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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

SONOMA COUNTY ASSOCIATION OF
RETIRED EMPLOYEES,

Plaintiff,

v.

SONOMA COUNTY,

Defendant.

Case No. CV 09-4432 CW

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: August 6, 2015
Time: 2 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

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NOTICE OF MOTION AND MOTION

Please take notice that on August 6, 2015 at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable Claudia Wilken of the United States District Court for the Northern District of California, Plaintiff Sonoma County Association of Retired Employees (“SCARE”) will and hereby does move for an order granting partial summary judgment pursuant to Federal Rule of Civil Procedure 56. Specifically, SCARE moves for summary judgment as to the County’s breach of its agreement to provide retirees with the same contribution for medical benefits as it provides active employees.

This Motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities in support of this Motion; the Request for Judicial Notice filed herewith; the declarations of Darin Ranahan, Bill Robotka, Carl Jackson, Joanne Sidwell, Michael Allen, Clancy Faria, Gary Wilkening, Gary Zanolini, Kenneth Couch, Mike Brown, Nick Velichinsky, Randy Biehler, Ray Myers, and Tom Ford, including all attached exhibits, filed herewith; on all other pleadings and papers on file in this action; and on such oral argument as may be heard by the Court concerning this Motion.

LEWIS, FEINBERG, LEE
& JACKSON, P.C.

DATED: May 28, 2015

/s/ Darin Ranahan

Jeffrey Lewis
Darin Ranahan
Linda Lam

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1 **I. INTRODUCTION**

2 For over 40 years, Sonoma County’s (the “County’s”) leaders represented to its workers
3 that the County would provide retirees with health insurance for the rest of their lives on the same
4 terms that it provided active employees with health insurance. The evidence demonstrates that
5 lead negotiators *for both sides* in negotiations for the County’s Memoranda of Understanding
6 (“MOUs”) with its employee unions understood these MOUs to convey lifetime (i.e., vested)
7 retiree medical benefits, as did the County Board of Supervisors (the “Board”) when it ratified
8 these MOUs. Indeed, both County and union negotiators have testified that both sides explicitly
9 affirmed the vested nature of the benefits in discussions at the bargaining table. For example,
10 former lead negotiator for the County, Ray Myers, testified as follows: “I told the unions clearly
11 across the table that we were going to continue our long-standing practice and commitment to
12 provide the retirees that benefit that I just described, the eligibility for that benefit for retirees and
13 . . . for current active employees who ultimately retired. . . . We saw this as a vested benefit, a
14 retirement benefit” Myers Dep. 101:16-102:3.¹

15 In addition, the County described these benefits as for life in a variety of publications and
16 announcements, admitted they were vested in various written and oral statements, and conformed
17 with industry practice in providing them as vested. The County’s statements included, among
18 many others, the admission in a letter brief to the Public Employment Relations Board (“PERB”)
19 that the County had an “agreement [in or around 1989] . . . between the County and its retirees
20 that, *in perpetuity*, assured retirees that they were tied to Administrative Management employees
21 for purposes of health care benefits” See RJN Ex. 510 (SONOMA-H-080185-94 at 88
22 (8/24/07 Letter Brief))² (emphasis added). For decades, the County lived up to its word, ensuring
23 that retirees who dedicated careers of service to the County would be provided with medical
24

25 _____
26 ¹ “Myers Dep.” refers to the Deposition of Ray Myers. Relevant pages of all depositions cited
27 herein are similarly denominated and are attached to the Declaration of Darin Ranahan (“Ranahan
28 Decl.”), filed herewith.

² “RJN” refers to Plaintiff’s Request for Judicial Notice in Support of Motion for Partial
Summary Judgment, filed herewith.

1 benefits for the rest of their lives. Indeed, the County leaned on this promise to suppress salaries
2 and pension enhancements. However, after new accounting standards published in 2004 laid bare
3 the full cost of the benefit, the County reneged, seeking to penalize its former workers for its own
4 failure to put away funds to fulfill its promises.

5 The fact that the County has budgetary issues does not justify its attempt to rewrite history
6 and claim that the retiree medical benefits were not vested. In establishing a bi-partisan
7 commission to study pension and retiree medical benefit liabilities, then-Governor
8 Schwarzenegger, although recognizing the seriousness of the financial issues faced by California
9 governments, stated that “[p]romised pensions and health benefits are vitally important to state
10 workers and their families, . . . [a]nd they are obligations that must – and will – be paid by
11 government.” Public Employee Post-Employment Benefits Commission, *Funding Pensions &*
12 *Retiree Health Care for Public Employees* (2007) (“Commission Report”) at 189,
13 <http://acred.piercecollege.edu/evlist/4.084.pdf> (last visited May 27, 2015).³

14 While SCARE’s case involves two alternate claims as to the level of benefits promised
15 and multiple theories of liability, this motion seeks to address only one claim: that the County
16 breached its contractual promise to provide retirees for their lifetimes with the same medical
17 benefits as active employees when it cut contributions to both active employees’ and retirees’
18 medical benefits while simultaneously providing active employees, but not retirees, with cash to
19 make up for those cuts. SCARE will demonstrate the other elements of its case at trial and/or in
20 opposition to the County’s dispositive motion.

21 II. FACTUAL HISTORY

22 A. From 1964 to 1989, the County Promised Its Retirees It Would Provide Them with 23 Medical Benefits for Life, Including While Negotiating MOUs with Its Unions.

24 1. The Development of the Retiree Medical Benefit Before 1989.

25 The County’s promise to provide retirees with some level of medical coverage for their
26

27 ³ See also *id.* at 3 (Commission stating that at the end of the day, it is simply “devastating to
28 individuals when health care benefits are changed after they have retired, since the cost of health
services can easily deplete a retiree’s income.”).

1 lifetimes dates back over fifty years, decades before the 1989 MOU language on retiree medical
2 benefits. On June 22, 1964, the Board passed a resolution extending medical benefits to
3 employees retiring on or after July 1, 1964 at the same cost as active employees.⁴ Exhibit 1 to
4 Second Amended Complaint;⁵ RJN Ex. 511 (P006670); RJN Ex. 501 (P047144-56 at 45, 48). The
5 County implicitly recognized the lifetime nature of this benefit by providing that survivors could
6 continue coverage after a retiree’s death. 2AC Ex. 2 (Res. No. 10292-1); RJN Ex. 501 (P047144-
7 56 at 47).⁶ The primary eligibility requirement was that retirees receive a normal or disability
8 pension, each of which required five years of service credit. *See* 2AC Ex. 2 (Res. 10292-1); RJN
9 Ex. 501 (at P047147); Myers Dep. 290:9-12; Declaration of Clancy Faria (“Faria Decl.”) ¶ 6;
10 Declaration of Tom Ford (“Ford Decl.”) ¶ 11.

11 From 1964 to 1989, the County provided single retirees with the same premium
12 contribution it provided single active employees. *See, e.g.*, RJN Exs. 501-509 (Group Insurance
13 Plans from 1964 to 1973). Beginning by 1972, the County’s premium contributions for retirees
14 and active employees were the same, regardless of the number of dependents. RJN Ex. 516 (Res.
15 No. 36702 (5/8/72)).⁷ At some point, the County began tying retirees specifically to
16 unrepresented administrative management employees. *See* Declaration of Carl Jackson (“Jackson
17 Decl.”) ¶ 3; Declaration of Nick Velichinsky (“Velichinsky Decl.”) ¶ 9; Hart Dep. 141:1-23.

18
19
20 ⁴ The promise to provide retirees with the same contribution to medical benefits as provided to
21 active employees has been referred to colloquially as a “tie.” *See, e.g.*, Hart Dep. 145:5-19. For
22 ease of reference, SCARE uses the term “tie agreement” to refer to this promise in all its
23 iterations, including the MOU language negotiated in 1989.

24 ⁵ Plaintiff requests judicial notice of the MOUs and resolutions attached to the Second Amended
25 Complaint (“2AC”), ECF Nos. 75-76. RJN at 2. Such exhibits will be identified by their 2AC
26 exhibit numbers.

27 ⁶ This promise could not have appeared in an MOU at this time because California had not yet
28 established a statutory scheme for public sector labor organizing, and thus all employees and
retirees received their medical benefits pursuant to resolutions passed by the Board (hereinafter,
“salary resolutions”). *See* Zerger, Kirsten L. et al., *California Public Sector Labor Relations* Ch.1
§ 1.05 (Matthew Bender 2014); Hart Dep. 56:22-57:17.

⁷ This change was made pursuant to “Memoranda of Understanding executed by and among [the
Board’s] Meet and Confer Committee and Operating Engineers’ Local No. 3, Sonoma County
Sheriff’s Office Employees’ Association and California Nurses’ Association, which Memoranda
[were] approved by [the] Board” RJN Ex. 516 at SONOMA-H-000040.

1 **2. The Lifetime Nature of the Benefit Was Widely Understood and Reinforced**
2 **by County Leadership.**

3 The understanding that retiree medical benefits were vested, lifetime benefits was
4 pervasive among members of the Board of Supervisors, top management, County staff, and union
5 negotiators before 1989. There is copious testimony establishing that this was the understanding
6 of top County staff and union representatives during this period, including:⁸

- 7 • The Board of Supervisors:
- 8 ○ The Board, generally: Myers Dep. 61:6-17.
 - 9 ○ Supervisor Helen Rudee (1977 to 1988): Declaration of Michael Allen (“Allen
10 Decl.”) ¶ 24.
 - 11 ○ Supervisor Ernie Carpenter (1981 to 1996): Carpenter Dep. 54:20-55:10, 91:17-
12 92:6, 98:25-99:6, 102:20-103:2; Allen Decl. ¶ 24; Myers Dep. 192:25-193:14.
 - 13 ○ Supervisor Tim Smith (1989 to 2008): Allen Decl. ¶ 24.
- 14 • The County Administrator, who served as the primary liaison between the Board of
15 Supervisors and County staff (Chrystal Dep. 84:7-19):
- 16 ○ The County Administrator, generally: Myers Dep. 61:6-17.
 - 17 ○ Len Wharton: Carpenter Dep. 76:13-79:4, 92:7-93:11.
 - 18 ○ Tom Schopflin: Myers Dep. 192:2-24; Gearhart Dep. 41:9-24.
- 19 • Personnel Department Staff, who had primary responsibility for negotiating MOUs with
20 County unions (Myers Dep. 24:12-25:3; Gearhart Dep. 15:14-16:2):
- 21 ○ Bill Hart (Personnel Director, 1973 to 1986): Carpenter Dep. 76:13-79:4, 92:7-
22 93:11; Myers Dep. 61:6-17, 192:2-24; Hart Dep. 33:2-18, 35:5-11; Ranahan Decl.
23 Ex. 1;⁹ Ex. 5 ¶ 11; Ford Decl. ¶ 3.
 - 24 ○ Richard Gearhart (Personnel Director, 1986 to 2000): Gearhart Dep. 41:9-24.
 - 25 ○ Ray Myers (Employee Relations Manager, 1981 to 1990): Jackson Decl. ¶ 4;
26 Braun Dep. 72:2-11; Ex. 30; Myers Dep. *passim* (e.g., 61:6-19, 234:4-20).
 - 27 ○ Dave Gonzalez (Personnel Analyst): Jackson Decl. ¶ 4.
 - 28 ○ Gary Wilkening (Personnel Analyst, 1969 to 1978 and 1980 to 1982; Personnel
 Operations Manager, 1982 to 2004): Ford Decl. ¶ 3; Declaration of Gary
 Wilkening (“Wilkening Decl.”) ¶¶ 3-4.
- 29 • Other County Management:
- 30 ○ Department heads, generally: Myers Dep. 61:6-17.
 - 31 ○ County managers, generally: Myers Dep. 61:6-17.
 - 32 ○ Don Merz (Treasurer-Tax Collector): Carpenter Dep. 86:17-87:12, 88:4-89:3; Ford
33 Decl. ¶ 3.

34

35 ⁸ For the Court’s convenience, a “cast of characters” listing key County personnel and union
36 negotiators (referenced herein) is attached as Appendix I to the Ranahan Decl.

37 ⁹ All references to exhibits are to exhibits attached to the Ranahan Decl., unless otherwise noted.

- 1 ○ Paul Allen Jr. (Director of Social Services Department): Velichinsky Decl. ¶ 3.
- 2 ○ Paul Roundtree (Assistant Director of Social Services Department): Velichinsky
- 3 ○ Tom Ford (Central Collections Manager and Assistant Tax Collector, 1981 to
- 4 ○ Gail Braun (Risk Manager, 1986 to 1996): Braun Dep. 71:19-72:7.
- 5 ○ Don Head (Director of Public Works): Carpenter Dep. 86:17-87:12, 88:4-89:3.
- 6 ○ Carl Jackson (Civil Engineer, Assistant Chief Engineer, and Assistant General
- 7 ○ Mike Brown (Sergeant, Sheriff's Office Personnel Services Unit, 1985 to 1987):
- Nick Velichinsky (Chief, Income Maintenance Division of Social Services
- Declaration of Mike Brown ("Brown Decl.") ¶¶ 4-6.
- Department; Chief, Child Welfare Services): Velichinsky Decl. ¶ 3.

8 ● Union Representatives:

- 9 ○ Michael Allen (SEIU, 1979 to 2004): Allen Decl. ¶¶ 9, 25.
- 10 ○ Tom Drumm (SEIU, 1988 to 2010): Drumm Dep. 13:19-14:6, 81:1-82:14.
- 11 ○ Clancy Faria (SCSOEA, late 1970s to mid-1990s): Faria Decl. ¶ 5.

12 Although MOUs did not always explicitly address retiree medical benefits during this

13 time, County negotiators assured union representatives at the bargaining table that the County

14 was committed to continue providing vested or lifetime retiree medical benefits. Allen Decl. ¶ 10;

15 Faria Decl. ¶¶ 5, 8; Myers Dep. 147:15-151:9; Ex. 5 ¶ 12; Velichinsky Decl. ¶ 7; *see also*

16 Velichinsky Decl. ¶ 5 (assurance to unrepresented management employees). County negotiators

17 reported back to the Board that they had promised lifetime retiree medical benefits at the

18 bargaining table. Myers Dep. 62:1-24, 63:17-64:9; Hart Dep. 31:11-18. The Board specifically

19 authorized County negotiators to convey this promise at the bargaining table. Myers Dep. 61:12-

20 62:24, 111:9-23, 234:21-235:5, 235:19-236:2, 292:2-7; Hart Dep. 27:4-25; Ex. 5 ¶¶ 7-8, 12.

21 During this period, the County repeatedly promised that the retiree medical benefits it

22 offered were lifetime benefits that were part of its entire retirement package. The County used a

23 standard form for job announcements from at least March 1973 to May 1984 that listed as a

24 benefit "an excellent retirement plan," including that "the County [would] continue to pay your

25 health insurance premium." Ex. 2 at P001228, 30, 33, 36, 39, 42, 44; Hart Dep. 41:6-44:1, 51:9-

26 52:3, 138:15-139:5; Myers Dep. 113:8-115:4, 137:19-138:22; *see also* Ex. 402 (P002035-38 at

27 36); Ex. 403 (P008880-81 at 81); Ex. 402 at P002037 ("[t]he County pays your full share of an

28 excellent Medical Group Insurance plan . . . and, upon retirement, continues to pay this cost.");

 Ex. 404 (P024913-15 at 15) (same); Declaration of Gary Zanolini ("Zanolini Decl.") ¶ 3.

1 The County also told employees in the hiring process, including during recruitment,
2 interviews, and new employee orientations, that they would be eligible for lifetime retiree medical
3 benefits upon retirement as part of the County’s retirement package. *See* Faria Decl. ¶ 4; Ford
4 Decl. ¶¶ 3, 10; Jackson Decl. ¶ 5; Wilkening Decl. ¶¶ 3-4; Brown Decl. ¶¶ 4-6; Velichinsky Decl.
5 ¶¶ 3-4, 6; Gearhart Dep. 41:9-24, 42:13-17; Hart Dep. 51:9-52:3, 127:18-128:3, 138:15-139:5;
6 Carpenter Dep. 76:13-78:12; *see also* Braun Dep. 69:25-70:12; Declaration of Bill Robotka
7 (“Robotka Decl.”) ¶ 5; Declaration of Randy Biehler (“Biehler Decl.”) ¶ 3. From 1986, the
8 County stated in pre-retirement counseling sessions that retirees would be entitled to lifetime
9 retiree medical benefits. Hart Dep. 44:6-48:21, 51:9-52:3, 138:15-139:5.

10 **3. Provision of Vested Retiree Medical Benefits During This Time Mirrored**
11 **Larger Trends Across the State and Nation.**

12 The development of the County’s retiree medical benefit program from the 1950s through
13 the 1980s mirrored larger trends across the country and state. The number of employers providing
14 retiree medical benefit coverage surged in the 1960s and 1970s, as the cost of providing such
15 benefits was relatively low. *See* Ex. 401 at 2-3 (expert report of Teresa Ghilarducci). Thus, the
16 vested nature of retiree medical benefits was not a particularly hotly contested issue in labor
17 negotiations. *Id.* at 3.

18 In California, local agencies, including counties, typically followed the State’s lead as to
19 retiree medical benefit programs. *Id.* at 6-7. Before 1961, local agencies largely did not provide
20 such benefits. *Id.* at 6. In 1961, the State began to offer health benefits to its retirees and their
21 survivors who received pensions (a.k.a., “annuitants” under the law). *See id.* at 6-7; RJN Ex. 551
22 (Meyers-Geddes State Employees’ Med. & Hosp. Care Act (“Meyers-Geddes Act”), Cal. Stats.
23 1961, ch. 1236, § 1 at 2985 (defining “annuitant”), 2991-92 (annuitants entitled to contributions)).

24 The retiree medical benefit regime set up under state law provided *vested* retiree medical
25 benefits. Ex. 401 at 7-8. The Meyers-Geddes Act did not expressly provide that retiree medical
26 benefits were “vested” or “lifetime” benefits. *See* RJN Ex. 551 (Meyers-Geddes Act). However,
27 the vested nature of the benefit was clearly understood, as evidenced by subsequent amendments.
28 *See, e.g.*, RJN Ex. 554 (Cal. Stats. 1984, ch. 676, § 11) (currently codified at Cal. Gov. Code §

1 22873 with title of “time period for vesting”) (providing that the employer contribution “shall not
2 be vested” until employees have 10 years of credited state service); Cal. Gov. Code § 22876
3 (referring to “vesting requirements” of Cal. Gov. Code §§ 22873-75).

4 In 1963, it became the official policy of the State to encourage public entities to provide
5 retiree health benefits. The California legislature directed local agencies to “give preference to
6 such health benefit plans as do not terminate upon retirement of the employees affected, and
7 which provide the same benefits for retired personnel as for active personnel at no increase in
8 costs to the retired person” RJN Ex. 553 (Cal. Stats. 1963, ch. 1403, § 1); Barsook,
9 Benjamin et al., *California Public Sector Employment Law* Ch. 9 § 9.20 (Matthew Bender 2014).
10 Indeed, State law was amended in 1963 to explicitly permit the provision of retiree medical
11 benefits by local agencies. *Compare* RJN Ex. 550 (Cal. Stats. 1957, ch. 944, §§ 2, 6) *with* RJN
12 Ex. 552 (Cal. Stats. 1963, ch. 1773, §§ 1-2) (currently codified at Cal. Gov. Code §§ 53201,
13 53205, both located in Title 5, Division 2, Part 1, Chapter 2, Article 1 of the California
14 Government Code). (Sonoma County provides its medical benefit contributions pursuant to this
15 statute. *See* RJN Ex. 515 (Res. No. 17050).)

16 Numerous local agencies began to follow the State’s lead in providing retiree medical
17 benefits to their employees. Ex. 401 at 6-7; Barsook et al., *supra*, at § 9.20. As described above,
18 the County began providing retiree medical benefits in 1964, i.e., right after the State’s 1963
19 amendments. Generally, local agencies providing retiree medical benefits modeled their retiree
20 medical benefit regime after the one established by the State, which set the industry standard for
21 provision of lifetime retiree medical benefits by public employers in California. Ex. 401 at 7. That
22 standard included vesting despite the absence of specific language so stating.

23 **B. In 1989, the County Enshrined Its Promise of Lifetime Retiree Medical Benefits in**
24 **Memoranda of Understanding with County Unions, While Adding More Stringent**
Vesting Requirements for New Hires.

25 By 1989, County staff became concerned with the growing cost of providing retiree
26 medical benefits. In the context of negotiating the County’s 1989 MOU with SEIU,¹⁰ the

27 _____
28 ¹⁰ At times, the County’s SEIU bargaining units have been referred to as the Sonoma County

1 County's Director of Personnel, Richard Gearhart, observed that the County's retiree medical
2 benefits at that point were considerably more generous than those offered by other counties and
3 even the State. Ex. 9; Gearhart Dep. 80:21-81:6, 82:19-84:15, 86:19-87:19. He noted "The State
4 recently adopted a 10 year State service requirement in order to pay 50% of the retired employee
5 only premium." Ex. 9; *see also* RJN Ex. 555 (Cal. Stats. 1988, ch. 906, § 3). Accordingly, he
6 proposed in a memo to Don Merz, the County Treasurer-Tax Collector who at that time was
7 responsible for administering the County's retirement system, that the County follow suit by
8 implementing a more stringent vesting schedule, along the lines of what the State had recently
9 implemented. Ex. 9; Myers Dep. 93:13-95:16. *Compare* Ex. 9 with RJN Ex. 555 (1988 Cal. Stats.
10 ch. 906 § 3).

11 Ray Myers, the Employee Relations Manager, was the County's lead negotiator,
12 responsible for negotiating its proposal at the bargaining table. Allen Decl. ¶ 4. Michael Allen
13 was lead negotiator for SEIU, the largest union. Myers Dep. 90:13-18; Allen Decl. ¶ 3. In the
14 course of bargaining over this proposal, Mr. Myers and other County negotiators represented to
15 the union negotiators that the retiree medical benefits were vested, lifetime benefits. Myers Dep.
16 100:5-17, 101:14-102:3, 103:7-104:14, 234:21-235:5; Allen Decl. ¶¶ 12, 16. Mr. Allen responded
17 that that was his understanding as well. Allen Decl. ¶ 12. Mr. Myers was specifically authorized
18 by the Board to make this representation. Myers Dep. 102:22-103:18, 111:9-23, 124:4-125:19,
19 234:21-235:5, 292:2-7. The Board was fully informed of the lifetime nature of the benefit. Myers
20 Dep. 152:7-15. Indeed, this was relatively uncontroversial, as the understanding that the retiree
21 medical benefit was a vested benefit was already pervasive. *See supra* section A.2.

22 Ultimately, the County and SEIU reached a tentative agreement on August 8, 1989.¹¹ It
23 provided that for individuals hired after January 1, 1990, who accumulated 10 years of
24 employment *and* participated in the County retirement system, "the County shall contribute for
25

26 Organization of Public Employees (SCOPE). *See generally* Drumm Dep. 10:11-11:23. For ease
of reference, this brief uses "SEIU" to refer to all incarnations of these bargaining units.

27 ¹¹ A tentative agreement is an interim agreement on a particular issue of bargaining that is later
28 incorporated into the larger MOU. *See, e.g.*, Couch Dep. 66:19-68:17, 69:13-21; Chrystal Dep.
65:4-66:5; Drumm Dep. 77:15-80:15.

1 the retiree the same rate for health insurance as is contributed to an active single employee,” and,
2 for individuals with 20 years of employment *and* participation in the County retirement system,
3 “the County shall contribute for the retiree and one (1) dependent the same rate for health
4 insurance as contributed for an active employee with one (1) dependent.” Allen Decl. Ex. 501;
5 Allen Decl. ¶¶ 13-14; Myers Decl. Ex. 501; Declaration of Ray Myers (“Myers Decl.”) ¶ 2. At the
6 union’s behest, Mr. Myers and Mr. Allen agreed to the following statement of intent: “Co[unty]
7 pay whatever it pays for active [employ]ee when retiree retires and treat retiree same *thereafter* as
8 it treats active employ[ee] contributions.” Allen Decl. Ex. 501 (emphasis added); Allen Decl. ¶
9 14; Myers Dep. 152:20-153:8. *Both* Mr. Myers and Mr. Allen have stated under penalty of
10 perjury that use of the word “thereafter” in the statement of intent, without durational limitation,
11 was intended to reflect the lifetime nature of this benefit. Allen Decl. ¶ 16; Myers Decl. ¶ 2.

12 Approximately two weeks later, on August 23, the parties executed a final MOU with
13 slightly modified language on retiree medical benefits in section 12.9.1. *See* Allen Decl. Ex. 502;
14 Myers Decl. Ex. 502. The changes in language were primarily stylistic, without change to the
15 basic agreement laid out in the temporary agreement. Allen Decl. ¶ 15. While not expressly
16 stating that retiree medical benefits were “for life” or “vested,” the final MOU language was
17 intended to confirm the lifetime nature of this benefit. Allen Decl. ¶ 16; Myers Decl. ¶ 2. For
18 example, the intent of tying eligibility to participation in the County retirement system was to
19 apply similar vesting rules to retiree medical benefits. Allen Decl. ¶ 16; Myers Dep. 236:7-17.

20 The restrictions on eligibility only applied prospectively to new hires, as *both* sides
21 understood that they could not change the vested benefit of earlier hires. Myers Dep. 103:19-
22 104:2, 290:1-22; Allen Decl. ¶ 12. Like Mr. Gearhart’s original proposal, the language and
23 eligibility requirements for this benefit closely tracked state law that undisputedly provided for a
24 vested benefit, and which similarly required participation in the state retirement system and
25 provided that the state “shall contribute” to the cost of retiree medical benefits. *Compare* Allen
26 Decl. Ex. 502 *with* RJN Ex. 551 (Cal. Stats. 1961, ch. 1236, § 1, pp. 2985, 2991).

27 This MOU was ratified by the Board on August 29. 2AC Ex. 4. As was common practice,
28 the other bargaining units followed SEIU’s lead when their MOUs came up for negotiation, as did

1 unrepresented employees when the salary resolution governing their terms and conditions of
2 employment was simultaneously amended on August 29. *See* 2AC Exs. 42 (WCE 1989-91 MOU
3 (signed September 18, 1989)), 34 (PDIA 1990-93 MOU (signed March 21, 1990)), 23 (SCSOEA
4 1990-91 MOU (signed July 31, 1990)), 13 (ESC 1990-93 MOU (signed August 17, 1990)), 19
5 (OE39 1990-93 MOU (signed October 23, 1990)); Ex. 20A (1989 salary resolution); *see also*
6 Gearhart Dep. 135:3-138:7; Myers Dep. 124:4-125:19; Allen Decl. ¶ 6.¹² Lead County negotiator
7 Ray Myers reaffirmed the County's commitment to providing lifetime retiree medical benefits in
8 the context of negotiating these follow-on MOUs, as he was authorized by the Board to do. Myers
9 Dep. 124:4-125:19, 126:11-14, 147:15-148:13, 149:23-150:25, 292:2-7; Faria Decl. ¶ 5. The
10 Board members who ratified these MOUs and passed this salary resolution understood that the
11 language at issue provided *lifetime* retiree medical benefits. *See* Carpenter Dep. 136:24-140:5;
12 Myers Dep. 111:9-23.

13 **C. From 1989 to the Mid-2000s, the County Continued to Perform and Reiterate Its**
14 **Promise of Lifetime Retiree Medical Benefits.**

15 Following the initial negotiation of the retiree medical benefit MOU language in August
16 1989 and its extension to other bargaining units and unrepresented employees, the understanding
17 that this benefit was a lifetime benefit continued to be pervasive in the County. Indeed, the
18 lifetime nature of the benefit was reaffirmed in a variety of settings, including: (1) later labor
19 negotiations; (2) employee recruitment efforts; (3) pre-retirement counseling sessions; and (4) in
20 response to specific benefits questions directed to the Risk Management Division, which
21 administered the County's retiree medical benefits.

22 **1. In Labor Negotiations Between 1989 and 2003, the County Both Reaffirmed**
23 **the Lifetime Nature of the Retiree Medical Benefit and Used That Benefit as a**
24 **Justification for Rejecting Union Demands.**

25 The lifetime nature of the retiree medical benefit was repeatedly reaffirmed in labor
26

27 ¹² It is undisputed that all of the MOUs attached to the 2AC were ratified by the Board. *See* 2AC
28 at ¶ 19; Defendant's Response to Plaintiff's Request for Admission Nos. 1, 4, 7, 10 (attached as
Ex. 405 to Ranahan Decl.). *See also* January 10, 2014 Order, ECF No. 96 at 16:13-16.

1 negotiations up to 2003.¹³ *See, e.g.*, Ford Decl. ¶ 6. County negotiators emphasized the “lifetime”
2 or “vested” nature of the retiree medical benefit in order to rebuff union demands for higher
3 wages, enhanced retirements, and automatic cost-of-living adjustments (“COLAs”) for pensions,
4 and recognized its lifetime nature when negotiating a related survivor benefit and rejecting union
5 proposals to shorten the applicable vesting period. *See, e.g.*, Zanolini Decl. ¶ 5.

6 When union negotiators pushed for higher wages, County negotiators stressed how “total
7 compensation,” which included retiree medical benefits, was competitive with that of comparator
8 employers. Allen Decl. ¶ 21; *see also* Zanolini Decl. ¶ 5; Biehler Decl. ¶ 4. This was particularly
9 important to County employees because County policy during this period was to *only* compensate
10 County employees at ninety-five to ninety-eight percent of the level that their comparators paid,
11 meaning that not only salaries, but County retirees’ pensions, based on their salaries, would be
12 that much lower than in other counties. Drumm Dep. 22:23-23:6, 25:19-26:6.

13 Significantly, when union negotiators attempted to negotiate an automatic COLA for
14 County retirees’ pensions, so as to place the retirees on the same footing as those in other
15 counties,¹⁴ County negotiators would retort that the County’s lifetime retiree medical benefit
16 made up for the lack of an automatic COLA. Ex. 19; Myers Dep. 282:4-285:22; Ford Decl. ¶¶ 5
17 (discussions with unrepresented management), 7 (union negotiations); Faria Decl. ¶ 8; Wilkening
18 Decl. ¶ 5; Velichinsky Decl. ¶ 7. Similarly, when union negotiators pushed for enhanced pension
19 benefits, County negotiators used lifetime retiree medical benefits to emphasize how County
20 retirees’ retirement benefits were greater than just their pensions. For example, in 2002 labor
21 negotiations, Assistant County Administrator (and future County Administrator) Bob Deis noted
22 that the “[e]ntire retirement plan needs to be looked at” and that “[r]etiree healthcare *for life* is big
23 part of plan” Allen Decl. Ex. 128 (emphasis added); Allen Decl. ¶ 22; *see also* Zanolini
24 Decl. ¶ 7; Zanolini Decl. Ex. 129 (“Need to look further, at all of the numbers, when determining
25

26 ¹³ After 2003, none of the bargaining units at issue in this case negotiated new MOUs until 2007.
27 *See* Myers Decl. ¶ 7.

28 ¹⁴ During this period, the County may have been the only county in California to not offer an
automatic COLA on pensions. *See* Gearhart Dep. 204:9-205:20.

1 retirement pay; i.e. health care after retirement.”); Ford Decl. ¶ 6.

2 In addition, the County reaffirmed its commitment to providing lifetime retiree medical
3 benefits in 1999, when it negotiated a survivor benefit—the existence of which was premised on
4 the lifetime nature of retiree medical benefits. As with the language negotiated in 1989, this
5 benefit was first negotiated with SEIU, and then extended to other bargaining units and
6 unrepresented employees. *See* Allen Decl. Ex. 503; RJN Ex. 549 (Res. No. 99-0918); Allen Decl.
7 ¶ 19. Both the lead SEIU negotiator *and* the lead County negotiator recognized that implicit in
8 this benefit was an understanding that retirees (and their survivors) were entitled to receive retiree
9 medical benefits *until their deaths*; i.e., for life. Declaration of Joanne Sidwell ¶¶ 4-5; Allen Decl.
10 ¶ 19; *see also* RJN Ex. 512 (P014306-08 at 08) (survivor benefit to continue for “the remainder of
11 [the survivor’s] life.”); Wertz Dep. 67:12-69:6. This same understanding was held by other union
12 negotiators. *See, e.g.*, Robotka Decl. ¶ 6. Notably, like other elements of the retiree medical
13 benefit, the survivor benefit was interwoven in the larger, vested retirement package, as the
14 surviving spouse was required to receive a continuance of a pension benefit in order to be eligible
15 for retiree medical benefits. *See* Ex. 45.

16 When one bargaining unit sought to negotiate shorter vesting periods, internal documents
17 maintained by the County labor negotiators referred to the 10- and 20-year eligibility
18 requirements as “vesting” periods. *See, e.g.*, Myers Decl. Exhs. 506 (SONOMA-H-098484-85
19 (4/3/2001 ESC minutes)) and 507 (SONOMA-H-065017 (4/23/01 MOU negotiation notes));
20 Myers Decl. ¶¶ 5, 6.

21 **2. Outside the Context of Labor Negotiations, the County Continued to**
22 **Reaffirm the Lifetime Nature of the Retiree Medical Benefit.**

23 During this period, the County continued its practices of recruiting employees with the
24 promise of lifetime retiree medical benefits and of informing new employees at their orientations
25 of their right to lifetime retiree medical benefits. *See* Ford Decl. ¶ 10. Members of the Board
26 continued to represent that they understood the benefit to be a lifetime one. *See* Allen Decl. ¶ 24.

27 In pre-retirement presentations and materials distributed to retirees, representatives from
28 County Risk Management and the Sonoma County Employees Retirement Association

1 (“SCERA”), which is responsible for administering County pensions, reiterated the promise of
2 lifetime retiree medical benefits to prospective retirees. Hart Dep. 44:6-48:21 (course from
3 approximately 1987 to 1992); *see also* Robotka Decl. ¶ 5; Jackson Decl. ¶ 7; Ex. 45 at P000380
4 (only way a retiree’s health coverage might change would be if changes were made to active
5 employees’ health benefits).¹⁵

6 In the administration of its retiree medical benefit, the County repeatedly reaffirmed the
7 lifetime nature of the benefit. The County clarified in literature distributed to employees that
8 employees who worked for the County, but were not contributing members to the County
9 retirement system for part of that time, could “buy back [] time” in order to be eligible for retiree
10 medical benefits, just as they could buy back time to be eligible for a County pension. Ex. 143.
11 Similarly, employees who took deferred retirements, but returned to County employment, could
12 be eligible for retiree medical benefits if they cumulatively met the requirements for both retiree
13 medical benefits and normal retirement. *Id.* In other words, retiree medical benefits did not exist
14 separate and apart from vested retirement benefits, but rather, were an essential element of the
15 retirement package. The Employee Benefits Manager responsible for administering the benefit
16 would tell employees specifically that it was a lifetime benefit. Wertz Dep. 67:12-20 (“When an
17 employee would say, ‘How long do I get my retiree benefits?’ I would say you’re – forever.”).

18 Even as the County later sought ways to cut back on its retiree medical benefits beginning
19 in the mid-2000s, top County staff and consultants still acknowledged their vested nature. As of
20 2006, it was still common parlance in the Human Resources Department to refer to the retiree
21 medical benefit as a “vested” or “lifetime” benefit. Declaration of Kenneth Couch (“Couch
22 Decl.”) ¶ 6; *see also* Alilovich Dep. 71:21-75:12, 179:15-180:2, 181:22-182:15 (the existence of a
23 lifetime medical benefit was “common knowledge” among County staff during Alilovich’s tenure
24

25 ¹⁵ In addition, in negotiating resolutions of disputes involving employee terminations, the County,
26 represented by County Counsel, agreed to allow employees at or near retirement age to retire,
27 rather than be fired, so that they would get the lifetime retiree medical benefits that accompanied
28 pensions. Drumm Dep. 83:9-84:7 (“they were allowed to retire so that they could get their retiree
– lifetime medical benefit”); *see also id.* at 87:7-88:10.

1 as Employee Benefits Manager). Even the people who were later responsible for cutting back this
2 benefit—Human Resources Director Ann Goodrich and County Administrator Bob Deis—still
3 referred to this benefit as a “vested” or “lifetime” benefit as of 2006. *Id.* Similarly, they referred
4 to the 10- and 20-year eligibility requirements first passed in 1989 as a “vesting period.” *Id.* Job
5 announcements as late as November 2008 referred to the “10-year vesting period” required to
6 obtain retiree medical benefits. *See, e.g.,* Ex. 90; Ex. 91; Ex. 92; Ex. 93; Ex. 94; Ex. 95; Goodrich
7 Dep. 38:2-23, 44:23-46:5, 47:11-48:2, 50:24-53:13, 56:15-24. In January 2006, Gary Bei, the
8 head of SCERA, referred to the retiree medical benefit eligibility requirements as “vesting” years.
9 *See* Ex. 406 at SONOMA-H-285902 (referencing “vesting” of 10 and 20 years).

10 **D. Beginning in the Mid-2000s, the County Took Steps to Cut Back Retiree Medical**
11 **Benefits.**

12 **1. As the County Began to Study the Cost of Its Retiree Medical Benefits, Top**
13 **County Management Began to Disavow the Vested Nature of the Benefits to**
14 **Best Position the County for Cutting Them Back.**

15 In 2004, the Governmental Accounting Standards Board (“GASB”) issued statements
16 (GASB 43 and 45), which set accounting standards for measuring Other Post-Employment
17 Benefits (“OPEB”), which included retiree medical benefits. Alilovich Dep. 32:1-5; Chadbourne
18 Dep. 138:2-9, 162:23-165:10; Ex. 401 at 3. In response to the publication of GASB 43 and 45, in
19 approximately 2005, the County began to study its OPEB liability. Chadbourne Dep. 138:13-
20 141:20; Ex. 151. Having failed to set aside funds to pay for its promises of retiree medical
21 benefits, the County was now faced with the prospect of having to show that liability on its
22 statements. It began to develop a strategy for addressing OPEB liability in the next round of labor
23 negotiations, set to begin in 2007. Andersen Dep. 48:12-52:10; Deis Dep. 89:17-91:11; Ex. 109.¹⁶

24 Around this time, top County management who oversaw preparation of the OPEB analysis
25 and were responsible for upcoming labor negotiations began to take the position that retiree
26 medical benefits were not a vested benefit. *See* Couch Decl. ¶ 7. Ann Goodrich (Director of

27 ¹⁶ It was assisted by actuarial consultants Gabriel, Roeder, Smith & Co. (“GRS”), Towers
28 Watson, and, eventually, the Segal Company. Ex. 407 (SONOMA-H-505937-41); Chadbourne
Dep. 143:15-23; Alilovich Dep. 29:11-31:9.

1 Human Resources beginning in January 2005), as well as other top County management, began
2 instructing staff in 2006 to stop using the word “vested” to refer to these benefits, in an effort to
3 best position the County to cut back those benefits. *Id.*¹⁷

4 By early 2007, the County had begun to take steps to reduce its OPEB liability. Andersen
5 Dep. 48:12-49:10; Ex. 232. On April 10, 2007, as a first step, the Board cut contributions for
6 unrepresented, administrative management employees’ medical benefits from 84% of any plan
7 offered to 85% of the lowest cost plan, also referred to as “85-Y.” Myers Dep. 265:18-267:17;
8 Gearhart Dep. 242:18-244:8; Ex. 27; Ex. 102; Couch Dep. 49:20-50:10. These cuts were also
9 applied to retirees as a result of what *the County* described in a PERB proceeding that year as an
10 “agreement . . . in perpetuity” that tied retirees’ benefits to those of active employees. *See* RJN
11 Ex. 510.

12 Then, County negotiators sought cutbacks to retiree medical benefits with the two primary
13 bargaining units up for MOU negotiation in 2007, the Sonoma County Law Enforcement
14 Association (“SCLEA”) and the Deputy Sheriffs Association (“DSA”). Couch Dep. 32:1-23,
15 53:3-14. In these negotiations, the County, represented at the bargaining table by Ken Couch and
16 Jim Andersen, unsuccessfully sought to negotiate language eliminating the tie between active
17 employees and retirees, and to insert language providing that retiree medical benefits were
18 provided at the discretion of the Board. *See* Ex. 408 (SONOMA-H-041642-43); Ex. 409
19 (SONOMA-H-041004-06); Ex. 410 (SONOMA-H-041630-35); Couch Decl. ¶¶ 11-12; Couch
20 Dep. 33:3-14; Andersen Dep. 55:25-56:10.

21 **2. Outside the Labor Negotiation Context, the County Spent 2007 Developing a**
22 **Plan for Cutting *Only* Retiree Medical Benefits.**

23 Simultaneous with these negotiations, the County engaged in a process of evaluating
24 methods to reduce OPEB liability. The working group at the County with primary responsibility
25

26 ¹⁷ On a similar note, the draft valuation report prepared by GRS was edited between February 13,
27 2006 and March 20, 2006 to remove reference to vesting and lifetime benefits. *Compare* Ex. 411
28 (at SONOMA-H-072199 and SONOMA-H-072217) *with* Ex. 412 (at SONOMA-H-028430 and
SONOMA-H-028448); *see also* Ex. 413 (P061098) (invoice referencing “vesting” requirements).

1 for forging the County’s strategy in this regard consisted of Bob Deis, the County Administrator;
2 Ann Goodrich, the Director of the Human Resources Department; Jim Andersen, the Assistant
3 County Administrator; and Cristine Alilovich, the Employee Benefits Manager in the Risk
4 Management Office. Andersen Dep. 49:25-51:4; Couch Decl. ¶ 9. Ken Couch, the Employee
5 Relations Manager until October 2007, also participated. Couch Decl. ¶ 9. Ms. Goodrich took the
6 lead in this process. Andersen Dep. 49:25-50:5. Despite the County’s admission of the tie in its
7 2007 PERB submission, throughout that year it focused on cuts to retiree medical benefits
8 alone—not on cuts to both retiree and active medical benefits. Couch Decl. ¶ 10; Ex. 240. By
9 November 2007, the County working group had all but settled on recommending that the Board
10 adopt a flat dollar contribution for retirees, with the intent to continue negotiating 85% of the
11 lowest cost plan with active employees. *See* Ex. 106 at P010309; Couch Decl. ¶ 10; Ex. 240.

12 **E. Concerned with Legal Exposure Based on the Tie Agreement, the County Revised Its**
13 **Scheme So as to “Cut” Both Active Employees’ and Retirees’ Benefits, While**
14 **Simultaneously Providing Active Employees with Cash in Lieu of Those Benefits.**

15 **1. Between November 2007 and April 2008, the County Devised a Scheme to Get**
16 **Around the Tie Agreement.**

17 By late November 2007, the County team began to express doubts about its plan to cut
18 retiree benefits alone. Concurrent with SCARE asserting retirees’ vested right to receive the same
19 contribution towards medical benefits as active employees, the County team rejiggered its plan so
20 as to ostensibly cut both active employees’ *and* retirees’ medical benefit contributions. *See* Ex. 26
21 (letter from SCARE to County); Ex. 240. On December 5, 2007, Mr. Andersen referred to this as
22 the County’s most “defensible” position. *See* Ex. 240. The County was concerned, however, that
23 it would have trouble recruiting and retaining employees with such low medical benefits. For
24 example, Mr. Andersen worried that the cut to a flat rate would “take us out of the market
25 comparison” *Id.*; *see also* Andersen Dep. 140:10-22. Accordingly, the County began to think
26 of ways to address this drastic cut to medical benefits. As of December 5, 2007, the leading
27 contender was a scheme to make payments to active employees through contributions to a
28 “cafeteria plan,” i.e., a plan under Internal Revenue Code section 125 permitting the use of pre-
tax dollars to purchase a variety of health benefits. *See* Ex. 240; Chadbourne Dep. 181:18-182:3;

1 Alilovich Dep. 173:4-21; Couch Decl. ¶ 13.

2 The scheme of offering contributions to a cafeteria plan—which ultimately evolved into
3 the so-called “cash allowance” (Alilovich Dep. 50:17-51:10)—would “avoid having to negotiate
4 away the link between retiree medical benefits and active medical benefits by equally cutting
5 contributions to both, and then separately offering active employees contributions into a cafeteria
6 plan.” Couch Decl. ¶ 13. As Ms. Alilovich wrote in notes around this time describing this
7 scheme, the County would adopt a flat dollar amount medical benefit contribution for both active
8 employees and retirees. Ex. 164; Alilovich Dep. 104:21-107:2. This would permit the County to
9 “legally argue” that retirees were getting the same contribution as active employees. *Id.*; *see also*
10 Ex. 414 (SONOMA-H-027838-40 at 38) (“what is the best way (administratively and legally) to
11 pair a cafeteria plan benefit during the phase-in” of the flat contribution to medical benefits). In
12 other words, “when labor sues, we’re just operating under the deal.” Ex. 164. Ms. Alilovich then
13 highlighted the two-part scheme that was ultimately adopted by the County in substantially
14 similar form. First, in “phase 1,” the County would provide active employees and retirees with the
15 same, flat \$500 per month for medical benefits. *Id.* Then, in “phase 2,” the County would provide
16 active employees with “\$500 toward retiree health in defined contribution plan, or cafeteria plan
17 or, increase in *salaries*.” *Id.* (emphasis in original). This scheme would address the County’s
18 OPEB liability because the cash allowance “was not a benefit that [could] be extended to
19 retirees.” Alilovich Dep. 53:2-55:8, 66:15-68:7.

20 **2. The County Then Attempted to Sell the Cash Allowance to Its Employees As**
21 **Making Up for Cuts to Medical Benefits.**

22 Having devised this scheme, the County then set about to negotiate it with its unions and
23 implement it with its unrepresented employees and retirees. The County first presented this
24 scheme to SEIU, its largest bargaining unit and the one generally responsible for setting benefits
25 that would then be extended to unrepresented management employees and other bargaining units.
26 Chadbourne Dep. 172:4-9; Allen Decl. ¶ 6. The County unveiled its plan at the bargaining table

27 //

28 //

1 with SEIU on April 9, 2008. Dania Torres-Wong, the County’s chief negotiator during this MOU
2 negotiation, emphasized how employees could use the cash allowance for medical expenses.¹⁸
3 Drumm Dep. 242:15-243:11; Ex. 161 at SONOMA-H-444876 (“you can use the \$ for medical”);
4 *see also* Ex. 159 (document from actuary emphasizing how “[w]e should also refer to \$600 cash
5 allowance as source for funding of pre-tax premium for health care benefits”). Ms. Alilovich
6 explained how the County would set up a mechanism for using the \$500 pre-tax to pay for
7 medical benefits. Ex. 161 at SONOMA-H-444876.¹⁹

8 Despite the County’s efforts, SEIU would not agree to the cash allowance scheme.
9 Accordingly, the County declared impasse on July 14, 2008, when its offer stood at \$500 for
10 medical benefits and \$600 in a cash allowance for employees only. *See* Ex. 111 at SONOMA-H-
11 298257. While it continued to negotiate with SEIU and other unions, it passed resolutions
12 imposing the \$500/\$600 plan on unrepresented management employees between August and
13 September 2008. RJN Ex. 547 (Res. No. 08-0715); RJN Ex. 548 (Res. No. 08-0790).
14 Notwithstanding the repeated representations by its labor negotiators at the bargaining table and
15 behind-the-scenes acknowledgment by top County management that the cash allowance was
16 designed to make up for and help sell cuts to medical benefits, the County disingenuously
17 claimed that its cash allowance was “not intended as a supplement toward medical, dental, or any
18 other insurance or benefit.” RJN Ex. 548 (Res. No. 08-0790). On November 4, 2008, the County
19 imposed the \$600 cash allowance and \$500 flat medical contribution on SEIU. RJN Ex. 514 (Res.
20 No. 08-0946). The County then proceeded to either impose or negotiate this scheme with its
21 remaining bargaining units, continuing to present the \$500/\$600 plan as a package. *See, e.g.,*
22 Robotka Decl. ¶¶ 9-10.

23
24
25 ¹⁸ The cash allowance was initially introduced in April 2008 in the amount of \$500 per month, or
26 \$2.88 per hour. Ex. 161 at SONOMA-H-444875. However, by July 2008, the County had raised
27 the cash allowance to \$600 per month, or \$3.45 per hour. *See* Ex. 111 at SONOMA-H-298258.

28 ¹⁹ As Ms. Torres-Wong later explained, “County proposal; everyone gets same contribution, also
cash allowance to lessen the impact.” Ex. 137 at SONOMA-H-444813. Indeed, when faced with
union rejection of this proposal, Ms. Torres-Wong asked “[i]f something could be done for the
active retirees in the way of cash allowance would you accept our health proposal[?]” *Id.*

1 **III. ARGUMENT**

2 **A. Legal Standard.**

3 **1. Summary Judgment.**

4 Partial summary judgment is properly granted when no genuine and disputed issues of
5 material fact remain as to part of any claim or defense, and when, viewing the evidence most
6 favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law.
7 Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co.*
8 *of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). Where the moving party demonstrates the
9 absence of genuine issues of material fact, the burden shifts to the non-moving party to “come
10 forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec.*
11 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). If the
12 opposing party’s evidence “is merely colorable or is not significantly probative, summary
13 judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986).

14 **2. Breach of Implied Terms of Express Contract.**

15 Under California law, a contract may be either express or implied. Cal. Civ. Code § 1619.
16 An express contract’s terms are written, while “[a]n implied contract is one, the existence and
17 terms of which are manifested by conduct.” *Id.* §§ 1620–21. “The distinction reflects no
18 difference in legal effect but merely in the mode of manifesting assent.” *Retired Employees Ass’n*
19 *of Orange County v. County of Orange*, 52 Cal. 4th 1171, 1178 (2011) (“*REAOC I*”). In addition,
20 “[a]ll contracts, whether public or private, are to be interpreted by the same rules,” which is “to
21 give effect to the mutual intention of the parties as it existed at the time of contracting.” Cal. Civ.
22 Code §§ 1635–36. Both implied and express terms of a contract are equally binding. *See REAOC*
23 *II*, 52 Cal. 4th at 1179.

24 All of this is consistent with long-standing law that labor agreements between California
25 government entities and unions are binding agreements that, like other types of contracts, may
26 include implied terms and are interpreted to give effect to the mutual intent of the parties. *See*
27 *Glendale City Employees’ Ass’n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 337-39 (1975). As the
28 California Supreme Court recognized in *Glendale* 40 years ago, a labor agreement with a public

1 entity, just like one with a private entity, “is more than a contract; it is a generalized code to
2 govern a myriad of cases which the draftsman cannot wholly anticipate.” *See id.* at 339 n.16
3 (quoting *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 177 (1961)).

4 In recent years, California public entities have tested whether this law applies in equal
5 force to contracts for retiree health benefits. In response, the California Supreme Court held,
6 consistent with the California Civil Code, *Glendale*, and other California law, that a county may
7 form a contract for vested retiree health benefits that is implied or contains implied terms and that
8 these contracts are interpreted in the same way as other contracts, by looking to the parties’ intent.
9 *REAOC II*, 52 Cal. 4th at 1176-77, 1182-83, 1189, 1194. Among other things, the Court
10 specifically stated that “a vested right to health benefits for retired county employees can be
11 implied under certain circumstances from a county ordinance or resolution.” *Id.* at 1194. *See also*
12 *SCARE v. Sonoma County*, 708 F.3d 1109, 1115 (9th Cir. 2013) (“*Sonoma III*”); *Retiree Support*
13 *Group of Contra Costa County v. Contra Costa County*, 944 F. Supp. 2d 799, 803-04 (N.D. Cal.
14 2013); *Requa v. Regents of Univ. of Cal.*, 213 Cal. App. 4th 213, 226 (2012); *Int’l Bhd. v. City of*
15 *Redding*, 210 Cal. App. 4th 1114, 1116 (2012); this Court’s January 10, 2014 Order (“January 10
16 Order”), ECF No. 96 at 4-5.

17 To prove the existence of an implied vesting term in a written contract, a party may use a
18 “clear basis in the contract” or “convincing extrinsic evidence.” *See REAOC II*, 52 Cal. 4th at
19 1191. As the Ninth Circuit held in *Sonoma III*, such extrinsic evidence may include evidence
20 “derived from experience and practice,” as well as “testimony regarding the County’s intent.”
21 *Sonoma III*, 708 F.3d 1116 n.4. In addition, courts may look to relevant industry-specific
22 customs, practices, usages, and terminology. *See* 1 Witkin, Summary of Cal. Law (10th ed. 2005)
23 Contracts §§ 755-56; *cf. M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 935 (2015)
24 (stating, in a retiree medical benefit case under federal law, that “a court may look to known
25 customs or usages in a particular industry to determine the meaning of a contract . . .”); *accord id.*
26 at 937-38 (Ginsburg, J., concurring) (“To determine what the contracting parties intended, a court
27 must examine the entire agreement in light of relevant industry-specific ‘customs, practices,
28 usages, and terminology.’”) (quoting 11 R. Lord, Williston on Contracts § 30:4 (4th ed. 2012)).

1 **B. The County Entered Into an Enforceable Contract with Its Represented Employees**
2 **to Provide Vested Retiree Medical Benefits at Least Equivalent to What It Provided**
3 **to Active Unrepresented Employees.**

4 As shown above, there can be no dispute that, from 1964 to 2009, the County promised its
5 employees that upon retirement they would receive the same County health care benefits as active
6 employees received. The County disputes that the right to receive these benefits was a vested
7 right. However, as described above, there is both language in the relevant contracts *and* extrinsic
8 evidence establishing clearly and convincingly that the County’s MOUs contained an implied
9 term that these benefits were vested.²⁰ The facts of this case, more than any other California
10 retiree medical benefit case on record, demonstrate the vested nature of the retiree medical
11 benefits at issue. Thus, the County’s promise of retiree health care was formalized in binding
12 MOUs starting in 1989. *See supra* section II.B. The wording of these contracts itself provides a
13 basis for vesting the benefits of employees who worked for the County thereafter, so long as they
14 met certain requirements.²¹ *See REAOC II*, 52 Cal. 4th at 1191; *Sonoma III*, 708 F.3d at 1116.
15 The vast amount of extrinsic evidence in this case, which makes clear the intentions of the parties
16 to the MOUs, together with industry practice, confirms what is in the MOUs and/or provides an
17 alternative basis for establishing an implied term of those MOUs.

18 **1. The Language of the MOUs Demonstrates the Vested Nature of Retiree**
19 **Medical Benefits or Gives Rise to an Ambiguity as to Their Duration.**

20 The language of the MOUs during the relevant time period clearly reflects the
21 understanding that the benefits are vested benefits. First, the MOUs provide that the County
22 “shall contribute” to the cost of a medical plan for retirees who meet certain eligibility
23 requirements. In *Thorning v. Hollister Sch. Dist.*, 11 Cal. App. 4th 1598, 1604-05 (1992), the

24 _____
25 ²⁰ Alternatively, the language in the MOUs is ambiguous as to the duration of the retiree medical
26 benefits, but the extrinsic evidence makes it clear that the benefits were vested.

27 ²¹ *See* this Court’s April 22, 2015 Order Granting Motion for Reconsideration, ECF No. 159 at
28 10-12, holding that there were sufficient facts to support SCARE’s allegation that the MOUs
entered into from 1989 onward created a promise by the County to continue its practice of paying
retiree health benefits for *pre-1990 hires who worked under post-1989 MOU’s, as well as for*
subsequent hires.

1 court found substantially similar language—that retirees “shall have the option to continue”—to
2 convey a vested benefit, even in the absence of an explicit vesting term. Indeed, the County’s
3 MOU language follows state law language conveying a vested benefit that provides that the State
4 “shall contribute” to such benefits. RJN Ex. 551 (Cal. Stats. 1961, ch. 1236, § 1, pp. 2985, 2991).

5 Next, the standard MOU language from approximately 1989 onward stated that the retiree
6 “must have been a contributing member (or a contribution was made on their behalf) of the
7 County’s Retirement System” for either 10 or 20 years—10 years for him/herself and 20 years for
8 him/herself and one dependent. *See supra* section II.B; *see also* Appendix II to Ranahan Decl.
9 (chart listing each MOU in the Complaint and, in column C, the page on which this term is
10 listed). This language is significant in several ways.

11 First, if a benefit is tied to another vested benefit, that is in and of itself persuasive
12 evidence that the benefit was intended to vest. *Cf. M&G Polymers*, 135 S. Ct. at 938 (Ginsburg,
13 J., concurring). Second, it is only logical that a contract containing eligibility terms for medical
14 benefits similar to those used for vesting pension benefits (i.e., a requirement of years of service)
15 should be interpreted as vesting the retiree medical benefits. Third, the requirement that an
16 employee work 10 or 20 years to be entitled to the benefit, commonly referred to in the County as
17 the vesting requirement for retiree health, provides a basis in the contract for the parties’
18 understanding that this benefit would last in perpetuity. As discussed below in section B.2, the
19 extrinsic evidence shows that this term captured the parties’ agreement that once an employee
20 rendered sufficient service she would be entitled to the retiree health benefit (that she had earned)
21 *throughout* the duration of her retirement. Indeed, it is simply absurd to believe that a union and
22 its members would agree that employees would forego wage or pension improvements (as was
23 the case here, as explained above) in exchange for the promise that if employees worked for 10 or
24 20 years they would receive retiree medical benefits *that the County could take away at any time!*
25 Yet that is the essence of the County’s position.

26 Therefore, even though the MOUs at issue do not explicitly use the words “vesting” or
27 “perpetuity,” they provide a basis in the contract for vesting. *See REAOC II*, 52 Cal. 4th at 1191;
28 *Sonoma III*, 708 F.3d at 1120.

1 **2. Convincing Extrinsic Evidence Demonstrates the Parties' Intent That These**
2 **Benefits Were Vested Benefits.**

3 As the evidence discussed above demonstrates, the County promised vested retiree health
4 care benefits during union negotiations, in its recruitment and retention efforts, during retirement
5 planning sessions, and in its representatives' communications with employees. As many
6 witnesses have testified, the vested or lifetime nature of the benefits was established, well known,
7 and openly discussed, and it was the benefit of the bargain for employees working for a county
8 that did not provide an automatic COLA on its pensions. *See supra* section II.A.2, II.C. The
9 County admitted that the benefits were vested. Not until 2006, when it became clear that the
10 County would have to show on its financial statements a liability for its promised retiree medical
11 benefits, did the County suddenly stop referring to the benefits as vested. But the County can no
12 more repudiate its promise because it wants to avoid its liabilities than a private party can
13 repudiate a contract because it failed to set aside money it promised to pay.

14 By way of contrast, for example, in *Sacramento County Retired Employees Ass'n v.*
15 *County of Sacramento*, 975 F. Supp. 2d 1150 at 1165-66 (E.D. Cal. 2013), the court held that the
16 plaintiffs-retirees did not provide sufficient evidence because they provided no MOUs and no
17 evidence that the benefit was bargained over; they provided only the following: a few
18 unpersuasive reports with conflicting statements on the issue; one declaration stating that the
19 retiree medical benefit was used to recruit employees without providing any recruitment
20 materials; one unequivocal statement from a human resources employee about the vested nature
21 of the benefit; references to legislation supporting the plaintiffs' argument without the legislation
22 itself; and a lone declaration stating that the benefit was simply a county *practice*. *Id.* at 1162-66.
23 This evidence was in the face of explicit (not after-the-fact) disclaimers of the vested nature of the
24 retiree medical benefit at issue. *See id.* at 1158. It is in stark contrast to the evidence here.

25 **3. The Custom, Practice, Usage, and Terminology Applicable to Retiree Medical**
26 **Benefits for Public Employees in California Supports the Vested Nature of**
27 **These Benefits.**

28 The context in which the County negotiated the MOU language also demonstrates the
parties' intent that these benefits vest. The individuals at the County responsible for devising this

1 proposal in 1989 did so with an eye toward the vested retiree medical benefits offered by the
2 State. *See supra* section II.B. Moreover, they were operating in an industry—the California public
3 sector—that recognized the vested nature of retiree medical benefits. *See supra* section II.A.3.

4 This context informs interpretation of the MOUs’ retiree medical benefit provision. For
5 one, use of the term “shall contribute” in the MOUs directly mirrors language used by the State to
6 provide what were undisputedly vested retiree medical benefits. Similarly, the MOUs’
7 requirement that employees be contributing members of the County retirement system mirrored
8 eligibility requirements at the State level for vested retiree medical benefits. In addition, the
9 MOUs’ imposition of 10- and 20-year eligibility requirements in 1989 mirrored contemporaneous
10 limits imposed on eligibility for vested retiree medical benefits at the State level.

11 As SCARE’s expert, Professor Teresa Ghilarducci, has stated, the State traditionally set
12 the industry standard for provision of retiree medical benefits—a standard emulated by local
13 agencies. Ex. 401 at 6-7. She also stated that the understanding that the sorts of eligibility
14 requirements imposed by the County are synonymous with vesting requirements was pervasive.
15 *Id.* at 7. SCARE’s outside consultants repeatedly referred to these as vesting requirements. *See*
16 *supra* section II.A.3. The County Administrative Officers Association of California even referred
17 to the type of years of service eligibility requirement imposed by the County as “years of service
18 *vesting* requirements.” Ex. 415 at P043158 (10/28/2005).

19 The practice of California public sector employers, including the County, typically has
20 been to treat retiree medical benefits as part of a vested retirement package (i.e., including
21 pensions and retiree medical benefits). *See* Ex. 401 at 9; *see also* Commission Report at 3 (stating
22 that retiree health benefits “are just as important as are pension benefits to the state’s workers and
23 retirees . . . [and] are part of deferred compensation packages used to attract and retain qualified
24 individuals for government service”) (emphasis added). This intent is made particularly clear here
25 by the requirement of participation in the County retirement system, as well as the numerous
26 documents and extensive witness testimony describing retiree medical benefits as part of the
27 vested retirement package. *See supra* section II.C.2.

28 In short, the industry custom and practice was that retiree medical benefits were vested

1 upon meeting requirements like those imposed here. *See supra* section III.A.2

2 **C. By Providing Active Employees—But Not Retirees—with Cash for Medical Benefits,**
3 **the County Breached Its Promise to Provide Retirees with the Same Medical Benefits**
4 **as Active Employees.**

5 Once the Court determines that the County promised eligible retirees a vested right to
6 receive the same contribution to medical benefits as active employees, finding breach of that
7 promise is straightforward. As made clear by the testimony and documents surrounding
8 development and implementation of the \$500/600 scheme, the entire purpose of that scheme was
9 to undercut the promise to provide retirees with the same medical benefit contribution as active
10 employees. *See supra* section II.E.1. The County even attempted to sell this scheme to its
11 employees by emphasizing how it could be used to make up for medical benefit cuts. *See supra*
12 section II.E.2. These actions “ha[d] the effect of . . . injuring the right of [retirees] to receive the
13 fruits of the contract,” i.e., the same medical benefit contribution as active employees. *See Storek*
14 *& Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55 (2002). Accordingly the
15 County should be held liable for breach of the tie agreement.

16 **IV. CONCLUSION**

17 The County for decades contractually promised to provide its retirees with the same
18 medical benefits, for life, as it provided active employees. When faced with the true cost of this
19 promise, it reneged when it superficially provided retirees with the same contribution as active
20 employees while effectively providing them with \$600 less. Accordingly, the Court should find
21 that (1) retirees who worked under MOUs in effect from 1989 onward and met applicable
22 requirements had vested rights to receive the same benefits as unrepresented active employees,
23 and (2) the County breached those contracts.

24 Dated: May 28, 2015

Respectfully submitted,

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