

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Claudia Wilken, Judge

Sonoma County Association	)	<b>Cross-Motions for</b>
of Retired Employees,	)	<b>Summary Judgment</b>
	)	
Plaintiff,	)	Pages 1 - 71
	)	
VS.	)	NO. C 09-04432 CW
	)	
Sonoma County,	)	
	)	
Defendant.	)	Oakland, California
_____	)	Thursday, October 29, 2015

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

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1 Thursday, October 29, 2015

2:16 p.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling civil case No. 09-4432,  
4 Sonoma County Association of Retired Employees versus  
5 Sonoma County.

6 Please step forward and state your appearances.

7 **MR. LYNCH:** Good afternoon, your Honor.

8 Raymond Lynch representing defendant Sonoma County. And  
9 Batya Forsyth, also representing the County.

10 **THE COURT:** I'm sorry?

11 **MS. FORSYTH:** Batya Forsyth, your Honor.

12 **THE COURT:** Oh.

13 **MR. RANAHAN:** Good afternoon, your Honor.

14 Darin Ranahan on behalf of plaintiff Sonoma County  
15 Association of Retired Employees, with Jeff Lewis.

16 **THE COURT:** Good afternoon.

17 So this is on for cross-motions for summary judgment, but  
18 I would actually like to start with the defendant.

19 **MR. LYNCH:** Yes, your Honor.

20 **THE COURT:** Even though the plaintiff also moved.  
21 You can stay there, though, if you're going to be arguing.

22 Yes, sir?

23 **MR. LYNCH:** All right.

24 **THE COURT:** And if you would, I'm concerned -- I  
25 mean, I know you briefed the facts and all, but we have a

1 number of different causes of action. I'm not sure we're  
2 really addressing all of them.

3 We've got the breach of contract or breach of covenant,  
4 I'm not totally sure which it is. I'd be interested to hear  
5 that. But breach of something claim. And then this  
6 promissory estoppel claim. I don't know what elements there  
7 are of that that might be different or why your argument would  
8 apply to the promissory estoppel claim and also the  
9 constitutional claims, both the contract claims and the due  
10 process claims. I don't know if those are broader and thus  
11 the more specific claim supersedes or if those claims are all  
12 separate and need to be addressed separately.

13 I do have some specific questions. Let me see if any of  
14 them are kind of --

15 (Pause in the proceedings.)

16 **THE COURT:** -- sui generis.

17 (Pause in the proceedings.)

18 **THE COURT:** In terms of the judicial notice and the  
19 documents and so forth, generally I would say that any  
20 document that you produced to them that purports to be your  
21 document is your document unless you say, oh, my gosh, this is  
22 a fraud and a forgery and I don't know how this got in our  
23 production. But if it's a job announcement, if you say it's a  
24 fraud or a forgery, let us know. If it's not, it's your  
25 document. Same with the emails.

1           On the experts, I'm not going to hear either expert either  
2 now or at trial give their opinion on whether any right was  
3 vested or wasn't. But I think that the plaintiffs' expert, to  
4 the extent she's really acting as a researcher or historian  
5 saying here's what the State did on these various years,  
6 here's what the counties did on these various years, and from  
7 that one might draw an inference that the counties were  
8 copy-cattng the State, she can present the facts and I can  
9 either draw that inference or not draw it. And if  
10 Mr. Campbell says those facts are wrong, and they really  
11 aren't -- those aren't the facts, then I would hear it. But,  
12 otherwise, you could just argue that, no, from those facts,  
13 one shouldn't draw that inference.

14           And that's really the only role that I would see for the  
15 experts either now or at trial.

16           Well, I guess I should ask both of you really. I'm having  
17 a hard time figuring out what this MOU actually means, part of  
18 it. It says -- it's the section of it that talks about the  
19 health benefit. And it says, "Upon meeting these two  
20 conditions, the County shall contribute for the retiree only  
21 the same amount toward the health plan premium as it  
22 contributes to an active single employee in the same manner  
23 and on the same basis as is done at the time for other  
24 retirees." And I can't understand what that means.

25           At what time? Now? Or 1990? In 2010 when the person

1 retires? Or what is the time that's being alluded to there?  
2 It's kind of an odd turn of phrase, and I'm having trouble  
3 understanding what it means.

4 **MR. LYNCH:** Do you want me to begin, your Honor, or  
5 do you have further questions?

6 **THE COURT:** I'm sorry?

7 **MR. LYNCH:** Do you want me to begin, or do you have  
8 further questions? I'm not sure if you're finished.

9 **THE COURT:** Oh, no. Well, I do have some other  
10 questions, but I imagine the rest will come out in your  
11 argument. Okay. I guess you can just address that in your  
12 argument.

13 **MR. LYNCH:** All right. I think that it -- Well, I  
14 will.

15 I'll start out just with some of your comments. I think  
16 fundamentally, fundamentally, this case is a contract case  
17 and -- and it's governed by the standard in *REAOC* and the  
18 standard that's been applied in -- by the Ninth Circuit  
19 following from that.

20 **THE COURT:** Well, sure, but are there different  
21 causes -- different elements of the other causes of action,  
22 any other defenses that you would raise to the other causes of  
23 action? Or is it just they're all just the same?

24 **MR. LYNCH:** Fundamentally, if there's -- if the -- if  
25 the contractual right -- if the promise within the standard of

1 REAOC has not been proven, I'd submit that all of the causes  
2 of action would fail.

3 **THE COURT:** Why?

4 **MR. LYNCH:** Because they're all --

5 **THE COURT:** The process isn't a contract, promissory  
6 estoppel isn't a contract.

7 **MR. LYNCH:** Promissory estoppel may be somewhat  
8 special, but underlying it has to be -- there has to be an  
9 enforceable contract. And --

10 **THE COURT:** Why?

11 **MR. LYNCH:** Because you have to -- Well, there has to  
12 be enough to find that -- First of all, a promissory estoppel  
13 against a public entity is disfavored and requires a very,  
14 very clear showing that such a promise has been made.

15 And the evidence that we've been talking about and the  
16 evidence that's presented in support of our summary judgment  
17 all goes to that point to demonstrate that there's not that  
18 kind of promissory estoppel basis here.

19 **THE COURT:** What are the elements of the promissory  
20 estoppel claim? It's an equitable claim, I guess.

21 **MR. LYNCH:** It is an equitable claim.

22 **THE COURT:** What are the elements? I think it seems  
23 to me -- I mean, this wasn't briefed which is why I'm confused  
24 about it. But my vague recollection from law school is that a  
25 promissory estoppel claim is made when there isn't a contract

1 and there'd be some other elements of it that I don't remember  
2 right at this moment.

3 **MR. LYNCH:** Actually, I don't think there's been a  
4 showing for promissory estoppel --

5 (Simultaneous colloquy.)

6 **THE COURT:** What is it? What would have to be  
7 proved?

8 **MR. LYNCH:** -- has to be a showing that there was --  
9 there was a very specific promise made and that there was  
10 specific reliance on that promise and that there was damage  
11 with respect to that promise. I don't think those elements  
12 are made here. Certainly there's been no particularized  
13 showing for all of these different members of the  
14 associational class or the association group that is being  
15 represented here by the plaintiffs.

16 **THE COURT:** So you would concede that a promise would  
17 be sufficient? It doesn't need a resolution or an ordinance  
18 as would a contract?

19 **MR. LYNCH:** No, I -- No. I believe that it would  
20 need a resolution or ordinance.

21 **THE COURT:** Well, that's what I'm getting at. Why  
22 would you -- What would you base that on?

23 **MR. LYNCH:** I would base that on -- on the -- on the  
24 REAOC case --

25 (Simultaneous colloquy.)

1           **THE COURT:** Right, but was there -- Was there a  
2 promissory estoppel claim in the *REAOC* case?

3           **MR. LYNCH:** There was not a promissory estoppel claim  
4 in the *REAOC* case, but -- but the reasoning and the rationale  
5 that underlies the entire *REAOC* case and the case law that --  
6 that is relied upon by the Supreme Court goes directly to  
7 that.

8           Basic principle says -- starts with the *National Passenger*  
9 case, I think a Supreme Court case from the 1940's, that  
10 addresses -- you're trying to find lifetime rights when you're  
11 trying to establish that kind of a contract right against a  
12 public entity.

13           And the -- and in *REAOC*, it arose as an implied contract  
14 claim, but the principles as to whether or not you can find  
15 that a public entity has made a commitment to a far-reaching  
16 lifetime promise is still based, I believe, on the same  
17 standard and for the same policy reasons that obtain under  
18 *REAOC* and would have to be met in promissory estoppel.

19           And I think that, if anything, the promissory estoppel  
20 would be even more difficult because I don't believe there's  
21 any -- been any showing here of a particularized nature. As  
22 to -- the allegations in the complaint talk about people  
23 making life decisions on an individual basis. We don't have  
24 that kind of showing that's been presented here. We don't  
25 have evidence of specific decisions that were made. It's

1 broad understandings that are asserted, alleged to have been  
2 made, but I don't believe that the promissory estoppel claim  
3 has been established.

4 And I do believe that the *REAOC* standard would still apply  
5 to it because the basic principles of the Constitution which  
6 give the Board of Supervisors plenary authority to set  
7 compensation and benefits terms, Government Code Section 25300  
8 that gives the Board of Supervisors that authority, and the  
9 presumptions that lifetime promises are not granted through  
10 legislation by a governing body all obtain -- obtain to the  
11 contract claims, and I believe they obtain to the promissory  
12 estoppel claims as well.

13 I know we briefed this more extensively in the motion to  
14 dismiss stage, and we cited the *Poway* case which sets forth  
15 the standard on promissory estoppel and the requirement that  
16 there be a clear -- very clear akin to the heavy burden in --  
17 in *REAOC* to establish that sort of right.

18 I believe that with the other claims, I think that they're  
19 all grounded on the -- on the asserted contract claim that is  
20 being alleged in this case, and they rise and fall on that.

21 I think that -- I know we dealt with that earlier in the  
22 case, and I believe that your initial order, I think that  
23 there's language to that effect probably in the December -- or  
24 the November 23rd from 2000 order.

25 And, again -- but all of it, I believe, in this case rises

1 and falls on whether or not there's a contract and whether or  
2 not there's a promise for vested lifetime rights. And the  
3 *REAOC* standard controls this and --

4 **THE COURT:** Okay. Well, never mind about all the  
5 causes of action, then. Just give me your general argument  
6 about why you should get summary judgment on any of these.

7 **MR. LYNCH:** The real -- the crux of it is that *REAOC*  
8 and the Ninth Circuit have established a fundamental standard  
9 that has to be met to establish this kind of right. And it's  
10 presumed, presumed that a public entity does not grant a  
11 lifetime vested right, and that can only be overcome by a  
12 showing of a clear basis in contract. Here, we have these  
13 MOU's and there's not clear language --

14 **THE COURT:** We have MOU's ratified by board  
15 resolutions.

16 **MR. LYNCH:** We have MOU's ratified by board  
17 resolution.

18 **THE COURT:** Amount to a resolution or ordinance.

19 **MR. LYNCH:** That's right. They're --

20 **THE COURT:** So we don't need to argue about that  
21 anymore.

22 **MR. LYNCH:** Well, I don't think so because the -- you  
23 start with the basis that it's presumed that a lifetime right  
24 has not been granted. It's also presumed that collective  
25 bargaining agreements don't set terms that survive.



1 to be unmistakable. You've got to have unmistakable intent.  
2 You start with the presumption that there's not that kind of  
3 grant. And that unmistakable intent has to be either found  
4 through language or circumstances that accompany the passage  
5 of the legislation that you're relying on, the resolutions  
6 that you were talking about.

7 And here there's a fundamental lack of any such evidence.  
8 Fundamental lack. If you look at -- We can start with the MOU  
9 or we can start with the resolution that adopts it. I'll  
10 start with the resolution that adopts it because fundamentally  
11 that's where the rubber meets the road. And there, the  
12 resolutions, by their express term, are for a set duration, a  
13 specified time period, for starters.

14 Number two, we have no evidence of any documents, any --  
15 and by "documents," I mean staff reports or legislative  
16 history, costing documents, nothing that is shown that was  
17 presented to this board in August of 1989 when fundamentally  
18 the plaintiffs claim this right was created. There's nothing  
19 presented to show that accompanied passage. And we don't have  
20 any evidence of any discussions by the board of supervisors at  
21 that particular time either.

22 And it's got to be focused on that time. The accompanying  
23 passage really focuses on the particular resolution where the  
24 right was assertively adopted. So that's one.

25 If you, number two, drop back to the MOU or collective

1 bargaining agreement, where it's asserted that this right was  
2 to be implied from, you can't find it. First of all, there's  
3 the language of the document itself. And you alluded to that  
4 in your earlier remarks. We've got testimony on it as well.

5 But what the undisputed facts show is that, first of all,  
6 there was never any reference in any prior MOU to anything  
7 about retiree healthcare. And, indeed, this Court found --  
8 the Ninth Circuit found it was correct. And based on that,  
9 you again found that there was no right that any retiree had  
10 to any healthcare prior to 1990.

11 **THE COURT:** Well, but there was a whole history of  
12 that being provided, which true enough can't be itself turned  
13 into an implied contract or an implied term, but it can be  
14 evidence, as the Ninth Circuit recognized, of what the intent  
15 of the parties was in 1989 when they said, essentially we're  
16 going to do what we've been doing except we're going to make  
17 you have to have 10 to 20 years of vesting.

18 **MR. LYNCH:** Except I don't think that's what was  
19 done. And that has to be viewed through the lens and I  
20 believe that that examination can be conducted as a matter of  
21 law based on the facts before the Court. Because I started  
22 with the proposition that there was no contractual right ever  
23 established for any retiree prior to 1990. I believe that's  
24 law of the case, and I believe that, you know, the Ninth  
25 Circuit --

1           **THE COURT:** Right, but as I said, conceding that to  
2 be true, it is or could be evidence of the intent of the  
3 parties at the relevant time.

4           **MR. LYNCH:** So let's -- let's take that for a moment.  
5 So you've got a practice. The Ninth Circuit in *REAOC III*  
6 believed -- talks about whether a practice -- practice  
7 standing alone is not enough.

8           So then we have to look at what happened in 1990.

9           **THE COURT:** It's not -- Well, we're going around in  
10 circles here, but okay. Never mind. Go ahead.

11          **MR. LYNCH:** Well, I don't want to go in circles.

12          **THE COURT:** I'll just stop asking my questions.

13          **MR. LYNCH:** Oh, please don't.

14          **THE COURT:** I'm sure I'll ask a different one. But  
15 go ahead.

16          **MR. LYNCH:** Focusing on the language.

17          **THE COURT:** Okay.

18          **MR. LYNCH:** Let's focus on the language that was  
19 drafted here and when it came in. And we've got the testimony  
20 from two of the people that were involved in the bargaining  
21 history.

22                 And fundamentally, when you carry it right down, they  
23 allege that there was a tentative agreement reached, and there  
24 was language in there suggested that this was going to be a  
25 lifetime benefit. And whether that's true or not, that

1 language was not finally agreed to. And the testimony is  
2 that -- from the County's negotiator, who's represented by the  
3 plaintiffs, that there was requests for more expansive  
4 language and that he was not authorized to provide that.  
5 We've cited the deposition testimony from Mr. Myers. But  
6 that's fundamental, and it's proven when you look at the  
7 actual language that made it into the agreement. And the  
8 language that went into the agreement was drafted carefully.  
9 Witnesses have admitted that.

10 And then that gets us to this language that you started to  
11 talk about initially. And it is carefully crafted. The first  
12 sentence says currently what the County is doing. Okay?  
13 They're doing something currently in terms of healthcare. We  
14 know from the start that that is not contractual.

15 **THE COURT:** It's a --

16 (Simultaneous colloquy.)

17 **THE COURT:** -- what it is. It tells us certain  
18 facts. It says currently we're doing X.

19 (Simultaneous colloquy.)

20 **MR. LYNCH:** Currently we're doing something, yes.  
21 That's right. And -- And then it moves on to talk about  
22 people that are hired after 1990. And -- and as you move  
23 through -- it's one, two, three, four, five -- I think six or  
24 seven lines down, it says, "the County shall contribute for  
25 the retiree only the same amount."



1 assuming, but plaintiffs are now saying maybe it will turn out  
2 some other way and they'll amend their complaint to conform to  
3 proof.

4 So where are we -- remind me where we're getting the fact  
5 that it's connected to the unrepresented management employees  
6 as opposed to anybody else.

7 **MR. LYNCH:** We're getting it's -- it's connected to  
8 the unrepresented management employees from six years of  
9 pleading allegations by the plaintiff in this case set forth  
10 very clearly in -- in all of their complaints.

11 **THE COURT:** Hmm.

12 **MR. LYNCH:** All of their complaints.

13 **THE COURT:** Okay.

14 **MR. LYNCH:** We also have record evidence that -- that  
15 there was a question that went before the Public Employee  
16 Relations Board with respect to two unions, and the Public  
17 Employee Relations Board -- and that litigation went on for a  
18 long time. The finding of the Public Employee Relations Board  
19 in both instances was that the reference in these MOU's to  
20 "active single employee" was a reference to unrepresented  
21 management employees.

22 We also have significant record evidence from the key  
23 principle -- key principle witnesses represented by the  
24 plaintiffs that say that that is the case. That includes the  
25 designated 30(b)(6) witness on behalf of the plaintiffs. It

1 includes former management employees, key management employees  
2 that were represented by the plaintiffs in this litigation.

3 That's the way that this case has been litigated all  
4 along. And that's -- that's what's -- that's what I believe  
5 is -- is undisputed. And I think the plaintiffs are bound by  
6 that. So I think that's -- that's an important point.

7 I also think that --

8 **THE COURT:** Go on.

9 **MR. LYNCH:** -- in the same manner and on the same  
10 basis as is done at the time for other retirees who are hired  
11 or -- and there's a typo there, it says "returned" -- sort of  
12 a Freudian slip, it should be "rehired" -- or rehired --

13 (Simultaneous colloquy.)

14 **THE COURT:** My copy does say "rehired."

15 (Simultaneous colloquy.)

16 **THE COURT:** The one I'm looking at.

17 (Simultaneous colloquy.)

18 (Off-the-record discussion.)

19 **THE COURT:** You're driving the reporter crazy here.  
20 It doesn't seem fair, but when I talk you have to stop.

21 **MR. LYNCH:** No, it's fair.

22 **THE COURT:** When you talk, I don't have to stop.

23 (Laughter.)

24 **THE COURT:** That's just how it is. And it makes the  
25 court reporter quite unhappy if two people are talking at

1 once.

2 **MR. LYNCH:** I understand that, your Honor.

3 **THE COURT:** Okay.

4 **MR. LYNCH:** In any event, in the same manner and on  
5 the same basis as is done at the time for other employee --  
6 other retirees who were hired or rehired before January 1,  
7 1990, to me, that is a careful explication that what is being  
8 done here is no more than the practice that was previously  
9 done.

10 When it says "in the same manner and on the same basis,"  
11 "on the same basis" -- I think we cited this in our papers  
12 from -- we had to go back to *Black's Dictionary* which talks  
13 about basis as a fundamental condition, the situation at the  
14 time.

15 This is carefully crafted language, "in the same manner  
16 and on the same basis as is done for other retirees who were  
17 hired or" --

18 **THE COURT:** You're skipping the part that I don't  
19 get.

20 **MR. LYNCH:** No, I'm getting to it.

21 **THE COURT:** "As is done at the time."

22 (Simultaneous colloquy.)

23 **THE COURT:** What time? What time?

24 **MR. LYNCH:** At that particular time.

25 **THE COURT:** What time?

1           **MR. LYNCH:** 1990, 1989 when this is being negotiated.  
2 I believe that this ties back to and it's a limitation --

3           **THE COURT:** Instead of what -- instead of saying --  
4 instead of meaning done at the time, they mean as is done now  
5 or at this time.

6           **MR. LYNCH:** That's right. As in --

7           **THE COURT:** That isn't what it says, but that's what  
8 you think it means.

9           **MR. LYNCH:** It says in the same manner and on the  
10 same basis as is done at the time for other retirees who were  
11 hired or rehired before January --

12           **THE COURT:** So what that really means is as is done  
13 at this time, which is to say whatever they were doing in  
14 1990.

15           **MR. LYNCH:** Which is to say prior to 1990, which was  
16 not contractual.

17           **THE COURT:** Maybe not, but what were they doing in  
18 1990? What were they giving people hired before January 1,  
19 1990?

20           **MR. LYNCH:** They were contributing. They were  
21 providing access to the healthcare -- for retirees who were  
22 receiving healthcare, access to the same plans as active  
23 employees, and they were making the same contribution as they  
24 were making to unrepresented management employees. I believe  
25 and it's probably -- it's -- we don't have evidence right

1 before the court right now, but this is -- at that particular  
2 time we have evidence in here is what was done from 1990 going  
3 forward.

4 **THE COURT:** So what they're agreeing to, then, is to  
5 do for these later hires what they were doing at that time in  
6 1989 for --

7 **MR. LYNCH:** People already --

8 (Simultaneous colloquy.)

9 **MR. LYNCH:** Already retired.

10 **THE COURT:** For people already retired.

11 (Simultaneous colloquy.)

12 **MR. LYNCH:** See, that's my point.

13 **THE COURT:** What were they doing for them?

14 **MR. LYNCH:** What they were doing for them was, number  
15 one and most importantly, not contractual.

16 **THE COURT:** Well, but that isn't the question.

17 **MR. LYNCH:** I know. But --

18 **THE COURT:** The question is: What were they doing  
19 for them? And I think you've answered it unless it's a  
20 different answer.

21 **MR. LYNCH:** I'm -- to me, there's two parts to that  
22 answer. One is was it contractual, the answer is no. And the  
23 second part is they were providing the same contribution as  
24 they were providing --

25 **THE COURT:** Okay.

1           **MR. LYNCH:** -- to unrepresented management employees,  
2           and that was subject to change. And so I -- the theory that's  
3           being advanced here is that somehow out of this language, you  
4           meet clear language. The clear and unmistakable language that  
5           there was an intent to make a lifetime grant of healthcare  
6           benefits ab initio right here right now, and I submit that  
7           language, it doesn't do it.

8           And I think that the language then under principles of  
9           contract interpretation has to be viewed through the lens of  
10          the rest of the contract, specifically that the contract is  
11          for a set duration with a start date and an end date that's  
12          inconsistent with terms that are going to survive it.

13          The other provision that you have to look at is what's  
14          called the full understanding provision which is the classic  
15          integration clause which says that the document contains all  
16          of the terms and conditions of employment set forth therein,  
17          and there's a no-modification provision which precludes  
18          carrying forward a practice unless it's set forth in writing.

19          I believe you have to look at the entire contract through  
20          that lens. And when you look at the two ways that one might  
21          under the law get to a vested right, one being clear contract  
22          language, or, if you will, the clear language in a resolution,  
23          you don't have it. You don't have it.

24          It's -- it's got to be clear. It's presumed not to be --  
25          not to be lifetime. It's got to be clear. And the Ninth

1 Circuit tells us that clarity has got to be unmistakable and  
2 there's a heavy presumption.

3 **THE WITNESS:** Okay. You've said that.

4 **MR. LYNCH:** So we've got that.

5 **THE COURT:** Is there anything else?

6 **MR. LYNCH:** There is. The other way is with  
7 extrinsic evidence, with convincing extrinsic evidence that  
8 the board intended to make that kind of a lifetime grant. And  
9 it has to be extrinsic evidence that evinces that that board  
10 intended to make that grant at the time it was created and  
11 that it accompanied the passage, which brings me back to where  
12 I started which I don't -- there's no evidence for that here.

13 **THE COURT:** Right. So are there any other theories  
14 or claims that you wanted to address?

15 **MR. LYNCH:** I believe all the -- all of it falls --  
16 rises or falls on this implied contract.

17 **THE COURT:** Not really. What about the "all or  
18 substantially all"?

19 **MR. LYNCH:** All or substantially all, no evidence has  
20 been put forth to -- to support that. First of all, again,  
21 we're looking -- and I want to say one other thing. We're  
22 looking at also please recognize that there are a group of  
23 active single employees, the unrepresented management  
24 employees, who also have no contractual right by this Court's  
25 holding and by the Ninth Circuit's holding. All right?



1 unrepresented management group, and they do not have a  
2 contract right, they do not have a vested right.

3 It's -- if you will, it would be fundamentally  
4 inconsistent to find that somehow a -- a contract had been  
5 negotiated to give rights to the union retirees and that  
6 those -- and that they were the same rights as the  
7 unrepresented management group got, and yet somehow the union  
8 employees are transformed into having greater rights. It's  
9 logically inconsistent.

10 And -- and that's the only thing that really accompanied  
11 passage of the adoption of this MOU. On the "all or  
12 substantially all" theory, the "all or substantially all,"  
13 first of all, there's record evidence that's undisputed that  
14 the relevant time frame here, and the relevant time frame in  
15 this case is from 1990 to 2009, county never paid all of the  
16 healthcare premiums for any retirees during that entire  
17 period.

18 And number two, the percentage contribution that the  
19 county made to retiree health care between 1990 and 2009  
20 changed virtually every couple of years, changed every couple  
21 of years.

22 (Simultaneous colloquy.)

23 **THE COURT:** Excuse me. Maybe I need to ask them this  
24 first, but maybe you know and can address it. We have a lot  
25 more fleshed out on what is the basis for the tie allegation,

1 but what is the purported resolution or ordinance that set out  
2 the "all or substantially all" contract?

3 **MR. LYNCH:** To my understanding, it's precisely the  
4 same resolutions and ordinances because it's not -- it's  
5 really not addressed in their motion, it's addressed in ours,  
6 but if you go back to the complaint and you look to which  
7 resolutions were added to source the -- the alleged contract  
8 right in this third amended complaint, they're precisely the  
9 same resolutions. And the "all or substantially all" is a  
10 theory that again, theoretically or as alleged, applies to the  
11 same group of people, e.g., the retirees from 1990 -- union  
12 retirees from 1990 to 2009. And it's based on the same  
13 resolutions. And it's based on the same contract language.  
14 And that's why -- although we haven't devoted a lot of time to  
15 it because there is no evidence to support the "all or  
16 substantially all" theory.

17 **THE COURT:** So do you know what their theory is? Is  
18 it that "on the same basis as is done at this time" and that  
19 basis was "all or substantially all"?

20 **MR. LYNCH:** I've never really explicated exactly what  
21 this "all or substantially all" is. The 30(b)(6) witness said  
22 that it was a threshold of 85 percent of whatever -- of the --  
23 of a County plan, except we've got undisputed evidence that in  
24 2006, the County only paid 84 percent.

25 **THE COURT:** Well, but what are they paying in '89 and

1 '90?

2 **MR. LYNCH:** In '89 and '90?

3 **THE COURT:** Yes. "At this time," the time of this  
4 resolution.

5 (Simultaneous colloquy.)

6 **THE COURT:** -- to read, as you say, what it really  
7 means is not at "the" time but at "this" time.

8 (Simultaneous colloquy.)

9 **MR. LYNCH:** -- I think it's probably in the magnitude  
10 of, you know -- I don't know what the amount would have been  
11 in percentage terms, 95 or 96 percent. Although the language  
12 talks about the same amount. It doesn't talk about the same  
13 percentage. And the amounts changed all the time because the  
14 healthcare costs continued to go up. And -- and consistently  
15 the retirees and the active employees all made greater  
16 contributions throughout that period of time.

17 But it doesn't start and end there. We've questioned  
18 witnesses here and -- about if anyone ever heard of this term  
19 "all or substantially all." No one has. Questioned the  
20 30(b)(6) witness. She wasn't able to articulate where this  
21 really came from. And in questioning negotiators, there's no  
22 evidence that there was ever any sort of negotiation or  
23 discussion about some sort of "all or substantially all," or  
24 even specific percentage terms that were going to apply to --  
25 to retirees. So I believe that there's a complete failure of

1 proof on that and that theory has to really go out the window.

2 I also would say although plaintiff clings to both  
3 theories still at this late date, the two theories are  
4 fundamentally inconsistent. You can't have both. And it's --  
5 it's anomalous that two fundamentally inconsistent and  
6 alternative theories are being asserted in a backdrop where,  
7 as a matter of law, the plaintiff is required to approve -- to  
8 prove, carry a heavy burden and meet this heavy *REAO*  
9 standard.

10 **THE COURT:** Well, at the moment, all they need to do  
11 is present enough evidence to create a dispute of material  
12 issue of fact. So they could present evidence of two  
13 different alternative theories. At trial, of course, one has  
14 to prevail, but at the moment conceivably they could do both,  
15 although I'm not sure I'm seeing the "all or substantially  
16 all."

17 And the third one, which you didn't address, but as you  
18 point out you did say you wanted to move on everything, but  
19 you didn't address pooling specifically. Do you have any idea  
20 what resolution or ordinance is -- is --

21 (Simultaneous colloquy.)

22 **MR. LYNCH:** There's no evidence -- there's no  
23 evidence of the -- the resolution for the claims in their  
24 entirety are the discrete body of resolutions that have been  
25 submitted and referenced in the -- in the Second Amended

1 Complaint. They're again the same resolutions that are --  
2 that adopt the various memoranda of understanding.

3 And if you look at those resolutions in plaintiffs'  
4 opposing briefs, why are they citing these resolutions? We  
5 don't even know why. Well, of course, they're fundamental.  
6 They're fundamental. And we cite them because we show that  
7 they are dead silent as to duration except that it says it's  
8 for a specific term. They're dead silent as to lifetime. I  
9 don't see anything about healthcare contributions. They  
10 certainly don't say anything about pooling. And there's no  
11 real evidence of pooling other than by practice which is  
12 alleged. That's all.

13 We don't have any evidence really of this being raised in  
14 negotiations. We certainly have no evidence that this was  
15 present to the Board of Supervisors. There's no evidence of  
16 costing of a lifetime benefit. There's no evidence of the  
17 Board of Supervisors costing any pooling benefit. There's no  
18 evidence of the Board of Supervisors costing any "all or  
19 substantially all" benefit.

20 And I come back to that. I don't mean to be repetitive,  
21 but I have to do that because that's what the law requires and  
22 it's been set forth. And with respect to materiality, I think  
23 materiality of any evidence has to be viewed through that  
24 particular lens which erects a heightened burden as a matter  
25 of law.

1           **THE COURT:** So you mentioned this costing out of  
2 things. Why do you think that Section 18 of the California  
3 Constitution would apply to a county budget? Plaintiffs argue  
4 that it applies only to bonds. I'm not sure exactly why they  
5 say that or what they rely upon. But it does seem like the  
6 language of it does allude to something where there's  
7 principal and interest. And a county's annual budget or  
8 quadrennial budget or whatever they do typically isn't  
9 described in terms of principal and interest, like we need  
10 X amount of principal to pay our wages and X amount of  
11 interest to support that.

12           So if the language --

13                           (Simultaneous colloquy.)

14           **THE COURT:** -- seem to imply that they're talking  
15 about bonds.

16           **MR. LYNCH:** I think it's far beyond bonds. We've  
17 cited cases that show that it's been applied in a number of  
18 different instances and not just bonds.

19           **THE COURT:** What does this "principal and interest"  
20 language refer to?

21           **MR. LYNCH:** Principal and interest language, I -- I  
22 suppose is going to refer to the -- the debt limitation is  
23 talking about an obligation that a county is assuming that  
24 goes beyond its annual budget or beyond one year.

25           **THE COURT:** But they enter into, I'm guessing, MOU's

1 or CBA's that are longer than a year.

2 **MR. LYNCH:** Sure.

3 **THE COURT:** So why isn't every CBA or MOU a violation  
4 of this? Why don't they have --

5 (Simultaneous colloquy.)

6 **THE COURT:** -- determine what is the principal of  
7 that and what is the interest on it and all of that?

8 **MR. LYNCH:** Because there's typically costing for  
9 those, for the term of the agreement. There's a budget that's  
10 set each year. And there's various exceptions to the debt  
11 limitation.

12 But it is an existing section of the California  
13 Constitution. It hasn't been raised. And certainly it does  
14 require that to -- for a board of supervisors or a county  
15 governmental entity to incur longstanding debt, they either  
16 have to come within one of the exceptions to it or they have  
17 to cost it or they have to consider what it's going to cost.  
18 We have no evidence again of any of that here. None.

19 **THE COURT:** So when an employee is active, the County  
20 has these different plans that they offer and they pay some  
21 percentage of the cost of them. When an employee retires,  
22 maybe they can retire before they're eligible for MediCare,  
23 but at some point they're going to be eligible for MediCare.  
24 How does that play into the County's payments? Or I suppose  
25 an active employment could be 65 and collecting MediCare. How

1 do the insurance plans interface with MediCare?

2 **MR. LYNCH:** Typically the way they interface with  
3 Medicare is once MediCare comes in, the plans that are  
4 available to retirees over 65, the cost of those plans are  
5 reduced greatly. And they actually, in this instance, the  
6 County's contribution, depending on the plan, is still  
7 covering a large amount of what healthcare costs. Depends on  
8 the particular plan.

9 County also contributes, I think -- I think for Medicare  
10 the coverage is about \$106 a month. The County contributes to  
11 in addition to the \$500 flat amount that it contributes  
12 towards healthcare, an additional \$97 towards the MediCare  
13 premium.

14 Fact of the matter is that there's different plans, of  
15 course, offered. The County has a County health plan that it  
16 offers which is a very, very rich plan. It's a costly plan.  
17 And so that's more costly for retirees, but it goes down for  
18 MediCare-eligible people. People are eligible to get Medigap  
19 policies and other policies. In most instances, retirees over  
20 65 who are MediCare eligible are having a large portion --  
21 much larger portion of their healthcare premiums paid.

22 **THE COURT:** Well, so if the person isn't eligible for  
23 MediCare, their premium is, let's say, \$500. When they become  
24 eligible, their premium is less because their coverage only  
25 needs to be a wraparound or something like that.

1           **MR. LYNCH:** Right.

2           **THE COURT:** So the County pays -- if the County were  
3 paying the 500, the County would pay less, maybe 250 --

4                               (Simultaneous colloquy.)

5           **THE COURT:** -- because MediCare would pick up the  
6 rest; is that what you're saying?

7           **MR. LYNCH:** That's right. And then in some  
8 instances, if that were the case, if -- if less than 500  
9 coupled with Medicare was sufficient to pay what the over-65  
10 retiree was receiving, they'd have it all paid.

11           **THE COURT:** And the County would be making -- would  
12 be saving. The County would be paying less because the  
13 premiums were cheaper because the person was on MediCare.

14           **MR. LYNCH:** That's true.

15           **THE COURT:** Now, what about the due process claims?  
16 Do those require a contract?

17           **MR. LYNCH:** I believe they do because the due process  
18 and property claims are all grounded on an obligation that's  
19 alleged to be based upon the same resolutions, same contract  
20 principles.

21           **THE COURT:** I don't know if they are or not.

22           **MR. LYNCH:** That's the allegation.

23           **THE COURT:** That's your answer?

24           **MR. LYNCH:** Yeah.

25           **THE COURT:** You think that's what they're alleging?

1           **MR. LYNCH:** Yes.

2           **THE COURT:** I mean, that's not what the due process  
3 clause says. It says you can't take away your property  
4 without due process of law --

5                               (Simultaneous colloquy.)

6           **MR. LYNCH:** Right, but the property that's being  
7 alleged to be taken away here is -- is at base -- again,  
8 brings us back to its source, source being what's set forth in  
9 the MOU's and the adopting resolutions. So there is no right  
10 if that's not in existence.

11           **THE COURT:** Yes, well, you might have some other  
12 arguments against the due process clause claims, but I guess  
13 we'll let that go for the moment.

14           And I don't even know what the contract -- the  
15 constitutional contract claims, you can't pass any law that  
16 detracts from the contract rights or something like that? I  
17 guess the idea would be a resolution would take away from a  
18 prior contract, right?

19           **MR. LYNCH:** It's a theory that it's an impairment of  
20 contract, an existing contract, and if there's no underlying  
21 contract for the asserted right or obligation, then there's no  
22 impairment of contract under either the federal or state  
23 constitutions.

24           **THE COURT:** Okay. So what do you think this "at the  
25 time" language means?

1           **MR. RANAHAAN:** Well --

2           **THE COURT:** At what time?

3           **MR. RANAHAAN:** Right. The way we've interpreted it  
4 this whole case has been what was offered in 1989, 1990 when  
5 they were negotiating and agreeing upon this language.

6           **THE COURT:** And that was what?

7           **MR. RANAHAAN:** That was that if you retired under a  
8 normal retirement or a disability retirement, you got retiree  
9 medical benefits at the same rate as active employees. If you  
10 retired under a deferred retirement, you did not get that.  
11 And I'm happy to go into further detail, what the difference  
12 is, if you'd find it helpful.

13           **THE COURT:** Well, it says they'll pay the same amount  
14 towards the premium. So that would lead me to think that they  
15 were agreeing to pay the amount towards the premium that was  
16 being paid in 1990.

17           **MR. RANAHAAN:** Right, which was somewhere, I think,  
18 around 90 percent, around there.

19           **THE COURT:** Well, "amount" generally speaks to an  
20 actual amount as opposed to a percentage. I mean, just the  
21 words seem to.

22           **MR. RANAHAAN:** I'm sorry.

23           **THE COURT:** It doesn't say "percentage," it says  
24 "amount."

25           **MR. RANAHAAN:** Well, the -- the active employees --

1 there's another section that's not in front of us at the  
2 moment where they say --

3 **THE COURT:** I have the whole thing.

4 **MR. RANAHAH:** Okay.

5 **THE COURT:** If you want to tell me a section to look  
6 at.

7 **MR. RANAHAH:** So in the preceding section, part of  
8 Section 12, they discuss the amount that active employees get.  
9 I believe it was similar for active unrepresented employees.  
10 And that has vacillated between being a dollar amount and a  
11 percentage amount over time, so it really depends on what time  
12 period you're looking at.

13 **THE COURT:** Well, I'm looking at 1989 to 1990.

14 **MR. RANAHAH:** 1990. And I believe it was a dollar  
15 amount at that time.

16 **THE COURT:** And how much was it?

17 **MR. RANAHAH:** I don't have that number in front of  
18 me. That hasn't been a -- our theory of the case.

19 **THE COURT:** So is it your theory of the case that the  
20 tie is to unrepresented management employees?

21 **MR. RANAHAH:** Yes, that has been our theory of the  
22 case all along.

23 **THE COURT:** And is it going to continue to be?

24 **MR. RANAHAH:** It will continue to be. The reason why  
25 we raise a question as to that is because a number of the

1 union witnesses seem to recall it being slightly different.  
2 They seem to recall it being that retirees were tied to people  
3 in that union's bargaining unit. We have to be sensitive to  
4 the fact that my client is -- Scare does not represent all  
5 retirees. It has its own positions. I did not want to give  
6 short shrift to the fact that there are other witnesses who  
7 have a slightly different memory of what the tie was to.

8 **THE COURT:** Hmm.

9 So you recognize -- well, do you agree that the  
10 unrepresented management employees don't have vested rights to  
11 medical insurance, medical premium payments? That could be  
12 reduced.

13 **MR. RANAHAN:** Well, I -- I think there's two separate  
14 concepts here. One is the amount of money that active  
15 employees have as a contribution to their medical benefits.  
16 Now, that -- the question of vesting doesn't come in there.  
17 Active employees don't need vesting. They're still working.

18 The other is, well, what do --

19 **THE COURT:** Right, but the amount paid towards their  
20 premium could be reduced.

21 **MR. RANAHAN:** That is true, right.

22 **THE COURT:** And it could even be reduced to zero.

23 **MR. RANAHAN:** We do not dispute that. That's just  
24 not the case --

25 **THE COURT:** So if that were reduced and you were tied

1 to them, then yours, too, could be reduced to zero at any  
2 moment.

3 **MR. RANAHAH:** That is true. We can't dispute that.

4 **THE COURT:** Can't and don't?

5 **MR. RANAHAH:** Can't and do not.

6 **THE COURT:** Okay.

7 **MR. RANAHAH:** But that is not the case here.

8 **THE COURT:** Well, it hasn't yet, but it could.

9 **MR. RANAHAH:** In theory. I mean, the County is still  
10 an active employer. It needs to recruit employees. I mean,  
11 my understanding --

12 (Simultaneous colloquy.)

13 **THE COURT:** -- badly.

14 **MR. RANAHAH:** I guess so.

15 My understanding from the discovery in this case is that  
16 that reality that the County would still want to attract  
17 qualified management employees by offering a good benefit  
18 package was what led people to want to be tied to them.

19 **THE COURT:** Okay.

20 **MR. RANAHAH:** Now that might not be true anymore, I  
21 don't know.

22 **THE COURT:** Okay. So what is your claim of breach?  
23 Is it breach of the contract? Or is it breach of the implied  
24 covenant of good faith and fair dealing? I guess it's breach  
25 of contract.

1           **MR. RANAHAAN:** Right. The implied covenant of good  
2 faith and fair dealing is integrated into the contract.

3           **THE COURT:** But that isn't your claim. I mean,  
4 that's actually a tort claim, I guess.

5           **MR. RANAHAAN:** Right, right. That's our primary claim  
6 is that when the County came up with its scheme to cut both  
7 retirees and active employees to \$500 in contributions while  
8 simultaneously giving active employees \$600 in cash, it was  
9 purely designed as a workaround to deprive retirees --

10          **THE COURT:** Right. Well, we'll get to that in a  
11 minute. But what I'm trying to get to is your actual cause of  
12 action is breach of contract.

13          **MR. RANAHAAN:** Correct.

14          **THE COURT:** Not breach of the covenant of good faith  
15 and fair dealing.

16          **MR. RANAHAAN:** Correct. Right.

17          **THE COURT:** So and it's breach of implied terms of  
18 the contract, really.

19          **MR. RANAHAAN:** Exactly, which includes the implied  
20 covenant of good faith and fair dealing.

21          **THE COURT:** Well, I thought it was an implied term  
22 that you had vested rights for life.

23          **MR. RANAHAAN:** That is an implied term.

24          **THE COURT:** So is that the term, the expressed -- is  
25 that the term that you believe has been breached?

1           **MR. RANAHAN:** Yes.

2           **THE COURT:** Okay. So I understand what your theory  
3 is, but my question is: How would -- if you -- let's say  
4 you're right and they really did the subterfuge to cut the  
5 premium contribution down to \$500 and then sort of give them  
6 600 more under the table to kind of make up for it but not  
7 give it to the retirees. And let's say that is really what  
8 they did and that that amounts to not giving the retirees the  
9 same thing as the UME's are getting. How would that breach be  
10 remedied? Would you give them \$600 under the table as well?

11           You can't -- the way they did it for the active employees  
12 was to raise their wages by \$3.45 per hour up to a cap. Your  
13 retirees, of course, couldn't be given a wage increase of  
14 \$3.45 an hour. So what would your argument be? That they  
15 have to pay them an extra \$600?

16           **MR. RANAHAN:** We're not seeking a windfall here. All  
17 we're seeking is up to 100 percent of the cost of their  
18 medical benefits if it's \$1,100 or under. We don't want  
19 anything above what the retirees' medical premiums are.

20           **THE COURT:** Hmm.

21           **MR. RANAHAN:** I'm not saying that they wouldn't have  
22 a right to it, but the -- that's not what the plaintiff is  
23 seeking for relief in this case.

24           **THE COURT:** Up to the cost of their premium.

25           **MR. RANAHAN:** Or \$1,100.



1 age, yes.

2 **THE COURT:** So how much more do you want then? Do  
3 you want 1,100 plus the MediCare premium? Or would you --  
4 1,100 including the Medicare premium?

5 **MR. RANAHAH:** I think up to 1,100 plus the Medicare  
6 premium.

7 **THE COURT:** Plus. So they'd be getting more than the  
8 active employees because they'd be getting 1,100 plus the  
9 Medicare premium.

10 **MR. RANAHAH:** Well, I think this is hypothetical  
11 because I don't believe that any of the MediCare plans cost up  
12 to \$1,100.

13 **THE COURT:** Just wait.

14 **MR. RANAHAH:** Just wait. It may be the case in the  
15 future. Well, the --

16 **THE COURT:** Like next spring, for example?

17 **MR. RANAHAH:** We'll see what happens with the budget.  
18 The MediCare premiums have not been a part of this case so  
19 we'd have to revisit that at some other point.

20 **THE COURT:** Okay.

21 So what is your argument that Section 18 of the  
22 Constitution only applies to bonds? That's what you say, but  
23 I'm not seeing really any authority that tells me that for  
24 sure.

25 **MR. RANAHAH:** Well, the -- the language of Section 18

1 is inconsistent with the --

2 **THE COURT:** The principal and interest stuff, as I  
3 was pointing out --

4 **MR. RANAHAH:** Right.

5 **THE COURT:** -- does sound more like a bond than it  
6 sounds like a wage. But is there anything else?

7 **MR. RANAHAH:** Exactly. Well, I think that the *County*  
8 *of Orange* case is probably the closest case, most on-point  
9 case. There's not a whole lot of case law on Section 18.  
10 What the *County of Orange* case says is that unfunded  
11 liabilities don't fall within the reach of the debt limitation  
12 provision.

13 And I'd just add, this was not in our brief, but I noted  
14 that on page 39 of the *County of Orange* decision, they cite  
15 existing accounting standards not requiring reporting of the  
16 unfunded liability as a reason for not subjecting it to the  
17 debt limitation provision.

18 In this case, I don't think there's any dispute that there  
19 were no accounting reporting standards for retiree medical  
20 benefits until well into the 2000's which is what prompted the  
21 County to want to start cutting them back.

22 So I would just add that point.

23 **THE COURT:** So are you really still pursuing this  
24 "all or substantially all" theory? Or are we really looking  
25 at the tie theory?

1           **MR. RANAHAN:** Well, clearly, the -- the evidence is  
2 more robust for the tie agreement theory. And that's --  
3 that's clear from our brief. But there are a number of  
4 witnesses who recall being told that they would get paid  
5 85 percent, a hundred percent, some high percentage of their  
6 retiree medical benefits, for life upon their retirement.

7           The County did, for roughly 45 years, pay between 85 and  
8 100 percent retiree medical benefits as is demonstrated by  
9 resolutions from 1964 up until 2008. So we're not -- we're  
10 not giving it up, but we would acknowledge that at this point  
11 the tie agreement theory appears to be the more viable of the  
12 two.

13           **THE COURT:** Well, what MOU/resolution would you be  
14 relying on to support the basis for an "all or substantially  
15 all" implied term of the contract?

16           **MR. RANAHAN:** We'd be relying on the numerous  
17 resolutions from 1964 to 2009 that are attached to our  
18 Complaint. For a long period they said this is how much we're  
19 contributing, 85 percent, 90 percent, whatever the amount was,  
20 in that longstanding practice, coupled with affirmations that  
21 would be a lifetime benefit, are the primary bases for the  
22 "all or substantially all" claim.

23           **THE COURT:** Well, if we just look, for an example, at  
24 the 1989 to '90 one, do you think that supports an "all or  
25 substantially all" theory?

1           **MR. RANAHAH:** I do, because at the time the amount  
2 the County was contributing was, like I said, approximately  
3 90 percent or more of the premium for retirees.

4           **THE COURT:** So instead of saying you get what they  
5 get at the time, at this time, you'd say you get what they get  
6 at this time and that is "all or substantially all"?

7           **MR. RANAHAH:** Correct.

8           **THE COURT:** That seems harder to read into it than  
9 the other.

10           So what about pooling? You say they didn't move on that,  
11 but they did move that they should win on everything and  
12 pooling is something. So do you have a resolution or  
13 ordinance that would support an implied term of pooling?

14           **MR. RANAHAH:** Right. Well, first of all, I'd point  
15 out that they only moved on pooling with respect to the "all  
16 or substantially all" claim.

17           **THE COURT:** They moved, they said, "We think we win  
18 on everything, all the causes of action, all the theories,  
19 everything, we win, it's all over." So at least implicitly,  
20 they're saying that everything you say is no good.

21           **MR. RANAHAH:** Right.

22           **THE COURT:** So you would need to respond on all  
23 possible theories. If you really were misled by it, I suppose  
24 I could give you a chance to respond on that point, but I'm  
25 wondering if you are, if there is a pooling implied term in

1 something.

2 **MR. RANAHAH:** Well, a couple points.

3 First, because we did not believe the subject of pooling  
4 was properly raised in their opening brief, we did not marshal  
5 the --

6 **THE COURT:** I know. That's what I said. And if you  
7 really didn't, I'll give you a chance. But do you really want  
8 one?

9 **MR. RANAHAH:** Yes.

10 **THE COURT:** Is there a pooling claim in one of these  
11 resolutions or ordinances?

12 **MR. RANAHAH:** Yes. The pooling -- the pooling claim  
13 is an implied term of the resolution and ordinance.

14 **THE COURT:** Which one?

15 **MR. RANAHAH:** It's --

16 **THE COURT:** The 1989, '90?

17 **MR. RANAHAH:** Exactly.

18 **THE COURT:** How is it implied? Where does it say  
19 that?

20 **MR. RANAHAH:** Well, saying that you get the same  
21 benefit as active employees, it's implicit in there that  
22 you're part of the same risk pool.

23 **THE COURT:** Why?

24 **MR. RANAHAH:** And the reason for that is because of  
25 how risk pooling works.

1           **THE COURT:** Well, I understand how it works. But if  
2 they're just going to pay the same as they pay for the others,  
3 how does that say that they have to be in the same pool?

4           **MR. RANAHAN:** Well, it's just like the 500, 600  
5 scheme in the sense that way one to work around providing the  
6 same benefits would be to depool them, in which case active  
7 employees' medical benefit premiums would drop precipitously  
8 and retirees -- pre-MediCare retirees' premiums would shoot  
9 through the roof.

10           And I would add that in 1989 pooling is what was done at  
11 the time that this language was adopted.

12           **THE COURT:** So what is required for a claim of  
13 promissory estoppel?

14           **MR. RANAHAN:** Well, also we --

15           **THE COURT:** Or are you pursuing a claim of promissory  
16 estoppel?

17           **MR. RANAHAN:** We still are. We haven't briefed that  
18 claim separately. My understanding of the claim is that it's  
19 a promise upon which a party reasonably relied on to their  
20 detriment.

21           **THE COURT:** And can you do that against a government  
22 entity that, normally speaking, needs a resolution or  
23 ordinance?

24           **MR. RANAHAN:** I would argue that you can. But I --  
25 to be honest, we have not separately briefed that. I'd want

1 the opportunity to conduct legal research and present briefing  
2 to the Court if you were considering separately the promissory  
3 estoppel claim.

4 **THE COURT:** And what about, you've really got, I  
5 suppose, four constitutional claims, two due process and two  
6 impairment of contract. Do you really have a due process  
7 claim, taking of property without due process of law?

8 **MR. RANAHAN:** Well, we would argue that a vested  
9 right is a property right.

10 **THE COURT:** And what due process of law was required  
11 that wasn't given?

12 **MR. RANAHAN:** The retirees -- well, the County came  
13 up with its scheme on its own. To the extent it owed retirees  
14 the same medical benefits as active employees, it did not --  
15 it -- it veiled its actions by saying it was providing  
16 employees cash. And -- and, again, I would say for the due  
17 process claim, that is one that we would want to separately  
18 conduct legal research and brief if the Court is separately  
19 considering it.

20 With the contract claims --

21 **THE COURT:** Well, the reason I ask is if the case  
22 goes to trial, at least on the breach of contract claim on the  
23 tying, which I tend to think it might, then we're going to  
24 have to, what, instruct the jury on five other alternative  
25 theories?

1           **MR. RANAHAN:** Right. I think we'd have to separately  
2 brief those.

3           **THE COURT:** Well, this would be the time.

4           I mean ordinarily, if someone does that and then someone  
5 responds, and we can figure it out. But at the moment, we  
6 would end up with a bunch of claims that I don't even know  
7 really what the elements are. There is some law out there  
8 about constitutional claims that if there's a more specific  
9 claim, you can't make the constitutional claim, you have to  
10 rely on the more specific claim. Maybe that applies, maybe it  
11 doesn't. Promissory estoppel might not apply in a case where  
12 you need a resolution or ordinance.

13           I don't know what the impairment of contract, how that  
14 relates to a breach of contract claim, if one can pursue both  
15 at the same time, what the elements of it are, et cetera. So  
16 somebody is going to have to figure that out sometime,  
17 probably.

18           And this is really, I guess, irrelevant, but I'm still  
19 confused about why it was that the plaintiffs initially said  
20 that the *REAOC* case was not applicable to this case, and now  
21 it seems that it is.

22           **MR. RANAHAN:** I don't believe that we said that.

23           **THE COURT:** I thought you did, and the Ninth Circuit  
24 thought you did. But maybe it was -- maybe everyone was  
25 mistaken.

1           **MR. LEWIS:** If I may speak to that, your Honor. I  
2 believe we said the District Court *REAO*C case --

3                           (Simultaneous colloquy.)

4                           (Off-the-record discussion.)

5           **MR. LEWIS:** -- since I was around on this and  
6 Mr. Ranahan wasn't.

7           On the original motion to dismiss which was decided by you  
8 after the District Court decision in *REAO*C but before the  
9 Ninth Circuit decision and this California Supreme Court  
10 decision on reference from the Ninth Circuit, we said *REAO*C  
11 didn't apply. We've never said *REAO*C did not apply, that the  
12 California Supreme Court *REAO*C decision didn't apply. We've  
13 said it does apply.

14           **THE COURT:** Right, but at the time the appeal was  
15 pending.

16           **MR. LEWIS:** Was pending, right. Because we said  
17 *REAO*C doesn't apply because it's wrong. I think we just said  
18 it's wrong. The District Court decision is wrong. We may  
19 have tried to distinguish it also --

20                           (Off-the-record discussion.)

21           **MR. LEWIS:** I don't think that we ever said that the  
22 *REAO*C California Supreme Court decision doesn't apply. If  
23 that's what you're asking.

24           **THE COURT:** No. I was asking more about the case  
25 that was pending at the time.

1           **MR. LEWIS:** Well, I can't recall every line of our  
2 brief on the motion to dismiss for however many years ago, I'm  
3 sorry about that. But I believe the heart of what we said is  
4 that it was wrong, and we may have tried to distinguish it  
5 also.

6           **THE COURT:** Okay.

7           **MR. RANAHAN:** Being lawyers, I would suspect we did.

8           **THE COURT:** Okay. So did you have anything else  
9 then?

10          **MR. RANAHAN:** Nothing further.

11          **THE COURT:** Did you want to reply?

12          **MR. LYNCH:** I would, to a couple of points.

13                 First of all, again back to this -- to this tie agreement,  
14 and we make the point in our papers that the County has  
15 continued to provide the same healthcare benefits to retirees  
16 as it provides to unrepresented management employees which is  
17 the thrust of this tie agreement claim. And of course counsel  
18 just conceded it could go down to zero and which is true  
19 because there is no contract right for the unrepresented  
20 management group and that's the group that they are allegedly  
21 tied to.

22                 With respect to the cash allowance, I would submit two  
23 points, two fundamental points as a matter of law. First of  
24 all, cash allowance is unavailable here as a matter of law.  
25 This -- this compensation, additional wage that is provided to

1 active employees is something that the retirees cannot receive  
2 in this case.

3 First of all, the County Board of Supervisors, under the  
4 Constitution and under the Government Code, has the authority  
5 to set compensation for employees. And that's what they did  
6 for the active employees, pure and simple. And there's no MOU  
7 that they rely on or any contract at all to reach that \$600  
8 amount. So they have to meet the REAOC standard, I would  
9 submit, to reach that \$600 through the resolution that granted  
10 that cash emolument to the active employees. And there's  
11 absolutely no evidence to state -- I don't -- that that can be  
12 done. I think it's presumed not part of this. And --

13 **THE COURT:** Well, let's say it were determined,  
14 hypothetically speaking, that the County made that \$600  
15 concession in order to avoid having to pay a higher premium  
16 rate to tied retirees.

17 Would you think that would be a -- and let's say it were  
18 true that there was such a tie agreement that had been -- that  
19 was an implied term of the resolution. Would you dispute that  
20 the payment of \$1,100 to UME's would not be applicable to  
21 retirees if all those things, which I understand you don't  
22 believe, but if they were all true?

23 **MR. LYNCH:** I would. Undeniably. Undeniably.

24 **THE COURT:** Oh, I think --

25 **MR. LYNCH:** Because -- because, again, we have to

1 look at this. This is an extraordinarily -- extraordinary  
2 claim that's being asserted here against a public entity, and  
3 that's not me being argumentative or an advocate. I'm looking  
4 at what the law says and what needs to be done to impose this  
5 kind of far-reaching obligation on -- on the taxpayers of a  
6 county. All right? And the assertion here is that teased out  
7 of this MOU language and silent MOU's, there's this secret  
8 promise based on a practice.

9 **THE COURT:** Right. I'm asking you to assume that's  
10 true.

11 (Simultaneous colloquy.)

12 **THE COURT:** I understand that you don't think it is,  
13 but if you could just wrap your head around it for a moment  
14 that it were found to be true.

15 **MR. LYNCH:** I am. What I'm saying is the fundamental  
16 claim is that there's a certain benefit that they say is the  
17 same benefit as unrepresented management gets, and that's the  
18 promise they got. Okay. If that's the promise they got,  
19 that's what they're getting right now. And if they -- if the  
20 County retained authority to redirect, which it did, even  
21 under their theory, however -- whatever kinds of terms of  
22 compensation they were going to provide to active employees,  
23 active unrepresented employees, who the Board of Supervisors  
24 undeniably has the solely authority to do. If they decided to  
25 give them all a suit instead of cash or anything else, that's

1 not part of the agreement that they're seeking to assert.

2 They've seized on the \$600, but the Board retained the  
3 authority to set compensation, and this was compensation.  
4 People have to work to get it. Retirees are no longer  
5 working. People -- the employees that receive it are taxed on  
6 what they receive and have been paying taxes on it. So has  
7 the County.

8 Whatever lens you want to look at that cash allowance  
9 through, it's undisputed that those -- that anybody receiving  
10 that can spend that money in any way they want. They can  
11 purchase healthcare, they can take cheaper healthcare, use  
12 some of it to purchase healthcare, take the rest of it and buy  
13 clothes or food or whatever. Those are all undisputed.

14 They're asking this Court through this heightened standard  
15 to come in and transform this compensation into a benefit. I  
16 say as a matter of law, they can't do that. I believe it  
17 fails for that reason alone.

18 And it fails because it's done against the backdrop of --  
19 of *REAOC* and the admonition by the Supreme Court and the Ninth  
20 Circuit that even -- that even if a court is finding that  
21 there is some lifetime right, it's far-reaching. The cases  
22 say courts have to be very cautious about setting those kind  
23 of terms. We're talking about something for life here.

24 So I say as a matter of law, the cash allowance fails.

25 I also say that at this point in time before this Court it

1 utterly fails because there's no evidence to support the  
2 subterfuge analysis, other than speculation. And this is a  
3 term, an implied term that they're seeking to impose, and they  
4 have to meet this clear and unmistakable evidence of intent,  
5 and I submit it simply has not been done. Simply has not been  
6 done.

7 And the covenant claim, there was some reference here to  
8 whether it's a tort or a contract claim. It's a contract  
9 claim. It's not a tort claim.

10 **THE COURT:** I'm sorry. What is?

11 **MR. LYNCH:** It's a contract-derived claim, not a tort  
12 claim.

13 **THE COURT:** What is?

14 **MR. LYNCH:** The covenant -- breach of covenant of  
15 good faith and fair dealing.

16 **THE COURT:** Oh, is it?

17 **MR. LYNCH:** Yes. That's the case law on that.

18 **THE COURT:** Is that right? Somehow I have a feeling  
19 that the breach of the covenant is a tort. Am I wrong?

20 **MR. RANAHAN:** It's a -- my understanding of it is  
21 that it's a hybrid claim. You can get certain tort remedies  
22 with a covenant of good faith and fair dealing breach that  
23 wouldn't typically be available in a contract claim. So it's  
24 not purely one or the other.

25 **MR. LYNCH:** It's palpably false. That was decided by

1 the *Foley* case in 1989, California Supreme Court. I know  
2 because I remember it very well because when I first started  
3 practicing law, every wrongful termination claim was a tort  
4 claim, too, based on the covenant, and the California  
5 Supreme Court said no, that's not right.

6 This is a contract-based claim, this covenant claim. It's  
7 not a breach of an insurance policy with a bad faith claim  
8 with a statutory tinge to it. That's not this. That covenant  
9 claim rises and falls on this contract claim pure and simple,  
10 and there is no evidence of subterfuge here. And I would  
11 submit that.

12 The -- I had another point that I wished to make, but, you  
13 know, it hasn't been really raised but Your Honor's  
14 questioning talking about the amounts. You know, if you --  
15 because it talks about amount in here. It doesn't talk about  
16 contribution.

17 **THE COURT:** Well, it does, but I'm --

18 **MR. LYNCH:** I mean, I'm back to the contract language  
19 that we've been going over a little bit.

20 But you could -- they haven't alleged it this way, but if  
21 that is linked to some amount that was being paid at that  
22 particular point in time, we may have to dig it out of the  
23 record, but I -- but we could do it, and I believe it's far  
24 less than \$500 a month that it's currently paid.

25 **THE COURT:** I looked at it again while we were

1 talking, and I guess what it would seem to say would be that  
2 County shall contribute the same amount as it contributes to  
3 an active employee, which would seem to be in the present  
4 tense in the future. So it would contribute what it, in the  
5 future, at that concurrent moment is paying. But it would do  
6 so in the same manner and on the same basis as is done at the  
7 time. And that's the part, the manner and the basis, is the  
8 part that could mean how we do it now in 1990 or could mean  
9 how we're doing it in 2010 when this person who just started  
10 in 1990 retired. And that, I think, is unclear. And I don't  
11 know if it matters because what is a manner and a basis, I  
12 don't know.

13 **MR. LYNCH:** Well, you can only deal with the words  
14 and what they mean. But on the same basis, I believe *Black's*  
15 *Law Dictionary* believes it's as it's being done at the time  
16 and there was no contract right for any retirees that were  
17 hired before 1990 or were rehired before 1990.

18 Those are -- remember, when it uses the term "retirees"  
19 there, they're talking about people that have left the  
20 employment. They've left with whatever -- whatever claim or  
21 right they had. And we've determined they had no right, no  
22 contract right. And there's case law that -- I mean, you  
23 know, I'm going over it -- *REAOC III* and also the *Sappings*  
24 (phonetic) case both talk about a practice is not enough to  
25 make this clear and unmistakable right.



1 a number of questions about promissory estoppel. You know,  
2 we -- we undertook this as well as we could, within the page  
3 limitation that we had, to try to brief all of the really  
4 material issues. But if the Court is -- would like additional  
5 briefing on promissory estoppel in particular, you know, we're  
6 certainly prepared to do that if that would be useful.

7 **THE COURT:** I think that I already denied a motion to  
8 dismiss the promissory estoppel claim. I'm not sure exactly  
9 how that happened, but I think it's in one of those prior  
10 orders. No, I'm just concerned about jury instructions,  
11 although it doesn't really matter for promissory estoppel  
12 since that would be an equitable claim anyway.

13 **MR. LYNCH:** Well, this is a bench trial.

14 **THE COURT:** Oh, the whole thing is a bench trial.

15 **MR. LYNCH:** Yes.

16 **MR. RANAHAN:** That's correct.

17 **THE COURT:** Oh. Did I know that? Why is it a bench  
18 trial? Maybe I knew and forgot. But what, did you waive  
19 jury? Or there's only legal claims? Or how did this happen?

20 **MR. RANAHAN:** I believe we waived jury, but I -- I  
21 think it happened before I --

22 **THE COURT:** Is that your impression as well?

23 (Simultaneous colloquy.)

24 **MR. LYNCH:** My impression is that this is being  
25 brought for equitable and declaratory relief because this is

1 brought on grounds of associational standing in the first  
2 place. It's not a class. It's not an individual case.

3 We attacked the promissory estoppel claims in our initial  
4 pleading, setting forth the standards of promissory estoppel  
5 and the clear evidence required and the heightened standard to  
6 establish such a claim against a public entity.

7 And I believe that we also briefed the notion, one point  
8 here, that while this is a claim that's brought on  
9 associational standing, the promissory estoppel claim has got  
10 broad allegations that talk about individual decisions made by  
11 a variety of people, and, you know, life decisions were made.  
12 I -- for the life of me, I don't know how you do that from an  
13 equitable standpoint for thousands of people. And that was  
14 the thrust of our claim -- of our -- one of our defense -- or  
15 our attack on the associational standing with respect to that  
16 claim. I actually think it was a good -- I mean, it was  
17 rejected. But we would -- we would be prepared in some  
18 limited briefing if it would help the Court to provide some  
19 additional briefing on how promissory estoppel folds in  
20 with --

21 **THE COURT:** Now I'm more worried about whether this  
22 is a bench trial or a jury trial.

23 **MR. LEWIS:** We have not demanded -- we did not demand  
24 a jury trial, your Honor.

25 (Simultaneous colloquy.)

1           **MR. LEWIS:** I'm not going to go into Mr. Lynch's  
2 arguments as to why we were or weren't entitled. There was no  
3 demand for a jury trial. I mean, I think his arguments are  
4 wrong, but there's no point in debating it since we didn't ask  
5 for it.

6           **THE COURT:** I see. Okay, well, that solves the jury  
7 instruction problem.

8           **MR. RANAHAN:** There you go. It helps to have someone  
9 who's been along longer.

10           **THE COURT:** Well, I will have to say I'm inclined to  
11 find a dispute of fact with respect to the tying agreement  
12 based on the language of the MOU and the resolution which  
13 seems to be not entirely clear, and there is extrinsic  
14 evidence that the Ninth Circuit has already pointed to and  
15 said that it might go that way, such as the testimony of the  
16 member of the Board of Supervisors which plaintiffs have  
17 provided and the Ninth Circuit specifically alluded to.

18           So I am less clear on the "all or substantially all" or  
19 the pooling angles, but it does appear to be a question of  
20 inference, at least, about the tying agreement.

21           I was going to suggest that you go to mediation or a  
22 magistrate judge or something to see if you can settle the  
23 case. I don't know if it's something that could be settled or  
24 not if it's a matter of sort of county resolutions. I don't  
25 know how that could be changed in settlement. But you said

1 you've been to mediation. Who did you go to?

2 **MR. LYNCH:** We mediated with Barry Winograd,  
3 Mr. Winograd.

4 **MR. LEWIS:** Mr. Lynch and I, however, have a parallel  
5 case involving Contra Costa County, and we used Judge Sabraw.  
6 We settled that so it's up to the County. We're willing to  
7 try that again since he was successful in the other case.

8 **THE COURT:** You want to do that?

9 **MR. LYNCH:** It's a possibility. I'd need to talk to  
10 my clients about that further.

11 (Simultaneous colloquy.)

12 **THE COURT:** But you'll do something. So the question  
13 is do I send you to a magistrate judge, or do you go to judge  
14 Sabraw or to someone else.

15 (Simultaneous colloquy.).

16 **THE COURT:** -- discuss it.

17 **MR. LYNCH:** -- if we were going to undertake this, we  
18 would -- we would be inclined to go to a mediator.

19 **THE COURT:** To Judge Sabraw.

20 **MR. LYNCH:** We might be inclined. I can't speak for  
21 any client right now.

22 **THE COURT:** Why don't you decide that and discuss it  
23 with the other side? **At the very least, you'll go to a**  
24 **magistrate judge because I can order that without anyone**  
25 **having to pay for it.** So that, you don't need to inquire

1 into, although you could inquire into whether there's a  
2 particular magistrate judge that you think would be more  
3 suited to it, but given the understanding that you will go to  
4 some form of mediation, if you then would prefer to go to  
5 Judge Sabraw or somebody else that you can agree on, that  
6 would be fine, too.

7 **MR. RANAHAN:** Okay.

8 **THE COURT:** And you'll need to do that obviously  
9 before the trial. You don't have a trial date. I was going  
10 to set one. Or I guess you all said you wanted to talk about  
11 it and perhaps set one. I don't know how long it would take  
12 to try or when you have in mind to try it.

13 **MR. LYNCH:** You've given us your inclination. Would  
14 you indulge me for a moment with one -- one more point.

15 **THE COURT:** Okay.

16 **MR. LYNCH:** Briefly.

17 Everything swirls, it seems, around this language in 1990.  
18 And there's a lot of material that's been presented to the  
19 Court. Of course it's a bench trial. It's a lot of things to  
20 move through. In -- in closing as succinctly as I can, the  
21 practice in and of itself is not enough. Focus -- and I -- on  
22 the portion of the testimony between the two people that were  
23 involved in negotiating this particular language, both of whom  
24 are represented by the plaintiffs. And -- and what you'll see  
25 is undisputed facts are on sort of like on a little sheet of

1 paper they wrote something down.

2 **THE COURT:** Right, I know, the thereafter. But they  
3 aren't who counts. Who counts is the Board of Supervisors.

4 (Simultaneous colloquy.)

5 **THE COURT:** And the guy from the Board of Supervisors  
6 who testifies, who the Ninth Circuit pointed to -- I forgot  
7 his name, starts with an "M," I think.

8 **MR. LYNCH:** It's Carpenter. But, you know, really,  
9 and I'd say look at his testimony, too. If you -- if you --  
10 if you parse through his testimony, you see that his  
11 understanding is based on sort of snippets and fragments of  
12 information that he got that was historical in the 1980's. At  
13 one point he said, "I didn't even think the County could do  
14 lifetime benefits." He gave some testimony. It's equivocal  
15 at best. He's one member of the board. It's not formal board  
16 action. None of that testimony is tethered to board action at  
17 the time that this alleged right was assertedly created.  
18 That's why -- that's why the law says accompanying passage.  
19 It can't be just floating in the air. You have to focus it on  
20 when this far-reaching right was obtained.

21 I would submit to you that Mr. Carpenter's testimony  
22 standing alone is absolutely insufficient to establish the  
23 claim or even to raise a triable issue. He didn't even  
24 remember any kind of discussion about this in 1989. There's  
25 a -- as you said, your Honor, the real focus is on the Board,

1 not the -- not the negotiators, not the County employees, not  
2 what people thought they understood, not this and that. It  
3 focuses on the Board. And -- and I'd request, look closely at  
4 this because there's really not evidence of that here.

5 **MR. RANAHAN:** Just to respond briefly.

6 The -- the evidence for Mr. Carpenter that plaintiff  
7 provided is exactly what the Ninth Circuit -- we told the  
8 Ninth Circuit we'd provide and they said would be sufficient.

9 Here we're seeking to imply a vesting term. Both the lead  
10 negotiator for the County and the lead negotiator for the  
11 Union in 1989 understood it to be a vesting term. There's  
12 clearly disputes of material fact as to what was said and what  
13 the meaning of certain things in the negotiating history in  
14 1989 was. We -- we strongly disagree with County's  
15 characterization of the facts. That's in the briefs.

16 I would add that to the extent Your Honor is inclined to  
17 rule regarding pooling, it is an -- it is part of the tie  
18 agreement claim, and I just want to convey that, that if  
19 you're getting the same benefit, implicit in that is that  
20 you're part of the same risk pool. And if Your Honor is  
21 inclined to rule on that issue, we'd like to have the  
22 opportunity to brief it.

23 **THE COURT:** Okay. Well, I guess you can file an  
24 additional five pages by Friday, next Monday, next Wednesday?

25 **MR. LEWIS:** Well, your Honor, I guess this is where

1 we need to bring a procedural matter to your attention as far  
2 as timing, which is our law firm ceasing to exist tomorrow.  
3 And Mr. Ranahan and I are going different places so it's a  
4 little chaotic right now.

5 **THE COURT:** Going in different places from each  
6 other?

7 **MR. LEWIS:** Yes, from each other. And I will -- the  
8 case is going to go with me.

9 **THE COURT:** Oh.

10 **MR. LEWIS:** And if we could have a -- like two weeks,  
11 that would be very much appreciated.

12 **THE COURT:** Okay.

13 **MR. LEWIS:** Thank you.

14 **THE COURT:** So you'll give me five pages in two  
15 weeks.

16 And you can give me five pages --

17 **MR. LYNCH:** In opposition to that or --

18 **THE COURT:** Well, unless you want to support it.

19 **MR. LYNCH:** I don't want to support it.

20 (Simultaneous colloquy.)

21 **MR. LYNCH:** You know, if I could address the  
22 promissory estoppel.

23 **THE COURT:** I'm sorry?

24 **MR. LYNCH:** The promissory estoppel.

25 **THE COURT:** Well, as long as it's a bench trial, it

1 doesn't really matter so much. I was more worried about a lot  
2 of other things. So I think we can just try the case, and at  
3 the end you can brief what causes of action have been proved.

4 **MR. LEWIS:** Thank you, your Honor.

5 **THE COURT:** I don't think we need to brief that now.

6 **MR. LYNCH:** I just raised it because it wasn't -- it  
7 wasn't briefed in the papers and since you're giving them an  
8 opportunity to file a five-page brief, I'd request the same on  
9 promissory estoppel but --

10 **THE COURT:** Well, I'm not -- there's that, and then  
11 there's all four constitutional claims which I think are not  
12 fleshed out either. And now I'm setting myself up for dozens  
13 of pages of briefing which I'm sort of thinking of deferring  
14 until the time of trial.

15 The pooling matters because that would be a questions of  
16 what evidence would be submitted. What cause of action is  
17 supported is more of a legal question that I think could be  
18 deferred.

19 So do you want to set a trial date now? Do you want to  
20 set a deadline for mediation now and set a trial date if it  
21 doesn't settle? Or what do you want to do?

22 **MR. LEWIS:** The latter, I think, makes sense or --

23 (Simultaneous colloquy.)

24 **THE COURT:** I would set a deadline for mediation,  
25 say, 30 days from now, sometime in the next 30 days.

1           **MR. LYNCH:** That would be --

2                               (Off-the-record discussion.)

3           **MR. LYNCH:** -- to conduct a meaningful mediation  
4 because of the nature of this and the moving parts in it and  
5 the calculations that are involved, you know, it's probably  
6 90 more likely.

7           **THE COURT:** Okay.

8           **MR. LEWIS:** That's reasonable.

9           **THE COURT:** You agree?

10          **MR. LEWIS:** Yes.

11          **THE COURT:** Okay. So we'll set a deadline of 90 days  
12 from today that you will do some form of mediation. You  
13 should agree -- can you agree within the next week whether you  
14 want a magistrate judge or a private mediator?

15          **MR. LEWIS:** Yes, I think so.

16          **MR. LYNCH:** Yes, I think.

17          **MR. LEWIS:** Ray, can you get your client?

18          **THE COURT:** So you'll get back to me if you want a  
19 magistrate judge, within a week, within a week. If you don't  
20 get back to me that you want a magistrate judge, I will take  
21 that to mean that you're agreeing to go to an agreed-upon  
22 mediator. And Judge Sabraw sounds like a good choice to me,  
23 given that he's done a similar case. But you should probably  
24 set your date with him right now because you know how these  
25 mediators --

1           **MR. LYNCH:** He's a big guy.

2           **THE COURT:** And we're looking at the holidays now.

3           **MR. LYNCH:** Yeah.

4           **MR. LEWIS:** Yes.

5           **MR. LYNCH:** So we would be setting a date to try to  
6 get this on calendar. Let's see. We're at the end of  
7 October, November, December. February 1st?

8           **MR. LEWIS:** That we'd come in and set a date.

9           **THE COURT:** If that's how you want to do it.

10          **MR. LEWIS:** I think that makes sense rather than set  
11 a date now for trial.

12          **THE COURT:** Okay. Well, then, if you don't settle,  
13 then what you need to do is try to agree on a length of the  
14 trial, on a format for the trial. Again, if it's a bench  
15 trial, certain things can be done on a written record.

16          **MR. LEWIS:** Okay.

17          **THE COURT:** But I'd need to know how long it's going  
18 to be and when you want to do it.

19          **MR. LEWIS:** Okay. We will -- we'll meet and confer  
20 on it.

21          **THE COURT:** So you could send me something after the  
22 mediation that gives me what you've agreed upon or two  
23 separate things that propose separate lengths of time and  
24 dates. You can consult with the courtroom deputy to find out  
25 what dates I'd be available.

1           **MR. LYNCH:** My guess is if we're doing a mediation,  
2 it's not going to take place till January.

3           **MR. LEWIS:** Probably not.

4           **MR. LYNCH:** For sure.

5           **THE COURT:** So I'm thinking maybe a five-day trial?

6           **MR. LEWIS:** I haven't even thought about it, to be  
7 honest with Your Honor.

8           **THE COURT:** Well, think about it.

9                               (Simultaneous colloquy.)

10          **MR. LEWIS:** We'll be filing substitution of attorneys  
11 and withdrawals and all that.

12          **THE COURT:** Sure.

13          **MR. LEWIS:** Within the next few court days.

14          **MR. LYNCH:** Just so we're clear on this additional  
15 briefing then, there's a brief coming in on pooling on --

16          **MR. LEWIS:** A week --

17          **MR. RANAHAN:** Two weeks.

18          **MR. LEWIS:** Two weeks from Friday.

19          **MR. LYNCH:** And when would our response to that be?

20          **THE COURT:** The following Friday.

21          **MR. LYNCH:** Seven days.

22          **THE COURT:** If that's agreeable.

23          **MR. LYNCH:** -- what these dates are, the 13th.

24          **MR. RANAHAN:** What we're talking about?

25                               (Off-the-record discussion.)

1           **MR. LYNCH:** If they're filing on a Friday, if we  
2 could have till the following Monday, it would be helpful.

3           **MR. LEWIS:** That's fine. So ten days.

4           **MR. LYNCH:** So ten days.

5           **THE COURT:** All right.

6           **MR. LYNCH:** Thank you, your Honor.

7           **MR. LEWIS:** Thank you, your Honor.

8                   (Proceedings were concluded at 3:45 PM.)

9                           --o0o--

10  
11  
12                           **CERTIFICATE OF REPORTER**

13  
14                   I certify that the foregoing is a correct transcript  
15 from the record of proceedings in the above-entitled matter.  
16 I further certify that I am neither counsel for, related to,  
17 nor employed by any of the parties to the action in which this  
18 hearing was taken, and further that I am not financially nor  
19 otherwise interested in the outcome of the action.

20  
21                           *Raynee H. Mercado*

22                   Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

23                           Tuesday, November 3, 2015