

Case No. H043540

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SIXTH APPELLATE DISTRICT**

**PETER CONSTANT, STEVEN HAUG, and SILICON VALLEY
TAXPAYERS' ASSOCIATION, a California non-profit corporation,**
Proposed Intervenors, Appellants and Petitioners

v.

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

**THE PEOPLE OF THE STATE OF CALIFORNIA on the
RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION,**
Plaintiff, Respondent, and Real Party in Interest

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,
Defendants, Respondents, and Real Parties in Interest

**DECLARATON OF GREGG MCLEAN ADAM IN
OPPOSITION TO PETITION FOR WRIT OF
MANDATE OR, IN THE ALTERNATIVE,
SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF**

From Order of the Superior Court of Santa Clara County
The Honorable Beth McGowen, Presiding
Superior Court Case No. 2013-cv-245503

(Counsel listed on following page)

*Laurie J. Hepler, No. 160884
lhepler@gmsr.com
Gary J. Wax, No. 265490
gwax@gmsr.com
GREINES, MARTIN, STEIN &
RICHLAND LLP
One Embarcadero Center, Suite 500
San Francisco, California 94111
(415) 315-1774

Gregg McLean Adam, No. 203436
gregg@majlabor.com
Jennifer S. Stoughton, No. 238309
jennifer@majlabor.com
MESSING ADAM & JASMINE LLP
235 Montgomery Street, Suite 828
San Francisco, CA 94104
(415) 266-1800

*Attorneys for Plaintiff, Respondent, and Real Party in Interest
San Jose Police Officers' Association*

I, Gregg McLean Adam, declare as follows:

1. I am a partner at the law offices of Messing Adam & Jasmine LLP (“MAJ”) and am general counsel for Plaintiff San Jose Police Officers’ Association (the “SJPOA”). I have been the primary lawyer assigned on behalf of SJPOA during the litigation and settlement discussion about Measure B. By virtue of that representation, I have personal knowledge of the facts set forth herein and, if called upon as a witness, I could and would testify competently as to them. I make this declaration in opposition to Peter Constant, Steven Haug, and Silicon Valley Taxpayer’s Association’s Petition for Writ of Mandate or, in the Alternative, Supercedeas, or Other Appropriate Relief.

2. Attached hereto as Exhibit A is a true and correct copy of a Stipulation, dated June 28, 2012, between the City of San Jose and the San Jose Police Officers’ Association and various other parties (collectively “Parties”) in *San Jose Police Officers’ Association et al. v. City of San Jose et al.*, Santa Clara County Superior Court case No. 112CV225926, which delayed the implementation of the key parts of Measure B until no earlier than January 1, 2013.

3. Attached hereto as Exhibit B is a true and correct copy of a subsequent Stipulation between the Parties dated October 18, 2012, which delayed the implementation of the key parts of Measure B until no earlier than June 14, 2013.

4. Attached hereto as Exhibit C is a true and correct copy of another Stipulation and Order dated March 29, 2013, which delayed the implementation of the key parts of Measure B until no earlier than January 1, 2014.

5. Attached hereto as Exhibit D is a true and correct copy of a the final Supplemental Stipulation and Order which delayed the implementation of the key parts of Measure B until no earlier than July 1, 2014.

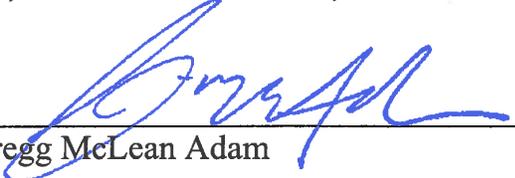
6. Attached hereto as Exhibit E is a true and correct copy of the Final Statement of Decision issued by Judge Patricia Lucas on February 20, 2014, finding key aspects of Measure B unconstitutional.

7. Following the issuance of Judge Lucas's Final Statement of Decision on February 20, 2014, the City took no further steps that I am aware of to further implement any part of Measure B.

8. Attached hereto as Exhibit F is a true and correct copy of the October 1, 2014 Order on Plaintiff's Motion for Attorney Fees issued by Judge Lucas ruling that SJPOA (and the other plaintiffs) were the prevailing party for purposes of an attorney fee award under California Code of Civil Procedure section 1021.5.

9. Attached hereto as Exhibit G is a true and correct copy of the January 14, 2015 Order Determining the Amount of Plaintiffs' Attorney Fees issued by Judge Lucas wherein she awarded SJPOA \$540,719.37 as the prevailing party in the litigation over the merits of Measure B.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of May, 2016 at San Francisco, California.



Gregg McLean Adam

Exhibit A

1 Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
2 Linda M. Ross (SBN: 133874)
lross@meyersnave.com
3 Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
4 MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
5 Oakland, California 94607
Telephone: (510) 808-2000
6 Facsimile: (510) 444-1108

7 Attorneys for Plaintiff
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 AND BOARD OF
ADMINISTRATORS FOR POLICE AND
15 FIRE DEPARTMENT RETIREMENT PLAN
OF CITY OF SAN JOSE,

16 Defendants.
17

Case No. 112CV225926

STIPULATION

Date: June 19, 2012
Time: 8:15 am

Trial Date: None Set

18
19 The San Jose Police Officers' Association ("SJPOA") having filed on June 6, 2012, a
20 Complaint For Declaratory and Injunctive Relief, and an Ex Parte Application For A Temporary
21 Restraining Order And Order To Show Cause Why a Preliminary Injunction Should Not Issue
22 Prohibiting Implementation Of Measure B Sections 9-13 ("Application for TRO and OSC");

23 Counsel for the SJPOA and the City of San Jose ("the City") having agreed to a
24 continuance of the hearing on the Application for TRO and OSC in order to develop an agreed-
25 upon schedule to efficiently govern litigation of the case;

26 The SJPOA and the City hereby stipulate as follows:

27 1. Measure B is not yet certified under the Elections and Government Codes, and,
28 according to the City, will require the City to enact implementing ordinances and procedures

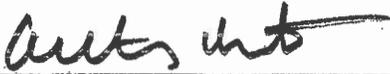
1 before it becomes effective. Accordingly, the City agrees that any implementing ordinances or
2 procedures adopted pursuant to Measure B that increase employee retirement contributions
3 (including for retiree healthcare), change disability retirement benefits, eliminate the Supplemental
4 Retiree Benefit Reserve, or relate to obligations concerning the actuarial soundness of the
5 retirement systems, will have an effective date of no sooner than January 1, 2013. The City is not
6 agreeing that implementation of Measure B section 1508-A, Tier 2 retirement benefits for new
7 employees will have an effective date of no sooner than January 1, 2013.

8 2. The SJPOA will take its Application for TRO and OSC off calendar.

9 3. The parties will meet and confer in an attempt to agree on a case management plan
10 that will allow for the effective and expeditious management of this lawsuit.

11
12 DATED: June 28, 2012

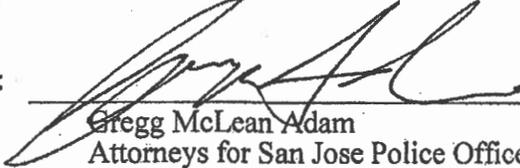
MEYERS, NAVE, RIBACK, SILVER & WILSON

13
14 By: 

15 Arthur A. Hartinger
16 Attorneys for Defendant
17 City of San Jose

18
19 DATED: June 28, 2012

CARROLL, BURDICK & MCDONOUGH

20 By: 

21 Gregg McLean Adam
22 Attorneys for San Jose Police Officers'
23 Association
24
25
26
27
28

Exhibit B

1 Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
2 Gonzalo C. Martinez, No. 231724
Amber L. West, No. 245002
3 **CARROLL, BURDICK & McDONOUGH LLP**
Attorneys at Law
4 44 Montgomery Street, Suite 400
San Francisco, CA 94104
5 Telephone: 415.989.5900
Facsimile: 415.989.0932
6 Email: gadam@cbmlaw.com

7
8 Attorneys for Plaintiff
San Jose Police Officers' Association

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11
12 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

13 Plaintiff,

14 v.

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

19 Defendants.

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

**STIPULATION TO EXTEND THE DELAY OF
MEASURE B'S IMPLEMENTATION
THROUGH JUNE 15, 2013**

20
21 San Jose Police Officers' Association ("SJPOA") files on behalf of all parties
22 this stipulation extending a prior June 28, 2012 stipulation entered into by Defendant City
23 of San Jose ("the City") and Plaintiff SJPOA. That stipulation acknowledged the City's
24 position that Measure B requires the City to enact implementing ordinances and
25 procedures before it becomes effective. The parties stipulated that any implementing
26 ordinances or procedures adopted pursuant to Measure B that increase employee
27 retirement contributions (including for retiree healthcare), change disability retirement
28 benefits, eliminate the Supplemental Retiree Benefit Reserve, or relate to obligations

CBM-SF\SF565793.2

1 concerning the actuarial soundness of the retirement systems, will have an effective date
2 of no sooner than January 1, 2013. The City expressly did not agree that implementation
3 of Measure B Section 1508A, Tier 2 retirement benefits for new employees will have an
4 effective date of no sooner than January 1, 2013.

5 The parties hereby extend the application of the June 28, 2012 stipulation
6 through June 15, 2013 and apply it to all cases consolidated for pre-trial purposes.

7 Dated: October __, 2012

8 MEYERS, NAVE, RIBACK, SILVER &
9 WILSON

10
11 By _____
12 Linda M. Ross
13 Attorneys for Defendants City of San Jose

14 Dated: October 8, 2012

15 WYLIE, MCBRIDE, PLATTEN & RENNER

16 By _____
17 John McBride
18 Christopher E. Platten
19 Attorneys for Plaintiffs Robert Sapien, Mary
20 McCarthy, Thanh Ho, Randy Sekany, Ken
21 Heredia, Teresa Harris, Jon Reger, Moses
22 Serrano, John Mukhar, Dale Dapp, James
23 Atkins, William Buffington and Kirk
24 Pennington

25 Dated: October __, 2012

26 BEESON, TAYOR & BODINE APC

27 By _____
28 Teague P. Paterson
Vishtasp M. Soroushian
Attorneys for Plaintiff AFSCME Local 101

1 concerning the actuarial soundness of the retirement systems, will have an effective date
2 of no sooner than January 1, 2013. The City expressly did not agree that implementation
3 of Measure B Section 1508A, Tier 2 retirement benefits for new employees will have an
4 effective date of no sooner than January 1, 2013.

5 The parties hereby extend the application of the June 28, 2012 stipulation
6 through June 15, 2013 and apply it to all cases consolidated for pre-trial purposes.

7 Dated: October __, 2012

8 MEYERS, NAVE, RIBACK, SILVER &
9 WILSON

10
11 By _____
12 Linda M. Ross
13 Attorneys for Defendants City of San Jose

14 Dated: October 18, 2012

15 WYLIE, MCBRIDE, PLATTEN & RENNER

16 By _____
17 John McBride
18 Christopher E. Platten
19 Attorneys for Plaintiffs Robert Sapien, Mary
20 McCarthy, Thanh Ho, Randy Sekany, Ken
21 Heredia, Teresa Harris, Jon Reger, Moses
22 Serrano, John Mukhar, Dale Dapp, James
23 Atkins, William Buffington and Kirk
24 Pennington

25 Dated: October 18, 2012

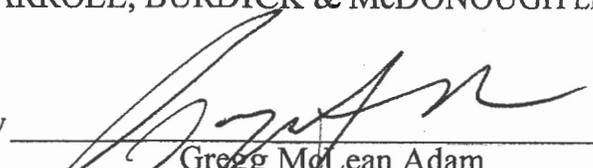
26 BEESON, TAYOR & BODINE APC

27 By _____
28 Teague P. Paterson
Vishtasp M. Soroushian
Attorneys for Plaintiff AFSCME Local 101

Dated: October 18, 2012

CARROLL, BURDICK & McDONOUGH LLP

By



Gregg McLean Adam
Attorneys for Plaintiffs San Jose Police
Officers' Association

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit C

1 Arthur A. Hartinger (SBN: 121521)
 ahartinger@meyersnave.com
 2 Linda M. Ross (SBN: 133874)
 lross@meyersnave.com
 3 Jennifer L. Nock (SBN: 160663)
 jnock@meyersnave.com
 4 Michael C. Hughes (SBN: 215694)
 mhughes@meyersnave.com
 5 MEYERS, NAVE, RIBACK, SILVER & WILSON
 555 12th Street, Suite 1500
 6 Oakland, California 94607
 Telephone: (510) 808-2000
 7 Facsimile: (510) 444-1108

8 Attorneys for Plaintiff
 City of San Jose

ENDORSED Santa Clara
 03/29/13 3:18pm
 David H. Yamasaki
 Chief Executive Office
 By: francesm DTSCIV01
 R#201300032697
 EX \$20.00
 TL \$20.00
 Case: 1-12-CV-225926
 F. Tong-Miller

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

12 SAN JOSE POLICE OFFICERS
 ASSOCIATION,

13 Plaintiff,

14 v.

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

18 Defendants.

Case No. 1-12-CV-225926

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

~~PROPOSED~~ STIPULATION AND
 ORDER RE IMPLEMENTATION OF
 MEASURE B IN CONNECTION WITH
 TRIAL SET FOR JUNE 17, 2013

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

19 AND RELATED CROSS-COMPLAINT
 20 AND CONSOLIDATED ACTIONS

22 WHEREAS, a court trial has been set for June 17, 2013, in these consolidated actions
 23 concerning various provisions of San Jose Charter Sections 1500-A, et seq., known as "Measure
 24 B";

25 WHEREAS, the parties desire to focus on preparation for trial and judicial resolution of
 26 the claims made in plaintiffs' complaints;

27 WHEREAS, the parties desire to avoid unnecessary litigation during trial preparation, trial
 28 and judicial consideration of this matter;

1 WHEREAS, the City expects that the process for implementing Measure B will occur over
2 a period of several months;

3 IT IS HEREBY STIPULATED by and among the parties in these consolidated actions that
4 the implementation by the City of San Jose of the following sections of Measure B, San Jose
5 Charter Sections 1500-A, et seq., shall be subject to the following agreement.

6 1. The effective date for implementation of Section 1506-A (additional employee
7 contribution rates), section 1507-A (one time voluntary election program) and section 1514-A
8 (savings) shall occur no sooner than January 1, 2014.

9 2. The effective date for implementation of Section 1512-A (a) (minimum
10 contributions towards the cost of retiree healthcare) shall occur no sooner than January 1, 2014,
11 except that contributions towards retiree healthcare shall be subject to any existing or future union
12 agreements, or City resolutions, authorized prior to January 1, 2014, that specify employee
13 contributions towards retiree healthcare,

14 3. The effective date for implementation of Section 1510-A (emergency measures to
15 contain retiree cost of living adjustments) shall occur no sooner than January 1, 2014. The parties
16 note that there are no current plans by the City to declare a service-level or fiscal emergency.

17 4. The effective date for implementation of Section 1509-A (disability retirements)
18 shall occur no sooner than January 1, 2014.

19 5. The effective date for implementation of Section 1515-A (severability) shall occur
20 no sooner than January 1, 2014.

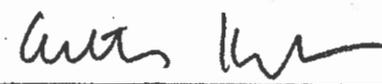
21 6. This stipulation sets forth an agreement concerning effective dates of various
22 sections of Measure B. It does not preclude the City from preparing for implementation of the
23 above referenced sections of Measure B, either through the enactment of ordinances or otherwise.

24 \\
25 \\
26 \\
27 \\
28 \\
29 \\
30 \\
31 \\
32 \\
33 \\
34 \\
35 \\
36 \\
37 \\
38 \\
39 \\
40 \\
41 \\
42 \\
43 \\
44 \\
45 \\
46 \\
47 \\
48 \\
49 \\
50 \\
51 \\
52 \\
53 \\
54 \\
55 \\
56 \\
57 \\
58 \\
59 \\
60 \\
61 \\
62 \\
63 \\
64 \\
65 \\
66 \\
67 \\
68 \\
69 \\
70 \\
71 \\
72 \\
73 \\
74 \\
75 \\
76 \\
77 \\
78 \\
79 \\
80 \\
81 \\
82 \\
83 \\
84 \\
85 \\
86 \\
87 \\
88 \\
89 \\
90 \\
91 \\
92 \\
93 \\
94 \\
95 \\
96 \\
97 \\
98 \\
99 \\
100 \\
101 \\
102 \\
103 \\
104 \\
105 \\
106 \\
107 \\
108 \\
109 \\
110 \\
111 \\
112 \\
113 \\
114 \\
115 \\
116 \\
117 \\
118 \\
119 \\
120 \\
121 \\
122 \\
123 \\
124 \\
125 \\
126 \\
127 \\
128 \\
129 \\
130 \\
131 \\
132 \\
133 \\
134 \\
135 \\
136 \\
137 \\
138 \\
139 \\
140 \\
141 \\
142 \\
143 \\
144 \\
145 \\
146 \\
147 \\
148 \\
149 \\
150 \\
151 \\
152 \\
153 \\
154 \\
155 \\
156 \\
157 \\
158 \\
159 \\
160 \\
161 \\
162 \\
163 \\
164 \\
165 \\
166 \\
167 \\
168 \\
169 \\
170 \\
171 \\
172 \\
173 \\
174 \\
175 \\
176 \\
177 \\
178 \\
179 \\
180 \\
181 \\
182 \\
183 \\
184 \\
185 \\
186 \\
187 \\
188 \\
189 \\
190 \\
191 \\
192 \\
193 \\
194 \\
195 \\
196 \\
197 \\
198 \\
199 \\
200 \\
201 \\
202 \\
203 \\
204 \\
205 \\
206 \\
207 \\
208 \\
209 \\
210 \\
211 \\
212 \\
213 \\
214 \\
215 \\
216 \\
217 \\
218 \\
219 \\
220 \\
221 \\
222 \\
223 \\
224 \\
225 \\
226 \\
227 \\
228 \\
229 \\
230 \\
231 \\
232 \\
233 \\
234 \\
235 \\
236 \\
237 \\
238 \\
239 \\
240 \\
241 \\
242 \\
243 \\
244 \\
245 \\
246 \\
247 \\
248 \\
249 \\
250 \\
251 \\
252 \\
253 \\
254 \\
255 \\
256 \\
257 \\
258 \\
259 \\
260 \\
261 \\
262 \\
263 \\
264 \\
265 \\
266 \\
267 \\
268 \\
269 \\
270 \\
271 \\
272 \\
273 \\
274 \\
275 \\
276 \\
277 \\
278 \\
279 \\
280 \\
281 \\
282 \\
283 \\
284 \\
285 \\
286 \\
287 \\
288 \\
289 \\
290 \\
291 \\
292 \\
293 \\
294 \\
295 \\
296 \\
297 \\
298 \\
299 \\
300 \\
301 \\
302 \\
303 \\
304 \\
305 \\
306 \\
307 \\
308 \\
309 \\
310 \\
311 \\
312 \\
313 \\
314 \\
315 \\
316 \\
317 \\
318 \\
319 \\
320 \\
321 \\
322 \\
323 \\
324 \\
325 \\
326 \\
327 \\
328 \\
329 \\
330 \\
331 \\
332 \\
333 \\
334 \\
335 \\
336 \\
337 \\
338 \\
339 \\
340 \\
341 \\
342 \\
343 \\
344 \\
345 \\
346 \\
347 \\
348 \\
349 \\
350 \\
351 \\
352 \\
353 \\
354 \\
355 \\
356 \\
357 \\
358 \\
359 \\
360 \\
361 \\
362 \\
363 \\
364 \\
365 \\
366 \\
367 \\
368 \\
369 \\
370 \\
371 \\
372 \\
373 \\
374 \\
375 \\
376 \\
377 \\
378 \\
379 \\
380 \\
381 \\
382 \\
383 \\
384 \\
385 \\
386 \\
387 \\
388 \\
389 \\
390 \\
391 \\
392 \\
393 \\
394 \\
395 \\
396 \\
397 \\
398 \\
399 \\
400 \\
401 \\
402 \\
403 \\
404 \\
405 \\
406 \\
407 \\
408 \\
409 \\
410 \\
411 \\
412 \\
413 \\
414 \\
415 \\
416 \\
417 \\
418 \\
419 \\
420 \\
421 \\
422 \\
423 \\
424 \\
425 \\
426 \\
427 \\
428 \\
429 \\
430 \\
431 \\
432 \\
433 \\
434 \\
435 \\
436 \\
437 \\
438 \\
439 \\
440 \\
441 \\
442 \\
443 \\
444 \\
445 \\
446 \\
447 \\
448 \\
449 \\
450 \\
451 \\
452 \\
453 \\
454 \\
455 \\
456 \\
457 \\
458 \\
459 \\
460 \\
461 \\
462 \\
463 \\
464 \\
465 \\
466 \\
467 \\
468 \\
469 \\
470 \\
471 \\
472 \\
473 \\
474 \\
475 \\
476 \\
477 \\
478 \\
479 \\
480 \\
481 \\
482 \\
483 \\
484 \\
485 \\
486 \\
487 \\
488 \\
489 \\
490 \\
491 \\
492 \\
493 \\
494 \\
495 \\
496 \\
497 \\
498 \\
499 \\
500 \\
501 \\
502 \\
503 \\
504 \\
505 \\
506 \\
507 \\
508 \\
509 \\
510 \\
511 \\
512 \\
513 \\
514 \\
515 \\
516 \\
517 \\
518 \\
519 \\
520 \\
521 \\
522 \\
523 \\
524 \\
525 \\
526 \\
527 \\
528 \\
529 \\
530 \\
531 \\
532 \\
533 \\
534 \\
535 \\
536 \\
537 \\
538 \\
539 \\
540 \\
541 \\
542 \\
543 \\
544 \\
545 \\
546 \\
547 \\
548 \\
549 \\
550 \\
551 \\
552 \\
553 \\
554 \\
555 \\
556 \\
557 \\
558 \\
559 \\
560 \\
561 \\
562 \\
563 \\
564 \\
565 \\
566 \\
567 \\
568 \\
569 \\
570 \\
571 \\
572 \\
573 \\
574 \\
575 \\
576 \\
577 \\
578 \\
579 \\
580 \\
581 \\
582 \\
583 \\
584 \\
585 \\
586 \\
587 \\
588 \\
589 \\
590 \\
591 \\
592 \\
593 \\
594 \\
595 \\
596 \\
597 \\
598 \\
599 \\
600 \\
601 \\
602 \\
603 \\
604 \\
605 \\
606 \\
607 \\
608 \\
609 \\
610 \\
611 \\
612 \\
613 \\
614 \\
615 \\
616 \\
617 \\
618 \\
619 \\
620 \\
621 \\
622 \\
623 \\
624 \\
625 \\
626 \\
627 \\
628 \\
629 \\
630 \\
631 \\
632 \\
633 \\
634 \\
635 \\
636 \\
637 \\
638 \\
639 \\
640 \\
641 \\
642 \\
643 \\
644 \\
645 \\
646 \\
647 \\
648 \\
649 \\
650 \\
651 \\
652 \\
653 \\
654 \\
655 \\
656 \\
657 \\
658 \\
659 \\
660 \\
661 \\
662 \\
663 \\
664 \\
665 \\
666 \\
667 \\
668 \\
669 \\
670 \\
671 \\
672 \\
673 \\
674 \\
675 \\
676 \\
677 \\
678 \\
679 \\
680 \\
681 \\
682 \\
683 \\
684 \\
685 \\
686 \\
687 \\
688 \\
689 \\
690 \\
691 \\
692 \\
693 \\
694 \\
695 \\
696 \\
697 \\
698 \\
699 \\
700 \\
701 \\
702 \\
703 \\
704 \\
705 \\
706 \\
707 \\
708 \\
709 \\
710 \\
711 \\
712 \\
713 \\
714 \\
715 \\
716 \\
717 \\
718 \\
719 \\
720 \\
721 \\
722 \\
723 \\
724 \\
725 \\
726 \\
727 \\
728 \\
729 \\
730 \\
731 \\
732 \\
733 \\
734 \\
735 \\
736 \\
737 \\
738 \\
739 \\
740 \\
741 \\
742 \\
743 \\
744 \\
745 \\
746 \\
747 \\
748 \\
749 \\
750 \\
751 \\
752 \\
753 \\
754 \\
755 \\
756 \\
757 \\
758 \\
759 \\
760 \\
761 \\
762 \\
763 \\
764 \\
765 \\
766 \\
767 \\
768 \\
769 \\
770 \\
771 \\
772 \\
773 \\
774 \\
775 \\
776 \\
777 \\
778 \\
779 \\
780 \\
781 \\
782 \\
783 \\
784 \\
785 \\
786 \\
787 \\
788 \\
789 \\
790 \\
791 \\
792 \\
793 \\
794 \\
795 \\
796 \\
797 \\
798 \\
799 \\
800 \\
801 \\
802 \\
803 \\
804 \\
805 \\
806 \\
807 \\
808 \\
809 \\
810 \\
811 \\
812 \\
813 \\
814 \\
815 \\
816 \\
817 \\
818 \\
819 \\
820 \\
821 \\
822 \\
823 \\
824 \\
825 \\
826 \\
827 \\
828 \\
829 \\
830 \\
831 \\
832 \\
833 \\
834 \\
835 \\
836 \\
837 \\
838 \\
839 \\
840 \\
841 \\
842 \\
843 \\
844 \\
845 \\
846 \\
847 \\
848 \\
849 \\
850 \\
851 \\
852 \\
853 \\
854 \\
855 \\
856 \\
857 \\
858 \\
859 \\
860 \\
861 \\
862 \\
863 \\
864 \\
865 \\
866 \\
867 \\
868 \\
869 \\
870 \\
871 \\
872 \\
873 \\
874 \\
875 \\
876 \\
877 \\
878 \\
879 \\
880 \\
881 \\
882 \\
883 \\
884 \\
885 \\
886 \\
887 \\
888 \\
889 \\
890 \\
891 \\
892 \\
893 \\
894 \\
895 \\
896 \\
897 \\
898 \\
899 \\
900 \\
901 \\
902 \\
903 \\
904 \\
905 \\
906 \\
907 \\
908 \\
909 \\
910 \\
911 \\
912 \\
913 \\
914 \\
915 \\
916 \\
917 \\
918 \\
919 \\
920 \\
921 \\
922 \\
923 \\
924 \\
925 \\
926 \\
927 \\
928 \\
929 \\
930 \\
931 \\
932 \\
933 \\
934 \\
935 \\
936 \\
937 \\
938 \\
939 \\
940 \\
941 \\
942 \\
943 \\
944 \\
945 \\
946 \\
947 \\
948 \\
949 \\
950 \\
951 \\
952 \\
953 \\
954 \\
955 \\
956 \\
957 \\
958 \\
959 \\
960 \\
961 \\
962 \\
963 \\
964 \\
965 \\
966 \\
967 \\
968 \\
969 \\
970 \\
971 \\
972 \\
973 \\
974 \\
975 \\
976 \\
977 \\
978 \\
979 \\
980 \\
981 \\
982 \\
983 \\
984 \\
985 \\
986 \\
987 \\
988 \\
989 \\
990 \\
991 \\
992 \\
993 \\
994 \\
995 \\
996 \\
997 \\
998 \\
999 \\
1000 \\
1001 \\
1002 \\
1003 \\
1004 \\
1005 \\
1006 \\
1007 \\
1008 \\
1009 \\
1010 \\
1011 \\
1012 \\
1013 \\
1014 \\
1015 \\
1016 \\
1017 \\
1018 \\
1019 \\
1020 \\
1021 \\
1022 \\
1023 \\
1024 \\
1025 \\
1026 \\
1027 \\
1028 \\
1029 \\
1030 \\
1031 \\
1032 \\
1033 \\
1034 \\
1035 \\
1036 \\
1037 \\
1038 \\
1039 \\
1040 \\
1041 \\
1042 \\
1043 \\
1044 \\
1045 \\
1046 \\
1047 \\
1048 \\
1049 \\
1050 \\
1051 \\
1052 \\
1053 \\
1054 \\
1055 \\
1056 \\
1057 \\
1058 \\
1059 \\
1060 \\
1061 \\
1062 \\
1063 \\
1064 \\
1065 \\
1066 \\
1067 \\
1068 \\
1069 \\
1070 \\
1071 \\
1072 \\
1073 \\
1074 \\
1075 \\
1076 \\
1077 \\
1078 \\
1079 \\
1080 \\
1081 \\
1082 \\
1083 \\
1084 \\
1085 \\
1086 \\
1087 \\
1088 \\
1089 \\
1090 \\
1091 \\
1092 \\
1093 \\
1094 \\
1095 \\
1096 \\
1097 \\
1098 \\
1099 \\
1100 \\
1101 \\
1102 \\
1103 \\
1104 \\
1105 \\
1106 \\
1107 \\
1108 \\
1109 \\
1110 \\
1111 \\
1112 \\
1113 \\
1114 \\
1115 \\
1116 \\
1117 \\
1118 \\
1119 \\
1120 \\
1121 \\
1122 \\
1123 \\
1124 \\
1125 \\
1126 \\
1127 \\
1128 \\
1129 \\
1130 \\
1131 \\
1132 \\
1133 \\
1134 \\
1135 \\
1136 \\
1137 \\
1138 \\
1139 \\
1140 \\
1141 \\
1142 \\
1143 \\
1144 \\
1145 \\
1146 \\
1147 \\
1148 \\
1149 \\
1150 \\
1151 \\
1152 \\
1153 \\
1154 \\
1155 \\
1156 \\
1157 \\
1158 \\
1159 \\
1160 \\
1161 \\
1162 \\
1163 \\
1164 \\
1165 \\
1166 \\
1167 \\
1168 \\
1169 \\
1170 \\
1171 \\
1172 \\
1173 \\
1174 \\
1175 \\
1176 \\
1177 \\
1178 \\
1179 \\
1180 \\
1181 \\
1182 \\
1183 \\
1184 \\
1185 \\
1186 \\
1187 \\
1188 \\
1189 \\
1190 \\
1191 \\
1192 \\
1193 \\
1194 \\
1195 \\
1196 \\
1197 \\
1198 \\
1199 \\
1200 \\
1201 \\
1202 \\
1203 \\
1204 \\
1205 \\
1206 \\
1207 \\
1208 \\
1209 \\
1210 \\
1211 \\
1212 \\
1213 \\
1214 \\
1215 \\
1216 \\
1217 \\
1218 \\
1219 \\
1220 \\
1221 \\
1222 \\
1223 \\
1224 \\
1225 \\
1226 \\
1227 \\
1228 \\
1229 \\
1230 \\
1231 \\
1232 \\
1233 \\
1234 \\
1235 \\
1236 \\
1237 \\
1238 \\
1239 \\
1240 \\
1241 \\
1242 \\
1243 \\
1244 \\
1245 \\
1246 \\
1247 \\
1248 \\
1249 \\
1250 \\
1251 \\
1252 \\
1253 \\
1254 \\
1255 \\
1256 \\
1257 \\
1258 \\
1259 \\
1260 \\
1261 \\
1262 \\
1263 \\
1264 \\
1265 \\
1266 \\
1267 \\
1268 \\
1269 \\
1270 \\
1271 \\
1272 \\
1273 \\
1274 \\
1275 \\
1276 \\
1277 \\
1278 \\
1279 \\
1280 \\
1281 \\
1282 \\
1283 \\
1284 \\
1285 \\
1286 \\
1287 \\
1288 \\
1289 \\
1290 \\
1291 \\
1292 \\
1293 \\
1294 \\
1295 \\
1296 \\
1297 \\
1298 \\
1299 \\
1300 \\
1301 \\
1302 \\
1303 \\
1304 \\
1305 \\
1306 \\
1307 \\
1308 \\
1309 \\
1310 \\
1311 \\
1312 \\
1313 \\
1314 \\
1315 \\
1316 \\
1317 \\
1318 \\
1319 \\
1320 \\
1321 \\
1322 \\
1323 \\
1324 \\
1325 \\
1326 \\
1327 \\
1328 \\
1329 \\
1330 \\
1331 \\
1332 \\
1333 \\
1334 \\
1335 \\
1336 \\
1337 \\
1338 \\
1339 \\
1340 \\
1341 \\
1342 \\
1343 \\
1344 \\
1345 \\
1346 \\
1347 \\
1348 \\
1349 \\
1350 \\
1351 \\
1352 \\
1353 \\
1354 \\
1355 \\
1356 \\
1357 \\
1358 \\
1359 \\
1360 \\
1361 \\
1362 \\
1363 \\
1364 \\
1365 \\
1366 \\
1367 \\
1368 \\
1369 \\
1370 \\
1371 \\
1372 \\
1373 \\
1374 \\
1375 \\
1376 \\
1377 \\
1378 \\
1379 \\
1380 \\
1381 \\
1382 \\
1383 \\
1384 \\
1385 \\
1386 \\
1387 \\
1388 \\
1389 \\
1390 \\
1391 \\
1392 \\
1393 \\
1394 \\
1395 \\
1396 \\
1397 \\
1398 \\
1399 \\
1400 \\
1401 \\
1402 \\
1403 \\
1404 \\
1405 \\
1406 \\
1407 \\
1408 \\
1409 \\
1410 \\
1411 \\
1412 \\
1413 \\
1414 \\
1415 \\
1416 \\
1417 \\
1418 \\
1419 \\
1420 \\
1421 \\
1422 \\
1423 \\
1424 \\
1425 \\
1426 \\
1427 \\
1428 \\
1429 \\
1430 \\
1431 \\
1432 \\
1433 \\
1434 \\
1435 \\
1436 \\
1437 \\
1438 \\
1439 \\
1440 \\
1441 \\
1442 \\
1443 \\
1444 \\
1445 \\
1446 \\
1447 \\
1448 \\
1449 \\
1450 \\
1451 \\
1452 \\
1453 \\
1454 \\
1455 \\
1456 \\
1457 \\
1458 \\
1459 \\
1460 \\
1461 \\
1462 \\
1463 \\
1464 \\
1465 \\
1466 \\
1467 \\
1468 \\
1469 \\
1470 \\
1471 \\
1472 \\
1473 \\
1474 \\
1475 \\
1476 \\
1477 \\
1478 \\
1479 \\
1480 \\
1481 \\
1482 \\
1483 \\
1484 \\
1485 \\
1486 \\
1487 \\
1488 \\
1489 \\
1490 \\
1491 \\
1492 \\
1493 \\
1494 \\
1495 \\
1496 \\
1497 \\
1498 \\
1499 \\
1500 \\
1501 \\
1502 \\
1503 \\
1504 \\
1505 \\
1506 \\
1507 \\
1508 \\
1509 \\
1510 \\
1511 \\
1512 \\
1513 \\
1514 \\
1515 \\
1516 \\
1517 \\
1518 \\
1519 \\
1520 \\
1521 \\
1522 \\
1523 \\
1524 \\
1525 \\
1526 \\
1527 \\
1528 \\
1529 \\
1530 \\
1531 \\
1532 \\
1533 \\
1534 \\
1535 \\
1536 \\
1537 \\
1538 \\
1539 \\
1540 \\
1541 \\
1542 \\
1543 \\
1544 \\
1545 \\
1546 \\
1547 \\
1548 \\
1549 \\
1550 \\
1551 \\
1552 \\
1553 \\
1554 \\
1555 \\
1556 \\
1557 \\
1558 \\
1559 \\
1560 \\
1561 \\
1562 \\
1563 \\
1564 \\
1565 \\
1566 \\
1567 \\
1568 \\
1569 \\
1570 \\
1571 \\
1572 \\
1573 \\
1574 \\
1575 \\
1576 \\
1577 \\
1578 \\
1579 \\
1580 \\
1581 \\
1582 \\
1583 \\
1584 \\
1585 \\
1586 \\
1587 \\
1588 \\
1589 \\
1590 \\
1591 \\
1592 \\
1593 \\
1594 \\
1595 \\
1596 \\
1597 \\
1598 \\
1599 \\
1600 \\
1601 \\
1602

1 7. Execution of this stipulation does not waive any bargaining rights, if any, of any
2 labor organization over enabling ordinances, or any contentions by the City in connection with any
3 assertion of bargaining rights by any labor organization over enabling ordinances.

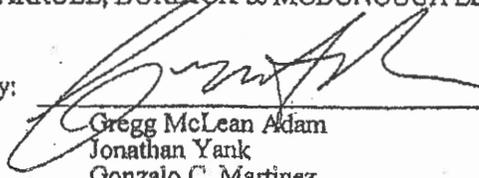
4
5 DATED: March 22, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

6
7 By: 
8 Arthur A. Hartinger
9 Linda Ross
Attorneys for Defendant
City of San Jose

10 DATED: March 21, 2013

CARROLL, BURDICK & MCDONOUGH LLP

11
12 By: 
13 Gregg McLean Adam
14 Jonathan Yank
Gonzalo C. Martinez
15 Amber L. West
Attorneys for San Jose Police Officers'
16 Association

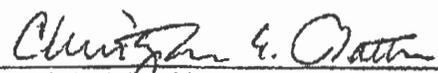
17 DATED: March ____, 2013

BEESON, TAYER & BODINE, APC

18
19 By: _____
20 Teague P. Paterson
21 Vishtasp M. Soroushian
Attorneys for Plaintiffs in AFSCME

22 DATED: March 21 2013

WYLIE, MCBRIDE, PLATTEN & RENNER

23
24 By: 
25 John McBride
26 Christopher E. Platten
Attorneys for Plaintiff, Sapien, Harris and
27 Mukhar
28

1 7. Execution of this stipulation does not waive any bargaining rights, if any, of any
2 labor organization over enabling ordinances, or any contentions by the City in connection with any
3 assertion of bargaining rights by any labor organization over enabling ordinances.
4

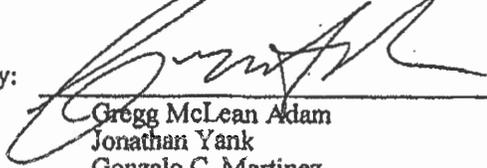
5 DATED: March __, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

6
7 By: _____
8 Arthur A. Hartinger
9 Linda Ross
10 Attorneys for Defendant
11 City of San Jose

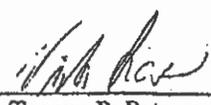
12 DATED: March 21, 2013

CARROLL, BURDICK & MCDONOUGH LLP

13 By: 
14 Gregg McLean Adam
15 Jonathan Yank
16 Gonzalo C. Martinez
17 Amber L. West
18 Attorneys for San Jose Police Officers'
19 Association

20 DATED: March 21, 2013

BEESON, TAYER & BODINE, APC

21 By: 
22 Teague P. Paterson
23 Vishtasp M. Soroushian
24 Attorneys for Plaintiffs in AFSCME

25 DATED: March __, 2013

WYLIE, MCBRIDE, PLATTEN & RENNER

26 By: _____
27 John McBride
28 Christopher E. Platten
Attorneys for Plaintiff, Sapien, Harris and
Mukhar

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER

The forgoing Stipulation having been received and good cause appearing,
IT IS SO ORDERED.

Dated: March 26, 2013

Peter H. Kirwan

JUDGE OF THE SUPERIOR COURT

Peter H. Kirwan

2062944.1

1 Arthur A. Hartinger (SBN: 121521)
ahartinger@meyersnave.com
2 Linda M. Ross (SBN: 133874)
lross@meyersnave.com
3 Jennifer L. Nock (SBN: 160663)
jnock@meyersnave.com
4 Michael C. Hughes (SBN: 215694)
mhughes@meyersnave.com
5 MEYERS, NAVE, RIBACK, SILVER & WILSON
555 12th Street, Suite 1500
6 Oakland, California 94607
Telephone: (510) 808-2000
7 Facsimile: (510) 444-1108

8 Attorneys for Defendants and
Cross Complainants City of San Jose
9 and Debra Figone, in her official capacity

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SANTA CLARA**

12 SAN JOSÉ POLICE OFFICERS
13 ASSOCIATION,
14 Plaintiff,
15 v.
16 CITY OF SAN JOSÉ, BOARD OF
17 ADMINISTRATION FOR POLICE AND
18 FIRE RETIREMENT PLAN OF CITY OF
19 SAN JOSÉ, and DOES 1-10 inclusive.,
20 Defendants.
21 AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS.

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

PROOF OF SERVICE

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 April 4, 2013, I served true copies of the following documents described as **STIPULATION AND ORDER RE IMPLEMENTATION OF MEASURE B IN CONNECTION WITH TRIAL SET FOR JUNE 17, 2013** on the interested parties in this action as follows:

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.

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

Executed on April 4, 2013, at Oakland, California.



Julie Hokanson

SERVICE LIST

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125</p> <p><u>E-MAIL:</u></p> <p>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. West CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104</p> <p><u>E-MAIL:</u></p> <p>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 Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4051</p> <p><u>E-MAIL:</u></p> <p>tpaterson@beesontayer.com; vsoroushian@beesontayer.com;</p>	<p>Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>Harvey L. Leiderman Jeffrey R. Rieger REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105</p> <p><u>E-MAIL:</u> hleiderman@reedsmith.com; jreiger@reedsmith.com</p>	<p>Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)</p>
--	--

2068330.1

Exhibit D

1 Arthur A. Hartinger (SBN: 121521)
 ahartinger@meyersnave.com
 2 Linda M. Ross (SBN: 133874)
 lross@meyersnave.com
 3 Jennifer L. Nock (SBN: 160663)
 jnock@meyersnave.com
 4 MEYERS, NAVE, RIBACK, SILVER & WILSON
 555 12th Street, Suite 1500
 5 Oakland, California 94607
 Telephone: (510) 808-2000
 6 Facsimile: (510) 444-1108
 7 Attorneys for Plaintiff
 City of San Jose
 8

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

11 **SAN JOSE POLICE OFFICERS**
 12 **ASSOCIATION,**

13 Plaintiff,

14 v.

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

19 Defendants.

Case No. 1-12-CV-225926

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

[PROPOSED] SUPPLEMENTAL
STIPULATION AND ORDER RE
IMPLEMENTATION OF MEASURE B

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

20 **AND RELATED CROSS-COMPLAINT**
 21 **AND CONSOLIDATED ACTIONS**

BY FAX

22 WHEREAS, the parties are waiting for a court decision concerning the recent trial
 23 challenging Measure B; and

24 WHEREAS, the parties desire to avoid unnecessary litigation during this period; and

25 WHEREAS, the City expects that the process for implementing Measure B will occur over
 26 a period of several months;

27 IT IS HEREBY STIPULATED by and among the parties in these consolidated actions that
 28 the implementation by the City of San Jose of the following sections of Measure B, San Jose

1 Charter Sections 1500-A, et seq., shall be subject to the following agreement.

2 1. The effective date for implementation of Section 1506-A (additional employee
3 contribution rates), section 1507-A (one time voluntary election program) and section 1514-A
4 (savings) shall occur no sooner than July 1, 2014.

5 2. The effective date for implementation of Section 1512-A (a) (minimum
6 contributions towards the cost of retiree healthcare) shall occur no sooner than July 1, 2014,
7 except that contributions towards retiree healthcare shall be subject to any existing or future union
8 agreements, or City resolutions, authorized prior to July 1, 2014, that specify employee
9 contributions towards retiree healthcare.

10 3. The effective date for implementation of Section 1510-A (emergency measures to
11 contain retiree cost of living adjustments) shall occur no sooner than July 1, 2014. The parties
12 note that there are no current plans by the City to declare a service-level or fiscal emergency.

13 4. The effective date for implementation of Section 1509-A (disability retirements)
14 shall occur no sooner than July 1, 2014.

15 5. The effective date for implementation of Section 1515-A (severability) shall occur
16 no sooner than July 1, 2014.

17 6. This stipulation sets forth an agreement concerning effective dates of various
18 sections of Measure B. It does not preclude the City from preparing for implementation of the
19 above referenced sections of Measure B, either through the enactment of ordinances or otherwise.

20 7. Execution of this stipulation does not waive any bargaining rights, if any, of any
21 labor organization over enabling ordinances, or any contentions by the City in connection with any
22 assertion of bargaining rights by any labor organization over enabling ordinances.

23 DATED: November 15, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

24
25
26
27
28

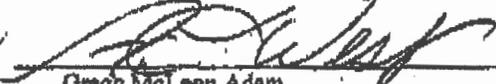
By: _____

Arthur A. Hartinger
Arthur A. Hartinger
Linda Ross
Attorneys for Defendant
City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November 19, 2013

CARROLL, BURDICK & MCDONOUGH

By: 
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Amber L. West
Attorneys for San Jose Police Officers' Association

DATED: November 19, 2013

BERSON, TAYER & BODINE, APC

By: 
Teague P. Paterson
Vishvas M. Soroushian
Attorneys for Plaintiffs in AFSCME

Dated: November __, 2013

WYLIE, McBRIDE, PLATTEN & RENNER

By: _____
John McBride, Esq.
Christopher E. Platten, Esq.
Mark S. Renner, Esq.
Attorneys for Plaintiffs/Petitioners, Sapian and Mukhar, et al.

Dated: November __, 2013

SILVER, HADDEN, SILVER, WEXLER & LEVINE

By: _____
Stephen H. Silver, Esq.
Richard A. Levine, Esq.
Jacob A. Kallinski, Esq.
Attorneys for Plaintiffs, San Jose Retired Employees Association, et al.

Dated: November __, 2013

REED SMITH, LLP

By: _____
Harvey L. Leiderman
Attorneys for Defendant City of San Jose, Board of Administration For Police and Fire Department Retirement Plan of City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November ____, 2013

CARROLL, BURDICK & MCDONOUGH

By: _____

Gregg McLean Adam
Jonathan Yanik
Gonzalo C. Martinez
Amber L. West
Attorneys for San Jose Police Officers'
Association

DATED: November ____, 2013

HEBSON, TAYLER & BODINE, APC

By: _____

Teague P. Paterson
Vahitasp M. Scroushian
Attorneys for Plaintiffs in AFSCME

Dated: November 19, 2013

WYLIB, McBRIDE, PLATTEN & RENNER

By:  _____

John McBride, Esq.
Christopher E. Platten, Esq.
Mark S. Renner, Esq.
Attorneys for Plaintiffs/Petitioners, Saplen and
Mukhar, et al.

Dated: November 19, 2013

SILVER, HADDEN, SILVER, WEXLER &
LEVINE

By:  _____

Stephen H. Silver, Esq.
Richard A. Levine, Esq.
Jacob A. Kalinaki, Esq.
Attorneys for Plaintiffs, San Jose Retired Employees
Association, et al.

Dated: November ____, 2013

REED SMITH, LLP

By: _____

Harvey L. Lelderman
Attorneys for Defendant City of San Jose, Board of
Administration For Police and Fire Department
Retirement Plan of City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November __, 2013

CARROLL, BURDICK & MCDONOUGH

By: _____
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Amber L. West
Attorneys for San Jose Police Officers'
Association

DATED: November __, 2013

BEESON, TAYER & BODINE, APC

By: _____
Teague P. Paterson
Vishasp M. Soroushian
Attorneys for Plaintiffs in AFSCME

Dated: November __, 2013

WYLIE, McBRIDE, PLATTEN & RENNER

By: _____
John McBride, Esq.
Christopher E. Platten, Esq.
Mark S. Renner, Esq.
Attorneys for Plaintiffs/Petitioners, Saplen and
Mukhar, et al.

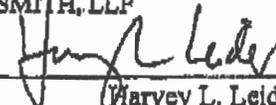
Dated: November __, 2013

SILVER, HADDEN, SILVER, WEXLER &
LEVINE

By: _____
Stephen H. Silver, Esq.
Richard A. Levine, Esq.
Jacob A. Kallnski, Esq.
Attorneys for Plaintiffs, San Jose Retired Employees
Association, et al.

Dated: November 19, 2013

REED SMITH, LLP

By:  _____
Harvey L. Leiderman
Attorneys for Defendant City of San Jose, Board of
Administration For Police and Fire Department
Retirement Plan of City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER

The forgoing Stipulation having been received and good cause appearing,

IT IS SO ORDERED

Dated: 11/22, 2013



JUDGE OF THE SUPERIOR COURT

Patricia Lucas

2199712.1

Exhibit E

(ENDORSED)
FILED
FEB 20 2014

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

**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 Milias-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
27
28

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
28

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 11514-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)
28

1 **Promissory and Equitable Estoppel** (AFSCME's Eighth Cause of Action)

2 **Writ of Mandate** (AFSCME's Eleventh Cause of Action)

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

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

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

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

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

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

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

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

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

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

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

26 The Individual Plaintiffs called actuary Thomas Lowman as an expert witness, who
27 testified about general actuarial principles of government defined-benefit plans.
28

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

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.

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

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
18 3. The Charter’s Reservation of Rights

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

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

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
adopt or establish a new or different plan or plans for all or any officers or employees....

28 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
28

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

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

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

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

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:

27 ...[I]f and when, from time to time, the members’ normal rate of contribution is hereafter
28 amended or changed, *the new rate shall not include any amount designed to thereafter*

1 *recover from members or return to members the difference between the amount of*
2 *normal contributions theretofore actually require to be paid by member and any greater*
3 *or lesser amount which, because of amendments hereafter made to this system or as a*
4 *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.]

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

7 The retirement board shall determine and fix, and from time to time it may change, the
8 amount of monthly or biweekly contributions for current service which must be required
9 of the City of San Jose and of members of this plan to make and keep this plan and the
10 retirement system at all times actuarially sound. For the purpose of this section,...
11 "contributions for current service" for member employed in the police department shall
12 mean the sum of the normal costs for each actively employed member in the police
13 department as determined under the entry age normal actuarial costs method, divided by
14 the aggregate current compensation of such members. *Rates for current service shall not*
15 *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.]

16 These provisions are consistent with the prior history requiring that the City pay UAALs.
17 The 1946 Charter amendments expressly allocated UAALs to the City. (Exhibit 1, at
18 POA005584 ("Any actuarial deficiency in the fund shall be made up over a period of years by
19 gifts, waivers, donations, earnings and contributions *by the City.*") (Emphasis added).) The 1961
20 Charter amendments retained this requirement, but added a provision allowing for increased
21 benefits in exchange for which employees paid UAAL. (Exhibit 2, at POA005619-20.) The
22 1965 Charter also required an actuarially sound system. (Exhibit 5215, at SJRJN000437.) In
23 1971, a Council resolution provided that member contributions "shall not include any amount
24 required to make up any deficit resulting from the fact that previous rates of contribution thereto
25 made by the City and by such members were inadequate" (Exhibit 3, at POA005622.) In
26 1979, the Council enacted Resolution 19690, the precursor to the current SJMC language.
27 (Exhibit 4, at POA005627.)

28 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
14 1. Expert Board to Determine Disability

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

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

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 Plaintiff’s 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
10 Plaintiffs argued that the “advantage” of reducing the waiting period for eligibility is
11 “meager” and may not apply in every case. (POA Post-Trial Brief, at 17:10-17.) However, the
12 analysis does not require that a new advantage be equivalent: “a precise dollar balance between
13 benefit and detriment” is not necessary. *Frank, supra*, 56 Cal.App.3d at 244. “It is enough that a
14 modification does not frustrate the reasonable expectations of the parties to the contract of
15 employment.” *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 782. This is, of course, consistent
16 with the notion that, prior to retirement, “the employee does not have a right to any fixed or
17 definite benefits but only to a substantial or reasonable pension.” *Wallace v. City of Fresno*
18 (1954) 42 Cal.2d 180, 183.

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

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

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

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

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

17 While Plaintiffs cite the requirement of SJMC 3.28.070(B)(4) that assets of the SRBR
18 must be allocated to members when the fund is terminated, they do not, and cannot, contend that
19 upon discontinuance of the SRBR, those funds will be used for any purpose other than the
20 retirement system. To the contrary, Section 1511-A expressly provides that “the assets [of the
21 SRBR shall be] returned to the appropriate retirement trust fund.” Plaintiffs claim instead that it
22 is unconstitutional for the City to use the SRBR assets to “offset what it would have otherwise
23 been required to pay into the retirement system for that year.” (AFSCME Post-Trial Brief, at
24 20:24-25.) But using the funds for the retirement system is not the same as using the funds “to
25 [the City’s] own advantage” (*id.*, at 20:25)—given that there is no right to distribution of the
26 funds as SRBR benefits. *Claypool, supra*, 4 Cal.App.4th at 660-61 (funds which offset employer
27
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 The language in the Police and Fire Plan is materially different from the Federated Plan.
16 The POA points out that the only element of discretion reserved to the City in the Police and Fire
17 Plan is to approve the board's methodology, which the City did in 2002, and so now nothing is
18 left but for the board to make distributions. The City's contention that "no retiree [under the
19 Police and Fire SRBR] was guaranteed ... any payment at all" (City's Post-Trial Brief, at 49:16)
20 is contrary to the language of the Municipal Code.

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

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

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

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
10 b. *Police and Fire Plan*

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

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

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

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

27 Neither of these bases provides the “clear” and “unmistakable” evidence required under
28 *REAOC*. The POA cites language from the Bogue award which does not specify comparability
to active police officers as opposed to active city employees (POA Post-Trial Brief, at 26:18-23;
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
15 But in any event, AFSCME did not prove at trial that the City misrepresented any fact, or
16 that anyone was actually induced to act. In particular, ASFCME did not establish that any of its
17 witnesses accepted employment and continued working for the City based on any
18 misrepresentation about benefits. Jeffrey Rhoads could not cite to any other job with better pay,
19 or with better benefits, that he had been offered but had rejected in preference for his City job.
20 (RT 114-118.) Margaret Martinez testified that her own private understanding of Exhibit 51, the
21 2008 Figone memorandum, was that the City was not planning to change healthcare benefits, but
22 she did not claim to have continued employment, or given up more lucrative employment, based
23 on the memorandum. (RT 322-333.) Even if they had testified as to detrimental reliance, their
24 testimony would not establish a basis for any relief for AFSCME.

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.

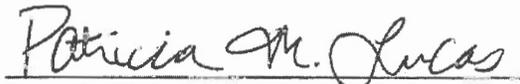
24
25 **M. City’s Cross-Complaint for Declaratory Relief**

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

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


Hon. Patricia M. Lucas
Judge of the Superior Court

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

BY Ann Vizconde, Deputy
Ann Vizconde

Arthur Hartinger, Esq.
Linda Ross, Esq.
Jennifer Nock, Esq.
Michael Hughes, Esq.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607

Teague Paterson, Esq.
Vishtasp Soroushian, Esq.
Beeson, Taylor & Bodine APC
Ross House, 2nd Floor
483 Ninth Street
Oakland, CA 94607

Harvey Leiderman, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

Stephen Silver, Esq.
Richard Levine, Esq.
Jacob Kalinski, Esq.
Silver, Hadden, Silver, Wexler & Levine
1428 Second Street, Suite 200
Santa Monica, CA 90401

John McBride, Esq.
Christopher Platten, Esq.
Mark Renner, Esq.
Wylie, McBride, Platten & Renner
2125 Canoas Garden Avenue, Suite 120
San Jose, CA 95125

Exhibit F

1 The matter was argued at substantial length on September 25, 2014, and submitted.

2 **I. Attorney Fees Pursuant to Section 1021.5**

3 The request for judicial notice filed with POA's moving papers is granted.

4 The request for judicial notice filed with Defendants' opposition is granted as to Exhibits
5 1-3 and 5 and is denied as to Exhibit 4. (See *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7
6 Cal.4th 1057, 1063 citing *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301, overruled on other
7 grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276 [“[J]udicial notice, since it is a
8 substitute for proof ..., is always confined to those matters which are relevant to the issue at
9 hand.”].)

10 The request for judicial notice by POA submitted in reply is granted as to Exhibits 2 and
11 3 and is otherwise denied as not appropriate for judicial notice and not relevant.

12 After submitting the matter for decision and without seeking leave of court, Defendants
13 then attempted to submit additional evidence and argument by letter dated September 26, 2014,
14 and a Request for Judicial Notice filed the same day. The request is denied as procedurally
15 improper and not relevant.

16 *A. Plaintiffs Were Successful Parties within the Meaning of Section 1021.5.*

17 The court's ruling declining to award costs does not preclude an award of section 1021.5
18 fees, as the statutory factors which the court is required to analyze on a fee application are not
19 identical to the criteria for an award of costs.

20 Although Defendants argue that Plaintiffs prevailed on only three of thirteen claims
21 (Opposition, at 3:26-27), the court's task does not consist of tallying up the number of individual
22 issues on which each side prevailed. “The party seeking attorney fees need not prevail on all its
23 claimed alleged in order to qualify for an award.” (*RiverWatch v. San Diego Sept. of Environ.*
24 *Health* (2009) 175 Cal.App.4th 768, 782-83.) Defendants' suggestion that the law requires
25 success on all legal claims (Opposition, at 7:15-16) is contrary to the law. Indeed, Defendants
26 elsewhere concede that the determination of whether a party is successful under section 1021.5
27 requires a critical analysis of the litigation's circumstances and a pragmatic assessment of gains
28 achieved by the litigation. (*Id.*, at 4: 13-16.)

1 A party may be considered a prevailing party for section 1021.5 purposes if it succeeds
2 on “any significant issue” achieving some of the benefit sought by filing the action. (*Maria P. v.*
3 *Riles* (1987) 43 Cal.3d. 1281, 1291-92 (affirming trial court’s award of fees despite order
4 dismissing case).) Defendants rely on *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry and*
5 *Fire Prot.* (2010) 187 Cal.App.4th 376, but that case does not support their position: in that case,
6 the plaintiff obtained no relief at all but unsuccessfully sought fees on the theory that the
7 appellate ruling “clarified” the law. Plaintiffs here did obtain relief. Similarly, Defendants’
8 reliance on *Marine Forests Society v. Cal. Coastal Comm’n* (2008) 160 Cal.App.4th 867, is not
9 persuasive because, unlike here, the plaintiff in that case did not achieve the relief it sought
10 (preservation of an artificial reef), and it was not entitled to fees under a catalyst theory on the
11 basis that the Legislature later amended the statute in question.

12 Defendants put forward several points in support of their argument that the issues on
13 which Plaintiffs prevailed were insignificant ones. First, Defendants point out that most of the
14 evidence at trial related to retiree healthcare, but it does not follow from the fact that the
15 healthcare issue involved more factual disputes than others that therefore the healthcare issue
16 was a more significant litigation objective. Defendants attempt to minimize the importance of
17 the invalidation of section 1506 calling for increased pension contributions, by arguing that
18 Plaintiffs as a practical matter obtained no relief, given that the City can lower wages. This
19 assertion ignores the practical reality, which motivated much of the litigation, recognizing that
20 lowering wages is a very different process involving different constraints than increasing pension
21 contributions. Defendants suggest that the court’s ruling on section 1507, the Voluntary Election
22 Plan, was not “separate” because it was “tied to” section 1506—but that logic is based on the
23 issue-tallying approach that the case authorities disallow. Defendants also argue that Plaintiffs’
24 success regarding section 1507 was not “tangible” because the provision was never approved by
25 the IRS—but that fact did not prevent Defendants from vigorously defending the section.
26 Similarly, Defendants now claim that Plaintiffs’ victory on the COLA issue, section 1510, is
27 “limited and technical” and “theoretical”, but the issue was a significant one which they had
28 argued strenuously. Finally, Defendants argue that the reservation of rights was only one of

1 many issues—but it was a very significant threshold issue which, had Defendants prevailed,
2 would have cut off other issues on which Plaintiffs did prevail.

3 Accordingly, Plaintiffs have met their burden to show that they achieved success within
4 the meaning of section 1021.5.

5 *B. An Important Right Effecting the Public Interest was Enforced.*

6 At the hearing, Defendants argued that pensions rights do not constitute an important
7 right within the meaning of section 1021.5, and as support for this assertion pointed out that the
8 only case cited by Plaintiffs involving pension rights was *Cal. Teachers Ass'n v. Cory* (1984)
9 155 Cal.App.3d 494, and in that original mandamus proceeding, an award of section 1021.5 fees
10 was denied. However, the denial was not based on the absence of an important right, but
11 because in the “unique circumstances” of that case, the “financial burden” factor had not been
12 met. (*Id.*, at 515.)

13 To the contrary, *Cory* supports Plaintiffs' position that pension rights are important
14 rights. The “unique circumstances” of *Cory* involved an effort by teachers, in challenging times
15 following Proposition 13, to compel the state controller to comply with the Education Code by
16 transferring money to the teachers' retirement funds instead of to the state general fund as
17 directed by budget legislation. The *Cory* court held that the teachers had an enforceable contract
18 right to have their retirement system funded in exchange for the services they provided. (*Cory*,
19 *supra*, 155 Cal.App.3d at 506.) Plaintiffs have cited a number of other cases discussing the
20 fundamental importance of pension rights. Defendants' suggestion that an important right must
21 have no pecuniary aspect (Opposition, at 9:17-19) is not supported by the law. Defendants also
22 argue, incorrectly, that there must be a “sweeping victory” or a decision “announc[ing] new law”
23 to support a fee award (Opposition, 10:9, 13), but the case law does not support such an
24 interpretation. Plaintiffs did obtain enforcement of the fundamental right to pension benefits.

25 *C. A Significant Benefit was Conferred on a Large Class of Persons.*

26 Defendants do not dispute that a large class of persons is affected by the decision.
27 Defendants argue that the ruling did not establish a “tangible benefit, much less a ‘significant
28 benefit’” and that the ruling was “theoretical and will make no concrete difference in practice.”

1 (Opposition, at 12:11-13.) However, this argument reflects a misunderstanding of section
2 1021.5. “[T]he ‘significant benefit’ that will justify an attorney fee award need not represent a
3 ‘tangible’ asset or a ‘concrete’ gain but, in some cases, may be recognized simply from the
4 effectuation of a fundamental constitutional or statutory policy.” (*Woodland Hills Residents*
5 *Association, Inc. v. City Council* (1979) 23 Cal.3d 917, 939.) Plaintiffs have established this
6 element.

7 *D. The Necessity and Financial Burden of Enforcement Make an Award Appropriate.*

8 The necessity and financial burden requirement raises two issues: whether private
9 enforcement is necessary and “whether the financial burden of private enforcement warrants
10 subsidizing the successful party’s attorneys.” (*Collins v. City of Los Angeles* (2012) 205
11 Cal.App.4th 140, 154, quoting *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214-15.)
12 Defendants have not contested the necessity of private enforcement, but argue that this was “just
13 financial litigation” and therefore no fee award is warranted.

14 Defendants incorrectly argue that any “financial motivation precludes” an award of
15 attorney fees pursuant to section 1021.5. (Opposition, at 13:14.) “The question is whether the
16 cost of the claimant’s victory transcends his personal interest -- that is, whether the burden on the
17 claimant was out of proportion to his individual stake.” (*Citizens Against Rent Control v. City of*
18 *Berkeley* (1986) 181 Cal.App.3d 213, 230-31.) “An attorney fee award under section 1021.5 is
19 proper unless the plaintiff’s reasonably expected financial benefits exceed by a substantial
20 margin the plaintiff’s actual litigation costs.” (*Collins, supra*, 205 Cal.App.4th at 154.)

21 Each of the Plaintiffs seeking fees is an association, representing members. Although
22 REA urges the court to consider only the financial stake of Plaintiffs as associations as opposed
23 to the stake of their members (Memorandum in Support, at 8:1-2), the law requires otherwise.
24 When a successful plaintiff is an association representing members who may have a financial
25 stake, the court should consider the members’ stake in the litigation when evaluating a section
26 1021.5 request. (*California Redevelopment Ass’n v. Matosantos* (2013) 212 Cal.App.4th 1457,
27 1476-82.)

28

1 Plaintiffs' members faced the potential of a substantial increase in their pension
2 contributions and healthcare costs, and a reduction in benefits and pay. In evaluating the
3 members' stake in the outcome, the court is mindful that each Plaintiff challenged Defendants'
4 position concerning the reservation of rights, a threshold issue involving whether Plaintiffs could
5 be heard on the substantive challenges to the various sections of Measure B. Each Plaintiff had
6 something to gain in future disputes by successfully opposing Defendants on the reservation of
7 rights issue: a fact tending to show Plaintiffs have met the financial burden requirement. (*Los*
8 *Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 15.) In that
9 regard, this case is similar to *Baggett v. Gates* (1982) 32 Cal.3d 128, 142-43 (reversing denial of
10 section 1021.5 fees), where the Supreme Court noted that, because the action sought to enforce
11 procedural rights and a favorable ruling might not result in any pecuniary benefit, the financial
12 burden requirement was satisfied. Similarly, in *Otto v. Los Angeles Unified School Dist.* (2003)
13 106 Cal. App. 4th 328, 332, the action sought enforcement of a procedural right and even a
14 favorable result may not have avoided a potential negative effect for the petitioner, and the court
15 reversed the denial of fees. (See also *People ex rel. Seal Beach Police Officers Ass'n v. City of*
16 *Seal Beach* (1984) 36 Cal.3d 591, 602 (reversing decision adverse to police union challenging
17 city charter amendment and awarding section 1021.5 fees).)

18 Defendants argue that with \$18 million at stake, Plaintiffs have failed to establish that the
19 stakes were out of proportion to their litigation burden. However, while there may have been
20 large potential cost savings at stake for Defendants, the stakes for Plaintiffs' members should be
21 analyzed differently. By challenging Measure B, Plaintiffs preserved the status quo, and did not
22 seek or obtain pecuniary benefit beyond that. (*Citizens Against Rent Control*, 181 Cal.App.3d at
23 230-31.) None of REA's members would have experienced increased contributions, but they
24 challenged the reservation of rights and did obtain protection for COLA rights. Likewise some
25 of POA's and AFSCME's current members, whose employment may be of indeterminate length,
26 may not receive benefit from the decision. To the extent that a "potential financial incentive for
27 [the representative association] and its members is indirect and largely speculative", that is a
28 factor favoring an award of attorney fees. (*Plumbers & Steamfitters, Local 290 v. Duncan*

1 (2007) 157 Cal.App.4th 1083, 1099; see also *Monterey/Santa Cruz County Building and*
2 *Construction Trades v. Cypress Marina Heights, LP* (2011) 191 Cal.App.4th 1500, 1523.)

3 Finally, in exercising its discretion, the court has also looked at the statutory factors taken
4 together. "All these factors under section 1021.5 are interrelated []. Where the benefits achieved
5 for others are very high it will be more important to encourage litigation which achieves those
6 results." (*Los Angeles Police Protective League*, 188 CA3d at 14.) Plaintiffs obtained a ruling
7 which benefits individuals who are not members but whose rights would be impaired by a
8 successful assertion of a reservation of rights.

9 Accordingly, the court finds that Plaintiffs have established all the elements necessary to
10 warrant a fee award under section 1021.5. The parties are given leave to file additional papers
11 addressing whether and to what extent the court should reduce fees to account for the issues on
12 which Defendants prevailed, as well as any lodestar or other issues pertinent to the amount of
13 fees to be awarded. On or before October 16, 2014, Plaintiffs may file and serve opening
14 argument and evidence. On or before October 27, 2014, Defendants may file and serve argument
15 and evidence in opposition. On or before November 3, 2014, Plaintiffs may file and serve reply.
16 The hearing is set for November 13, 2014.

17 **II. Cost-of-proof Sanctions Pursuant to Section 2033.420**

18 The City had reasonable grounds to believe that it would prevail and there are other good
19 reasons for the City's decision not to admit the statements as they were vague and overbroad
20 statements of the law. The motion is denied.

21 Dated: October 1, 2014

22 

23 Honorable Patricia M. Lucas
24 Judge of the Superior Court

Exhibit G

1
2
3 Order Issued
4 on Submitted Matter

(ENDORSED)
FILED
JAN 14 2015

5
6 DAVID H. YAMASAKI
Chief Executive Officer/Clerk,
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA

10
11
12
13
14 SAN JOSE POLICE OFFICERS'
15 ASSOCIATION,

16 Plaintiff,

17 vs.

18
19 CITY OF SAN JOSE AND BOARD OF
20 ADMINISTRATORS FOR POLICE AND FIRE
21 DEPARTMENT RETIREMENT PLAN OF
CITY OF SAN JOSE,

22 Defendants.

23 AND CONSOLIDATED ACTIONS.
24

Case No. 112CV225926
(and Consolidated Actions 112CV225928,
112CV226570, 112CV226574, and
112CV227864)

ORDER DETERMINING AMOUNT OF
PLAINTIFFS' ATTORNEY FEES

25
26
27 In these consolidated cases, the parties agreed, by stipulation filed September 8, 2014, to
28 bifurcate the issue of whether Plaintiffs are entitled to attorney fees pursuant to Code of Civil
Procedure section 1021.5 from the issue of the amount of fees. On October 1, 2014, the court

1 entered an order determining that San Jose Police Officers' Association (POA), San Jose Retired
2 Employees Association (REA), and AFSCME Local 101 (AFSCME) (collectively, Plaintiffs) are
3 entitled to recover attorney fees. Following further briefing, the issue of the amount of fees to be
4 awarded was heard and submitted on January 6, 2015.

5 The court is "afford[ed] considerable deference" in making the determination of the
6 amount of fees and costs to be awarded. (*Collins v. City of Los Angeles* (2012) 205 Cal. App.
7 4th 140, 153 (*Collins*); *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal. App. 4th 691, 698.)
8 The court has considered only admissible evidence, and has not considered evidence presented
9 for the first time in reply which should have been presented in the moving papers.

10 I. PRINCIPLES GOVERNING SECTION 1021.5 FEE AWARDS

11 A. *The "Taxpayer Burden"*

12 Although the City argues in passing that the court should consider the fact that fee awards
13 in this case will be paid to "the plaintiff-organizations" and payment will "fall upon the
14 taxpayers of San Jose" (Opposition Memorandum, at 4:8-9), the City provides no authority for
15 that proposition. While the Supreme Court, in affirming a trial court's fee award, noted that one
16 of the "various relevant factors" the trial court considered was "the fact that an award against the
17 state would ultimately fall upon the taxpayers", it did not explain whether or how this factor
18 affected its decision. (*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 49.) Subsequent
19 cases have held that the fact that the payor is a governmental entity is not a valid reason to
20 reduce a fee award, either by applying a negative multiplier (*Rogel v. Lynwood Redevelopment*
21 *Agency* (2011) 194 Cal. App. 4th 1319, 1331-32) or by denying a positive multiplier where that
22 would otherwise be appropriate. (*Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359,
23 400 ("Allowing properly documented attorneys' fees to be cut simply because a losing party is a
24 governmental entity would defeat the purpose of the private attorney general doctrine codified in
25 Code of Civil Procedure section 1021.5 and would also incentivize governmental entities to
26 negligently or deliberately run up a claimant's attorneys' fees, without any concern for
27 consequences.") Accordingly, the court has not reduced the fee award based solely on the fact
28 that the payor is a governmental entity.

1 B. *Partial Success on the Merits*

2 All parties acknowledge that the law requires a court faced with a section 1021.5 request
3 to consider the extent to which the success of the moving party has been less than complete. The
4 extent of success must be taken into account in determining reasonable fees. (*Sokolow v. County*
5 *of San Mateo* (1989) 213 Cal.App.3d 231, 248, 250 (*Sokolow*)). In a case of partial success, the
6 lodestar may be excessive, even if the claims were “interrelated, nonfrivolous, and raised in good
7 faith.... [T]he most critical factor is the degree of success obtained.” (*Hensley v. Eckerhart*
8 (1983) 461 U.S. 424, 436 (*Hensley*)). “A reduced fee award is appropriate if the relief, however
9 significant, is limited in comparison to the scope of the litigation as a whole.” (*Id.*, at 440.)

10 The court must inquire whether charges included in the lodestar are “unrelated” to the
11 moving party’s successful claims; “[w]ork on an unsuccessful and unrelated claim generally will
12 not be compensable.” (*Environmental Protection Information Center v. Department of Forestry*
13 *& Fire Protection* (2010) 190 Cal.App.4th 217, 238 (*EPIC*)). A claim is unrelated if based on
14 different facts and legal theories. (*Id.*, at 239.) If the court determines that the unsuccessful
15 claims are not related to the successful claims, then the second step of the *Hensley* test is not
16 required. (*Id.*) AFSCME misstates the law in suggesting that this second step is an alternative to
17 the preliminary inquiry. (AFSCME Reply Memorandum, at 4:5-6.)

18 While the court continues to believe that the City’s “issue-tallying” approach is not the
19 legally correct analysis, neither are Plaintiffs’ approaches sound. POA and REA urge that all
20 claims asserted are related because they all challenge Measure B (POA Reply Memorandum, at
21 4:11-14; REA Reply Memorandum, at 2:3-4), while AFSCME and REA argue that all claims are
22 related because they all affect vested rights. (AFSCME Reply Memorandum, at 5:5-6; REA
23 Reply Memorandum, at 2:4-6.) REA also argues that all claims are related because the
24 reservation of rights was a threshold issue. (REA Reply Memorandum, at 2:7-9.) Each of these
25 points, and all three of them together, are too simple to account for the complexity of the claims
26 presented to the court, and are not supported by the law.

27 “[A] common administrative record and a common procedural history are not sufficient
28 on their own to establish that claims are related.” (*EPIC, supra*, 190 Cal.App.4th at 244 (citation

1 omitted.) In *National Parks & Conservation Association v. County of Riverside* (2000) 81 Cal.
2 App. 4th 234, although plaintiffs were successful in challenging one Environmental Impact
3 Report and obtained an award of fees, they were not entitled to fees as to further litigation about
4 a second EIR on the same project. Although "technically within the same action", the challenge
5 to the second EIR was "a substantively discrete action." (Id., at 239-240.)

6 Distinct challenges to the same set of regulations are not "inseparable for the purposes of
7 attorney's fees." (*Sierra Club, supra*, 769 F.2d at 803.) Like the challenges in *Sierra Club*, each
8 of Plaintiffs' various challenges to Measure B "involves a particular substantive concern of the
9 petitioners with a particular aspect of" the law, and "the different policy rationales and statutory
10 provisions set forth by the [City] as support for its decisions on different issues make the
11 different claims legally distinct." (Id.) As the analysis set forth in the Statement of Decision
12 reflects, Plaintiffs' successful claims are not related to the unsuccessful claims for purposes of a
13 section 1021.5 fee award.

14 Next, the court must determine how to adjust the fee award to take into account the
15 unrelatedness of the unsuccessful claims. In making such an adjustment, the court need not
16 identify specific hours to be eliminated but may instead reduce the award to account for limited
17 success. (*Hensley, supra*, 461 U.S. at 436-37.) Such an adjustment would be accomplished
18 through a negative multiplier. Although each Plaintiff urges the relative importance of the issues
19 on which it prevailed and argues that the court has the discretion not to reduce a fee award for
20 partial success, each Plaintiff has presented calculations that include a negative multiplier: for
21 AFSCME and REA, a negative multiplier of .85, and for POA, .75. The City argues that a
22 negative multiplier of .15 be applied to AFSCME and POA, and for REA, .20. The court is
23 aided in this analysis by its extensive knowledge of the pretrial, trial and posttrial proceedings in
24 this case, the claims and participation of each of the Plaintiffs, and the extent of the evidence and
25 the complexity of the arguments as to each issue.

26 The meaning of the vested rights doctrine and the significance of the City's reservation of
27 rights were important and complex threshold issues on which Plaintiffs prevailed. Plaintiffs also
28 prevailed on two other issues: 1) the issue of pension contribution rates and the alternative

1 "Voluntary Election Program" (1506-A and 1507-A) which were subject to essentially identical
2 analyses, and 2) the issue of emergency reduction in cost of living adjustments (1510-A). Of the
3 issues on which Plaintiffs did not succeed, the more complex issues were the Supplemental
4 Retiree Benefit Reserve (1511-A), disability retirement (1509-A), and retiree health care benefits
5 (1512-A). The remaining issues on which Plaintiffs did not prevail were less involved, legally
6 and factually: reservation of voter authority (1504-A), actuarial soundness (1513-A), alternative
7 wage reduction (1514-A), severability (1515-A), promissory and equitable estoppel, and Bane
8 Act violations. AFSCME asserted all these claims. POA asserted all but the estoppel claims. In
9 addition to the threshold reservation of rights issue, REA succeeded only on the COLA claim,
10 lost on the issues concerning SRBR, healthcare, actuarial soundness, voter authority, and
11 severability, and did not argue the contribution rates/VEP, disability retirement, or wage
12 reduction issues. Taking into account all the pertinent factors, the court determines that the
13 appropriate negative multiplier for AFSCME and POA is .50, and for REA, .65.

14 Plaintiffs presented argument that the fees-on-fees portion of the award (i.e., fees spent
15 on fee-related litigation) should not be subject to a negative multiplier, while the City argued that
16 it should be so subject. Although all parties agreed that no published case addresses this point,
17 AFSCME directed the court to *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 582-
18 583 (*Graham*), focusing in particular on the portion of the Supreme Court's opinion addressing
19 the application of multipliers to fee-related litigation. In remanding the case to the trial court for
20 further consideration of entitlement to fees, the Supreme Court rejected the defendant's argument
21 that a positive multiplier could never be applied to fees-on-fees, since "[s]uch a rule does not
22 appear in harmony with the principle that the awarding of attorney fees and the calculation of
23 attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial
24 court." (*Id.*, at 581.) On remand, the trial court was directed to consider whether a positive
25 multiplier should be applied to fees-on-fees.

26 Under *Graham*, the trial court has the discretion to treat fees-on-fees the same as or
27 differently from lodestar fees for purposes of a multiplier, keeping in mind the policies
28 underlying section 1021.5. In exercising its discretion in applying a negative multiplier when the

1 party entitled to fees accomplished only partial success, a trial court may consider the extent to
2 which it is "in the interest of justice", given all the circumstances of the case, for that party to
3 bear its own attorney fees. (*Collins, supra*, 205 Cal. App. 4th at 157-58.) In this case, given the
4 partial extent of Plaintiffs' success on the merits, it is consistent with the policies underlying
5 section 1021.5 to treat fee-related litigation in the same way as the lodestar fees, and to apply the
6 negative multiplier to those fees to limit Plaintiffs' recovery.

7 *C. Plaintiffs' Financial Stake in the Outcome*

8 The City argues that, even apart from Plaintiffs' partial success on the merits, the court
9 has authority to reduce the claimed fees by "apportioning" the payment of fees between them
10 and the City, based on Plaintiffs' financial stake in the litigation. In this regard, the City relies
11 on *Collins* in which a class of plaintiffs who had been arrested for driving under the influence of
12 alcohol or drugs received bills from the City of Los Angeles for emergency response costs. The
13 judgment entered after trial included a refund payment to class members totaling \$464,218, as
14 well as debt forgiveness of \$896,185 for class members who had not paid the City's bill. The
15 Court of Appeal considered both sums, holding that "in determining the amount of attorney fees
16 that a plaintiff reasonably could be expected to bear for purposes of apportioning a fee award
17 under section 1021.5, a court should consider not only the actual or expected monetary recovery
18 but the full monetary value of the judgment." (*Collins, supra*, 205 Cal. App. 4th at 158.) On
19 that basis, the appellate court held that it was reasonable to require plaintiffs to be responsible for
20 fees to the extent of 25% of the value of the judgment, and affirmed the trial court's allocation.

21 Unlike *Collins* where the plaintiffs won a precisely quantified and current sum, partly in
22 refunds and partly in debt forgiveness, here Plaintiffs' judgment deals with unquantified future
23 sums. Therefore, *Collins* does not provide a basis to reduce Plaintiffs' fee award beyond the
24 negative multiplier.

25 II. AFSCME

26 AFSCME seeks \$513,441.25, which reflects a \$275 blended hourly rate. The request is
27 supported by a Memorandum and a Reply Memorandum, Declarations of Teague Patterson and
28 Robert Bezemek, Reply Declaration of Vishtasp Soroughsian, and "Supplemental" Declaration

1 of Teague Patterson. AFSCME also makes a Request for Judicial Notice and a "Supplemental"
2 Request for Judicial Notice, which are granted.

3 The City argues that some of the tasks performed were unnecessary and/or an
4 unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the
5 tasks performed and the amount of time spent was reasonable, with the exception of the fees
6 incurred in the federal case in the amount of \$27,280. California law gives the trial court
7 discretion to award fees incurred in work on another case when that work was "useful to [the]
8 resolution" of the action in which the fees are sought. (*Children's Hospital & Medical Center v.*
9 *Bontá* (2002) 97 Cal. App. 4th 740, 779-80.) In this case, the work in the federal case did not
10 "materially contribute" to the resolution of any issues in the case, nor did it diminish the work of
11 the court or counsel in this case. (*Id.*, at 781.)

12 After subtracting the fees related to the federal case, the remaining fees are adjusted from
13 \$486,131.25 to \$571,919.11 to back out AFSCME's negative multiplier of .85. Then, applying
14 the negative multiplier of .50, the total for AFSCME fees is \$285,959.55

15 III. POA

16 POA seeks \$967,335, which reflects hourly rates from \$175 to \$450. The request is
17 supported by a "Supplemental" Memorandum and Reply Memorandum, a Declaration of Franco
18 Vado, "Supplemental" and "Second Supplemental" Declarations of Greg Adam, and a Reply
19 Declaration of Gonzalo Martinez. POA clarifies in the "Supplemental" Memorandum at p.2, n.
20 1, that all points and authorities on which it relies in making this request are set forth therein.

21 The hourly rates identified in POA's motion are reasonable, with one caveat. POA
22 requests an award of fees for work in which partners billed nearly as many hours as associates:
23 1,548 partner hours at \$450 compared to 1,712 associate hours at \$325 and 209.4 paralegal hours
24 at \$175. (Reply Memorandum, at 10:21-24.) This generally would not be considered an
25 optimally efficient approach. Partner hourly rates are justified by the efficiency achieved in
26 delegating work to the competent person with the lowest billing rate. Even in important
27 litigation, attention to this principle is necessary to warrant higher rates for more experienced
28 lawyers. There are significant inefficiencies when senior lawyers undertake to accomplish tasks

1 in which their level of experience is not utilized: that happened in this case. Accordingly, the
2 partner billing rate is adjusted to \$375.

3 The City argues that some of the tasks performed were unnecessary and/or an
4 unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the
5 tasks performed and the amount of time spent was reasonable, with certain exceptions. With
6 respect to the POA's opposition to the City's successful motion to dismiss the seventh cause of
7 action for violation of the MMBA, the City argues for deletion of 109.1 partner hours and 43.1
8 associate hours, to which POA provides no response. Accordingly, those hours will be deleted.
9 The City also argues that POA should not recover for time spent (76 partner hours and 2.6
10 associate hours) on two motions that were never made: a motion for judgment on the pleadings
11 and a motion to strike the City's summary adjudication motion. POA responds that the time
12 spent was "*fully put to use* in developing legal strategy and argument" to oppose the City's
13 motion for summary adjudication. (Reply Memorandum, at 8:15 (emphasis in original).)
14 However, POA's position that no reduction whatever is warranted is not plausible and is not
15 supported either by the time entries or by the Martinez Declaration on which POA relies. While
16 Mr. Martinez explains that he was able to "build on" the legal research done (Martinez
17 Declaration, at 4:2), the time entries show that many hours were spent on drafting and "extensive
18 revisions". Accordingly, 47.3 partner hours will be deleted. Finally, the proposed judgment was
19 not efficiently handled, and 32 associate hours are deleted.

20 If the negative multiplier included in POA's calculations is backed out, the amount of
21 fees would be \$1,289,780. The reductions in hours detailed above bring the partner hours down
22 from 1,548.3 to 1,391.9, and associate hours from 1,712 to 1,636.9. Applying the reduced billing
23 rate of \$375 and adding the paralegal hours, the revised total equals \$1,081,438.75. Applying to
24 this number a negative multiplier of .50 brings the total POA fees to \$540,719.37.

25 IV. REA

26 REA seeks \$532,340, which reflects hourly rates from \$250 to \$600. The request is
27 supported by a "Supplemental" Memorandum and a Reply Memorandum, a "Supplemental"
28 Declaration of Stephen Silver and a Declaration of Jacob Kalinski. REA also intends that the

1 court consider its brief and the Declaration of Mr. Silver filed July 30, 2014. That Declaration
2 summarizes Mr. Silver's professional background, states the actual rates charged to REA, and
3 also states that these rates are lower than those charged "in the community" (not specified).

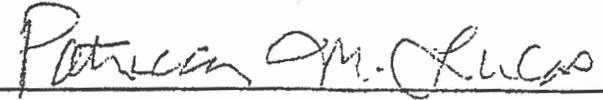
4 The City argues that the hourly rates claimed by REA are not supported by proof and are
5 unreasonable. The only information provided about the professional background and experience
6 of REA attorneys other than Mr. Silver are parenthetical phrases in Mr. Silver's Declaration
7 which do not supply the measure of proof required under *Ajaxo, Inc. v. E*Trade Group* (2005)
8 135 CA4th 21, 65. In the absence of such proof, the most persuasive evidence provided is the
9 actual rates charged, so the court will adopt such rates for the other attorneys.

10 It does not appear that REA has presented evidence addressing the relevant Bay Area
11 community rather than Los Angeles where counsel have their offices: a reasonable hourly rate
12 for purposes of a fee award takes into account "the community" relevant to the inquiry. (*PLCM*
13 *Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.) At the hearing, REA argued that Mr.
14 Silver's professional accomplishments were at least equal to those of Mr. Adam representing
15 POA, and that the court should therefore apply to Mr. Silver's time the "Bay Area rate" of \$450
16 requested by POA. As to Mr. Silver's time, there is sufficient evidence to support such a rate.

17 With REA as well, the City argues that some of the tasks performed were unnecessary
18 and/or an unnecessarily large amount of time was spent on certain tasks. Generally, the court
19 finds that the tasks performed and the amount of time spent was reasonable, with two exceptions.
20 First, given REA's limited role at trial, it was not reasonably necessary to have two lawyers
21 present for the entire trial. REA's response, set forth in Mr. Kalinski's Reply Declaration at
22 11:8-19, is not convincing: neither his review of documents before trial nor his responsibilities
23 for ensuring that REA's exhibits were offered into evidence justifies attendance in the courtroom
24 all day every trial day. Accordingly, 46.3 hours of Mr. Kalinski's time are deleted. Second, the
25 travel time is not reasonable, and 50.9 hours of Mr. Silver's time and 65.2 hours of Mr.
26 Kalinski's time are deleted.

1 Deleting the hours listed above, adding in the hours on this motion, and using the hourly
2 rates supported by the evidence, the revised lodestar is \$327,897.50. Applying to this number a
3 negative multiplier of .65 brings the total REA fees to \$213,133.37.

4
5 Dated: January 13, 2015

6 

7 Honorable Patricia M. Lucas
8 Judge of the Superior Court
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28