

1 **LOUNSBERY FERGUSON ALTONA & PEAK, LLP**
KENNETH H. LOUNSBERY (SBN 38055)
2 JAMES P. LOUGH (SBN 91198)
ALENA SHAMOS (SBN 216548)
3 YANA L. RIDGE (SBN 306532)
Lounsbery Ferguson Altona & Peak, LLP
4 960 Canterbury Place, Suite 300
Escondido, California 92025
5 TELEPHONE: (760) 743-1201 / FAX: (760) 743-9926
Email: KHL@LFAP.COM
6 Email: JPL@LFAP.COM
Email: ASO@LFAP.COM
7 Email: YLR@LFAP.COM

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

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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
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TAXPAYERS' MOTION TO VACATE JUDGMENT AND FOR FURTHER TRIAL OR NEW TRIAL [C.C.P. § 657, ET SEQ. AND CRC RULE 3.1600]
Judge: Hon. Beth McGowen
Dept. 7
Date: May 17, 2016
Time: 9:00 am

Invervenors Steven Haug and Silicon Valley Taxpayers Association, a California non-profit corporation (jointly referred to as "Taxpayers") respectfully submit the following Memorandum of Points and Authorities in support of their Motion to Vacate Judgment and for Further or New Trial pursuant to Code of Civil Procedure §657, *et seq.* Taxpayers respectfully request that this Court exercise its authority to vacate the Stipulated Judgment, filed March 30, 2016, and grant further trial or new trial on the grounds of irregularities in the proceedings and in the Stipulated Judgment; accident and surprise to Taxpayers; newly discovered evidence; insufficiency of evidence and errors in law.

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1 **I. INTRODUCTION**

2 The Stipulated Judgment filed on March 30, 2016 impairs the Taxpayers’, and the People’s,
3 constitutional rights, specifically, the right to petition under the First Amendment to the United States
4 Constitution, the right of initiative under the California Constitution, and the right to vote on future
5 pension changes provided to them by Measure B. The Stipulated Facts on which the Judgment is
6 based reveal the City’s violation of its duty to defend Measure B and are inconsistent with the City’s
7 prior sworn statements and admissions. These defects in the Judgment severely prejudice Taxpayers
8 and demand a new trial on the merits.

9 The City abdicated its constitutional duty to defend Measure B by vigorously opposing and
10 blocking intervention that would defend Measure B, by executing the Stipulated Facts and Proposed
11 Findings and Writ in *Quo Warranto* on March 8, 2016, and submitting those papers, along with the
12 Stipulated Judgment and Order (“Stipulated Judgment Documents”) to the Court on an *ex parte* basis,
13 and without notice to Taxpayers or Proposed Intervenor Constant. The Stipulated Judgment
14 Documents blatantly contradict the City’s previous sworn testimony defending Measure B and the
15 City’s compliance with the Meyers-Milias-Brown Act (Gov. Code §§ 3505, 3505.4) (“MMBA”);
16 causing irregularity and surprise, invalidating Measure B and eliminating the People’s right to vote
17 on future pension changes. Taxpayers, and Intervenor Constant – whose arguments are incorporated
18 herein by reference – reasonably relied on the City’s statements in its opposition pleadings and
19 representations to the public that the City was defending Measure B. The Parties’ actions undermined
20 the Court’s ability to perform its duty to uphold its obligation to “jealously guard” the People’s
21 reserved power of initiative and wiped out a Charter Amendment that was passed by nearly 70% of
22 the City’s voters, depriving the voters of their right to vote on future pension changes.

23 **II. PROCEDURAL AND FACTUAL BACKGROUND**

24 **A. THE CITY STATED UNDER PENALTY OF PERJURY THAT IT**
25 **COMPLIED WITH THE MMBA IN PLACING MEASURE B ON**
26 **THE BALLOT IN 2012.**

27 Since the adoption of Measure B, there have been multiple challenges to its substance, which
28 the City defended until very recently. In pleadings filed in opposition to Relator’s *Quo Warranto*

1 Application, and in response to Relator’s Complaint in this action, the City defended Measure B under
2 oath:

3 In May 2012, Mayor Chuck Reed and City Council directed staff to draft a proposed ballot
4 measure addressing retirement benefits for new and current employees and to contact the City’s
5 unions to start bargaining over such ballot measure. (Statement of Undisputed Facts in Opposition to
6 SJPOA’s Application for Leave to Sue in *Quo Warranto* (“Undisputed Facts”), RJN Ex. 14 ¶¶ 6-7;
7 Declaration of Alex Gurza in Opposition to SJPOA’s Application for Leave to Sue in *Quo Warranto*
8 (“Gurza Decl.”), RJN Ex. 15 ¶¶ 9-10.) The City and Relator agreed in a “Pledge of Cooperation” that
9 negotiations would complete by October 31, 2011, and if no agreement is reached, the Parties would
10 proceed to impasse procedures. (Undisputed Facts, RJN Ex. 14 ¶¶ 8-9; Gurza Decl., RJN Ex. 15 ¶
11 14.) The Parties met for thirteen negotiation sessions and exchanged several proposals of the ballot
12 measure. (City’s Memorandum of Points and Authorities in Opposition to SJPOA’s Application for
13 Leave to Sue in *Quo Warranto*, RJN Ex. 13 pp. 7-8; Undisputed Facts, RJN Ex. 14 ¶¶ 10-13; Gurza
14 Decl., RJN Ex. 15 ¶ 15.) Not able to agree on the ballot measure, the Parties reached an impasse on
15 October 31, 2011 and proceeded to mediation on November 15 and 16, 2011. (Undisputed Facts,
16 RJN Ex. 14 ¶¶ 14-15; Gurza Decl., RJN Ex. 15 ¶¶ 18-19.) The Parties stipulated on March 8, 2016
17 that they reached an agreed-upon impasse on October 31, 2011. (Stipulated Facts And Proposed
18 Findings, Judgment and Order (“Stipulated Facts”), No. 7 and (“Stipulated Findings”), No. 2.)

19 During mediation, the City offered a number of concessions, which it incorporated into its
20 November 22 draft of the Ballot Measure. (Undisputed Facts, RJN Ex. 14 ¶¶ 16-19; Gurza Decl.,
21 RJN Ex. 15 ¶¶ 20-21.) The City denied Relator’s allegations that no bargaining took place over
22 November 22 version of the ballot measure and affirmatively stated that further bargaining occurred
23 in December 2011 and January 2012. (Verified Complaint in *Quo Warranto* (“QW Complaint”) ¶
24 35; Defendant City of San Jose’s and City Council of San Jose’s Answer to Verified Complaint in
25 *Quo Warranto* (“Answer”) ¶ 35; Gurza Decl., RJN Ex. 15 ¶ 24.) A later, December 5 version of the
26 ballot measure was “substantially similar” to November 22, 2011 version. (Undisputed Facts, RJN
27 Ex. 14 ¶ 22.) The City denied Relator’s allegation in the *Quo Warranto* Complaint that the City
28 “significantly changed” or made “dramatic changes” to its November 22 ballot measure. (QW

1 Complaint, ¶¶ 33, 39-40; Answer, ¶¶ 33, 39-40.) Despite the City’s denials and statements, however,
2 it stipulated on March 8, 2016 that November 22 version “made significant revisions from prior
3 versions” and the December 5 version “made additional concessions as compared to the November
4 22 version.” (Stipulated Facts, ¶¶ 12, 14.)

5 The City Council voted to place on the June 2012 ballot the December 5 version of the ballot
6 measure. (Undisputed Facts, RJN Ex. 14 ¶ 22.) The City’s intent to place the measure on June and
7 not March 2012 ballot was to allow more time for additional mediation with the unions. (Undisputed
8 Facts, RJN Ex. 14 ¶ 23.) Because the Parties met twice in late December 2011 and early January
9 2012, the City denied Relator’s allegations that the City refused to bargain after Relator requested
10 more bargaining in November and December 2011. (QW Complaint, ¶ 34; Answer, ¶ 34; Undisputed
11 Facts, RJN Ex. 14 ¶ 25; Gurza Decl., RJN Ex. 15 ¶ 24.) After those meetings – which coincidentally
12 were omitted from the Stipulated Facts executed by the City on March 8, 2016 – the Parties proceeded
13 to engage in mediation on four occasions: January 17 and 18, 2012 and February 6 and 10, 2012.
14 (Undisputed Facts, RJN Ex. 14 ¶ 27; Gurza Decl., RJN Ex. 15 ¶ 24; see also Stipulated Facts, ¶¶ 16-
15 17 omitting the reference to these meetings.)

16 The City incorporated into its February 21, 2012 revised version of the ballot measure a
17 number of concessions discussed with Relator in mediation, but Relator claimed that it “had no
18 opportunity to bargain about this new ballot language.” (Undisputed Facts, RJN Ex. 14 ¶¶ 28-31;
19 Gurza Decl., RJN Ex. 15 ¶¶ 26-27.) The City rejected with a lengthy explanation Relator’s March 2,
20 2012 proposal because it was a “step backward,” despite the City’s claim in the Stipulated Facts that
21 the proposal was a “further revised” one. (Undisputed Facts, RJN Ex. 14 ¶¶ 32-34; Gurza Decl., RJN
22 Ex. 15 ¶ 28; Stipulated Facts, ¶¶ 21-22.) On March 6, 2012, the City voted to place Measure B on
23 June 2012 ballot, and it was approved by the San Jose electorate by a margin of 69.5%. (Undisputed
24 Facts, RJN Ex. 14 ¶¶ 32-34; Gurza Decl., RJN Ex. 15 ¶¶ 29-30.)

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**B. THE CITY BLINDSIDED INTERVENORS WITH ITS CONTRADICTORY
ASSERTIONS, AND *EX PARTE* FILING OF THE JUDGMENT.**

In this very action, the City initially defended Measure B by denying the allegations in Relator's Verified *Quo Warranto* Complaint, that the City violated the MMBA obligation to meet and confer in good faith.¹ (QW Complaint, ¶¶ 16, 50, 62-65; Answer, ¶¶ 16, 50, 62-65.)

Then, on March 8, 2016, the very next day after Intervenors reserved the hearing date for the Application to Intervene, and Proposed Intervenor Peter Constant informed Mayor Sam Liccardo of Intervenors' intention to seek intervention to defend the challenged measure, the City executed the Stipulated Facts. (Supp. Declaration of Peter Constant in Reply to Support of Application to Intervene ("2nd Constant Decl.") ¶¶ 3-5; Declaration of Marguerite Mary Leoni filed herewith ("2nd Leoni Decl.") ¶¶ 4-7; Stipulated Facts & Proposed Findings, p. 7.) In so doing the City directly contradicted its sworn testimony defending the Measure by inconsistently and erroneously asserting that the City violated the MMBA in placing Measure B on the City's 2012 Ballot; effectively abrogating its duty to defend Measure B.

Intervenors were unaware of the Parties' subterfuge. On March 16, 2016, after meeting and conferring with the Parties, Intervenors appeared *ex parte* before this Court for entry of an Order Shortening Time to file and hear their Application for Intervention. (Stipulation and Order Shortening Time for Hearing on the Application to Intervene and Continuing the Case Management Conference, filed March 16, 2016.) Representatives from the City, and Relator, had communicated with Intervenors after March 8, 2016 and were present at the *ex parte*, but provided no notice of the executed stipulations and submitted Judgment Documents. (Declaration of Alena Shamos filed herewith ("2nd Shamos Decl.") ¶¶ 3-8; Declaration of James W. Carson in Support of Ex Parte Application to Stay Enforcement of Judgment ("4th Carson Decl.") ¶ 3.) On March 23, 2016, the City and Relator filed Oppositions to Intervenors' Application for Intervention, but did not disclose the existence of the Stipulated Judgment Documents. Taxpayers were never served with the Stipulated Judgment Documents. (2nd Shamos Decl. ¶ 10; 2nd Leoni Decl. ¶¶ 8, 11.)

28 ¹ The City also affirmatively offered sworn testimony demonstrating compliance (Gurza Decl., RJN Ex. 15 ¶¶ 9-10, 14-15, 18-21, 24, 26-28; Undisputed Facts, RJN Ex. 14 ¶¶ 16-19, 22-23, 25, 27-31.)

1 In the Stipulated Judgment Documents, the City states that impasse was broken by
2 modifications and the City’s concessions, creating a further obligation to meet and confer, which the
3 City did not fulfill. (Stipulated Conclusions, ¶¶ 1-3.) On that basis the City agrees to invalidate
4 Measure B; contradicting its prior testimony and position and abandoning its duty to defend the
5 measure.

6 **III. THE JUDGMENT SHOULD BE VACATED AND THE MATTER SET FOR**
7 **TRIAL.**

8 As set forth in these papers, and the Motion filed by Intervenor Peter Constant, the Court
9 should grant this Motion pursuant to C.C.P §§ 657 and 663 because the errors affected substantial
10 rights of the Taxpayers and resulted in severe prejudice to them. (*West v. Reigal* (1962) 208
11 Cal.App.2d 638, 643.) Taxpayers further request that the Court grant this Motion pursuant to its
12 inherent power and authority under C.C.P. § 128 to achieve justice and control the litigation before
13 it. (C.C.P. § 128; *Blueberry Properties, LLC v. Chow* (2014) 230 Cal.App.4th 1017, 1021; *Rutherford*
14 *v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.)

15 Upon motion of the party aggrieved, a judgment may be vacated, and another and different
16 judgment entered, if the decision is based on incorrect or erroneous legal basis, not consistent with or
17 not supported by the facts, which materially affected the substantial rights of the parties and entitles
18 the party to a different judgment. (C.C.P. § 663.) Vacating judgment is available when a court draws
19 incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted
20 evidence. (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.) The Court should vacate
21 the Stipulated Judgment based on the City’s violation of its duty to defend the challenged measure
22 and the doctrine of judicial estoppel, in addition to other irregularities and errors discussed in
23 Intervenor Constant’s Motion. The Court should then enter another and different judgment ordering
24 to place invalidation of Measure B and the PF Settlement Framework on the ballot, which will give
25 the voters a choice of whether they prefer it to Measure B. In the alternative, the Court should review
26 the Stipulated Judgment, vacate it, and order a further or new trial. (*Carney v. Simmonds* (1957) 49
27 Cal.2d 84, 88 [authorizing review of stipulated judgment for new trial].) “[A]ny doubts should be
28 resolved in favor of granting a complete new trial.” (*Garcia v. San Gabriel Ready Mixt.* (1959) 173

1 Cal.App.2d 355, 359.) The trial judge has a positive duty to keep the verdict in line with the facts
2 and law when the matter is presented on motion for a new trial. (*Thompson v. John Strona & Sons*
3 (1970) 5 Cal.App.3d 705, 711; *Lee v. Cranford* (1951) 107 Cal.App.2d 677, 681.)

4 Pursuant to C.C.P. § 657, the Court’s “decision may be ... vacated, in whole or in part, and a
5 new or further trial granted on all or part of the issues, on the application of the party aggrieved”
6 where the “substantial rights of the aggrieved party” have been “materially” affected. (C.C.P. § 657.)
7 A motion for new trial under C.C.P. § 657 must be granted where the aggrieved party was deprived
8 of a fair trial. (*Tunmore v. McLeish* (1919) 45 Cal.App. 266, 269.) The intent is to promote judicial
9 deliberation and to make the right of review more meaningful. (*Krueger v. Meyer* (1975) 48
10 Cal.App.3d 760, 762.) The grounds for granting a new trial include “irregularity of the proceedings”
11 (C.C.P. § 657(1)), “accident or surprise” (C.C.P. § 657(3)), “newly discovered evidence” (C.C.P. §
12 657(4)), “insufficiency of the evidence” (C.C.P. § 657(6)), and “errors in law” (C.C.P. § 657(7)).
13 Taxpayers are severely prejudiced by the Stipulated Judgment. Failure to grant the requested relief
14 will deprive Taxpayers of their constitutional freedoms.

15 Taxpayers are “aggrieved” parties within the meaning of C.C.P. §§ 657 and 663 because their
16 rights are injuriously affected by the Stipulated Judgment. They also have standing based on their
17 right to defend Measure B where the City has failed to do so, pursuant to *Perry v. Brown* (2011) 54
18 Cal.4th 1116, 1126. It is an abuse of discretion to deny Taxpayers’ standing to file a motion for a
19 new trial. (See *Perry, supra*, 54 Cal.4th 1116 at 1150.) Taxpayers supported, expended resources,
20 and voted to enact Measure B, and have a right to appear in the case pursuant to *Perry*. As further
21 discussed in Intervenor Constant’s Motion, Taxpayers also have standing to bring this motion as
22 aggrieved parties under the holdings of *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 417 and
23 *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 151-153, that individual measure supporters
24 and interest groups are “aggrieved” parties. Notably, in *Simac*, the citizens group was an aggrieved
25 party because they sought to ensure the measure they had worked so hard to pass was properly
26 implemented, and that the city would not be forced to issue building permits in direct conflict with
27 the new law. In *Paulson*, the individual and organizational supporters of the measure provided
28 substantial “man hours” in supporting the measure. In addition to Haug and members of SVTA being
voters in the City, with rights under *Perry v. Brown*, Taxpayers were directly involved in the campaign

1 for Measure B; SVTA formed a political committee specifically to support Measure B and spent
2 \$45,000 toward those efforts. (Declaration of Mark Hinkle in Support of Application to Intervene
3 (“Hinkle Decl.”), ¶¶ 2-4.) SVTA officially endorsed a “yes” vote on Measure B, held monthly
4 meetings with city taxpayers and voters discussing the benefits of Measure B, and sent email blasts
5 to its members urging support of Measure B. (Hinkle Decl., ¶¶ 4-6.) Pursuant to *Simac* and *Paulson*,
6 and based on Taxpayers’ involvement in supporting Measure B, Taxpayers qualify as parties
7 “aggrieved” by the Judgment that would completely eliminate Measure B from the San Jose City
8 Charter. In addition to meeting the standard for parties “aggrieved” by the Judgment, Taxpayers seek
9 to exercise this right on behalf of voters who supported Measure B and defended the measure passed
10 by nearly 70% of the vote. Taxpayers have standing to bring this Motion and will be severely
11 prejudiced if it is denied.

12 **A. THE CITY’S ABANDONMENT OF ITS DEFENSE OF MEASURE B VIOLATES
13 TAXPAYERS’ CONSTITUTIONAL RIGHTS.**

14 Deprivation of constitutional rights undeniably causes prejudice. (See *Elrod v. Burns* (1976)
15 427 U.S. 347, 373; *New York Times Co. v. United States* (1971) 403 U.S. 713; *Ketchens v. Reiner*
16 (1987) 194 Cal.App.3d 470, 480; *American Booksellers Assn., Inc. v. Superior Court* (1982) 129
17 Cal.App.3d 197, 206.) The right to legislate through initiative is granted to the People by the
18 California Constitution and has been described as “a fundamental exercise of the First Amendment
19 right to petition ... vital to a basic process in the state's constitutional scheme” (*City of Santa*
20 *Monica v. Stewart* (2005) 126 Cal.App.4th 43, 73 (citing *Robins v. Pruneyard Shopping Center*
21 (1979) 23 Cal.3d 899, 907).)

22 Measure B expressly provided the City’s voters and Taxpayers authority to approve any
23 change in pension and post-employment benefit matters; a right the City extinguished by entering
24 into the Stipulated Judgment. (San Jose City Charter, Article XV-A, § 1504-A, RJN Ex. 1.) This
25 “duty to defend” the measure has constitutionally-based policy reasons. The right of initiative is the
26 People’s “reserved power” that is to be “jealously guarded” by the Courts. (*Building Industry Assn.*
27 *v. City of Camarillo* (1986) 41 Cal.3d 810, 821; *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.)
28 Here, the City Council asked the People to decide and the People exercised their “reserved power.”
The California Supreme Court has recognized that, even where the government has a duty to defend

1 an initiative adopted by the voters, intervention should be allowed to “guard the people’s right to
2 exercise initiative power, a right that must be jealously defended by the courts.” (*Building Industry
3 Ass’n of Southern Cal., Inc. v. City of Camarillo* (1986) 41 Cal.3d at 822.) This statement of *Building
4 Industry Association* was discussed at length by the California Supreme Court in *Perry v. Brown*, and
5 adopted as the rule in California initiative cases. The *Perry* Court expressed concern that “there is a
6 realistic risk that the public officials may not defend the approved initiative measure ‘with vigor’”
7 and reinforced the right of the proponents and voters who enacted the measure into law to intervene
8 to defend the validity of the measure. (*Perry, supra*, 52 Cal.4th at 1149-51.)

9 Unlike other cases where cities consistently claimed the adopted initiative was invalid, the
10 City of San Jose defended the Measure B until the recent change in the political winds. (*See, City of
11 Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th 465.) The City has
12 now turned its back on the voters by violating its duty to defend. (*Arnel Dev. Co. v. City of Costa
13 Mesa* (1980) 28 Cal.3d 511, 514 n.3.) The City’s abandonment of its duty, and direct contradiction
14 of its previous testimony and legal position, has resulted in errors in this proceeding that significantly
15 infringe on Taxpayers’ constitutional rights to petition and to legislate through initiative, resulting in
16 entry of a judgment that is contrary to law and prejudicial to Taxpayers.

17 **B. THE STIPULATED JUDGMENT VIOLATES THE PRESUMPTION**
18 **OF MEASURE B’S VALIDITY.**

19 The Judgment violates the basic presumption of validity given to all statutes and charter
20 amendments. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1302; *Lockyer v. City
21 and County of San Francisco* (2004) 33 Cal.4th 1055, 1086; *Taylor v. Cole* (1927) 201 Cal. 327, 333.)
22 Under the Constitution, Charter amendments are given the same dignity as state statutes. (Cal. Const.
23 Art XI, Sec. 3(a).) A Charter Amendment is enrolled in the same manner as a statute and has the
24 same presumption of validity as statutes enjoy. Statutes are presumed valid. (*Calfarm Ins. Co. v.
25 Deukmejian* (1989) 48 Cal.3d 805, 814-15.) The Courts do not look at the wisdom or the social
26 impact of the measure. All presumptions are in favor of its preservation. (*Id.*) The presumptions of
27 regularity were ignored by the Stipulated Judgement. The Stipulation does not explain the facts
28 behind why the “meet and confer” process was flawed, only that it was. Without a factual record, the

1 Relator and City have stipulated their way around a Charter Amendment entitled to a presumption of
2 validity. This act violates the standards that applies to all statutes, charter amendments and ordinances
3 adopted by the voters or a legislative body. (See, e.g., *Porter v. Riverside* (1968) 261 Cal.App.2d
4 832.)

5 **C. THE CITY’S CONTRARY POSITION ASSERTED IN THE STIPULATED**
6 **JUDGEMENT AND FACTS SEVERELY PREJUDICES TAXPAYERS.**

7 In deciding a Motion for new trial, the Court is “vested with the authority, for example, to
8 disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom.” (*Mercer v.*
9 *Perez* (1968) 68 Cal.2d 104, 112.) Where the Court is not satisfied with the evidence supporting the
10 underlying judgment, it is the Court’s “duty to grant a new trial.” (*Barrese v. Murray* (2011) 198
11 Cal.App.4th 494, 503.) In entering into the Stipulated Judgment, the City has taken a position
12 contrary to the legal and factual positions it maintained in this action, and in opposing Relator’s
13 application for leave to sue in *Quo Warranto*. The City’s “about face” undermines the veracity of the
14 alleged “evidence” on which the Court relied in entering the Stipulated Judgment, violates the
15 doctrine of judicial estoppel, severely prejudicing Taxpayers, as well as the integrity of this judicial
16 proceeding. Here, the Stipulated Facts contradict all previous opposition pleadings and declarations
17 filed by the City. In its opposition to the Relator’s Application to the Attorney General for Leave to
18 Sue in *Quo Warranto* and in its Answer to the Complaint in this action, the City vehemently denied
19 violating the MMBA and has completely contradicted that stance in the Stipulated Facts. Below are
20 three material examples of the City’s contradictions:

21 1) The City stood its ground in its opposition papers and its Answer to the *Quo Warranto*
22 Complaint that it bargained over November 22 version of the ballot measure, that its November 22
23 version did not make significant revisions from prior versions and its December 5 version was
24 “substantially similar” to the November 22 version. (Answer, ¶¶ 33, 35, 39-40; Undisputed Facts,
25 RJN Ex. 14 ¶¶ 16-19, 22; Gurza Decl., RJN Ex. 15 ¶ 21; see C.C.P. §§ 128.7, 446.) The City also
26 claimed that its February 21 version of the Ballot Measure incorporated concessions already discussed
27 with Relator in mediation. (Gurza Decl., RJN Ex. 15 ¶¶ 25-27; Undisputed Facts, RJN Ex. 14 ¶¶ 28-
28 31.) The City then changed its position by stipulating that its concessions and modifications to the

1 ballot measure revived the duty to meet and confer and that it did not bargain after further obligation
2 to bargain arose. (Stipulated Conclusions, ¶¶ 1-3.)

3 2) The City attested that it met twice with Relator and engaged in additional mediation
4 in December 2011, January 2012, February 2012, and denied its failure to bargain in its Answer to
5 the *Quo Warranto* Complaint. (Undisputed Facts, RJN Ex. 14 ¶¶ 23, 25, 27; Gurza Decl., RJN Ex
6 15 ¶ 24; Answer, ¶¶ 34.) But in the Stipulated Facts, the City not only omitted the two meetings with
7 Relator, it changed course and claimed that it failed to bargain after impasse was broken. (Stipulated
8 Facts, ¶¶ 16-17; Stipulated Conclusions, ¶¶ 1-3.)

9 3) In its Answer to the *Quo Warranto* Complaint and in the proceeding before the
10 Attorney General, the City expressly denied Relator’s allegations of the MMBA violations. (Answer,
11 ¶ 16, 50, 62-65.) The City maintained it met and conferred with Relator in good faith. (Att’y Gen.
12 Op. 12-605 (April 15, 2013), p.2.) In the Stipulated Judgment Documents, however, the City
13 abandoned its prior stance, taking opposite position and claiming that it violated the MMBA.
14 (Stipulated Conclusions, ¶¶ 1-3.)

15 In addition to being deemed verified under C.C.P. § 446, the City’s Answer in this action
16 constitutes a judicial admission. Judicial admissions “are conclusive concessions of the truth of those
17 matters ... and may not be contradicted, by the party whose pleadings are used against him or her.”
18 [Citations.] (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456.) “[A] pleader cannot
19 blow hot and cold as to the facts positively stated.” (*Id.*) “While a court has inherent power to relieve
20 a party from the effects of a judicial admission by amendment to the pleadings (Code Civ. Proc.
21 § 473), [the City] never sought to amend [its] answer” (*Valerio v. Andrew Youngquist*
22 *Construction* (2002) 103 Cal.App.4th 1264, 1271–72.) The City is bound by the admissions in its
23 Answer.

24 The facts set forth in the pleadings filed by the City in opposition to the Relator’s Application
25 for Leave to Sue in *Quo Warranto* also constitute evidentiary admissions by the City, and can be
26 treated as prior inconsistent statements in the context of this Motion. (*Minish, supra*, 214 Cal.App.4th
27 at 457; *Magnolia Square Homeowners Ass’n v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1061;
28 Evidence Code § 1220.) The City is likewise bound, under the doctrine of equitable estoppel set

1 forth in Evidence Code § 623, by its statements in this action and in opposing the Relator’s
2 Application for Leave to Sue. The City knowingly posted all of its pleadings on its webpage for all
3 to see. (*Minish*, at 459; see Evid. Code § 623.) Taxpayers, and Intervenor Constant relied to their
4 detriment on the City’s statements in its pleadings and representations to the public that the City was
5 defending Measure B. (2nd Shamos Decl. ¶ 11.)

6 The doctrine of judicial estoppel, also referred to as the doctrine of preclusion of inconsistent
7 positions, provides another layer of protection to the integrity of the judicial process and prevents
8 manipulation of and fraud on the judicial system. (*Jackson v. County of Los Angeles* (1997) 60
9 Cal.App.4th 171, 181, 184; *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850; see also
10 *Minish, supra*, 214 Cal.App.4th at 454.) This doctrine is invoked when a party’s inconsistent behavior
11 will otherwise result in a miscarriage of justice. (*Haley v. Dow Lewis Motors, Inc.* (1999) 72
12 Cal.App.4th 497, 511.) It has been held to apply where: (1) The same party has taken different
13 positions; (2) The positions were taken in judicial or quasi-judicial administrative proceedings; (3)
14 The party was successful in asserting the first position (i.e., the tribunal adopted the position or
15 accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not
16 taken as a result of ignorance, fraud, or mistake. (*The Swahn Group, Inc. v. Segal* (2010) 183
17 Cal.App.4th 831, 842.) Although the proper application of the doctrine of judicial estoppel “is at best
18 uncertain,” it is well established that for the doctrine to apply, the “seemingly conflicting positions
19 ‘must be clearly inconsistent so that one necessarily excludes the other.’ Moreover, the doctrine
20 ‘cannot be invoked where the position first assumed was taken as a result of ignorance or mistake.’”
21 (*Jackson, supra*, 60 Cal.App.4th at 182.)

22 As to the third factor – successful assertion, the doctrine of judicial estoppel is equitable in
23 nature, and warrants application in this instance because of the way the City is playing “fast and
24 loose” with the Court. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 119.) In *Thomas v. Gordon*,
25 for example, the Court determined that judicial estoppel was applicable despite the absence of proof
26 of success in earlier litigation, because of the party’s “egregious attempt to manipulate the legal
27 system.” (*Id.* at 119.) The primary issue is not what the trier of fact determined, but what the City
28 contended, in this action and in the prior proceeding before the Attorney General. (*Id.*) The

1 successful assertion factor is not met only when the inconsistency is minor and is not referenced in
2 the record. (*The Swahn Group, supra*, 183 Cal.App.4th at 850.)

3 The Attorney General Opinion at the heart of this action specifically states: “[The City]
4 maintains that we should deny SJPOA’s request in this instance because **the City bargained with**
5 **SJPOA to impasse** over the contents and terms of Measure B and that **no further bargaining was**
6 **legally required.**” (Att’y Gen. Op. 12-605 (April 15, 2013), p.2 (emphasis added).) Further, in its
7 Answer to Relator’s Complaint, the City denied Relator’s allegations of the MMBA violations. (QW
8 Complaint, ¶¶ 16, 50, 62-65; Answer, ¶¶ 16, 50, 62-65.) The City then stipulated to its violations of
9 the meet and confer obligations, contrary to the record in the proceeding on the Application for Leave
10 to Sue before the Office of the Attorney General and the City’s Answer to the *Quo Warranto*
11 Complaint before this Court. Such material contradiction is clear from the record.

12 The City’s self-contradiction is being used intentionally as a means to obtain an unfair
13 advantage. (*Haley, supra*, 72 Cal.App.4th at 509–10.) The City cannot demonstrate ignorance or
14 mistake as the cause for the contradiction. To justify its new and contrary position that it violated the
15 MMBA, the City had to claim that impasse was broken, contrary to its previous assertions, and omit
16 from the Stipulated Facts references to two important meet and confer meetings that occurred in
17 December 2011 and January 2012 with Relator. (Undisputed Facts, RJN Ex. 14 ¶ 27; Gurza Decl.,
18 RJN Ex. 15 ¶ 24; see also Stipulated Facts, ¶¶ 16-17 omitting the reference to these meetings.) Such
19 omission was intentional to support the Stipulated Conclusion that the City violated its newly revived
20 duty to meet and confer after the impasse was allegedly broken by modifications to Measure B and
21 the City’s concessions. (Stipulated Conclusions, ¶¶ 1-3.) Even if impasse was broken and further
22 obligation to meet and confer arose, the City did in fact meet this obligation in good faith when it met
23 with Relator twice and engaged in four additional mediation sessions. (Undisputed Facts, RJN Ex.
24 14 ¶ 25; Gurza Decl., RJN Ex. 15 ¶ 24.) In its Answer, the City also asserted that it did not refuse to
25 bargain after more bargaining was requested in November and December 2011. (Answer, ¶ 34.) The
26 omission of the two meetings was not accidental. If not omitted, the evidence of the two meetings
27 would highlight the inaccuracy of the Stipulated Conclusion that the City failed to fulfill its meet and
28 confer obligation after impasse had been allegedly broken.

1 Intervenor have been prejudiced by the City's contradictions. Intervenor were led to believe
2 the City would protect Measure B, or place it on the ballot. Then the City switched course, argued
3 that the application for intervention was untimely, blocking the application to intervene. Such tactics
4 prevented intervention and left Measure B without a defense. Intervenor suffered prejudice from
5 not being able to assert its right to defend the challenged measure, the right given to them by
6 California Constitution and California Supreme Court in *Perry*. Having been deprived of this right,
7 Intervenor's constitutional rights of petition and of initiative suffered tremendous injury. The City's
8 stipulation to the facts and judgment violated its constitutional duty to defend Measure B and the
9 doctrine of judicial estoppel, as well as constituted admissions by which the City is bound. The
10 Court's approval of the Stipulated Judgment based on conflicting testimony breached the Court's duty
11 to "jealously guard" the People's power of initiative and eradicated Taxpayers' constitutional right to
12 petition and to legislate by initiative and thus it cannot stand.

13 **IV. TAXPAYERS ARE ENTITLED TO FURTHER OR NEW TRIAL.**

14 **A. IRREGULARITY OF PROCEEDINGS**

15 The City's abandonment of its defense of the challenged measure, refusal to allow Taxpayers
16 to maintain that defense in violation of the City's obligation to provide for the defense of the measure,
17 coupled with the City's contradicting evidence in violation of the doctrine of judicial estoppel led the
18 Court into error in its ruling on Intervenor's motion to intervene. The City lacked authority to
19 stipulate to the repeal of Measure B, being a duly enacted initiative charter amendment, as it is solely
20 within the Court's authority. (See *Perry, supra*, 52 Cal.4th at 1155.) The Parties' further failure to
21 disclose the existence of the Stipulated Judgment Documents, serve them on Intervenor, and inform
22 the Court of its duty to guard the initiative right as well as its limitation in the approval of the
23 invalidation of the measure by stipulation, as discussed in more detail in Intervenor Constant's
24 Motion, resulted in an irregularity in the proceedings that severely prejudiced Taxpayers. (C.C.P. §
25 657(1).) These "overt acts" of the Parties resulted in an irregularity in these proceedings severely
26 prejudicing Taxpayers and affected Taxpayers' substantial rights to a fair trial. (*Gay v. Torrance*
27 (1904) 145 Cal. 144, 148; *Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182.)

1 **B. ACCIDENT AND SURPRISE AND NEWLY DISCOVERED EVIDENCE**

2 The Court should grant Taxpayers’ motion on the basis of unfair surprise because the City’s
3 abandonment of its defense of Measure B, the parties’ *ex parte* filing of the Stipulated Judgment
4 papers (without serving the Intervenor) and the Court’s entry of the Judgment before the Intervenor
5 could argue their Application to Intervene prejudiced Taxpayers in their efforts to defend the
6 challenged measure. (C.C.P. § 657(3); *Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432 [when a
7 situation arises constituting a legal surprise, counsel must make it known to the court].)

8 Intervenor also meet the burden to seek a new trial based on newly discovered evidence.
9 because they can show that “(1) the evidence is newly discovered; (2) he or she exercised reasonable
10 diligence in discovering and producing it; and (3) it is material to the ... case.” (*Plancarte v.*
11 *Guardsmark* (2004) 118 Cal.App.4th 640, 646.) The timing of Intervenor’s discovery of the City’s
12 signature on the Stipulated Judgment Documents is material to Taxpayers’ case. Despite monitoring
13 the City’s website and the Court’s portal with reasonable diligence, Intervenor could not have
14 discovered that the City stipulated to entry of judgment on March 8, 2016 based on facts that
15 contradict the City’s prior position and testimony and invalidate Measure B. (C.C.P. § 657(4); *Doe*
16 *v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506; 2nd Leoni Decl. ¶¶ 9-10; 2nd Constant
17 Decl. ¶ 5) Taxpayers have never been served with the Stipulated Judgment Documents. (2nd Shamos
18 Decl. ¶ 10.)

19 **C. INSUFFICIENCY OF EVIDENCE**

20 The Stipulated Judgment was entered based on incomplete and contradictory facts, requiring
21 a new or further trial. (C.C.P. § 657(6); *Yarrow v. State* (1960) 53 Cal.2d 427, 434-35.) The City’s
22 own assertions in this action, and in opposition to the Relator’s Application for Leave to Sue, present
23 evidence that supports a contrary judgment to that which was entered in this action. (*Id.* at 436.) In
24 addition, the doctrine of estoppel, *infra*, bars the City from taking a blatantly inconsistent position
25 regarding its compliance with the MMBA prior to placement of Measure B on the ballot.² Where the
26 Court is dissatisfied with the evidence supporting the underlying judgment, it is the Court’s “**duty, to**

27
28 ² (See *infra*, Gurza Decl., RJN Ex. 15 ¶¶ 9-10, 14-15, 18-21, 24, 26-28; Undisputed Facts, RJN Ex. 14 ¶¶ 16-19, 22-23, 25, 27-31; Answer, ¶¶ 16, 33, 35, 39-40, 50, 62-65; Stipulated Facts, ¶¶ 16-17; Stipulated Conclusions, ¶¶ 1-3.)

1 grant a new trial.” (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 588; *Barrese v. Murray* (2011)
2 198 Cal.App.4th 494, 503 (emphasis added).) The Court is not bound by its prior rulings, or prior
3 interpretation of evidence, in granting this Motion, and the Stipulated Facts are clearly contradicted
4 by evidence. (*Yarrow v. State, supra*, 53 Cal.2d at 437.) Allowing the Stipulated Judgment to stand
5 will result in a miscarriage of justice.

6 **D. THE JUDGMENT IS AGAINST LAW AND THERE ARE ERRORS IN LAW**

7 The records of this Court support a finding that the Judgment entered in this action is against
8 law and there are errors in law. (C.C.P. § 657(6) & (7).) As a preliminary matter, the Court lacks
9 authority to invalidate a duly enacted Charter Amendment based on the stipulation of the parties, and
10 the Stipulation was signed in violation of the City’s duty to defend Measure B. The Judgment further
11 violates the law and is erroneous because it “fails to find on material issues made by the pleadings –
12 issues as to which a finding would have the effect to countervail or destroy the effect of the other
13 findings – and as to which evidence was introduced” (*Renfer v. Skaggs* (1950) 96 Cal.App.2d
14 380, 383.) The stipulations of the Parties contradict existing evidence and fail to demonstrate a
15 violation of the City’s duty to bargain in good faith pursuant to the MMBA.³ The Court must therefore
16 grant new trial to re-examine the facts and the law. (*Id.*; see also, *Schmeltzer v. Gregory* (1968) 266
17 Cal.App.2d 420, 423-24 [upholding the granting of a motion for new trial where an affirmative
18 defense should have compelled a different finding].)

19 **V. CONCLUSION**

20 Based on the foregoing, and the Motion of Peter Constant, Taxpayers respectfully request that
21 the Court vacate the Judgment filed March 30, 2016 and set this matter for new or further trial.

22 DATED: 4/22/2016 LOUNSBERY FERGUSON ALTONA & PEAK, LLP

23
24 By: 
25 ALENA SHAMOS
26 Attorneys for Intervenors, STEVEN HAUG and
27 SILICON VALLEY TAXPAYERS
28 ASSOCIATION

28 ³ See n.2 above.