6 A. Yes.

7 Q. What is it?

8 A. It is my pay stub for November 2012.

9 Q. When you say pay stub, pay stub from whom?

10 A. From the City of San Jose.

11 Q. And could you explain to us what it shows with
12 respect to your -- the medical premium you were paying, it
13 looks like, in November of 2012.

14 A. I was paying zero. I was paying nothing.

15 Q. Where is that reflected on the statement?

16 A. In the deduction column, second from the bottom
17 under Kaiser Medical.

18 Q. Now, subsequently, did anything change with
19 respect to the medical benefits you were receiving from
20 the City?

21 A. Yes.

22 Q. What happened?

23 A. Previous to that we were advised that we would
24 have to make a change in plans. If I were to maintain the
25 current plan that I was receiving, I would have to pay
26 \$314 a month.

27 Q. How was that information passed along to you?

28 A. It was passed out to several correspondences from