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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive, Defendants.	No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR:** **(1) VIOLATION OF CALIFORNIA CONSTITUTIONAL CONTRACTS CLAUSE;** **(2) VIOLATION OF CALIFORNIA CONSTITUTIONAL TAKINGS CLAUSE;** **(3) VIOLATION OF CALIFORNIA DUE PROCESS;** **(4) VIOLATION OF CALIFORNIA FREEDOM OF SPEECH—RIGHT TO PETITION;** **(5) VIOLATION OF SEPARATION OF POWERS DOCTRINE;** **(6) BREACH OF CONTRACT;** **(7) VIOLATION OF MMBA;** **(8) VIOLATION OF CAL. PENSION PROTECTION ACT.**

Plaintiff SAN JOSE POLICE OFFICERS' ASSOCIATION ("SJPOA" or "Plaintiff") on behalf of its members brings this action for declaratory, injunctive and other relief asking the Court to declare unconstitutional and temporarily and permanently enjoin implementation of proposed changes to the San Jose Police and Fire Department Retirement Plan:

1. Plaintiff challenges provisions of "The Sustainable Retirement Benefits and Compensation Act," which was passed by the San Jose electorate as Measure B at the June 5, 2012 election ("Measure B"), and which will amend provisions of the San Jose City Charter in ways detrimental to the SJPOA and its members. Unless restrained, Measure B will become effective immediately and directs the City Council with the goal that implementing ordinances "shall become effective no later than September 30, 2012."

2. Numerous provisions of Measure B violate the California Constitution on their face and as applied to Police Officers who were participants in the 1961 Police and Fire Department Retirement Plan ("Retirement Plan") on or prior to June 5, 2012, in that Measure B:

a. substantially impairs these employees' contracts with the City of San Jose for the Retirement Plan and benefits in place when they began working for the police department, and as improved during their employment;

b. constitutes a taking of private property rights without just compensation or due process;

c. violates their right to free speech and to petition the courts through a "poison pill" that punishes employees if they successfully challenge portions of Measure B;

d. violates the separation of powers doctrine by giving the City ultimate authority over whether an unlawful ordinance implementing Measure B should be amended or severed;

e. impairs SJPOA members' rights under their Memorandum of Understanding ("MOA") with the City by unilaterally increasing contributions for future retiree medical benefits above what is contractually agreed;

f. violates the Meyers-Milias-Brown Act ("MMBA"), Gov. Code section 3500, *et seq.,* by unilaterally reducing employee salaries—a mandatory subject of bargaining—if Section 1506-A of Measure B is declared invalid; and

g. violates the California Pension Protection Act by abrogating the fiduciary duties of the Board of Administration for Police and Fire Department Retirement Plan ("Retirement Board") to current and future retirees.

3. Hundreds of current Police Officers on whose behalf Plaintiff brings this action will suffer severe and irreparable harm upon implementation of Measure B and amendment of the Charter. Among other things, Measure B forces employees to make the Hobson's choice between standing on their existing pension rights and having their existing salaries reduced by as much as 16%, or "voluntarily" opting into a second tier Retirement Plan with lesser benefits so they can keep their current salaries. Measure B also has numerous other consequences for Police Officers as further described herein, including detrimentally changing the definition of disability retirement, authorizing suspension of cost-of-living adjustments, eliminating the Supplemental Retirement Benefits Reserve program, and dramatically increasing salary deductions for future retiree healthcare.

4. Measure B also discourages employees from exercising their freedom of speech rights, including their right to petition the courts for redress. For example, it specifically provides that if its lesser "voluntary" retirement program is "illegal, invalid or unenforceable as to Current Employees . . . then . . . an equivalent amount of savings shall be obtained through pay reductions." It also gives the City ultimate authority to decide whether any implementing ordinance determined to be unlawful should be "amend[ed] ... or ... sever[ed]," regardless of any court order obtained by employees enforcing their rights.

JURISDICTION AND VENUE

5. All parties exist and reside within the County of Santa Clara, and all relevant actions and omissions took place within the County of Santa Clara, making this Court the appropriate venue for this action.

THE PARTIES

6. Plaintiff SJPOA is a California nonprofit unincorporated labor association representing over a thousand individuals working in Police Officer classifications in Bargaining Units 11, 12, 13 and 14 (collectively "Police Officers") employed by the City of San Jose. SJPOA's purposes include advocating for the interests of its members with respect to their collective bargaining rights, including their pension and retirement rights. SJPOA brings this action on behalf of itself and its members, having standing to do so under the doctrine articulated by the California Supreme Court in *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

7. The members of SJPOA are current employees of the City of San Jose who were induced to accept positions in and continued to work in the police department in reasonable reliance that they had the "collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those" existing at the time they began working for the city, or enhanced during their service with the City. (*Legislature v. Eu* (1991) 54 Cal.3d 492; *Carman v. Alvord* (1982) 31 Cal.3d 318.)

8. Despite serving in the capital of Silicon Valley, San Jose Police Officers are amongst the lowest paid Police Officers in the Bay Area. They previously agreed to a 10% reduction in total compensation, effective since July 1, 2011 and continuing at least until June 30, 2012. They currently pay approximately 10.46% of their salary towards normal cost retirement contributions. They also currently pay an additional 7.01% of their salary towards retiree medical benefits—a contribution rate that far exceeds the industry standard. Under Measure B, Police Officers' payments would substantially increase through additional salary deductions, further decreasing their net income.

9. The City of San Jose ("City") is a charter city that employs the members of SJPOA and has established the Retirement Plan. The City is governed by the San Jose City Charter ("Charter") and by superseding state law. Labor-management relations between the SJPOA and the City are governed by the MMBA.

10. The Retirement Plan is administered by Defendant Board of Administration of the Police and Firemen Retirement Plan ("the Board"), whose fiduciary duties are to current and future beneficiaries. The Board has no authority over any changes to the structure or implementation of the Retirement Plan. The Board is sued because of its role in administering the benefits at issue in this lawsuit.

11. The terms and conditions of SJPOA members' employment, including their right to certain retirement benefits and their current salaries, are governed by a MOA between the SJPOA and the City, which was entered into pursuant to the Meyers-Milias-Brown Act, Government Code section 3500, et seq.

BACKGROUND

12. The San Jose City Charter establishes that the City has a duty to establish and maintain a retirement plan for its employees. As further described herein, the Charter mandates certain minimum retirement benefits for Police Officers.

13. The Retirement Plan applicable to Police Officers is contained in the San Jose Municipal Code. The Charter imposes on the City a duty to keep the Retirement Plan actuarially sound.

14. The Retirement Plan is funded by contributions from employees and the City as specified in the funding provisions of the City Charter, Municipal Code, and MOA.

15. In the spring and early summer of 2011, SJPOA and the City had lengthy negotiations over retirement benefits during collective bargaining negotiations. Specifically, the City represented that, according to its projections, retirement costs were rapidly escalating and needed to be reduced.

16. The SJPOA and the City agreed to continue negotiations on pension and retiree health care benefits for current and future employees, even though they had reached agreement on the other terms and conditions of employment.

17. The City subsequently began a campaign to reduce all City employees' pension benefits, including those of Police Officers, through a City-sponsored voter ballot initiative and a threatened declaration of fiscal emergency. If implemented, Measure B will amend the San Jose City Charter.

18. To support the City's efforts to declare a fiscal emergency and the ballot measure, the City's mayor asserted repeatedly in public statements and press releases that, by Fiscal Year ("FY") 2015-16, the City's retirement contribution costs would reach $650 million per year.

19. On July 5, 2011, certain City Council members formally proposed a ballot initiative that would unilaterally reduce retirement benefits of all City employees, including those represented by SJPOA. The ballot measure was purportedly directed at reducing the City's retirement costs to FY 2010-2011 levels by FY 2015-16.

20. The City's projected retirement contribution increases were partly rooted in the City's reduced contributions during times when the Retirement Plan had an actuarial surplus.[1] For example, in fiscal years 1993 through 2004 the City reduced its contributions into the Retirement Plan by approximately $80 million. The Retirement Board later concluded in 2011 that, had the City not reduced its contributions during that time period, the $80 million would have grown to $120 million. That increased the Retirement Plan's Unfunded Actuarial Liability by approximately 44%.

21. On December 1, 2011, the independent actuary for the Retirement Plan issued a report with updated projections for the City's prospective retirement costs which showed that the City's retirement contributions would be far less than previously estimated and far less than the City had been relying on as justification for the proposed

[1] An actuarial surplus is defined as a situation where the actuarial value of the assets in the retirement fund is more than the value of the plan's actuarial liability.

declaration of fiscal emergency and ballot measure. Specifically, the report showed that the City's contributions for Fiscal Year 2012-13 for the Police and Fire Retirement Plan would be approximately $55 million less than previously expected.

22. At a City Council meeting on December 6, 2011, the Mayor withdrew his proposal to have the City Council declare a fiscal emergency. Even though there was no fiscal emergency, the City Council nonetheless proceeded with placing the ballot measure before the voters.

23. On February 21, 2012, the City issued a revised ballot measure. On March 6, 2012, the City Council voted to place that revised ballot measure ("Measure B") on the June 5, 2012 election ballot. On April 10, 2012, the Sixth Appellate District Court of Appeal found the ballot statement of issue was "impermissibly partisan," and ordered the City to revise it, which it did.

24. Measure B was passed by the San Jose electorate on June 5, 2012. If allowed to go into effect, Measure B will change SJPOA members' retirement benefits and the Retirement Plan as further described below.

POLICE OFFICERS' RIGHTS UNDER THE RETIREMENT PLAN AND MOA

25. The Retirement Plan established by the pre-Measure B City Charter and the San Jose Municipal Code gives Police Officers constitutionally-protected and vested contractual and property rights to certain pension benefits and the right to proceed under the Retirement Plan in place when they began working for the City, as well as any improvements to those benefits made during their employment with the City.

26. SJPOA members' benefits and rights became vested when they accepted their positions with the City or, with respect to any improvements to those benefits, when they continued laboring for the City. In exchange for these benefits and rights, SJPOA members accepted their positions with the City and will continue to as they have in the past dutifully labor for the City of San Jose.

27. The City Charter prescribes certain minimum benefits for Police Officers. The Charter expressly states that the City "may grant greater or additional benefits."

There is no provision for reducing employee benefits or for reducing benefits below the minimum in the Charter. As further described herein, Police Officers' pension rights arise from the Charter, the Municipal Code, and the MOA.

28. **Service Retirement and Pension Calculation.** The Charter (Section 1504) establishes Police Officers' right to service retirement. The Municipal Code provides that Police Officers are eligible to begin receiving service retirement benefits at age 50 with 25 years of service, at age 55 with 20 years of service, or at any age following 30 years of service. Upon retirement, they are entitled to a pension calculated according to the following formula contained in Municipal Code section 3.36.809: 2.5% of final compensation for each year of service up to 20 years, plus 4% of final compensation for each year of service between 21-30 years up to a cap of 90% of final compensation.

29. **Disability Retirement and Pension Calculation.** The Charter (Section 1504) establishes Police Officers' right to disability retirement and defines "disabled" as "the incurrence of a disability . . . which renders the officer or employee incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of his or her office or position and of any other office or position *in the same classification of offices or positions* to which the City may offer to transfer him or her ...." (emphasis added). Upon disability retirement, Police Officers are entitled to a pension calculated according to the following formula in Municipal Code section 3.36.1020: 50% of final compensation, plus 4% of final compensation for each full year of service exceeding 20 years, to a cap of 90% of final compensation.

30. **Splitting of Normal Retirement Costs According to 3:8 Ratio.** The Charter (Section 1504) and Municipal Code (Section 3.36.410) establish that Police Officers contribute 3/11ths of the normal costs of maintaining the Retirement Plan, and the City pays 8/11ths.

31. **City Pays All Unfunded Actuarial Liability ("UAL") for Pensions.** The Municipal Code (Sections 3.36.1520 and 3.36.1550) establishes that the City pays

any UAL generated by the Retirement Plan.[2] Under the Retirement Plan, the City is required to pay UAL and Police Officers did not pay UAL for pensions.

32. When the Retirement Plan generated an actuarial surplus, the City reaped all of the benefits and used those excess earnings to reduce its contribution rates during FYs 1993-2004 by approximately $80 million. According to the Retirement Board, that $80 million would have grown to $120 million and increased the existing UAL by 44%.

33. **Yearly Cost of Living Adjustments ("COLA").** The Municipal Code (Section 3.44.150) establishes Police Officers' right to an annual 3% COLA to pension benefits upon retirement. The normal cost of the COLA is funded by contributions from Police Officers and the City on a 3-8 basis (Section 3.44.090) to fund the normal cost.

34. **Supplemental Retiree Benefit Reserve ("SRBR") Payments.** The Municipal Code (section 3.36.580) also establishes a supplemental retirement benefit reserve, funded from employee and City contributions and administered solely for the benefit of Retirement Plan members, from which the Retirement Board has the discretion to make a variable annual payment to retirees based on investment performance.

35. **Contribution Rates for Retiree Healthcare.** Employee contribution rates for retiree healthcare are established through the collective bargaining process. Thus, the MOA sets Police Officers' contribution rates for retiree healthcare. Specifically, contributions for retiree medical benefits are made by the City and Police Officers on a 1:1 ratio. The MOA caps any increase in these contribution rates for Police Officers at 1.25% per year. The MOA further provides that employees shall not pay more than 10% of their pensionable salary to fund retiree healthcare.. Currently, SJPOA members pay 7.01% of their pensionable pay toward retiree healthcare costs, which will increase to 8.26% on July 1, 2012 under the MOA.

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[2] UAL is "the difference between actuarial accrued liability and the valuation assets in a fund. [Citation] Most retirement systems have [UAL]. . . . [UAL] does not represent a debt that is payable [in full] today." (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 34.)

36. In enacting the Charter and Municipal Code sections described above, and by ratifying the MOA, the City expressly and/or implicitly intended to bind itself to these terms for current Police Officers. These rights became protected vested rights when these officers began working with the City (or continued to work following benefit improvements), and cannot be legislated away by the City or by ballot initiative. Nothing in the Charter and the Municipal Code prohibits the creation of any implied rights.

MEASURE B: "THE SUSTAINABLE RETIRMENT BENEFITS AND COMPENSATION ACT"

37. Measure B makes a number of significant and detrimental changes to the Retirement Plan and to retiree benefits established in the MOA affecting Police Officers. All of these changes were made without any consideration and without giving Police Officers comparable new advantages.

38. By its own terms, Measure B will immediately amend the San Jose City Charter and "prevail[s] over all other conflicting or inconsistent wage, pension or post employment benefit provision in the Charter, ordinances, resolutions or other enactments." Some of these changes take place immediately, while others will require implementing ordinances, though Measure B would appear to require that the City begin promulgating such implementing ordinances right away. Measure B provides that it is the goal that any implementing ordinances "shall become effective no later than September 20, 2012."

39. Measure B does not purport to retroactively change the pension formulas for prior service years and only purports to apply prospectively.

Sections 1506-A and 1507-A: A "Voluntary" Choice Between Giving Up the Right to Current Level of Salary Now or Giving Up Future Retirement Benefits

40. The core of Measure B is the misleadingly-titled "Voluntary Election Program" ("VEP") which creates "an alternative retirement program" that would provide benefit levels that are *less* favorable than those outlined above. Employees who "opt in" to the VEP will maintain their current salaries and the current 3:8 cost-sharing ratio for the

normal costs. By contrast, Police Officers who elect to remain in the current Retirement Plan for future service credits will be forced to pay up to 50% of the pension UAL through a reduction in their current salaries up to 16%. This Hobson's choice is contained in Sections 1506-A and 1507-A of Measure B.

41. Section 1506-A mandates that employees not entering the VEP will have their salary reduced by as much as 16% in order to pay for up to half of the pension UAL. Although Measure B styles this reduction as an "adjust[ment] through additional retirement contributions," Measure B would effectively require Police Officers (who have never paid UAL contributions for their pensions) to offset the City's UAL costs through salary deductions resulting in reductions to take-home pay without giving them any comparable advantage.

42. Section 1507-A sets out the VEP which caps employees' pension benefits and prospectively changes the pension formula for those employees "voluntarily" "opting" into this system. Section 1507-A mandates that such employees "will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits."

43. The VEP imposes a reduced retirement benefits formula as follows: 2% of final compensation for each year of prospective service, up to a cap of 90% of final compensation. It re-defines "final compensation" as "the average annual pensionable pay of the highest three consecutive years of service." Section 1507-A also increases the retirement age to 57 for Police Officers, including the eligibility to retire after 30 years of service, and disallows retirement before age 50. It caps COLA increases at 1.5% per fiscal year. Finally, it imposes a new requirement that an employee is eligible for a full year of service credit only upon reaching 2080 hours of regular time worked, excluding overtime.

44. In exchange for giving up their rights, Police Officers entering the VEP keep their current salaries, do not pay UAL and retain the 3:8 cost-sharing ratio—rights which Police Officers already have. Police officers forced into VEP would thus receive no comparable advantage for the waiver of their rights.

45. The VEP presents a Hobson's choice that is unconscionable and unlawful because current employees have no meaningful choice. The City is obligated by the MOA to maintain contractual salaries and retiree healthcare contributions at the agreed rate, and is also obligated by the Charter and Retirement Plan to pay Police Officers the benefits under the retirement system in place when they began working for the City, as well as any enhancements made during their service with the City. The City may not lawfully renege on either of its obligations, let alone penalize current employees for standing on their rights.

46. An employee's election under the VEP is not "voluntary" at all and fails for lack of consideration in the form of a comparable advantage because, regardless of what decision an employee makes, he or she is forced to give up valuable rights protected under the law. Further, any such choice is made under economic duress because employees not electing the VEP have their salaries reduced by as much as 16%.

47. Although the VEP would require IRS approval, Measure B mandates that the "compensation adjustments" shall be effective regardless of whether IRS approval has been given and regardless of whether the City Council has implemented the VEP.

48. The City has known since at least January of 2012 that the VEP will not receive IRS approval in 2012 and is likely never to receive such approval. Nonetheless, the City Council voted to put Measure B, including the VEP, on the June 5, 2012 ballot.

Section 1509-A: Evisceration of Disability Retirement Availability

49. Section 1509-A of Measure B immediately and radically alters Police Officers' rights to disability retirement by unilaterally imposing numerous burdensome requirements, including that "City employees must be incapable of engaging in *any* gainful employment for the City." (Emphasis added.) Specifically, Measure B re-defines

disability retirement for Police Officers by now requiring a determination that an employee be unable to "perform *any other jobs* described in the City's classification plan *in the employee's department* because of his or her medical condition." (Emphasis added.) The practical effect for a Police Officer is that if he or she is able to perform *any* function within the police department—including non-peace officer functions—he or she is now ineligible for disability retirement. Under the current Retirement Plan, such an employee would have been eligible for disability retirement if he or she could not perform work within his or her own classification.

50. Measure B further requires that a disability retirement assessment be made even if there are *no* positions for which an otherwise-disabled Police Officer may be eligible—i.e., even if there are no vacancies for such jobs. That means that if an otherwise-disabled employee is found to be able to perform non-peace officer functions in his or her department but there is no available vacancy, that employee will be ineligible for disability retirement. Even if there is an available vacancy, Measure B would not require that the officer be placed in the vacancy. Under Measure B such an employee would get ***nothing*** even though he or she was incapacitated in the line of duty. Measure B does not provide employees with any comparable advantage for taking away this right.

Section 1510-A: Unfettered Right to Deny COLA Increases

51. Section 1510-A gives the City the right to deny COLA increases to non-VEP and VEP employees alike. Upon a unilateral declaration of "fiscal and service level emergency" by the City Council, it allows the City to suspend COLA increases to applicable retirees (defined as "current and future retirees employed as of the effective date of this Act") for up to five years. Measure B does not require that the time period for which COLAs are suspended have any nexus to the declared emergency. Nor does Measure B contain any definition of a "fiscal and service level emergency" or even require that the City Council's suspension of COLAs be "reasonable" under the circumstances or reasonably related to the declared emergency. Measure B does not provide employees with any comparable advantage for taking away this right.

52. Any "suspend[ed]" COLA increases are automatically ***forfeited*** because Measure B directs that COLAs "shall" only be restored "prospectively" and even then only "in whole or in part." Measure B provides no way for retirees to obtain past COLAs to which they were entitled, nor does it provide a comparable advantage for the loss of this protected right.

53. Additionally, Section 1510-A caps COLA increases once they are "restore[d]" as follows: 3% for current retirees and non-VEP employees, and 1.5% for VEP employees. There is also no requirement that any "restore[d]" COLAs be "reasonable" under the circumstances or reasonably related to the declared emergency, let alone any provision for affected employees to obtain past COLAs to which they were entitled.

Section 1511-A: Elimination of SRBR

54. Section 1511-A eliminates the SRBR in whole and with it any supplemental benefits that Police Officers would have received during retirement, even though such employees have paid into the SRBR. It directs that any funds in the SRBR be placed in the Retirement Plan and mandates that any supplemental benefits other than those authorized by Measure B "shall not be funded from plan assets." Measure B does not provide employees with any comparable advantage for taking away this right.

55. Elimination of the SRBR will have detrimental effects upon retirement of Police Officers who paid into the SRBR in expectation they would receive that benefit.

Section 1512-A: Increases to Payment for Retiree Healthcare

56. Section 1512-A dramatically increases the amount that Police Officers will have to pay for retiree healthcare. Under Measure B, Police Officers would be required to pay a full 50% of the normal cost and unfunded liability for the retiree healthcare plan. This would have the effect of eliminating the 10% cap contained in the MOA and, consequently, resulting in a significant net salary decrease, as the combined cost is currently 32% of salary. That salary decrease is in addition to and cumulative with

the other salary deductions under Measure B, which will have a detrimental impact on SJPOA members.

57. Additionally, Measure B detrimentally re-defines "low cost plan" to mean "the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement Plan." That effectively makes it impossible for the SJPOA to bargain over retiree medical benefits, as it will fix employees' benefits to the lowest cost plan City-wide, regardless of whether such plan was bargained for by another bargaining unit or unilaterally imposed on another bargaining unit by the City.

Section 1513-A: Compromising Board's Fiduciary Duties to Current and Future Beneficiaries

58. Section 1513-A compromises the Retirement Board's constitutionally-based fiduciary duties to current and future beneficiaries, including SJPOA members, by forcing the Retirement Board to take into account "*any* risk to the City and its residents" in its actuarial analyses, by compelling the Retirement Board to equally "ensure fair and equitable treatment for current and future plan members *and taxpayers* with respect to the costs of the plans [,]" and requiring the Retirement Board to act with the objective "to minimize … the volatility of contributions required to be made by the City …." These changes violate Article XVI, section 17 of the California State Constitution, which mandates that the Retirement Board's fiduciary duties are owed only to participants and their beneficiaries.

Sections 1514-A and 1515-A: Poison Pill and Usurping Judicial Function

59. Measure B would punish employees for exercising their constitutional rights to challenge its provisions in the courts in at least two different ways. It also usurps the power of the judiciary.

60. Section 1514-A contains a wholly punitive "poison pill" that mandates that if Section 1506-A(b)—which requires that the salaries of non-VEP, current employees be reduced by as much as 16% to cover half of the UAL under the Retirement

Plan—is "illegal, invalid or unenforceable as to Current Employees," then "an equivalent amount of savings *shall* be obtained through *pay reductions*." Measure B does not require that such pay reductions be used to pay UAL. It does not even provide any guidance as to what those reductions should be used for and appear to be reductions for the sake of reductions.

61. The absence of any such guidance makes plain that the reduction in employee salaries is merely punitive, *i.e.*, to discourage employees from challenging Measure B in court and to punish them if they are successful.

62. Section 1515-A contains another provision that provides that "[i]f any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council" to have it decide "whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective."

63. The City Council is not a court and may not decide the legality of a measure it unilaterally put before the voters. Under our system of government, the decisions described above are not up to the City Council but are the province of the courts. Measure B usurps the power of the judiciary to fashion an appropriate remedy and to decide the severability of unlawful ordinances promulgated thereunder.

64. Section 1515-A has the additional effect of discouraging employees from challenging Measure B in court, because even if they were successful, the City could take the position that it has the sole and ultimate authority to decide their suit.

RIGHT TO INJUNCTIVE AND DECLARATORY RELIEF

65. No adequate remedy exists at law for the injuries suffered by SJPOA members because the constitutional violations cannot be protected against and SJPOA members' rights cannot be preserved absent injunctive relief. If this Court does not grant injunctive relief of the type and for the purpose specified below, SJPOA and its members will suffer further irreparable injury.

66. Conversely, the City will suffer no cognizable harm by continuing to give effect to the Retirement Plan currently in place.

67. As a result, SJPOA requests that this Court preserve the *status quo ante* by preliminarily and permanently enjoining the City from enforcing or otherwise applying Measure B to its members.

68. An actual controversy has arisen and now exists between SJPOA and the City concerning their respective rights, duties, and obligations under the Retirement Plan. Plaintiff contends that by the foregoing acts and omissions, the City has violated SJPOA members' rights under the California Constitution, the City Charter, the Retirement Plan and the MOA, as well as the MMBA and California Pension Protection Act.

69. SJPOA is informed and believes the City disputes the allegations regarding its obligations under and violation of the law and the contractual agreements.

70. At all times mentioned herein, the City has been able to perform its obligations under the law. Notwithstanding such ability, it failed and refused, and continues to fail and refuse, to perform its duties under the law and the agreements.

71. SJPOA requests a judicial determination of its rights and a declaration of the City's obligations under the California Constitution, the San Jose City Charter, Retirement Plan and the MOA, as well as under the MMBA and California Pension Protection Act. SJPOA further requests that this Court declare that Measure B is unlawful and unenforceable as applied to SJPOA members currently employed by the City, and that by purporting to apply Measure B to said employees the City violated its obligations under the law.

FIRST CAUSE OF ACTION
Impairment of Contract
Cal. Const. art. I § 9 and Cal. Civ. Code § 52.1

72. Plaintiff hereby incorporates by reference the preceding paragraphs.

73. Article I, Section 9 of the California Constitution prohibits laws that impair contracts. The City, in violation of Civil Code section 52.1[3], has violated and continues to violate the rights of Plaintiff's members herein alleged.

74. The Retirement Plan, as embodied in the San Jose Charter and Municipal Code, gives rise to vested contractual rights for employees in the Plan on or before June 5, 2012. Additionally, the MOA's sections on retirement benefits also give additional contractual rights to SJPOA members.

75. Measure B substantially impairs the contractual rights of Plaintiff's members.

76. The substantial impairment is neither reasonable nor necessary to serve an important public purpose. Nor is it consistent with the theory and purpose or tied to the successful operation of the Retirement System.

77. Measure B, as applied to current employees, is unconstitutional and violates Article I, Section 9 of the California Constitution.

SECOND CAUSE OF ACTION
Taking
Cal. Const. art. I § 19 and Cal. Civ. Code § 52.1

78. Plaintiff hereby incorporates by reference the preceding paragraphs.

79. Article I, Section 19 of the California Constitution prohibits the taking of private property for public use in the absence of just compensation. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

80. SJPOA members have a vested property right in the benefits provided by the Retirement Plan, and in the Retirement Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City.

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[3] Civil Code section 52.1 creates a private right of action to seek redress in the Superior Court for violation of constitutional rights.

81. In addition, the retirement benefits are a form of promised deferred compensation. Measure B thus interferes with the investment-backed expectations of SJPOA members.

82. By taking these protected benefits without giving SJPOA members any comparable advantage, commensurate benefit or compensation; Measure B violates the California Constitution as a taking of property for a public purpose without just compensation.

83. Measure B will have a devastating economic impact on individual SJPOA members both now and in the future.

84. The substantial impairment worked by Measure B is neither reasonable nor necessary to serve an important purpose.

THIRD CAUSE OF ACTION
Due Process
Cal. Const. art. I § 7 and Cal. Civ. Code § 52.1

85. Plaintiff hereby incorporates by reference the preceding paragraphs.

86. Article I, Section 7 of the California Constitution prohibits the taking of property without due process. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

87. SJPOA members have a vested property right in the benefits provided by the Retirement Plan, and in the Retirement Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City.

88. By taking these protected benefits without giving SJPOA members any comparable advantage, commensurate benefit or compensation, Measure B violates the California Constitution as a taking of property for a public purpose without due process of law.

FOURTH CAUSE OF ACTION
Freedom of Speech—Right to Petition
Cal. Const. art. I §§ 2 and 3, and Cal. Civ. Code § 52.1

89. Plaintiff hereby incorporates by reference the preceding paragraphs.

90. Article I, Sections 2 and 3 of the California Constitution guarantee the rights to freedom of speech and to petition the courts for redress. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

91. Section 1514-A of Measure B violates these protections by chilling or otherwise discouraging SJPOA members from exercising their right to seek redress in the courts by penalizing them for bringing a meritorious and successful lawsuit. Measure B provides that if Section 1506-A(b) "is determined to be illegal, invalid or unenforceable as to Current Employees[,]" current employees' salaries "shall" be reduced by "an equivalent amount of savings."

92. This "poison pill" unlawfully penalizes SJPOA members if they succeed in a lawsuit challenging Measure B. Among other things, there is no nexus between the extracted "savings" to the City by reduced employee salaries and Section 1506-A(b); that is, there is no requirement the "savings" be used to pay UAL. Instead, these deductions are wholly punitive in nature to discourage employees' exercise of their fundamental right to petition the courts.

93. Section 1515-A of Measure B also violates the right to petition by chilling or otherwise discouraging SJPOA members from exercising their right to seek redress in the courts because it gives the City Council ultimate authority to decide "whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective." Measure B discourages employees from exercising their fundamental rights to petition the courts because, regardless of any successful court judgment, the City Council usurps the judiciary's role to decide the remedy, i.e., amendment or severability.

FIFTH CAUSE OF ACTION
Separation of Powers Doctrine
Cal. Const. art. III § 3 and Cal. Civ. Code § 52.1

94. Plaintiff hereby incorporates by reference the preceding paragraphs.

95. Article III, Section 3 of the California Constitution provides for the separation of powers between the legislative, executive, and judicial branches. The City, in violation of Civil Code section 52.1, has violated and continues to violate the rights of Plaintiff's members herein alleged.

96. Section 1515-A of Measure B violates the separation of powers doctrine because it gives the City Council ultimate authority to decide "whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective" if such ordinance is found to be "invalid, unconstitutional or otherwise unenforceable." The City Council is not a court and may not decide the legality of a measure it unilaterally put before the voters. Measure B thus usurps the authority of the judicial branch because it allows the City Council to decide the remedy if an ordinance is struck down, *i.e.*, amendment or severability.

SIXTH CAUSE OF ACTION
Breach of Contract

97. Plaintiff hereby incorporates by reference the preceding paragraphs.

98. The MOA is a valid and binding contract.

99. SJPOA members have at all times performed their duties under the MOA by, among other things, serving the City of San Jose in Police Officer classifications.

100. The City has breached the MOA by the actions and omissions alleged above. Specifically, Measure B, which the City Council drafted and voted to place on the June 2012 ballot as a voter initiative, denies or otherwise reduces gross and net salaries, increases employee deductions, contributions, and withholdings, and decreases retirement benefits agreed to in the MOA.

101. Additionally, the poison pill further breaches the MOA by unilaterally reducing the salaries of Police Officers by as much as 16%.

102. SJPOA members will suffer damages, as described above, caused by the City's breach of the MOA, in the form of reduced salaries and retirement benefits.

SEVENTH CAUSE OF ACTION
Violation of MMBA
Gov. Code § 3512 *et seq.*

103. Plaintiff hereby incorporates by reference the preceding paragraphs.

104. The MMBA prohibits the City from taking unilateral action on matters impacting wages, hours, and other terms and conditions of employment for Police Officers without first providing the SJPOA with reasonable notice and an opportunity to bargain, resolve any differences, and reach agreement prior to implementation. Gov. Code § 3504.5. "The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse." *Santa Clara County Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537. The SJPOA and the City have not bargained to impasse.

105. Section 1506-A of Measure B violates the MMBA both substantively and procedurally because it directs that the City shall unilaterally reduce salaries by as much as 16% if the VEP is "illegal, invalid or unenforceable as to Current Employees," without requiring the City to bargain over such reductions and/or even if bargaining were to take place it makes the amount of salary reductions non-negotiable.

106. Section 1512-A violates the MMBA both substantively and procedurally because it unilaterally effects an increase in employee contributions for retiree healthcare benefits and, consequently, reduces net salaries. It also violates the MMBA because it effectively eliminates the SJPOA's ability to bargain with the City over retiree healthcare benefits, when such benefits are a mandatory subject of bargaining under the MMBA.

EIGHTH CAUSE OF ACTION
California Pension Protection Act
Cal. Const. art. XVI, § 17 and Cal. Civ. Code § 52.1

107. Plaintiff hereby incorporates by reference the preceding paragraphs.

108. Article XVI, section 17 of the California Constitution provides that a public employee retirement board's fiduciary duties are to current and future retirees and their beneficiaries. It further provides that the retirement board "shall have plenary

authority and fiduciary responsibility for investment of moneys and administration of the system . . . ." The City, in violation of Cal. Civ. Code section 52.1, has violated and continues to violate the rights of plaintiff's members herein alleged.

109. Measure B violates the California Constitution because it compromises the Retirement Board's constitutionally-based fiduciary duties to SJPOA members, who participate in the plan as future retirees, by compelling the Board to consider "*any* risk to the City and its residents" in its actuarial analyses and by compelling the Retirement Board to equally "ensure fair and equitable treatment for current and future plan members *and taxpayers* with respect to the costs of the plans . . . ."

PRAYER

WHEREFORE, Plaintiff SJPOA prays for the following relief:

1. A declaration that:

a. Measure B cannot be applied to SJPOA members working for the City on or before June 5, 2012;

b. the City was and is required to provide SJPOA members with the retirement benefits and Retirement Plan in place when they began working for the City, as well as any enhancements made during their service with the City;

c. the City is required to provide the retirement benefits delineated in the MOA;

d. and, by the above-described actions and omissions, the City violated its obligations.

2. A preliminary and permanent injunction prohibiting the City from applying or otherwise enforcing any part of Measure B to SJPOA members working for the City before June 5, 2012;

3. For any and all actual, consequential, and incidental damages as against the City according to proof, including but not limited to damages that have been or may be suffered by members of SJPOA and all costs incurred by SJPOA in attempting to enforce the constitutional and statutory rights of the association and its members;

4. For attorneys' fees as against the City pursuant to California Code of Civil Procedure section 1021.5, Government Code section 800, or otherwise;

5. For costs of suit herein incurred; and,

6. For such costs and further relief as the Court deems just and proper.

Dated: June 6, 2012

CARROLL, BURDICK & McDONOUGH LLP

By _____

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