No. 10-17873

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONOMA COUNTY ASSOCIATION OF RETIRED EMPLOYEES,

Plaintiff/Appellant,

vs.

SONOMA COUNTY,

Defendant/Appellee.

On Appeal from the United States District Court for the Northern District
Honorable Claudia Wilken
U.S.D.C. Case No. 09-cv-04432 CW

OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, SCARE states that it is a private 501(c)(3) non-profit organization, is not a publicly held corporation or other publicly held entity, and has no parent entities. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of Appellant.

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I. STATEMENT OF THE BASIS OF APPELATE JURISDICTION

Appellant Sonoma County Association of Retired Employees ("SCARE") filed this action pursuant to 28 U.S.C. §§ 1331 and 1343, and pursuant to the district court's supplemental jurisdiction over claims brought under the laws of the State of California. (ER 661, ¶ 7; ER 57-58, ¶ 7.) The district court dismissed SCARE's complaint in its entirety, without leave to amend, on November 23, 2010, and Plaintiffs filed a timely notice of appeal on December 21, 2010. Fed. R. App. P. 4(a)(1); (ER 1-2, 24.) This Court has jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED

1) Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees.
2) Whether, under California law, a contract with a county for employee compensation is subject to ordinary rules of contract interpretation, pursuant to which terms may be implied and a contract term may be either facially ambiguous or shown to be ambiguous through parol evidence.
3) Whether a contract providing retiree health benefits that does not contain a durational provision is ambiguous as to whether the benefits will be paid for the retirees' lives or only for the term of the contract, or whether such a contract may be shown to be ambiguous through parol evidence.
4) Whether SCARE has sufficiently alleged one or more contracts, either implied or set forth in County Board of Supervisors' resolutions or memoranda of understanding with employee organizations, that can be construed, intrinsically or based on parol evidence, as ambiguous with respect to the County's obligation to provide lifetime medical benefits to retirees.

5) Whether, if the Court holds that the district court's dismissal of SCARE's breach of contract claims should be reversed, it should also reverse the district court's dismissal of all of SCARE's other claims, given that the district court based its dismissal of those other claims on its dismissal of the contract claims.

III. STATEMENT OF THE CASE

A. Nature of the Case

SCARE brought this lawsuit to vindicate the rights of its members (the "Retirees"), who dedicated their services to Sonoma County (the "County") in exchange for the County's contractual promises that they would receive retiree health care benefits for themselves and their dependents. (ER 660, ¶ 1; ER 662, ¶ 11; ER 662-66, ¶¶ 14-25; ER 56, ¶ 1; ER 58, ¶ 11; ER 58-72, ¶¶ 14-34.) Relying on the County's promises, the Retirees gave up various wage increases and pension cost of living adjustments, and dedicated their working years to the County. (ER 660, ¶ 1; ER 56, ¶ 1.)

The County honored these binding agreements for over forty years until 2008 when it drastically cut the Retirees' health care benefits, despite the Retirees' loyalty and full performance of their employment obligations. (ER 660-61, ¶ 2; ER 662, ¶ 14; ER 666-67, ¶¶ 25-30; ER 56-57, ¶ 2; ER 58, ¶ 14,; ER 73-74, ¶¶ 35-42.) The County's drastic cuts to the Retirees' health care benefits forced, and will continue to force, the Retirees to pay much higher, and increasing, amounts for these benefits. (ER 660-61, ¶ 2; ER 56-57, ¶ 2.) County Retirees, most of whom live on fixed incomes, will be unable to pay these costs, or may be able to pay them only by foregoing other essential expenses. (ER 660-61, ¶ 2; ER 56-57, ¶ 2.)

After fruitless efforts to negotiate with the County, SCARE, whose members were loyal County employees, was left with no other option but to bring this action to enforce its members' rights. SCARE seeks injunctive and declaratory relief

which would require the County to restore and honor its commitment to pay all or substantially all of the cost of health care benefits for Retirees and their dependents, or in the alternative, to pay as much toward Retirees' health care as it does for active management employees. (ER 661, ¶ 4; ER 57, ¶ 4.)[1]

B. Course of Proceedings

SCARE filed its complaint ("Complaint") in the Northern District of California on September 22, 2009. SCARE alleged that the County breached both express and implied contracts with its retired employees to pay all or substantially all of the cost of their medical benefits or, in the alternative, to pay at least as much toward their medical benefits as it paid toward the benefits of active management

[1] There is no doubt that the County, like most public entities, faces serious financial issues. However, those problems cannot justify the County simply reneging on its longstanding promises. The bipartisan Public Employee Post-Employment Benefits Commission established by Governor Schwarznegger to make recommendations regarding payment of government retiree pension and medical benefits found that retiree health benefits "are just as important as are pension benefits to the state's workers and retirees . . . [and] are part of deferred compensation packages used to attract and retain qualified individuals for government service." Public Employee Post-Employment Benefits Commission, *Funding Pensions & Retiree Health Care for Public Employees* (2007) ("Commission Report"), *available at* http://www.pebc.ca.gov/images/files/final/080107_PEBCReport2007.pdf, last visited April 29, 2011, at 3. Consistent with this recognition by the Commission, a recent report by the Center for State and Local Government Excellence found that, education and other factors being equal, public employees are not compensated as highly as private employees even after their more generous benefit packages are taken into account. Center for State and Local Government Excellence, *Out of Balance? Comparing Public and Private Sector Compensation Over 20 Years* (2010), *available a*t www.slge.org, last visited April 29, 2011, at 9, 15-16. Because of the discrepancy in pay between private and public sector jobs, the historically richer benefit packages in the public sector were critical to attracting and retaining the Retirees and other individuals.

employees. (ER 662-66, ¶¶ 15-29; ER 667-69, ¶¶ 34-43.) SCARE alleged that these breaches also amounted to breaches of the covenant of good faith and fair dealing (ER 669-70, ¶¶ 44-49), and violations of the contract clauses of the California and U.S. Constitutions (ER 670-73, ¶¶ 50-77). SCARE further alleged promissory estoppel claims (ER 673-75, ¶¶ 78-87) and due process claims under both the California and U.S. Constitutions. (ER 675-79, ¶¶ 88-115.)

The County moved to dismiss all of Plaintiff's claims, and on May 14, 2010, the district court granted the motion with leave to amend. (ER 648.) The district court rejected Plaintiff's implied contract claims, stating that there were no "cases that establish that oral and other extrinsic evidence can, by itself, contractually bind Sonoma to provide retirees medical benefits." (ER 653.) The district court further found that in order to sufficiently plead an express contract claim, the contract "must be a resolution or ordinance formally enacted by a majority of the members of the Board of Supervisors" and that SCARE had to specifically identify one or more such resolutions or ordinances in its Complaint. (*Id.* at 6.) The district court also dismissed both the implied covenant of good faith and fair dealing and due process claims, finding that because SCARE did not sufficiently plead a contract, these claims also were insufficiently pled. (ER 653-54, 658.) Finally, the district court dismissed SCARE's promissory estoppel claims, again finding that the failure to sufficiently plead the existence of express or implied contracts undermined these claims. (*Id.* at 655.) In addition, the district court found that the promissory estoppel claims were deficient because (1) the Retirees could not reasonably have relied on the County's promises because they should have known that the County could only bind itself by resolution or ordinance (*Id.*), and (2) application of estoppel would nullify a strong rule of policy, adopted for the benefit of the public. (*Id.* at 655-57.)

SCARE filed an amended complaint on July 6, 2010 ("First Amended Complaint" or "FAC"), alleging the same claims and theories, adding more detail to the facts, and citing and attaching 68 exhibits consisting of, *inter alia*, resolutions, ordinances, and memoranda of understanding between the County and various unions ("MOUs"). (ER 56-647.) These exhibits were included in response to the district court's May 14, 2010 Order, which required SCARE to allege, with specificity, the resolutions and ordinances relied upon in the pleading. (ER 653, 659.)

The County filed a Second Motion to Dismiss based on the FAC. (ER 25.) Given the Court's finding in the First MTD Order that the County may only bind itself through an express contract that consists of a "resolution or ordinance formally enacted by a majority of the members of the Board of Supervisors," the issue of whether the County could enter into implied contracts had previously been decided and was not at issue on the Second Motion to Dismiss. (ER 653; ER 7-8; ER 23.)

On November 23, 2010, the district court granted Defendant's Second Motion to Dismiss, finding that despite its listing of 68 resolutions and ordinances, "SCARE has not shown a resolution or ordinance in which Sonoma agreed to provide retirees with health care premium benefits in perpetuity." (ER 5.) SCARE filed its notice of appeal on December 21, 2010. SCARE appealed both of the district court's dismissal orders. (ER 1-2.)

C. Disposition Below

The district court dismissed SCARE's Complaint with leave to amend and SCARE's FAC without leave to amend. SCARE appeals both dismissal orders.

IV. STATEMENT OF FACTS

In both the Complaint and the FAC, SCARE alleged the following claims under two alternative theories: breach of contract; breach of the covenant of good

faith and fair dealing; impairment of contract under the United States and California Constitutions; promissory estoppel; and violation of due process under the United States and California Constitutions. (ER 667-79, ¶¶ 34-115; ER 74-87, ¶¶ 43-124.)

First, the Retirees[2] alleged that since at least 1964, the County had promised to continue to pay all or substantially all of the cost of post-retirement health care benefits for its employees and their dependents, and to do so pursuant to a system that pooled the Retirees and their dependents with the active employees (the "Substantially All" claims). (ER 662-63, ¶¶ 14-16; ER 59, ¶¶ 15-16.) The Retirees accepted these benefits in lieu of other benefits, such as cost of living adjustments to their pensions. (ER 662-63, ¶¶ 15-16; ER 59, ¶¶ 15-16.) The County conveyed this set of promises to the Retirees orally and "in writing in numerous Board of Supervisors' resolutions, ordinances, salary resolutions, job announcements, job offers, retirement-related documents, and other County-issued documents." (ER 663-64, ¶ 17; ER 59-66, ¶¶ 18-23.) The promises were also implied by the County's conduct and past practice. (ER 663-64, ¶ 17; ER 59, ¶ 17; ER 65-66, ¶¶ 21-23.)

Alternatively, the Retirees alleged that the County entered into one or more contracts with the Retirees in 1985 in which the County promised that going forward, in perpetuity, Retirees and their dependents would receive the same health benefits, and the County would pay the same amount for this coverage, as it provided to and paid for active management employees and their dependents. (ER 664, ¶¶ 18-20; ER 66-67, ¶¶ 24-26.) This agreement was known to both the County and the Retirees as the "Tie Agreement." (ER 664, ¶ 18; ER 66-67, ¶ 24.)

[2] Given that SCARE brings this action on behalf of the Retirees, Appellant will for the most part use the term "Retirees" in place of "SCARE" for the balance of this Brief.

The County's set of promises related to the Tie Agreement were written, implied, and conveyed orally. (ER 664-65, ¶ 21; ER 67, ¶ 27.)

In the FAC, the Retirees alleged additional detail on both the "Substantially All" and the "Tie Agreement" theories, including that County employees had to meet years of service requirements akin to pension vesting requirements in order to obtain retiree health benefits, that the County repeatedly stated in writing that it had the practice of paying all or substantially all of the cost of Retiree health benefits, that the oral promises would be attested to by former County Supervisors and administrators, and that the County did not include any durational limitation on these benefits. (ER 59-66, ¶¶ 18-23; ER 67-70, ¶¶ 28-29; ER 71-72, ¶ 31.) The FAC also makes clear that the benefits provided to unionized employees through MOUs that were ratified by the Board of Supervisors were similarly provided to non-unionized employees through Board-adopted salary resolutions. (ER 59-64, ¶¶ 18-19; ER 67-71, ¶¶ 28-30.)

In addition, regarding the Tie Agreement specifically, the FAC alleged that numerous resolutions and MOUs from 1989 forward stated that the County would contribute for retirees the same amount toward a health plan premium as it contributed to active employees. (ER 70-71, ¶ 30.) Furthermore, the Retirees alleged that the County had taken the position in other legal proceedings that it was obligated to provide the Retirees with the same benefits as it provides to active employees. (ER 72, ¶ 32.) Indeed, in two such proceedings, the County stated that "'the agreement was made between the County and its retirees that, *in perpetuity*, assured retirees that they were tied to Administrative Management Employees for purposes of health care benefits.'" (*Id.*, quoting County quoting letter from SCARE President; emphasis supplied.)

In August and September 2008, the County breached these promises. First, the County changed its contributions for health care benefits to a flat monthly

contribution of up to $500 per month for unrepresented active employees, administrative management, the Board of Supervisors, and all Retirees. (ER 73, ¶ 26; ER 73, ¶ 35.) Thus, the County ceased paying all or substantially all of the cost of health care for Retirees and their dependents. At virtually the same time, the County awarded a cash allowance of approximately $600 a month to all individuals affected by the $500 flat monthly medical contribution *except* the Retirees. (ER 666, ¶ 27; ER 73, ¶ 36.) Thus, by subterfuge, the County stopped honoring the Tie Agreement because it paid active management employees $600 more a month for health care than it paid for Retirees' care. (ER 666, ¶¶ 26-29; ER 73, ¶¶ 35-38.)

These changes will have a drastic impact on the Retirees, many of whom are elderly individuals who live on fixed incomes and will be required to pay hundreds of additional dollars a month toward their medical premiums. (ER 667, ¶ 30; ER 73-74, ¶ 39.) The Retirees made numerous life decisions based on the County's promises, including whether and for how long to work for the County, how much to save for retirement, where to live after retirement, and which health care benefits to select for themselves and their families. (ER at 667 ¶¶ 31-32; ER at 74 ¶¶ 40-41.)

V. STATEMENT OF RELATED CASES AND PROCEEDINGS

This Court recently heard argument in *Retired Employee Association of Orange County v. County of Orange*, N. 09-56026 ("*REAOC*"), which presented similar, and overlapping, issues to those presented here. In *REAOC*, the matter was fully briefed, the panel oral arguments, and then the panel certified a pivotal question to the California Supreme Court: "Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees." *REAOC*, 610 F.3d 1099, 1101 (9th Cir. 2010). The California Supreme Court accepted the question,

both sides briefed the issue, and both parties to this lawsuit, SCARE and the County, submitted amicus briefs.

For the sake of efficiency, the Retirees sought to delay briefing in the instant case until the California Supreme Court decides the question certified to it in *REAOC*. (Appellant's Motion to Extend, 9th Cir. Dkt. No. 9.) The County opposed the Retirees' motion and the Court denied it. (Appellee's Response to Motion to Extend, 9th Cir. Dkt. No. 10; Clerk's Order Denying Motion to Extend, 9th Cir. Dkt. No. 11.) However, this case clearly presents the question of whether a County can enter into an implied contract with its employees for post-retirement health benefits, which is precisely the question this Court certified to the California Supreme Court in the REAOC case.[3] Therefore, the Retirees again respectfully request that the Court stay this matter pending resolution of the California Supreme Court's proceedings in the REAOC case. In addition, when the California Supreme Court issues its decision, SCARE requests an opportunity to submit supplemental briefing regarding the impact of that Court's decision on this matter.

[3] In its opposition to SCARE's Motion to Extend the briefing schedule, the County took the implausible position that neither of SCARE's complaints nor the district court's orders assert, allege, or make findings on an implied contract claim. (*See, e.g.,* Appellee's Response to Motion to Extend, 9th Cir. Dkt. 10-1, at 1, 4.) As discussed in this brief, as is evident on the face of SCARE's Complaint and FAC, and as explained in the district court's orders, the Retirees asserted claims based on implied contracts. The district court dismissed these claims in its order granting the County's First Motion to Dismiss. (ER at 653.) In fact, the County itself recognized in its Second Motion to Dismiss that the district court had previously "rejected Plaintiff's claim of an implied contract in the first complaint." (ER at 46.) Similarly, the district court, in its order granting the County's Second Motion to Dismiss, recognized that in its May 14, 2010 ruling on the County's First Motion to Dismiss, it found that "in the public employment context, oral promises and other extrinsic evidence could not form a contract." (ER at 7-8, 23.) The County's attempts to re-write this history are plainly incorrect.

VI. STANDARD OF APPELLATE REVIEW

The Ninth Circuit "review[s] de novo a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim." *Gibson v. Office of Atty. Gen., State of Cal.*, 561 F.3d 920, 925 (9th Cir. 2009); *see also Monterey Plaza Hotel Ltd. v. Local 483 of Hotel Employees Union*, 215 F.3d 923, 926 (9th Cir. 2000).

VII. SUMMARY OF ARGUMENT

At the heart of this dispute, the parties disagree as to whether a California county is bound to the promises it makes to its employees in the same way as a private entity is bound to its promises. Thus, in dismissing the Retirees' initial complaint, the district court held that the County, unlike a private party, could not be bound by an implied contract. Although this is the question before the California Supreme Court, the Retirees address it below. However, even if the district court was correct in holding that the Retirees cannot proceed on an implied contract theory, this Court should reverse because, in dismissing the Retirees' amended complaint, the district court essentially held that the County, unlike a private party, is not subject to ordinary rules of contract interpretation. As explained below, in so holding, the district court disregarded both basic California contract interpretation principles and decisions of this and other federal courts adjudicating retirees' medical benefit claims.

In rejecting the Retirees' implied contract claim, the district court found that any contract had to be set forth expressly in a formal resolution or ordinance of the Board of Supervisors. However, under California law, a county may enter into implied contracts unless a statute prohibits it from doing so. Here, no statute prohibited the County from entering into an implied contract to provide lifetime medical benefits to employees who devoted all or substantial portions of their working lives to public service. The combination of statements in Board of

Supervisors' resolutions, MOUs, job announcements, job offers, other County-issued documents, oral statements to employees, and decades of practice, were sufficient, along with the employees' performances of their jobs in return, to establish a contract. That contract was either to pay all or substantially all of the retirees' benefits for life, so long as the retirees had worked sufficient years to earn those benefits, or to pay benefits under the Tie Agreement (*i.e.*, to pay, for the retirees' lifetimes, medical benefits that matched those of active management employees), an agreement that was admitted to by the County in State administrative proceedings.

The district court dismissed the Retirees' FAC, in its entirety, despite its detailed listings and attachments of tens of resolutions, ordinances, and MOUs. As the district court itself recognized, neither party disputes that the resolutions, ordinances, and Board-ratified MOUs detailed in the FAC were and are binding on the County. (ER at 13.) There also can be no dispute that the resolutions, ordinances, and MOUs provide for retiree medical benefits. It is similarly uncontroverted that the resolutions, ordinances, and MOUs contain no explicit durational language; i.e., they do not state that for those retiring during the term of a resolution, ordinance, or MOU, the benefits will be paid for life, nor do they state that the benefits will be paid only for the term of the resolution, ordinance, or MOU.

The district court dismissed the FAC because the resolutions, ordinances, and MOUS did not *expressly* promise that retiree medical benefits would be "in perpetuity," and therefore no contract was formed. (ER at 11, 14-15, 23-24.) In so ruling, the district court, without saying so, found (1) that the absence of durational language was not ambiguous on its face, and (2) that extrinsic evidence could not be used to establish an ambiguity as to the term of the promised benefits.

However, federal courts, including this Court, have held in similar retiree medical benefit cases that either the absence of durational language itself creates an ambiguity or that retirees may demonstrate such an ambiguity by parol evidence. *See* section VIII.B.2.b. Similarly, California law requires that ambiguous terms in contracts be reviewed in light of parol evidence in order to determine the parties' intent and/or that parol evidence may be used to demonstrate an ambiguity. *See* section VIII.B.2.a. Moreover, in California, a practice or course of dealing between an employer and a represented bargaining unit can be an implied term in an MOU, even where the term is not in writing. This liberal approach to MOU interpretation should be applied not only to the MOUs in this case, but also to the salary resolutions which extended the bargained-over provisions in the MOUs to non-represented employees. *See* section VIII.B.2.a. Here, the parol evidence alleged in the Retirees' complaints -- statements in Board of Supervisors' resolutions, MOUs, job announcements, job offers, and other County-issued documents; oral statements to employees; testimony of former County administrators and Supervisors; decades of practice; and vesting-like eligibility requirements -- is more than adequate to demonstrate an ambiguity.

Thus, this Court should reverse the district court's dismissal of the Retirees' breach of contract claims. Moreover, because the district court's dismissal of the balance of the Retirees' claims was explicitly based, in whole or in part, on its dismissal of the contract claims, this Court should remand all of the claims.

VIII. ARGUMENT

A. A Public Entity May Enter Into Implied Contracts Regarding Employee Compensation, and the Retirees' Complaints Sufficiently Alleged Such a Contract.

Under California law, the County is able to bind itself through implied contracts so long as no statute prohibits it from doing so. Here, SCARE

sufficiently alleged facts showing that the County and the Retirees created an implied contract for retiree health benefits. Given that there is no statutory prohibition that prevents the County from entering into implied contracts, SCARE's allegations are sufficient at the pleading stage.

1. A Public Entity May Enter Into Implied Contracts Unless Statutorily Prohibited From Doing So.

California Civil Code § 1428 states that "[a]n obligation arises either from: One--The contract of the parties; or, Two--The operation of law." Cal. Civ. Code § 1428 (emphasis added). The statute on its face makes no exception for governmental entities. As a result, it applies equally to contracts with public parties and to contracts with private parties Consistent with this conclusion, the California Supreme Court has recognized such contracts. *See Youngman v. Nev. Irrigation Dist.*, 70 Cal. 2d 240, 246-247 (1969) (holding that a California public entity can enter into implied or express contracts for employee compensation); *Kashmiri v. Regents of the Univ. of Cal.*, 156 Cal. App. 4th 809, 828-30 (2007) (holding that an implied contract existed between students and their public university).

In *Youngman*, the plaintiff alleged that he was entitled to annual step salary increases from his employer, a public water district, based on the announced practice of the water district and the district's conduct in conformity with the practice. 70 Cal. 2d at 245. The California Supreme Court explained that "[g]overnmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements." *Id*. at 246. Finding no such prohibition, the Supreme Court rejected the employer's argument that it lacked the authority to enter into implied contracts with employees. *Id*. at 247. Instead, it

held that the water district's two-year practice of providing annual step salary increases to its employees could create an implied-in-fact contract requiring the employer to provide the increases. *Id*. at 244-45, 247. It further held that the questions of whether the employer's action in conveying the practice orally to the plaintiff happened as alleged and was authorized were for the trier of fact. *Id.* at 247-48.

In *Kashmiri*, the plaintiffs, students at the University of California ("UC"), alleged that UC could not raise fees because it had published statements in catalogs and websites stating that it would not. 156 Cal. App. 4th at 814. While not squarely deciding whether UC had a special status as a public university that exempted it from regular contract law, the California Court of Appeal explained that "[c]ourts have consistently applied contractual analysis when analyzing implied-in-fact agreements between students and colleges, even when the institution of higher education is a public college or university." *Id.* at 830-31. The "terms of this implied-in-fact contract are analyzed no differently than those arising between private parties. . . . [because 'a]ll contracts, whether public or private, are to be interpreted by the same rules.'" *Id*. (quoting Cal. Civ. Code, § 1635.) The California Court of Appeal then held that the representations by UC, and the attendance of the students in reliance on those promises, created a binding implied contract that precluded UC from raising the fees at issue. *Id*. at 815, 829.

Other California courts similarly have found that there is "no doubt that a public agency may be found liable in appropriate circumstances on the basis of . . . an implied-in-fact contract." *Air Quality Products, Inc. v. State of Cal.*, 96 Cal. App. 3d 340, 349 (1979); *Cal. Teachers Ass'n. v. Cory*, 155 Cal. App. 3d 494, 504 n.7 (1984) ("*CTA*") (explaining that legislatures can enter into contracts like ordinary individuals *or* by law through properly enacted statutes); *U.S. Ecology,*

Inc. v. State of Cal., 92 Cal. App. 4th 113, 132 (2001) ("[A]n administrative agency has the power to contract on a particular matter if this power may be fairly implied from the general statutory scheme."). *See also* 10A McQuillin, Municipal Corp., § 29.114 (3d Ed. 2010) ("[I]t is well settled that . . . a municipal corporation in a proper case may be liable . . . upon an implied contract, as distinguished from an express contract. An implied contract requires the same elements as as [sic] express contract, and differs only in the method of expressing mutual assent. Implied contracts arise where there is a bargained-for exchange intended by the parties, but no overt expression of agreement . . . a municipal corporation may be liable upon an implied agreement in the absence of a law expressly forbidding such a liability").

Therefore, unless statutorily prohibited from doing so, a public entity such as the County may enter into implied contracts for post-employment compensation and such contracts must be enforced. Here, no statute prohibits the County from entering into implied contracts.

The only statute that arguably creates an exception, and which SCARE anticipates the County will seek to rely on in its opposition, is California Government Code Section 25300, which states that a board of supervisors may prescribe compensation and terms of employment "by resolution of the board of supervisors as well as by ordinance." Cal. Gov't Code § 25300. This statute does not prohibit the County from entering into implied contracts.

Section 25300 states that a county *may* act by resolution or ordinance, not that it *shall or must* do so. "[F]or purposes of statutory interpretation, 'shall' is mandatory and 'may' is permissive." *In re Estate of Miramontes-Najera*, 118 Cal. App. 4th 750, 758 (2004). Therefore, counties are not required to act *only* by

ordinance or resolution. If the legislature had sought to so limit the counties' actions, it would have used "must" or "shall" in place of "may." Section 25300 does not state that the County *cannot* enter into contracts in other ways, simply that it *may* do so by resolution or ordinance. Cal. Gov't Code § 25300. The courts should not stretch to affix a meaning to Section 25300 that is not there. "When the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *In re Simmons' Estate*, 64 Cal. 2d 217, 221 (1966).

Moreover, the Legislature's intent in passing Section 25300 was not to constrain counties' ability to set compensation; rather, it was to make compensation-setting easier for counties. *See Dimon v. County of L.A.*, 166 Cal. App. 4th 1276, 1284 (2008) (explaining that Section 25300 was intended to simplify compensation-setting). Therefore, it would be counter to both the clear language and the purpose of Section 25300 to read into it a requirement that counties can *only* set compensation by resolution or ordinance, or to imply a prohibition against implied contracts.[4]

[4] The Court should read assertions that a statute precludes an implied contract narrowly, given the harsh and unfair results that might flow from such a preclusion. For example, if the County's position – that Section 25300 precludes it from entering into any contracts not wholly contained in a Board of Supervisors resolution – was taken to its logical extension, it would mean that the County could create and offer a job paying a specific salary to a person, the person could accept the job and render his or her services, and the County could simply refuse to pay the person if it did not include the position and the salary in a formal ordinance or resolution. The result in this case would equally violate basic notions of fairness -- the County may induce long years of loyal service by promising retiree health benefits in job postings, documents distributed to employees, and oral statements from administrators, paying those benefits for years and years, and even referencing them in Board of Supervisors resolutions and then just walk away from its promises.

2. Implied Contracts With Public Entities May Be Created Through Conduct and Need Not be Bilateral.

The California Supreme Court has recognized that an individual's performance of his or her job as a public employee may create contractual rights, including rights to post-retirement benefits, despite the absence of a signed bilateral agreement. Thus, in *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978), that court stated that "[a] public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." *See also Claypool v. Wilson*, 4 Cal. App. 4th 646, 661 (1992) (quoting *Betts*, 21 Cal. 3d at 863-64); *County of San Luis Obispo v. Gage*, 139 Cal. 398, 407-08 (1903) (stating that an offer "made to no person in particular . . . coupled with the subsequent performance of the conditions by the respondent, furnishes all the elements which are necessary to the formation and existence of an implied contract."); *Kashmiri*, 156 Cal. App. 4th at 829 (holding that "students' conduct when they accepted the University's offer of enrollment" created an implied contract); Rest. 2d Contracts § 50(2) (recognizing acceptance by performance).

3. SCARE Sufficiently Alleged Implied Contracts.

The district court, in its Order on the County's first motion to dismiss, found, *without citation*, that there was no authority showing that "oral and other extrinsic evidence can, by itself, contractually bind Sonoma to provide retirees medical benefits." (ER 653.) Accordingly, the district court did not analyze whether the Retirees' Complaint sufficiently alleged an implied contract. However, as discussed above, such authority exists and is binding in this case; a governmental entity's written and/or oral promises, together with employees'

acceptance by performance of their jobs, may constitute a binding contract. Thus, if this Court determines that a county can be bound pursuant to an implied contract, then the Court should remand this case for determination of whether the Retirees have pled their implied contract claims sufficiently. However, if the Court believes that a question before it is whether the Retirees have sufficiently pled one or more implied contracts, then the answer is "yes."

"[T]he essential difference between an implied and an express contract is the mode of proof." *Id.* For an express contract, the terms "are stated in words," while in an implied contract, "the existence and terms . . . are manifested by conduct." *See* Cal. Civ. Code §§ 1620, 1621; *see also, e.g., Guz v. Bechtel*, 24 Cal. 4th 317, 336 (2000) (explaining that employment contracts "may be *implied in fact*, arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations") (emphasis original); *Cal. Emergency Physicians Med. Group v. Pacificare of Cal.*, 111 Cal. App. 4th 1127, 1134 (2003) ("[a] course of conduct can show an implied promise."). When pleading an implied contract, "only the facts from which the promise is implied must be alleged." *Youngman*, 70 Cal. 2d at 246-47.

Here, the Retirees alleged that the County promised to provide retiree health benefits for Retirees and their dependents, funded in whole or substantially by the County. In the alternative, the Retirees alleged that the Tie Agreement required the County to provide the same benefits, at the same amount, to Retirees as the County provided to and paid for its active administrative management employees. The Retirees alleged that these alternative promises were evidenced by the following: (1) the Board of Supervisors' oral conveyance of the County's promises to the County administrators, who in turn orally conveyed the County's promises to employees; (2) the County's inclusion of these promises, or references to them, in

various written documents such as salary and other resolutions, ordinances, memoranda of understanding,[5] job announcements, job offers, retirement-related documents, and other County-issued documents; and (3) the County's performance in conformance with these promises for over four decades. (ER 663-65, ¶¶ 17, 21, 23; ER 59, ¶ 17; ER 65-66, ¶ 21; ER 66, ¶ 23; ER 67-69, ¶¶ 27-28; ER 72, ¶ 34.)[6]

In the FAC, the Retirees alleged additional detail on both the "All or Substantially All" and the "Tie Agreement" theories. For example, the Retirees alleged that County employees, both those represented by unions and those that were unrepresented, had to meet years of service requirements in order to obtain retiree health benefits. (ER 59-64, ¶ 18.) Employees hired prior to 1990 had to complete at least five years of service as County employees, retire directly from County service, and have qualified for a County pension as contributing members of the County's Retirement System for five years. (*Id*., ¶ 18a, d.) Employees hired after 1990 had to complete 10 years of service to receive County-paid retiree health benefits for themselves or 20 years of service to receive County-paid retiree health benefits for themselves and one dependent, as well as meet the other pre-1990 requirements. (*Id*., ¶ 18b, e.) These eligibility requirements are similar to requirements for vesting of pension benefits (i.e., for making such benefits non-

[5] In other words, even if the County's resolutions, ordinances, and/or MOUs do not themselves constitute enforceable contracts providing lifetime retiree medical benefits (but see Section VIII.B., below), they are evidence of implied contracts to that effect.

[6] With regard to the last of these, for example, the Retirees alleged that the County performed on its promises described in the Complaint and FAC by continuing to pay all or substantially all of the cost of health care benefits for Retirees and their dependents from 1964 to the present; alternatively, the Retirees alleged that the County paid benefits pursuant to the Tie Agreement for at least several decades. (ER 665, ¶ 23; ER 66, ¶ 23; ER 72, ¶ 34.)

forfeitable). *See e.g.* Peter J. Wiedenbeck & Russell K. Osgood, CASES AND MATERIALS ON EMPLOYEE BENEFITS 543 (1996) ("The concept of 'vesting' – the elimination of all contingencies, usually by the completion of a specified period of service, on a participant's right to receive a pension or deferred compensation benefit in the future – has been a feature of [tax-]qualified [pension] plans from their inception"). As a result, the use of such conditions of eligibility for retiree medical benefits evidences an intention that such benefits are also non-forfeitable.

The Retirees further alleged that the County repeatedly stated in writing that it followed the practice of paying all or substantially all of the cost of Retiree health benefits. (ER 63, ¶ 18.f.) In County resolutions from 1972 through 2006, the County stated in the recitals that it followed a practice of paying most or all of the medical insurance premiums for both active and retired county employees. (*Id*.) Again, even if these resolutions do not themselves constitute contracts (*see* Footnote 5, above), they are evidence of such contracts.

With regard to the alternative claims based on the Tie Agreement, the FAC alleged that that the County had taken the position in other legal proceedings that it was obligated to provide the Retirees "in perpetuity" with the same benefits as are provided to active employees. (ER 72, ¶ 32.) In addition, numerous resolutions and MOUs from 1989 forward stated that the County would contribute for retirees the same amount toward a health plan premium as it contributed for active management employees. (ER 70-71, ¶ 30.)

Thus, the Retirees' pleadings are sufficient to plead an implied contract, especially given that "only the facts from which the promise is implied must be alleged." *Youngman*, 70 Cal. 2d at 246-47. In *Youngman*, the plaintiff alleged that the promise at issue was implied through the announced practice of the employer and the employer's conduct in conformity with the practice. *Id*. at 245. Here, SCARE alleges much more – decades of conduct in conformity with the practice;

numerous oral statements of the promise; writings, including Board of Supervisors' resolutions, evidencing the promise; and, regarding the Tie Agreement, the County's publicly stated position in legal proceedings. Therefore, the Complaint and FAC plead not only allegations of conduct that imply the County's promise, but in fact documents evidencing the implied contract. This is more than is required under the case law. *See, e.g., Youngman*, 70 Cal. 2d at 247 (holding announced practice and conduct was sufficient to allege an implied contract); *Kashmiri*, 156 Cal. App. 4th at 815, 829 (finding written representations in catalogs and websites were sufficient to create an implied contract).

B. The Agreements Promising Retiree Medical Benefits, Whether Implied or Contained in Formal Actions by the Board of Supervisors, Are Ambiguous on their Faces As to Whether Such Benefits Are for the Retirees' Lifetimes, or May Be Held Ambiguous In Light of Parol Evidence.

Whether or not the Court accepts the retirees' argument above, that the County may enter into implied contracts, the Court must address another issue; whether the implied contracts at issue on the first motion to dismiss and/or the resolutions, ordinances, and MOUs at issue on the second motion to dismiss were or might (based on parol evidence) be found ambiguous as to the *duration* of their promises of retiree medical benefits.

As explained below, there can be no dispute that counties may bind themselves contractually through resolutions and MOUs; nor can it be disputed that the resolutions and MOUs at issue here contained promises of retiree medical benefits. However, it is also undisputed that the resolutions and MOUs contain neither language limiting the benefits to the terms of the resolutions and MOUs, nor language stating that the benefits will continue for the Retirees' lifetimes.

Similarly, the various oral and written statements and practices that might demonstrate an implied contract may be similarly silent on the durational question.

As a result, in either case (i.e., a claim based on an implied contract or one based on resolutions and MOUs), this Court must address the issue of whether, under California law, the contract alleged here is, on its face, impliedly ambiguous, or may be shown to be ambiguous through parol evidence. The district court found that the absence of an explicit promise to pay the benefits "in perpetuity" warranted dismissal of the Retirees' claims. However, because the contracts at issue here are either ambiguous on their faces or may be proven ambiguous under California's parol evidence rule, the district court was incorrect.

1. Public Entities May Bind Themselves Through Resolutions and Ratifications of MOUs.

There can be no dispute that the resolutions and ordinances SCARE alleged in its Complaint and alleged with great specificity and attached to the FAC are binding on the County.[7] As the district court stated "the issue is not whether the documents submitted [with SCARE's FAC] are resolutions; Sonoma does not

[7] While of little import here, because the FAC alleges numerous "formal" resolutions, the district court's finding in the First Motion to Dismiss Order that "formal" resolutions are required is incorrect. *See Dimon*, 166 Cal. App. 4th at 1285 (holding that "[a] resolution in effect encompasses all actions of the municipal body other than ordinances. . . . [¶] Resolutions, as distinguished from ordinances, need not be, in the absence of some express requirement, in any set or particular form.") (citations omitted). In *Dimon*, the court held that a Board's ratification of a union contract, which was recorded in meeting minutes, was the equivalent of a resolution. *Id*. at 1285-86. The court explained that "an actual formal resolution is not required." *Dimon*, 166 Cal. App. 4th at 1284-85 (internal citations omitted). Other courts have held the same. *See Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 641-42 (1980); *Smith v. Mt. Diablo Unified Sch. Dist*., 56 Cal. App. 3d 412, 416-17 (1976).

argue that they are not. Rather, the issue is to what the BOS [Board of Supervisors] agreed in those resolutions." (ER at 13.)

The County also did not dispute that the Board of Supervisors' ratification of an MOU was sufficient to make all of the terms of that MOU binding on the County, despite the fact that the Board's ratification may or may not be contained in a formal resolution and, even if written, may not reiterate the terms of the MOU. *See, e.g., Glendale City Employees' Assn. v. City of Glendale*, 15 Cal. 3d 328, 335 (1975) (explaining that "once the governmental body votes to accept the memorandum, it becomes a binding agreement"); *Dimon*, 166 Cal. App. 4th at 1284 (holding that a Board's ratification of a union contract, which was recorded in meeting minutes, was the equivalent of a resolution). Therefore, while the parties do not agree as to the meaning and scope of the resolutions, ordinances, and MOUs at issue, the parties agree that they are indeed binding on the County.

2. Public Entities' Contracts Are Interpreted Using the Same Standards As Other California Contracts -- Ambiguities May Be Demonstrated By Resort to Parol Evidence and the Contracts May Contain Implied Terms.

As discussed above, whether this Court holds that a contract may be implied or must instead be explicit in a resolution and/or an MOU, the question remains as to whether the absence of durational language, one way or the other, in the alleged contracts, is fatal to the Retirees' claims. Given longstanding principles of California law and decisions by this Court and others in retiree medical benefits cases, the answer is "no."

Again, California law plainly states that "[a]ll contracts, whether public or private, are to be interpreted by the same rules." Cal. Civ. Code § 1635; *see also Glendale* at 339 ("all modern California decisions treat labor-management

agreements *whether in public employment or private* as enforceable contracts which should be interpreted to execute the mutual intent and purpose of the parties.") (emphasis added). The district court's holding – that the explicit promise of benefits in "perpetuity" must be in the legislative enactment in order to create a binding contract – is antithetical to the express language of California Code § 1635, decades of case law holding that contracts with public entities may contain implied terms, and California's parol evidence rule, which allows the use of such evidence to create an ambiguity where none is present on the face of an agreement and/or to decipher ambiguous contract terms.

a. Under California Law, Parol Evidence May Be Used to Demonstrate That a Contract Is Ambiguous, and Contracts Can Contain Implied Terms.

California courts have long held that parol evidence may be used to establish an ambiguity, even where a contract is not ambiguous on its face. *Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (1968) ("The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it [the instrument] appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible").[8]

[8] A court interpreting a contract under California law must (1) consider "all credible evidence [including extrinsic evidence] offered to prove the intention of the parties," and (2) "[i]f the court decides, after considering this [written and extrinsic] evidence, that the language of a contract, in the light of all the circumstances, 'is fairly susceptible of either one of the two interpretations contended for' . . . extrinsic evidence relevant to prove either of such meanings is admissible." *Pacific Gas and Elec.*, 69 Cal. 2d at 39-40 (quoting *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 225 (1895)).

Moreover, under California law, a promise does not have to be explicitly stated in the contract. For example, a practice or course of dealing between an employer and a bargaining unit can be an implied term of an agreement, even where the term is not stated in the agreement itself. *See Claypool*, 4 Cal. App. 4th at 670 (recognizing that the California Court of Appeal "implied contractual obligations in *Valdes v. Cory* and [*CTA*] which constrained the administration of PERS and the Teachers' Retirement Fund," although finding there was no implied contract on the facts before it).

In *Valdes v. Cory*, 139 Cal. App. 3d 773, 785, 787 & n.6 (1983), the California Court of Appeal determined that a contractual obligation existed by looking at the longstanding policies and procedures that established the employer's pension contribution rate, the statute's language that evinced an "implicit legislative acknowledgment of the state's continuing obligation," the statutory provisions that "manifest[ed] an intent that periodic employer contributions [would] not be altered," and the state's conduct and conformity therewith, including pamphlets it distributed to state employees on the issue. Based on all of these factors, the court of appeal held that there was an implied contractual obligation to continue to pay the previously established level of contributions to the retirement system absent actuarial input stating that the rate should be different. *Id*. at 787. This implied obligation arose because the petitioners had an implied vested right in a contribution rate established through sound actuarial principles and, therefore, the legislature could not unilaterally or randomly act to decrease its contributions. *Id*.

In *CTA*, the court of appeal held, despite the State's arguments to the contrary, that a contractual obligation that was not express could be implied. 155 Cal. App. 3d at 506 ("Given this commitment to permanency of funding and the

critical importance which funding bears to the capacity of the state to fulfill the underlying contractual promise to pay the pensions, we imply a promise of funding in exchange for the valuable services rendered by the state's teachers.").[9]

These contract interpretation standards are applied even more liberally in the collective bargaining context. *See Ariz. Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co*., 753 F.2d 1512, 1517-18 (9th Cir.1985). In *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 579 (1960), the U.S. Supreme Court expressly rejected the employer's proposition that "an employee's claim [under a collective bargaining agreement] must fail unless he can point to a specific contract provision upon which the claim is founded." The Supreme Court explained that in the context of collective bargaining, the "source of law" governing disputes over collective bargaining agreements "is not confined to the express provisions of the contract," because past practices are "equally a part of the collective bargaining agreement although not expressed in it." *Id*. at 581-82; *see also Consol. Ry. Corp. v. Ry. Labor Executives Ass'n*, 491 U.S. 299, 311 (1989) (noting that collective bargaining agreements "may include implied, as well as express, terms"); *Detroit & Toledo Shore Line R. Co. v. United Trans. Union*, 396 U.S. 142, 155 (1969) ("Where a condition is satisfactorily tolerable to both sides, it is often omitted from the [collective bargaining] agreement . . ."). As *United Steelworkers* and its progeny hold, a collective bargaining contract necessarily includes implied terms arising from the parties' course of dealing in collective bargaining agreements.

[9] As noted *supra* in Section VIII.A.2, contracts with public entities do not need to be bilateral.

In *Glendale,* the California Supreme Court adopted the *United Steelworkers'* framework and recognized that an MOU with a public entity, just like one with a private entity, "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate." *See* 15 Cal. 3d at 339 n.16 (quoting *Posner v. Grunwald-Marx, Inc*., 56 Cal. 2d 169, 177 (1961)); *Cal. State Employees Assn. v. Public Employment Relations Bd.,* 51 Cal. App. 4th 936; *Amalgamated Transit Union v. L.A. County Metro. Transit Auth.,* 107 Cal. App. 4th 673, 689 (2003). *Glendale* involved a dispute between the City of Glendale and its employees' association over contractual language regarding a salary survey that the parties agreed to use to set employee compensation. *See* 15 Cal. 3d at 332. To resolve the dispute, the trial court admitted extrinsic evidence – the testimony of the negotiators who bargained for the contract – to interpret the contract term at issue. *Id*. at 333. On the basis of that extrinsic testimony, the trial court concluded that the City had breached the terms of the contract. *Id.*

In affirming the trial court's ruling in *Glendale*, the California Supreme Court reasoned that an MOU is binding "once approved by the city council", even where the entire meaning of that MOU is not readily discernible on its face. *Id*. at 334-35. The court explained, "once the governmental body votes to accept the memorandum, it becomes a binding agreement" for the entire "generalized code" of past practices and implied promises contained within the MOU. *Id.* at 335, 339 & n.16; *see also Riverside Sheriffs' Ass'n v. County of Riverside*, 173 Cal. App. 4th 1410 (2009).

These cases demonstrate that (1) parol evidence may be used to demonstrate an ambiguity not apparent on the face of a contract, (2) like private sector contracts, public sector contracts in California may contain implied terms, and (3) that those contracts must be reviewed with reference to extrinsic evidence in order

to properly interpret those terms. As a result, the absence of language stating that retiree medical benefits were promised "in perpetuity" or for the Retirees' lifetimes, does not preclude the Retirees from demonstrating that the contracts, which indisputably promised retiree medical benefits, were ambiguous and/or contained implied terms as to the duration of those benefits. In addition, as discussed below, analogous cases decided by this and other courts of appeal further support this conclusion.

b. Analogous Federal Cases, Which are Consistent with California Law, Support the Retirees' Position that the Lack of Durational Language in the Contracts and/or Use of Parol Evidence Creates an Ambiguity Regarding Whether SCARE Members' Retiree Health Care Benefits Are Vested.

It is black letter law that retiree health benefits, like other benefits, can vest and survive the expiration of a collective bargaining agreement. *See, e.g., Nolde Bros. v. Local No. 358*, *Bakery & Confectionery Workers Union*, 430 U.S. 243, 249 (1977) ("[T]here is . . . no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired") (citations and quotations omitted); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971) (recognizing retiree benefits may vest "[u]nder established contract principles"); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984) (citing *Allied Chemical*, 404 U.S. at 181 n.20, and holding that if retiree medical insurance constitutes a vested benefit under a collective bargaining agreement, that benefit extends beyond the life of the agreement and cannot end without the retirees' consent). Consequently, determining whether a collective bargaining agreement vests health insurance benefits for life in retired employees is a question of contract interpretation, and the parties' intent controls the continuation of retiree welfare

benefits beyond the agreement's termination. *See, e.g., UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983).

As described above, the MOU provisions, salary resolutions, and other documents and pronouncements expressly or impliedly constituting contracts here, do not include either express vesting language or express durational limitations in the provisions granting retiree health care. In the absence of express vesting language and of express duration-limiting language in a provision granting retiree medical benefits, courts have consistently found, based on these absences alone or on parol evidence, that there are two possible interpretations: Either the right to retiree health care vests and survives the term of the agreement, or that right extinguishes when the agreement terminates.

In a retiree medical benefit case similar to this one, this Circuit, consistent with California law, considered parol evidence to determine whether an ambiguity existed and to determine the parties' intent. In *Bower*, this Court held that the absence of unambiguous durational language in a collective bargaining agreement requires a court to consider parol evidence both to identify the ambiguity and to properly interpret the contract. 725 F.2d at 1223-24. This Court found that the expiration of the labor agreement at issue did not determine whether the plaintiffs' retiree health care rights vested, because the agreement did not unambiguously limit medical benefits to the term of the agreement. *Id.* That agreement, like virtually all collective bargaining agreements, including MOUs covering public employees, had an expiration date for the agreement generally, but not in the separate benefit subsection at issue. *Id.* This Court rejected the argument that the agreement's general expiration date terminated the retirees' right to medical benefits.

Instead, this Court turned to contract interpretation principles and examined parol evidence, including statements from management that insurance benefits would continue for life. *Id*. at 1224. In doing so, the court found a number of facts in dispute and held that "those facts create ambiguities in the contract." *Id.* at 1223 (citing *Nat'l Union Fire Insurance of Pittsburgh, Pa. v. Argonaut Insurance Co*., 701 F.2d 95, 97 (9th Cir. 1983)). As a result of those ambiguities, this Court reversed the trial court's judgment against the retirees. *Id. Bower*'s core holding – that a court should examine parol evidence to determine whether an ambiguity exists and to interpret the contract – is consistent with California's approach to interpreting contracts generally and collective bargaining agreements (MOUs) specifically, as described above.

Other courts across the country are in accord, either examining parol evidence to determine whether an ambiguity exists, or in some cases finding an inherent ambiguity. *See, e.g.*, *Yard-Man*, 716 F.2d at 1482 (noting importance of discerning the intent of the parties when confronted with retiree health benefit provisions in CBAs); *Maurer v. Joy Tech., Inc.,* 212 F.3d 907, 917-18 (6th Cir. 2000) (finding ambiguity where general durational limitation clauses for the entire agreement "are not clearly meant to include retiree benefits"); *Local Union No. 150-A, UFCW, et al. v. Dubuque Packing Co.,* 756 F.2d 66, 69-70 (8th Cir. 1985) (finding ambiguity where bargaining agreements did not state that retiree benefits expired with the agreements); *Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp.,* 122 F.3d 228, 233-34 (5th Cir. 1997) (reversing a district court's decision that retired employees' rights to benefits expired with the CBAs in effect at the time they retired because it "pretermitted its analysis of any extrinsic evidence of the parties' intent"); *Deboard v. Sunshine Mining & Ref. Co.,* 208 F.3d 1228, 1240-41 (10th Cir. 2000) (finding language regarding vesting of retiree

health benefits ambiguous and finding extrinsic evidence demonstrated intent to create vested rights).

The district court missed the fundamental point of this case law. Indeed, it misconstrued one of the few cases it discussed on this point. In *Litton Fin. Printing Div. v. Nat'l Labor Relations Bd.*, 501 U.S. 190, 207 (1991), the Supreme Court recognized the general principle that rights which vest under a collective bargaining agreement will survive termination of the agreement. However, contrary to the district court's opinion, *Litton* did not require that a provision surviving the termination of a collective bargaining agreement "must say so in explicit terms." (ER 16-17.) Instead, Litton recognized the exact opposite principle: "A postexpiration grievance can be said to arise under the contract [ ] where … *under normal principles of contract interpretation*, the disputed contractual right survives expiration of the remainder of the agreement." *Litton*, 501 U.S. at 205-06 (emphasis added).

California law is in accord with the federal cases. For example, in *California State Employees' Association v. Public Employment Relations Board*, 51 Cal. App. 4th 923, 939 (1996), the California appeals court rejected the argument that general "duration of this Agreement" language waived the employees' bargaining rights when the collective bargaining agreement expired. The court noted that it would be improper to give "such general and innocuous language … a significance not clearly intended or expressed by the parties." *Id.* That principle holds even truer in the context of retiree benefits, where for nearly a century California has followed the rule that public employees' retirement benefit provisions are to be liberally construed to "protect the reasonable expectations of those whose reliance is induced." *O'Dea v. Cook*, 176 Cal. 659, 662 (1917); *Bellus v. City of Eureka*, 69 Cal. 2d 336, 340, 348-350 (1968).

Common sense also dictates that rights to retirement benefits do not automatically terminate with the expiration of a contract promising such benefits because "[w]ithout vesting, an employee who retires during the course of any one collective bargaining agreement would lose his or her ability to protect any retirement benefit conferred in that agreement less than three years after receiving the benefit." *Navlet v. Port of Seattle*, 164 Wash.2d. 818, 844-85 (2008).[10] That logic applies with particular force here, where employees who worked for decades to earn retiree health care rights could see them extinguished. Perhaps implicitly recognizing the problem that underlies the County's argument here, each of the decisions discussed above found that the agreements' general durational limitations were unpersuasive as to whether the retiree benefits vested. Each court held that examination of parol evidence was necessary. This Court should do the same.

c. The Absence of Explicit Duration-Limiting Language, the Extrinsic Evidence, and/or, in Some Instances, the Eligibility Requirements Contained in the Contracts' Retiree Health Care Subsections Themselves, Are Sufficient to Establish An Ambiguity.

As demonstrated above, there were assuredly contracts, whether implied or in resolutions and MOUs, providing retiree medical benefits. Examination of those contracts, alone or along with extrinsic evidence, demonstrates that the absence of explicit promises that benefits will be paid "in perpetuity" does not mean that benefits will not be paid for the retirees' lifetimes.

At least some of the MOUs and salary resolutions contain specific provisions for retiree health care. (ER 59-64, ¶¶ 18-19; ER 67-71, ¶¶ 28-30.)

[10] There is no logical basis to interpret Board of Supervisors' salary resolutions providing retiree medical benefits for formerly unrepresented (i.e., non-unionized) employees any differently than collective bargaining agreements covering unionize employees.

Specifically, they contain eligibility requirements commonly associated with vested pension retirement benefits -- completion of a substantial number of years of service -- and/or they condition eligibility for retiree health benefits on vesting for a County pension. (ER 59-64, ¶ 18; ER 65-66, ¶ 21; ER 67-69, ¶ 28; ER 71-72, ¶ 31.) These provisions, which are intrinsic to the contracts, by themselves at least create an ambiguity as to the duration of the promise of retiree benefits.[11]

Second, given that California law allows parties to establish implied contractual terms, the absence of any durational language, one way or the other, in those contracts allows the Retirees to use extrinsic evidence to establish the implied term that the benefits will be provided for their lifetimes.

Third, even if the intrinsic vesting-like eligibility requirements and/or the absence of durational language are alone insufficient to create an ambiguity as to the duration of the promise of retiree health care benefits, the Retirees' allegations of extrinsic evidence are more than sufficient to establish such an ambiguity. Thus, the Retirees' amended pleading includes among other things, the following:

- The language of resolutions highlighting the County's longstanding practice of paying for retiree medical insurance. (*See* ER 63, ¶ 18f) (stating "the County of Sonoma pays the medical insurance premium for both active and retired county employees", "the County of Sonoma pays for most of the medical insurance premium of for retired County employees", and similar acknowledgments).)
- Testimony by former County employees who drafted the resolutions, a former Board supervisor from 1976-96, and former County administrators who transmitted Board promises to employees; County-issued announcements, job offers, and retirement-related documents. (ER 65-66, ¶ 21; ER 71-72, ¶ 31.)

[11] These requirements apply to both of the Retirees' alternative claims; i.e., the claim that the County promised to pay all or substantially all of the cost of medical benefits or that it promised to pay such benefits under the Tie Agreement.

- The County's recognition of the Tie Agreement and its admissions in other legal proceedings that it is obligated to provide retirees with the same benefits as are provided active employees. (ER 72, ¶ 32, quoting the County's response to an unfair practice charge that "[s]ince 1985, the County's retirees have paid the same premiums and have received the same benefit *as do active Administrative Management employees*. In and around 1989, 'the agreement was made between the County and its retirees that, *in perpetuity*, assured retirees that they were tied to Administrative management employees for purposes of health care benefits'" (County quoting letter from SCARE; first emphasis in original; second supplied.)

This evidence is critical to determine the parties' intent as to whether retiree health care rights vested under the All or Substantially All allegations or under the Tie Agreement allegations. By requiring that words such as "for life" or "in perpetuity" be included in the text of the legislative action itself in order to find that a contract for lifetime benefits had *formed,* the district court simply ignored California and analogous law, as well as the factual allegations discussed above. Thus, regardless of whether this Court holds that an express contract is required, SCARE's pleadings more than adequately state a plausible claim for relief. The district court's orders dismissing the retirees' breach of contract claims should be reversed.

C. The Retirees Adequately Pled Contract Clause and Due Process Claims.

The district court dismissed the Retirees' Contract Clause and Due Process claims because it found that those claims were dependent on the creation of a contract. Consequently, if this Court reverses the district court's dismissal of the Retirees' contract claims, then it should reverse the district court's dismissal of the impairment of contract and due process claims under the United States and California Constitutions.

D. The District Court Should Not Have Dismissed SCARE's Promissory Estoppel Claims.

The elements of a promissory estoppel claim are "(1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages." *Toscano v. Greene Music*, 124 Cal. App. 4th 685, 692 (2004). The Retirees pled each of these elements. (ER 662-64, ¶¶ 15-18; ER 667, ¶¶ 31-32.)

The district court, however, improperly dismissed SCARE's promissory estoppel claims. First, the district court erroneously held that an implied or oral promise could not bind the County under Cal. Gov't Code Section 25300. (*See* ER at 657; ER at 24.) As outlined above in section VIII.A.1, Section 25300 does not prohibit a public entity from entering into implied contracts. Moreover, because the "elements of an equitable estoppel claim are established by the facts," *see City of Long Beach v. Mansell*, 3 Cal. 3d 462, 493 (1970), the Retirees' promissory estoppel claims should not have been adjudicated at the pleading stage.

Second, the Complaint and FAC both pled that the Retirees reasonably and detrimentally relied on the County's promises, making numerous life decisions regarding, among other things, whether and for how long to work for the County, how much to save for retirement, and which health care benefits to select for themselves and their families. (ER 667, ¶¶ 30-32; ER 73-74, ¶¶ 39-41.) Moreover, many Retirees chose to continue working for the County rather than moving to other, higher paying employment at least in part because of the promise of retiree health care benefits. (ER 667, ¶¶ 31-32; ER 74, ¶¶ 40-41.) Now retired, SCARE members have suffered and will continue to suffer harm from the County's breaches. (ER 660-61, ¶ 2; ER 56-57, ¶ 2.)

Despite this well-pleaded language, the district court found that SCARE did not allege reasonable reliance because persons dealing with a public agency "are presumed to know the law with respect to any agency's authority to contract." (ER

655; citations omitted.) As discussed in great detail above, however, the methods by which public entities can be contractually bound are at the heart of this case and the REAOC case pending before the California Supreme Court. If the law was unclear enough to warrant this Court to seek guidance from the California Supreme Court, it is simply unsupportable to conclude, as the district court did, that the County's employees should have known over the past several decades that the County could only contract by formal resolution.

Finally, the district court improperly weighed competing public policy considerations at the pleading stage of the case. First, the district court noted that estoppel would not apply if such application "would effectively nullify a strong rule of policy, adopted for the benefit of the public." (ER 654) (citing *Poway Royal Mobilehome Owners Ass'n v. City of Poway*, 149 Cal. App. 4th 1460, 1471 (2007).) The district court, then acknowledged, quoting *Longshore v. County of Ventura*, 25 Cal. 3d 14, 28-29 (1979), that estoppel is especially *appropriate* in the context of pension benefits because "the unique importance of pension rights to an employee's well-being" means that "the potential injustice to employees or their dependents [is] clearly outweighed [by] any adverse effects of established public policy." (ER 656.)

However, the district court then apparently concluded that the policy recognized in *Longshore* was outweighed by "a competing policy at issue of saving taxpayers money and maintaining funding for other needed purposes in times of budget crisis." (*Id*.) In making that assertion, the district court did not cite to any case law. If anything, case law is to the contrary. California courts have required public entities to fulfill their promised payments to "protect the reasonable expectation of the employees." *Bellus*, 69 Cal. 2d at 340; *see also O'Dea*, 176 Cal. at 662 (noting public employee retirement provisions are liberally construed to "protect the reasonable expectations of those whose reliance is

induced). If the district court were correct, then any time a governmental entity had a budget crisis, it could simply walk away from its pre-existing obligations. That cannot be the case. In any event, the Court's weighing of competing policy claims at the pleading stage was improper.

IX. CONCLUSION

California recognizes that retiree benefits "are a government obligation of great public importance. They help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their contracts." *Carmen v. Alvord*, 31 Cal. 3d 318, 325 n.4 (1984). The Retirees fulfilled their end of the bargain, dedicating their working years to the County in exchange for promised retiree health benefits. The County cannot be permitted to turn its back on its former employees, now retired and elderly, under the narrow defense that it failed to put the promise in a formal resolution, or failed to include the term "in perpetuity" in writing. The district court's dismissal orders, which adopted the County's position, are at odds with California and analogous federal law holding no such explicit magic words are required to provide vested retiree health care benefits.

CERTIFICATION OF VIRUS CHECK

I hereby certify that the PDF version of Appellant's Opening Brief has been scanned for viruses by McAfee SonicWALL Enforced Client Anti-Virus and Anti-Spyware, Version 5.0, and no viruses have been detected.

Dated: April 29, 2011

Respectfully Submitted,

/s/ Jeffrey Lewis

Jeffrey Lewis

Attorney for Plaintiff/Appellant Sonoma County Association of Retired Employees

CERTIFICATE OF COMPLIANCE PURSUANT TO 9th CIRCUIT RULES 32(a)(7)(B) FOR CASE NUMBER 10-17873

I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11, 559 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, 14-point Times New Roman font.

Dated: April 29, 2011

/s/ Jeffrey Lewis

Jeffrey Lewis

Attorney for Plaintiff/Appellant Sonoma County Association of Retired Employees

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, I electronically filed the foregoing:

APPELLANT'S OPENING BRIEF

with the Clerk of the Court for the United States Court of Appeals for the 9th Circuit by using the appellate CM/ECF system.

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