NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP
MARGUERITE MARY LEONI (SBN 101696)
CHRISTOPHER E. SKINNELL (SBN 227093)
JAMES W. CARSON (SBN 287001)
2350 Kerner Blvd., Suite 250
San Rafael, CA 94901
TELEPHONE: (415) 389-6800 /FAX: (415) 388-6874
Email: mleoni@nmgovlaw.com
Email: cskinnell@nmgovlaw.com
Email: jcarson@nmgovlaw.com

Attorneys for [Proposed] Intervenor Peter Constant

KENNETH H. LOUNSBERY (SBN 38055)
JAMES P. LOUGH (SBN 91198)
ALENA SHAMOS (SBN 216548)
YANA L. RIDGE (SBN 306532)
Lounsbery Ferguson Altona & Peak, LLP
960 Canterbury Place, Suite 300
Escondido, California 92025
TELEPHONE: (760) 743-1201 / FAX: (760) 743-9926
Email: KHL@LFAP.COM
Email: JPL@LFAP.COM
Email: ASO@LFAP.COM
Email: YLR@LFAP.COM

Attorneys for [Proposed] Intervenors, Steven Haug and Silicon Valley Taxpayers Association, a California non-profit corporation.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA on the RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION, *Plaintiff,* v. CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE, *Defendants.*	CASE NO. 113-CV-245503 **JOINT REPLY IN SUPPORT OF APPLICATION TO STAY ENFORCEMENT OF JUDGMENT (C.C.P. § 918)** Date: April 27, 2016 Time: 2:00 p.m. Dept.: 7 Judge: Hon. Beth McGowen

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I. INTRODUCTION

A long line of California cases, including cases specifically addressing the validity of ballot measures, clearly establishes Proposed Intervenors can become parties to this action by filing post-judgment motions for a new trial. The Court maintains explicit statutory and inherent jurisdiction, undisputed in this case, to stay its previously issued judgment and Writ in *Quo Warranto*, and should do so here until it has the opportunity to rule on Proposed Intervenors' Motions to Vacate and for Further Trial or New Trial ("motions for a new trial", herein). The hearing date on the motions is set for May 17, 2016, and the City of San Jose ("City") and the San Jose Police Officers' Association ("SJPOA", collectively, "Parties") have not provided any evidence -- nor could they with the constitutional rights of San Jose voters at stake -- that a short stay in the enforcement of the Court's judgment and writ will result in any prejudice to the Parties.

II. LEGAL ARGUMENT

A. Proposed Intervenors Currently Have Standing in this Case to Seek a Stay Through the Filing of Their Post-Judgment Motions for New Trial.

The Parties' claim Proposed Intervenors "could only become [parties] in this case by virtue of an order authorizing [their] intervention" under Code of Civil Procedure Section 387. (Joint Oppo. at 5.) This is incorrect as a matter of law. It is black letter law that nonparties to an action may intervene and gain standing in a case by filing a post-judgment motion, even after they have been denied intervention under Code of Civil Procedure section 387. One who is denied intervention may still "become a party of record and obtain a right to appeal by moving to vacate the judgment." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736.)

> A long line of cases has established a 'nonstatutory' form of intervention whereby one who is legally aggrieved by a judgment may become a party to the record and obtain a right to appeal by moving to vacate the judgment pursuant to Code of Civil Procedure section 663 [motion to vacate and set aside a judgment].

(See also *Lippman v. City of L.A.* (1991) 234 Cal.App.3d 1630, 1633; *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 417-418; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 152.)

The court in *Lippman, supra,* held, "we see no reason why, if an aggrieved person can become

a party to the record by moving to vacate the judgment, he or she cannot accomplish the same result by moving for a new trial under Code of Civil Procedure section 657." (*Lippman*, at1633; see also *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1342 [nonparty who moves for new trial permitted to appeal as if he were a party].) Further, stays are appropriate under Code of Civil Procedure section 918 when "[a] party wishes to pursue postjudgment motions (e.g. for new trial . . .)." (The Rutter Group, *California Practice Guide, Civil Appeals and Writs*, § 7:62.)

There is no question Proposed Intervenors gained standing by filing their Motions to Vacate and for Further Trial or New Trial to pursuant to Code of Civil Procedure section 657. In *Paulson*, the court held ballot measure supporters became parties by filing post-judgment motions after the trial court denied intervention and issued an adverse rulings striking down a referendum, thwarting the will of the voters. (*Paulson*, *supra*, 145 Cal.App.4th at 417-418; see also *Simac*, *supra,* 92 Cal.App.3d at 152.) This is exactly Proposed Intervenors' posture in this case. In *Carleson*, the California Supreme Court likewise held that an organization and three individuals all became parties to the action by filing a motion to vacate the judgment *after* they had initially been denied intervention by the trial court pursuant to section 387. (*Carleson*, *supra*, 5 Cal.3d at pp. 736-738.)

The cases cited by the Parties are inapposite, discussing the general concept of standing and intervention pursuant to Code of Civil Procedure section 387. None of these cases stand for the proposition that Proposed Intervenors lack standing to bring their motions for new trial. (*Chiatello v. City and County of San Francisco* (2010) 189 Cal. App. 4th 472 [taxpayer, who was not subject to the tax, lacked standing to challenge Proposition Q, that extended a payroll tax].) There is no question here that Intervenors are subject to Measure B and repealing it would infringe on constitutional rights. (*Id.* at 481 [party's demonstration that the subject of a particular challenge infringes constitutional rights qualifies as beneficial interest sufficient to confer standing on that party].)

In *Sipple v. City of Hayward* (2014) 225 Cal. App. 4th 349, the issue was whether an internet service provider had standing to file suit against the taxing agencies after the claims for refund had been rejected. The court held that the provider did have standing. (*Ibid.*) *Beshara v. Goldberg* (1963) 221 Cal. App. 2d 392, involved the proper procedures for challenging a writ of attachment of real property. The court upheld the trial court's order denying appellant's motion to quash the writ because

it was interposed after trial and rendition of judgment. Similarly, *Milstein v. Turner* (1951) 107 Cal. App. 2d 184, does not involve post-judgment motions by an aggrieved party. In that case, the court merely held a person not named a defendant in an action for possession of real property was not entitled to inject himself into the action by the device of filing an answer to the complaint. (*Id.* at 185.) In *Hospital Council of Northern Cal. v. Superior Court* (1973) 30 Cal. App. 3d 331, the court held that a pre-emptory challenge to the judge was untimely when the intervenor making the challenge was permitted to intervene by oral motion a couple of months earlier, was untimely.

Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, actually supports the right of Proposed Intervenors to seek the interim relief of a stay while the Court considers their motion for a new trial. The Court held: "[I]t is unnecessary for plaintiffs [Common Cause] to show a separate basis for standing to obtain a preliminary injunction, distinct from the basis for their standing to seek a writ of mandate at a trial on the merits." (*Id.* at pp. 439-440.) Intervenors clearly have standing to file their Motions to Vacate Judgment and for New or Further Trial; *a priori* they have standing to seek the interim relief of a stay pending the Court's decision on their motions.

B. Proposed Intervenors Meet the "Aggrieved" Party Standard to Seek a New Trial Pursuant to C.C.P. § 657.

Proposed Intervenors are parties "aggrieved" under Code of Civil Procedure section 657 because their rights are injuriously affected by the Stipulated Judgment. They are voters, a representative of voters, and Measure B's direct beneficiaries who supported and enacted Measure B with their votes, and who have a right to appear in this case pursuant to *Perry v. Brown* (2011) 52 Cal.4th 1116 now that the City has abandoned its defense of Measure B.

Code of Civil Procedure section 657 provides that, <u>any</u> decision of the court may be modified or vacated, and a new or further trial granted on the application of a party aggrieved, for a variety of causes materially affecting the substantial rights of such a party. A person is "aggrieved" if his or her rights or interests are injuriously affected by the judgment. (*Carleson*, *supra*, 5 Cal.3d at 737; *Shaw*, *supra*, 83 Cal.App.4th at 1342; *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 13; *Paulson*, *supra*, 145 Cal.App.4th at 417.) An "aggrieved" party's interest need not be pecuniary, "that is not an indispensable element." (*Plaza Hollister Ltd. Partnership*, at 13.; see

also *People ex rel. Public Util. Com. v. Ryerson* (1966) 241 Cal.App.2d 115, 119; *County of San Bernardino v. Harsh California Corp.* (1959) 52 Cal.2d 341, 345. But Proposed Intervenors have also made a showing of pecuniary injury. (*Paulson v. Abdelnour, supra*, 145 Cal.App.4th at 417-418; Decl. of Hinkle; 3rd Decl. of Constant.)

In *Paulson*, the court ruled that an individual supporter of a local ballot measure who signed the referendum petition and a local organization that provided financial support and substantial "man hours" in promoting the measure were "aggrieved" by a judgment that the measure was unconstitutional. (*Paulson*, *supra*, 145 Cal.App.4th at p. 417-418.) The trial court denied intervention, but the proposed intervenors filed a post-judgment motion, and the Court of Appeal held they were "aggrieved" parties with standing to file a motion to vacate and to appeal the underlying judgment striking down the measure. (*Ibid.*)

Similarly, the California Court of Appeal held in *Simac* that an unincorporated association of residents and registered voters who drafted and organized voter support for an initiative imposing new development standards qualified as "aggrieved." (*Simac*, *supra*, 92 Cal.App.3d 146, 151-153.) In *Simac*, the residents of Morgan Hill passed Measure E to impose development restrictions. After the election, two Measure E opponents filed election contests. A developer sought a writ of mandate to compel issuance of building permits that did not conform to the restrictions of Measure E, claiming the effective date of the measure was postponed by the filing of the election contests. (*Id.* at pp. 153-154.) After the trial court mandated the city issue the permits, the unincorporated association sought to vacate the judgment to ensure Measure E was properly implemented and to conform the city's issuance of the building permits to the express terms of the initiative. (*Id.* at p. 153.)

Proposed Intervenors Constant, Haug, and SVTA are all Measure B supporters who are "aggrieved" parties just like in *Paulson* and *Simac*. Notably, in *Simac*, the citizens group was an aggrieved party because they sought to ensure the measure they had worked so hard to pass was properly implemented, and that the city would not be forced to issue building permits in direct conflict with the new law. In *Paulson*, the individual and organizational supporters of the measure provided substantial "man hours" in supporting the measure. Here, Proposed Intervenor Constant worked tirelessly to develop and promote Measure B. Constant participated in numerous public meetings,

interviews and events to raise support for the initiative. (*Ibid.*; 3rd Decl. of Constant.) He devoted hundreds of hours of personal time making public appearances about Measure B, and incurred associated personal expenses. (3rd Decl. of Constant, ¶ 6.) Proposed Intervenor Haug also is an individual supporter of Measure B, a San Jose resident and voter who voted to enact Measure B (and was empowered to vote on pension changes by that Measure, falling squarely within the analysis of *Perry*), and the current SVTA Treasurer. (Decl. of Haug, ¶ 2, 5-8.) SVTA was directly involved in the campaign for Measure B; it formed a political committee specifically to support Measure B and spent $45,000 toward those efforts. (Decl. of Hinkle, ¶¶ 2-4.) SVTA officially endorsed a "yes" vote on Measure B, held monthly meetings with city taxpayers and voters discussing the benefits of Measure B, and sent email blasts to its members urging support of Measure B. (Decl. of Hinkle, ¶¶ 4-6.) Therefore, pursuant to the court's holdings in *Simac* and *Paulson*, and based on their involvement in supporting Measure B, Constant, Haug, and SVTA all qualify as parties "aggrieved" by the stipulated judgment that would completely eliminate Measure B from the San Jose City Charter.

Proposed Intervenor Constant's pecuniary interests are also directly and injuriously affected by the judgment to wipe out Measure B because he is a vested beneficiary of the City pension fund. Constant has an interest in upholding Measure B to ensure the long term solvency of the fund, the very intent of the Measure B. As discussed in Constant's Supplemental Declaration, in Support of Intervention, the settlement framework negotiated by the City differs substantially from Measure B by imposing additional obligations on the fund that may not be sustainable over the long term. (Suppl. Decl. of Constant, ¶¶ 11-12.) Constant's rights as a vested pension beneficiary are directly affected by a judgment in this *quo warranto* action to overturn Measure B and install a settlement agreement that weakens the protections adopted by the voters to ensure the long-term stability of the fund.

Proposed Intervenor Constant has an additional interest in ensuring an adjudication that respects the validity of Measure B and its proper interpretation as passed by the voters and substantively upheld by this court in the consolidated cases. As a member of the San Jose City Council from 2007 to 2014, Constant was deeply involved in the formation and passage of Measure

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B. (Decl. of Constant, ¶¶ 7, 10-11.) Constant's direct, personal involvement in passing the initiative qualifies him as a party "aggrieved" by the court's judgment to strike down Measure B.

The settlement framework agreed to by the Parties is a far cry from the reforms imposed by Measure B and in direct conflict with the voters' reservation of the right to approve any changes to the city pension system. (Supp. Decl. of Constant, ¶¶ 11-12; Decl of Hinkle, ¶ 10; Decl. of Haug, ¶ 10.) When the City abdicated its duty to defend Measure B, the voters had a right pursuant to *Perry* to have their voices heard in this matter to protect the integrity of the initiative process and the rights and interests accorded them by Measure B. Proposed Intervenors, in addition to meeting the standard for parties "aggrieved" by the stipulated judgment, further seek to exercise the right to seek a new trial on behalf of voters who supported Measure B passed by nearly 70% of the vote. Proposed Intervenors thus have standing to bring this Motion to Vacate and for Further Trial or New Trial.

C. Parties Do Not Dispute that Proposed Intervenors Will Be Irreparably Harmed Without a Stay.

The Parties do not dispute that Proposed Intervenors will be irreparably harmed without a stay to maintain the *status quo* in this action. A stay would protect the effectiveness of post-judgment relief granted by the Court by ensuring the City does not take actions to invalidate the resolution that placed Measure B on the ballot, as directed in the Court's writ, before this Court has the opportunity to consider fully the interests of the voters in this case. A stay will protect the constitutional initiative and charter amendment rights of San Jose voters pending the Court's ruling on Proposed Intervenors' motions for a new trial. A stay also ensures that the City does not enforce the alternative pension scheme set forth in the Settlement Framework before the Court has an opportunity to rule on the new trial motions. That scheme differs in many ways from Measure B (see Supp. Decl. of Constant, ¶ 11), causing public confusion about applicable pension provisions. Implementing the settlement would also create the opportunity for additional litigation by members of the City's pension system claiming a vested right in the Settlement Framework if the Court should later decide that Measure B was validly enacted. The Parties do not contest any of this.

D. The Parties Have Made no Showing of Prejudice From a Stay.

Parties claim a stay will prejudice their efforts to negotiate two ballot measures. (Joint Oppo.

at pp. 6:16-7:4.) Parties offer no evidence or explanation about how a stay would prejudice their negotiation efforts. The requested stay is targeted at implementation of the Stipulated Judgment declaring Resolution 76158 invalidly enacted. It is also targeted at the stipulated Writ in *Quo Warranto* commanding the City to take all necessary steps to comply with the Stipulated Judgment, by declaring Resolution 76158 null and void replacing ordinances amending the Municipal Code to conform with Measure B. (See Stip. Judgment at p. 3, and Stipulated Writ in *Quo Warranto*, at pp. 2:9-15.) Nothing in the requested interim stay would prevent the Parties from working on ballot language.[1]

Further, the Parties' own evidence shows they have already agreed to specific ballot measure language:

> As part of the settlement negotiations, the parties have reached agreement on language for a ballot measure with POA and San Jose Firefighters Association, IAFF Local 230 and have agreed to basic deal points on ballot language with the remaining nine (9) labor organizations. The ballot language agreed to with the POA includes specific voter authorization of the Tier 2 benefits negotiated under the framework. (Exhibit 4).

(Decl. of Duenas ISO App. to Intervene, ¶ 9.) The referenced "Exhibit 4" is a "Side Letter Agreement" between the Parties providing the specific ballot measure language agreed to, which is signed by Mr. Sakai and Mr. Adam, attorneys for the respective Parties herein, on March 8, 2016.

The Parties claim a stay will only leave them with "a short time" to negotiate the ballot language with other bargaining units. (Joint Oppo. at p. 7.) There is no need for negotiations over the ballot language with the other 11 bargaining units because the Parties have waived that requirement in the Side Letter Agreement:

> In the event no agreement on ballot measure language is reached with the bargaining units representing employees in the Federated City Employees' Retirement System, the parties agree that this ballot

[1] The Parties cite *Mehr v. Superior Court* (1983) 139 Cal. App. 3d 1044, 1048 for the proposition they will be irreparably harmed if the Court issues a stay pending its resolution of Intervenors' motion to vacate and for trial. *Mehr v. Superior Court* does not help them at all. In *Mehr*, Petitioners in an unlawful detainer action demonstrated that if the judgment were not stayed, they and their three small children would suffer irreparable injury in that they would be evicted from their home of 15 years. (Id. at 1048.) The Parties here allege nothing even remotely comparable.

> measure language shall be placed on the November 2016 ballot for employees in the Police and Fire Department Retirement Plan." (Side Letter Agreement, p. 4 of 4.)

The Parties have also already agreed on the terms of the longer ballot measure — in essence the Settlement Framework — and to a stay of this action so that the ballot measure can be placed on the ballot. The Settlement Framework, fully executed by the Parties provides:

> If agreements are not reached to end litigation with all plaintiffs in Measure B litigation, or <u>if the process of *quo warranto* does not permit the replacement of Measure B with this or any other agreement, the City Council, Local 230 and the POA shall request a stay of all Measure B litigation to which they are involved in to permit this agreement to appear on a 2016 ballot as a measure to replace Measure B in its entirety with respect to police and fire participants of the Police & Fire Retirement Plan</u>." (Decl. of Adam, Ex. A to Ex. 1, p 2 of 16, emphasis added.)

By its very terms, the measure placing the entire agreement of the parties on the ballot also does not require negotiations with the other 11 bargaining units. Moreover, the Parties have represented to this Court that all such contingencies have been removed. Relator's *ex parte* letter delivering the Parties Stipulations and Proposed Stipulated Judgment and Writ to the Court states, "I am pleased to report that since [February 18, 2016], the parties have completed the remaining conditions precedent to placing the final settlement documents before the Court."

As predicted, the Parties protest that, unless Measure B is invalidated, they will be required to continue defending it in court and before PERB, and their difficulties recruiting police officers will continue. However, the City is obligated to defend Measure B—or let Proposed Intervenors' do so—according to *Perry v. Brown, supra,* 52 Cal.4th 1116; *Building Industries Association v. City of Camarillo* (1986) 41 Cal.3d 810; *Arnel Development Company v. City of Costa Mesa* (1980) 28 Cal.3d 511; *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 456; and *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43; among other cases. Defending Measure B could not possibly be irreparable harm. The City claims it has been having trouble recruiting police officers, but that difficulty existed even before Measure B. (Supp. Decl. of Constant, ¶¶ 7-8.) A brief delay in the recruitment program while the Court considers Proposed Intervenors' motions is not prejudicial to the Parties, if it is harm at all, and especially not compared to the

wholesale annihilation of Proposed Intervenors' constitutional rights.

The Parties erroneously claim Proposed Intervenors conceded at oral argument that they could have brought their Application to Intervene "months ago", and this application for a stay and post-judgment motions are somehow untimely or meant to delay. That is inaccurate[2] and irrelevant. Proposed Intervenors could not have filed their Motion for a New Trial until the Stipulated Judgment was entered. That occurred on March 30. Notice of Entry was mailed to the Parties on April 6. Proposed Intervenors filed their motions for a new trial on April 12, 2016. The timing of Proposed Intervenors filing their motions for a new trial was therefore entirely in the hands of the Parties.

Finally, the Parties claim their Settlement Framework is similar to Measure B with "much of Measure B's savings". (Joint Oppo. at 7:23-24 & 8:9-10.) But that is in the eye of the beholder, and irrelevant. The voters enacted Measure B as part of their City's Charter. If the Parties think the Settlement Framework is a better deal, they should place it on the ballot for the voters to decide. Indeed, they have already agreed to do so, and should abide by their agreements.

In contrast to the Parties' protestations, Proposed Intervenors' harm is demonstrably irreparable. Without a stay, the City is under an obligation imposed by this Court to wipe Measure B out of the City Charter without any input from the voters, violating their constitutional initiative rights and the interests of San Jose voters in reforming their pension system. The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury. (*Elrod v. Burns* (1976) 427 U.S. 347, 373; *American Booksellers Assn., Inc. v. Superior Court* (1982) 129 Cal.App.3d 197, 206.) The Stipulated Judgment declares Measure B to be invalid. Issuing a stay here would simply maintain the status quo of Measure B remaining part of the City Charter while the Court considers the pending motions for a new trial.

III. CONCLUSION

It is in the interests of justice that the Court exercise its statutory authority under Code of Civil

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[2] In any case, Proposed Intervenors were not required to seek intervention until they knew the City had ceased to represent their interests. (*United States v. Carpenter* (9th Cir. 2002) 298 F.3d 1122, 1125.) Proposed Intervenors attempted to intervene when the City's abandonment of defense of their constitutional rights became clear, but were thwarted by the Parties' actions. A post-judgment motion then became an avenue for Proposed Intervenors to become parties to this action. (*Lippman, supra*, 234 Cal.App.3d at p. 1633.)