

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Claudia Wilken, Judge

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

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: Lewis, Feinberg, Lee, Renaker &
Jackson, PC
476 - 9th Street
Oakland, California 94607
BY: JEFFREY LEWIS,
DARIN D. RANAHAN, ATTORNEYS AT LAW

For Defendant: Hanson, Bridgett LLP
425 Market Street, 26th Floor
San Francisco, California 94105
BY: BATYA F. FORSYTH,
RAYMOND F. LYNCH, ATTORNEYS AT LAW

Reported By: Raynee H. Mercado, CSR No. 8258

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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 **THE COURT:** Talking about MOU's, not collective
2 bargaining agreements.

3 **MR. LYNCH:** These are collective bargaining
4 agreements. They're --

5 **THE COURT:** Well, everybody has been calling them
6 MOU's.

7 (Simultaneous colloquy.)

8 **THE COURT:** As we've established a moment ago, they
9 were ratified by the board in a resolution so that makes them
10 a resolution.

11 **MR. LYNCH:** It makes it a resolution adopting the
12 MOU's, but it based -- when you start off with whether or not
13 there's a contract, the contract that's at issue here is an
14 MOU, that's the nomenclature that's used in the public sector,
15 but it's actually a collective bargaining agreement because of
16 the nature. It's negotiated with the employees' exclusive
17 representative.

18 And what's required fundamentally is to be able to
19 establish clearly and unmistakably that the board, in adopting
20 these MOU's, intended to grant this far-reaching, lifetime
21 right that survived the expiration -- the term of each of
22 these MOU's. The Supreme Court tells us that. The Ninth
23 Circuit tells us that. They tell us that in this case. They
24 tell us that in the *REAOC III* case.

25 In that *REAOC III* case, the court uses the term it's got

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 **THE COURT:** Well, before we get to that --

2 **MR. LYNCH:** Yes.

3 **THE COURT:** -- it says, for any employee that's newly
4 hired, et cetera, this benefit shall only be available.

5 Now, what does "this benefit" mean? To me, "this benefit"
6 means the one we just mentioned in the prior sentence, which
7 is "currently here's what we do." So the second sentence says
8 that thing that you do now, we're going to keep doing that.
9 It --

10 **MR. LYNCH:** Possibly --

11 (Simultaneous colloquy.)

12 **THE COURT:** -- or you --

13 **MR. LYNCH:** -- read on.

14 **THE COURT:** -- in a different way. And here's the
15 difference. The 10-year, 20-year bit. And then we go on to
16 the language that I can't figure out what it means, and I'm
17 hoping that you'll tell me what you think it means.

18 **MR. LYNCH:** Well, I'm focused on the County shall
19 contribute for the retiree only this same amount towards the
20 health plan premium as it contributes to an active single
21 employee. "Active single employee" per the complaint for the
22 last six years is unrepresented management employees.

23 That's the reference there.

24 **THE COURT:** Well, that is a question I have. Why do
25 you say so? I understand that that's what we've been

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 And with respect to, before I leave this language, if the
2 grant that's been given to the union employees, if this
3 language, which it does, references to whatever is being done
4 for unrepresented management employees, that's the claim --

5 **THE COURT:** You're going back to the --

6 **MR. LYNCH:** I am, but it's an --

7 (Simultaneous colloquy.)

8 **MR. LYNCH:** -- additional point that I failed to make
9 and I want to make sure I get this out because that group has
10 been held not to have any contractual right to lifetime
11 benefits, any contractual right whatsoever. That's law of the
12 case.

13 And when you look to evidence that accompanied passage of
14 this -- of the adoption of this particular MOU, on the very
15 same day that MOU was adopted, this same language was put into
16 what's called a salary resolution that governed unrepresented
17 management employees. And that salary resolution, by its
18 express terms adopted by the board of supervisors, said that
19 was subject to change and the unilateral authority of the
20 board. I submit that is powerful evidence that is
21 inconsistent with arguing that language is put into a
22 collective bargaining agreement that -- that references a
23 benefit as the same as an unrepresented management group is
24 going to get, it's adopted by the legislative body on the very
25 same day the precise same language is adopted for the

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. RANAHAH:** Well --

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

3 **MR. RANAHAH:** 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. RANAHAH:** 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. RANAHAH:** 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. RANAHAH:** I'm sorry.

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

25 **MR. RANAHAH:** 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. RANAHAH:** 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. RANAHAH:** 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. RANAHAH:** Correct.

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

16 **MR. RANAHAH:** Correct. Right.

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

19 **MR. RANAHAH:** 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. RANAHAH:** 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 **THE COURT:** Of the plan of their choice.

2 **MR. RANAHAAN:** Correct.

3 **THE COURT:** And if it was a Medicare wraparound plan
4 that was a lot cheaper, that's all they're asking for?

5 **MR. RANAHAAN:** Right. If someone on Medicare is not
6 going to -- wouldn't get a whole lot out of that. Someone who
7 is not of Medicare age --

8 **THE COURT:** -- be surprised how much, the Medicare
9 wraparounds --

10 **MR. RANAHAAN:** I suppose it depends on the person.

11 (Simultaneous colloquy.)

12 **THE COURT:** You, too, need to wait. If you see her
13 throwing her hands up, that means you're talking over me and
14 you need to stop.

15 **MR. RANAHAAN:** Okay. I apologize.

16 **THE COURT:** And then I guess they also pay something
17 towards the Medicare premium itself. So I guess you want
18 that, or no?

19 **MR. RANAHAAN:** That's -- the County has not stopped
20 contributing to the Medicare premium.

21 **THE COURT:** Oh, is that right?

22 **MR. RANAHAAN:** Correct. So that's --

23 **THE COURT:** So -- excuse me -- but they pay the \$500
24 plus the Medicare premium?

25 **MR. RANAHAAN:** For those retirees who are of Medicare

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. RANAHAAN:** 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. RANAHAAN:** 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. RANAHAAN:** 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. RANAHAAN:** 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 The mere fact that we're having so much trouble with -- so
2 much discussion about these terms and who -- even talking
3 about their own witnesses, what active single employee is and
4 two different inconsistent theories, it hardly -- it hardly
5 establishes clear and unmistakable obligation that's been made
6 as a matter of law. And that's what -- that's what's required
7 here.

8 **THE COURT:** It may establish evidence raising a
9 disputed issue of material fact that has to be resolved by a
10 fact finder, however.

11 **MR. LYNCH:** I think not. But I don't include all in
12 isolation.

13 I know the Court asked a number of -- there was also
14 something on the "all or substantially all" I just wanted to
15 say. When you asked your question about what resolutions,
16 there was a reference to resolutions from 1964 to 2009. And
17 as law of the case right now that no resolution between 1964
18 and 1990 as a matter of law established any kind of lifetime
19 benefit right of any kind.

20 **THE COURT:** Perhaps, but they're reading that same
21 term into the '89-'90 MOU, at least, as well as the pooling
22 claim --

23 (Simultaneous colloquy.)

24 **MR. LYNCH:** Undertaking to do so. I think it's
25 irrelevant, but that's my point. I know the Court also asked

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.)

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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