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**BY HAND DELIVERY**

July 19, 2010

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Retired Employees Association of Orange County v. County of Orange*
*Supreme Court Case No. S184059*

To the Honorable Justices of the Supreme Court of California:

## Introduction

Pursuant to Rule of Court 8.548(e)(1), we write on behalf of our client, Defendant and Appellee County of Orange (the "County"), to support the United States Court of Appeals for the Ninth Circuit's Order Certifying a Question to the Supreme Court of California, filed June 29, 2010.[1] As set forth below, the County respectfully requests that the Court accept the certification, but reformulate the question to be answered.

## Question as Presented by the Ninth Circuit

Through its order, the Ninth Circuit requested that the Court decide the following question of California law in the context of its determination of Plaintiff/Appellant's Contract Clause claims:

> 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.

## Proposed Restated Question

The Ninth Circuit acknowledges that the Supreme Court may "reformulate" the question, and the Ninth Circuit agrees "to accept and follow the court's decision." (Order at 9358.) To provide maximum direction and clarity on this critical state law question, the County proposes, pursuant to Rule 8.548(e)(3), that the Supreme Court restate the question as follows:

[1]The request for certification was received by the Supreme Court on June 30, 2010.

Where a county board of supervisors annually sets retiree health plan rates by formal board action, and for a number of plan years chooses to set retiree rates equal to employee rates, but never adopts legislation obligating the county to set future health plan rates in any particular fashion beyond any single plan year, has the county formed an implied contract under state law conferring upon retirees a lifetime, vested right to health rates equal to employee rates?

**Factual Basis for Restated Question**

The County has made available group medical insurance to its retirees since 1966, pursuant to a Board of Supervisors resolution. The Board has exercised its discretion to approve group rates each year through formal Board action. For the plan years 1985 through 2007, the Board chose to "pool" retirees with active employees to equalize retiree and active rates for most of its group health plans. In 1991, the County prevailed in a legal challenge to its decision not to pay the retiree premiums. (*See Orange County Employees Assn. v. County of Orange* (1991) 234 Cal. App. 3d 833, 836-7, 285 Cal.Rptr. 799 (*OCEA*) [holding that the County was not required to "provide retired county personnel with health care benefits equal to those provided to active employees, at no additional out-of-pocket cost to the retirees"].) In 1993, the Board formally adopted a Retiree Medical Plan that: provided a monthly grant to help offset retiree premiums; specifically included a clause confirming that no benefits would become vested; and expressly reserved the Board's right to make changes to the retiree medical plan. In 2006, after negotiations with labor and advance notice and opportunity for comment to plaintiff and appellant Retired Employees Association of Orange County ("REAOC"), in compliance with California Government Code section 31693, the Board restructured its retiree medical program to address both an immediate and long-term funding shortfall. One aspect of the restructuring was to split the pool for rate-setting purposes.

In 2007, REAOC filed the instant complaint for equitable relief, contending in part that splitting the pool was an impairment of contract prohibited by the Contract Clauses of both the California and federal constitutions, but REAOC never applied for a temporary restraining order or a preliminary injunction to stop the split-pool rates from going into effect. The split-pool rates went into effect for the 2008 plan year, and the Board subsequently approved split-pool rates for the 2009 and 2010 plan years as well. Because neither the 1966 nor 1993 Board resolutions, nor any other Board enactment, including rate-setting resolutions, memoranda of understanding, or Personnel Salary Resolutions, contained a commitment by the Board to set rates using a pooled method for the lifetime of a retiree, REAOC proffered an "implied contract" theory to support its Contract Clause claims. Accordingly, the crucial issue here is whether a county, whose board exercises its discretion each year to set retiree health rates, and who never formally adopts legislation providing for a lifetime vested method of setting retiree health rates, can nevertheless be deemed to have formed an implied contract that confers vested rights to such health benefits on retired County employees. We believe the proposed restatement of the question fairly and accurately incorporates the key facts and issues of this case.

**The Restated Question is Properly Certified Under Rule 8.548(a)**

The question is properly certified under Rule 8.548(a) because resolution of the state law issue, particularly as proposed, could determine the outcome of this case in federal court. In resolving Contract Clause claims, federal courts "look to state law to determine the existence of a contract" regarding the "specific terms allegedly at issue," and "accord respectful consideration and great weight to the views of the State's highest court" in "whether state or local statutes or ordinances create contractual rights protected by the Contracts Clause." (*San Diego Police Officers Assn. v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725, 736-737 (*San Diego Police Officers)*; citations omitted.) While the Ninth Circuit's question generally frames the issue, its breadth may have the unintended consequence of an advisory opinion. The more specific proposed question, however, goes to the existence of a contract regarding the "specific terms allegedly at issue" by including the relevant facts of this case, and would thus lead to a Supreme Court decision that "could determine the outcome of a matter pending in the requesting court," rather than a decision that may be advisory. (*Id.* at p. 736; Rule 8.548(a)(1).) The question is also properly certified under Rule 8.548(a) because, while the California Constitution and statutes, as well as case law of this Court and the appellate courts, support the County's position that it cannot be obligated to provide a vested benefit by implication, and without any formal action by the County's board of supervisors providing such a vested right, the Supreme Court has not had the occasion to squarely address this precise question. (Rule 8.548(a)(2).)[2]

**Resolution of the Question Will Settle an Extremely Important Question of Law**

Pursuant to Rule 8.548(f)(1), the Court may exercise its discretion to grant the request, given the importance of clarifying this public sector post-employment benefit contracting issue, given the importance of this state's interest in interpreting its own constitution and laws, given the current economic climate in which public entities need to be able to manage the scarce public resources to which they are entrusted with accountability to the voters and taxpayers and without accidentally finding themselves committed to an "implied" contract for a lifetime vested benefit, and given the likelihood that the question posed by the Ninth Circuit is likely to recur – indeed, is already recurring in other cases. (*See, e.g., Sonoma County Assn. of Retired Employees v. Sonoma County* (N.D. Cal., May 14, 2010, No. 09-04432 CW) 2010 WL 1957463.)

Because Article 11, Section 1(b) of the California Constitution and California Government Code section 25300 mandate that the County's Board of Supervisors has plenary authority over employee compensation, because public pension rights are deemed to be part of the compensation bargain, and because California Government Code section 31692 provides an express presumption against the vesting of retiree health benefits provided by California counties, the prospect that the Constitution and relevant California statutes may be interpreted to obligate a County to provide a lifetime vested retiree health benefit in any way other than by formal Board action requires that this

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[2] The longstanding rule is that "the public employee is entitled only to such compensation as is expressly provided by statute or ordinance...." (*Markman v. County of Los Angeles* (1973) 35 Cal. App. 3d 132, 135.)

Court weigh in. (*See County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344-346, 93 Cal.Rptr.3d 39 (*County of Sonoma*) [setting "compensation of county employees" in any way other than by a majority of a County's governing body "would be inconsistent with both longstanding statutory rules of interpretation and established California case law, as well as deeply offensive to basic principles of representative democracy"]; *County of Riverside v. Superior Court* (2003) 30 Cal. 4th 278, 285, 132 Cal.Rptr.2d 713 ["The constitutional language is quite clear and quite specific: the county, not the state, not someone else, shall provide for the compensation of its employees"]; Codified Ordinances of Orange County Title 1, Div. 3, Art. 1, § 1-3-2 ["The regulation of the ... compensation of officers and employees of the County of Orange... shall... be fixed by resolution of this Board"]; Cal. Gov't Code § 3505.1 [memoranda of understanding not binding until approved by governing body of public agency]; Cal. Gov't Code § 25005 [majority vote required]; *Miller v. State of California* (1977) 18 Cal.3d 808, 814, 135 Cal.Rptr. 386 [public pension rights part of compensation bargain].)

Indeed, in each California case addressing the existence of a contractual or vested right to a particular retiree benefit, there has been an actual legislative enactment – whether a statute, resolution, or Board declaration of policy – that provided the basis of the asserted vested right. *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 787, 189 Cal.Rptr. 212 ["The *explicit language in the retirement law* constitutes a contractual obligation on the part of the state as employer..."]; emphasis added.) In some cases, the legislative enactment showed an intent to create a vested right. (*See, e.g., Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, 1604-1605, 1607-1608, 15 Cal.Rptr.2d 91 [found retired school board members who had served over 12 years had a vested right to post-retirement continuation of paid health benefits after "look[ing] to the language" of the following Board legislation and the Government Code statutes on which it was based: "Any members retiring from the Board after at least one full term shall have the option to continue the health and welfare benefits program if coverage is in effect at time of retirement, except that Board members who have served less than twelve (12) years but at least one term shall pay the full cost of health and welfare benefits coverage"].)

In other cases, the language of the enactment did not show such an intent, and the courts did not find a vested right. (*See, e.g., Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949, 954, 14 Cal.Rptr.3d 764 [where retirees claimed a vested right to free PPO coverage rather than just free HMO coverage, based on a 20-year practice of providing free coverage as well as a Board enactment stating that the "District shall underwrite the cost of the District's Medical and Hospital Insurance Program" for eligible retirees, the court rejected the claim of vested right, commenting that, "As the basis for a vested right, the policy is curiously brief and unspecific"]; *Ventura County Retired Employees' Assn., Inc. v. County of Ventura* (1991) 228 Cal.App.3d 1594, 1596, 1598-1599, 279 Cal.Rptr. 676 (*Ventura*) [like *OCEA,* found that California Government Code section 53205.2 did not require the County to provide equal health care benefits for active employees and retirees, and emphasized, "Had the Legislature so intended, it surely would have said so"].) Here, in the absence of any Board enactment committing the County to pool rates for a period longer than one year, there is no explicit language in any Board enactment or state statute constituting a contractual obligation to use a pooling methodology to set rates.

Interpreting the California Constitution and related statutes to let the courts imply a long-term County commitment that would otherwise have to be made explicitly through the legislative process would thus be a radical departure from California law. (*See, e.g., County of Sonoma, supra*, 173 Cal.App.4th at 344-346; *Ventura, supra,* 228 Cal.App.3d at 1599 [refusing to compel the "County to

exercise its budgetary discretion in a particular manner"]; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 234-235, 138 Cal.Rptr. 101 [constitutional concept of separation of powers provides that "a court is without power to interfere with purely legislative action" such as that prescribed by Cal.Const., art. XI, § 1(b) and Cal. Gov. Code § 25300].) Given the immense legal and policy implications of such a finding, and given the commensurate importance of the question posed by the Ninth Circuit, the justifications for certification that this Court identified in *Los Angeles Alliance For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 361, 93 Cal.Rptr.2d 1, support granting certification in this case. Here, as in *Alliance*, "the availability of a certification procedure provides the most expeditious, and, as a practical matter, perhaps the only effective, means to enable California, through its courts, to exercise the state's authority over the proper interpretation and application of ... its own Constitution." (*Ibid.*) Moreover,

> "The [certification] procedure: (i) allows federal courts to avoid mischaracterizing state law (thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error); (ii) strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts, and forestalls needless litigation; and (iv) protects the sovereignty of state courts."

(*Id.* at pp. 360-361.)

**Conclusion**

By this litigation, the appellant seeks to "imply" an extremely costly long-term commitment to subsidize retiree medical benefits, but the County's Board of Supervisors *never* approved such a long-term commitment, and never agreed to set health plan rates in any particular fashion beyond a single plan year. Because there is no California precedent for finding an implied contract for the lifetime retiree benefits sought in this case, and because federal courts look to state law to determine the existence of a contract for the specific terms at issue, the Ninth Circuit has properly sought guidance in this case, and a Supreme Court decision based on the restated question will likely determine the outcome of REAOC's appeal.

Moreover, the Ninth Circuit has posed an issue of importance to California's counties, their taxpayers, voters, employees, and retirees that 1) this Court has not yet had a chance to squarely address, 2) has significant public policy ramifications not only for the current budget crises faced by California's public entities but for the future of employer-provided retiree health benefits, separation of powers, and representative democracy, 3) is already recurring in another case in federal court, and 4) could resolve the instant litigation as well as clarify the parameters for creating vested rights to lifetime retiree medical benefits.

We therefore respectfully request that the Court grant the request for certification, and restate the question as proposed above.

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

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COUNTY OF ORANGE

cc: United States Court of Appeals for the Ninth Circuit

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## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, California 94607.

On July 19, 2010, I served true copies of the following document(s) described as on the interested parties in this action as follows:

United States Court of Appeal for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
(Court of Appeal Case No. 09-56026)

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**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 19, 2010, at Oakland, California.

_____

Kathy Thomas

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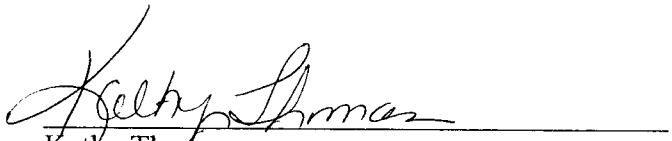

Kathy Thomas