Case No. 13-56061

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAYLAN HARRIS, JERRY JAHN and JAMES MCCONNELL, On Behalf Of Themselves And Others Similarly Situated,

Plaintiffs–Appellants,

v.

COUNTY OF ORANGE

Defendant–Appellee.

OPENING BRIEF OF APPELLANTS

Appeal From The United States District Court,
Central District of California, Case No. SACV 09-0098 AG (MLGx),
Hon. Andrew J. Guilford

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction because (1) Retirees brought federal claims under the United States Constitution and 42 U.S.C. § 1983, and (2) Retirees' state-law claims comprise part of the same case or controversy as its federal claims. 28 U.S.C. §§ 1331, 1367. This Court has jurisdiction over this appeal because the District Court issued orders on January 30, 2013 and April 29, 2013, which together dismissed without leave to amend all of Retirees' claims. Excerpts of Record ("ER") I at 0001-0017 (April 29, 2013 Order) *and* 0018-0026 (January 30, 2013 Order).

Judgment was entered on June 6, 2013. ER II at 0027-0028. Retirees filed a timely notice of appeal on June 19, 2013. ER III at 0403-0404; Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

I. This Court recently held that retired Sonoma County employees: (1) may prove that a retirement health benefit vested upon retirement based solely on *extrinsic* evidence of the parties' intent; and (2) need not allege express promises of vesting. *Sonoma County Assoc. of Retired Employees v. County of Sonoma*, 708 F.3d 1109 (9th Cir. 2013). Did the District Court err in subsequently holding that retired *Orange County* employees: (1) may *not* rely on extrinsic evidence to prove that a retirement health benefit vested upon retirement; and (2) *were* required to allege an express promise of vesting?

II. Did Appellants plausibly allege breach of contract and contractual impairment, when they identified express MOU terms and extrinsic evidence plausibly suggesting that the parties intended that the Grant Benefit vest upon retirement?

III. Did the District Court err in holding that Appellants' allegations did not plausibly suggest that the County targeted them because of age-based stereotypes, when Appellants alleged, and proffered evidence demonstrating, that the County targeted them based on the *express* assumption that they were older, and therefore less healthy, than active employees?

STATEMENT OF THE CASE

Appellants ("Retirees") are retired employees of Orange County ("the County") who retired before January 1, 2008, and their dependents. Retirees estimate that the class includes more than 8,000 persons. This case is now in its *fifth* year, and the District Court still has not permitted Retirees to move beyond the pleading stage. The relevant procedural history that leads to this second appeal is set forth below.

Retires filed this lawsuit as a putative class action in February of 2009. Retirees alleged that the County breached, and unconstitutionally impaired, their contract rights to two retirement health benefits, which Retirees refer to as the Grant Benefit and the Retiree Premium Subsidy. They further alleged that the County violated California's Fair Employment and Housing Act ("FEHA") when it targeted them for elimination from the County's health plan—which had historically included both active and retired employees—and segregated them into a "retiree-only" plan, for the express reason that they are as a group "older" than active employees, and therefore have higher health care costs.

The District Court certified the class on February 22, 2010. On April 7, 2010 the County moved under Fed. R. Civ. P. 12(c) for judgment on the pleadings as to all of Retirees' claims. The parties argued that motion on June 14, 2010. The District Court then held the motion under submission—and stayed the case—for

nine months, over repeated requests throughout that period, from both parties, to issue its ruling. On March 29, 2011—nearly one year after the motion was filed—the District Court granted the motion and dismissed all of Retirees' claims without leave to amend. Retirees appealed.

On June 8, 2012 this Court reversed all of the District Court's holdings. *Harris v. County of Orange*, 682 F.3d 1126 (9th Cir. 2012). With regard to Retirees' Grant Benefit claims, it held that Retirees had failed specifically to allege that the County promised, in terms in the relevant Memoranda of Understanding ("MOUs") or otherwise, that the Grant Benefits would "vest" upon retirement. But it held that Retirees should have been given leave to amend to cure that defect. *Id.* at 1134-1135.

After remand, Retirees filed a Second Amended Complaint ("SAC") on October 9, 2012. ER III at 0317-0348. The allegations in the SAC mirrored those from the First Amended Complaint, with regard to (1) the claims for breach and impairment of contractual rights to the Retiree Premium Subsidy,[1] and (2) the claim for age discrimination. With regard to the Grant Benefit, Retirees alleged that they had an implied right to receive that benefit *throughout* their retirement,

[1] The parties agreed that these claims did not need to be separately argued in this lawsuit because they turned on the same factual and legal questions that were being addressed in the *REAOC* Lawsuit. While Retirees continue to preserve these claims, they believe that this coordination should continue during this appeal, and for that reason do not separately address these claims here.

and that this implied promise was evidenced by express terms in the relevant Memoranda of Understanding ("MOUs") and by extrinsic evidence of the parties' intent, such as their course of dealing. ER III at 0324-0330.

On November 8, 2012 the County again moved for dismissal, this time under Rule 12(b)(6). On January 30, 2013 the District Court granted the County's motion. ER I at 0018-0026. It dismissed Retirees' Grant Benefit claims, without leave to amend, on the grounds that Retirees were required to allege an *express* legislative promise from the Orange County Board of Supervisors ("the Board") that the Grant Benefit vested upon retirement, and that as a matter of law Retirees could not premise such a claim on extrinsic evidence of the parties' intent with respect to vesting. *Id.* at 0023-0024.

On February 25, 2013 this Court issued its ruling in *Sonoma County Assoc. of Retired Employees v. County of Sonoma*, 708 F.3d 1109 (9th Cir. 2013) ("*Sonoma II*"). In that case, this Court expressly held that retired county employees *could* premise claims to vested retirement health benefits on an implied contract theory, supporting their claim to vesting solely on by extrinsic evidence of the parties' intent. *Id.* Recognizing that *Sonoma II* rejected the sole rationale for the District Court January 30, 2013 dismissal of Retirees' Grant Benefit claims, Retirees moved for reconsideration on March 4, 2013. On April 30, 2013 the

District Court denied that motion, standing firm on its pre-*Sonoma II* reasoning. ER I at 0005-0007.

In its January 30, 2013 Order the District Court also dismissed Retirees' age discrimination claim, finding that the County's decision to evict Retirees from the historically-commingled health plan was "based on a retirement status and is facially neutral to age." ER I at 0024-0025. However, it granted Retirees leave to amend, because it wanted additional briefing from the parties "in this somewhat murky area of law." *Id.* at 0025.

On March 4, 2013 Retirees filed a Third Amended Complaint ("TAC"). ER III at 0296-0316. It alleged with more specificity *uncontested* facts supporting Retirees' claim that the County did not merely discriminate "based on retirement status," but rather targeted "retirees" *based on* its express stereotyped assumptions that (1) a "retiree" is likely to be older than an active employee; and (2) an older person is likely to have higher health care costs than a younger one. *Id.* at 0312-0315. Retirees further alleged that the County's stated reason for moving Retirees into their own separate health plan and premium pool was its concerns over the "aging population" of its (commingled) health plan, and the additional costs that this would impose on it. *Id*. Retirees alleged (and there is no dispute) that these admissions were contained in a declaration filed in the related *REAOC* Lawsuit by

the County's chief of employee benefits, as well as a brief filed by the County in *REAOC* in support of its 2008 summary judgment motion. *Id.*

The County again moved to dismiss Retirees' age discrimination claim, essentially repeating the same arguments. On April 26, 2013 the District Court issued a Tentative Order, again dismissing Retirees' FEHA claim, but this time without leave to amend. ER II at 0043-0051. The District Court reached the factual conclusion (on this Rule 12(b)(6) motion) that the County had discriminated strictly on the basis of "retirement" status, and did not use retirement status as a proxy for age. *Id*. At the April 29, 2013 hearing, Retirees' counsel disputed that conclusion, and proffered even *more* allegations and evidence (in addition to what was contained in the TAC) establishing that the County's *sole* reason for evicting Retirees from the commingled plan was its stereotyped assumptions regarding Retirees' age and relative health care costs. ER II at 0151-0153. Counsel explained that Retirees had prepared a Fourth Amended Complaint to attach the proffered evidence, and were prepared to file it immediately. *Id.* at 0153. The District Court stated that it would take the matter under submission to consider counsel's proffer and argument. *Id.* at 0158.

Later that day, the court made its Tentative Ruling final. The final Order did not include any discussion of Retirees' proffered additional allegations regarding the County's age-based motive. ER I at 0009-0016. Retirees were concerned that

the almost immediate filing of the final Order, and the absence of any mention of Retirees' proffer, indicated that the District Court had not considered the additional allegations. Accordingly, they moved for reconsideration, seeking leave to file the Fourth Amended Complaint that they proffered at the hearing, and attaching that pleading along with the evidentiary documents supporting their allegations. ER III at 0257-0295.

At the May 10, 2013 hearing on Retirees' motion, the District Court explained that it did in fact conduct "a fair evaluation of the new allegations" and "totally considered" them before denying Retirees leave to file their Fourth Amended Complaint. ER II at 0090, 0099. On May 30, 2013 the District Court entered an order denying Retirees' reconsideration motion. On June 6, 2013 judgment was entered in favor of the County on all of Retirees' claims. ER II at 0027-0028. Retirees timely appealed. ER III at 0403-0404.

STATEMENT OF FACTS

The District Court granted the County's Rule 12(b)(6) motion, without leave to amend, as to Retirees' claims for breach of contract and contractual impairment relating to the promised Grant Benefit, and their claim for age discrimination under FEHA. Retirees' allegations must be accepted as true for purposes of that motion. Those allegations are set forth below.

I. RETIREES' ALLEGATIONS THAT THE COUNTY IMPAIRED THEIR CONTRACTUAL RIGHTS TO THE GRANT BENEFIT

The following was alleged in the SAC. In 1993, after years of negotiations between the County and the labor unions, the County instituted a Retiree Medical Insurance Grant Program (the "Grant Program") that provided, *inter alia*, a monthly stipend to retired employees to help defray their health insurance premiums (the "Grant Benefit"). ER III at 0324. The governing terms and conditions of the Grant Program were set forth in the MOUs and PSRs in effect from 1993 through 2007. *Id.* at 0324-0325. The Grant Benefit was calculated by multiplying years of service by a fixed-dollar amount. *Id.* at 0325. The fixed dollar amount was $10 in 1993, but increased every year by up to 5% to reflect (although not offset entirely) medical premium inflation. *Id.*

The County reaped enormous concessions from the unions in exchange for its promise to provide the Grant Benefit. ER III at 0324, 0328. As part of the bargain the unions agreed to allow the County to access $150 million of a $200

million pension surplus fund for general County purposes, and use only the remaining $50 million to fund the Grant Program. *Id.* The rights to the pension surplus funds had been disputed at the bargaining table for years before the deal was finally made. *Id.* In addition, the County was able to induce a large number of employees to retire "early" in reliance on the new Grant Program, thus helping it to accomplish its goal of labor force reduction. *Id.* at 0324.

In addition to the initial $50 million infusion, the Grant Program was funded by a 1% contribution from every employee's monthly pay. ER III at 0325, 0327. Under a contract with the Orange County Employee Retirement System ("OCERS"), the County was obligated to "step in" and fund the Grant Program if the $50 million "seed" money and the 1% employee contributions ever fell short of the cost of the Grant Benefit. *Id.* at 0325.

Effective January 1, 2008 the County unilaterally changed the terms of the Grant Program by instituting significant reduction in the Grant Benefit of retired employees. ER III at 0325-0326. The County cut the total monthly Grant by 50% for retirees once they reached age 65, and cut the annual cap on the increase in the fixed-dollar multiplier from 5% to 3%. *Id.* The County negotiated with the unions to make these changes with respect to active employees (future retirees), and traded a significant wage increase to make up for the reduced health benefit. *Id.*

However, the County did not negotiate with retired employees, and did not provide anything in exchange for the reduction in their health benefits. *Id.*

A. Retirees Had an Implied Right To Receive The Grant Benefit Throughout Their Retirements.

Retirees had an implied contractual right to receive the Grant Benefit, as it was defined in the 1993-2007 MOUs, throughout their retirement. ER II at 0326-0329. That right was reflected in the express terms of the 1993-2007 MOUs. *Id.* at 0326. They provided that, "[u]pon paid County retirement, an eligible retiree who has enrolled in a County-offered health plan or Medicare Part A or Part B *shall receive* a Retiree Medical Insurance Grant," that is, the monthly benefit calculated by multiplying years of service by the fixed-dollar multiplier set forth in the MOUs. *Id.* (emphasis added). The MOUs provided that to be "eligible" a retiree must "be actively retired from the County of Orange" and be "receiving a monthly retirement allowance from the Orange County Employees Retirement System." *Id.* By linking the contractual right to receive the Grant Benefit to the contractual right to receive a pension benefit, the MOUs indicated the Board of Supervisors' intent that the Grant Benefit (like pension benefits) be a "lifetime" benefit once an employee retired. *Id.* at 0326-0327.

In addition to the express terms of the MOUs, the circumstances accompanying the Board of Supervisors' adoption of those MOUs further evidence the legislative intent that retired employees had a contractual right to receive the

Grant Benefit throughout the duration of their retirement. ER II at III at 0327-0329. These circumstances include the following:

First, the 1993-2007 MOUs provided that the Grant program was to be funded through active employees' payment to the County of 1% of their wages through payroll deductions. *Id.* The fact that employees paid their own wages to fund the Grant Benefit is evidence of the Board's intent that the Grant Benefit was an element of deferred compensation that could not be unilaterally reduced once earned. *Id.* Indeed, the MOUs acknowledge this by providing that employees who left County service prior to becoming eligible for the Grant Benefit, would receive a "lump sum" payment reflecting a refund of the 1% of monthly wages that they had deferred. *Id.*

Second, the Board of Supervisors agreed to the terms of the 1993 Grant program in part to induce active employees to retire earlier than they otherwise would have retired. *Id.* This expressed intent is contrary to the County's current assertion that it had unfettered discretion to reduce or eliminate the very retirement benefit that it had used to induce employees into believing that they could afford to retire early. *Id.*

Third, prior to the unilateral reduction of the Grant Benefit in 2007, the Board of Supervisors and its representatives had consistently acknowledged that retirement health benefits, once conferred, could not be unilaterally eliminated or

altered as to existing retirees, without obtaining the express permission of those retirees and/or providing new benefits equal to or better than those being taken away. *Id.*

Fourth, in the process of agreeing to the terms of the 1993 Grant program, the unions traded concessions to the County in the sum of approximately $150 million, in addition to agreeing to the 1% employee wage contribution. *Id.* The fact that the County received an enormous financial concession from its employees, after years of bargaining, is further evidence that, contrary to the County's later argument, the Board in 1993 did not intend to retain the unilateral power to eliminate or reduce the Grant Benefit of retired employees, without obtaining their agreement and/or providing equal or better benefits in return. *Id.*

Fifth, the County has repeatedly acknowledged that active employees had contract rights to the Grant Benefit as reflected in the 1993-2007 MOUs and PSRs. The Board understood it was required to negotiate with *active* employees to obtain their agreement to make alterations to the 1993 Grant program. *Id.* This is further evidence that the Board intended retirees—like active employees—to have contractual rights with respect to the benefit, and did not intend to retain unfettered power to revoke or reduce this retirement benefit once an employee retired. *Id.*[2]

[2] As an alternate theory, Retirees alleged that the County was required to continue to provide the Grant Benefit—as defined in the 1993 MOUs and PSRs—for as long as the contemplated funding mechanism remained sufficient to cover that

II. RETIREES' ALLEGATIONS SUPPORTING THEIR CLAIM FOR AGE DISCRIMINATION UNDER FEHA.

The following is alleged in the TAC. From 1985 through 2007, retired employees and active employees were combined into one integrated health plan and risk pool for the purpose of setting annual health insurance premiums. ER III at 0298. By virtue of being in the same pool as active employees, retirees enjoyed substantially lower premiums than they would have paid had they been rated as a separate group. *Id.*

Effective January 1, 2008, the County unilaterally expelled Retirees from the integrated health plan and premium pool, and moved them into separate health plans, and into a separate risk pool for purposes of determining their health insurance premiums. ER III at 0298, 0313-0314. By its own express admission, the County took this action because it believed that (1) the health plan participants who were retired were on average "older" and less "healthy" than those with "active" status; and (2) by segregating *everyone* with "retired" status into a

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cost. ER III at 0329-0330. The County breached that obligation, and impaired Retirees' contract rights, by mismanaging the funds intended for the Grant Benefits such that they were depleted prematurely, which led the County to institute the drastic reductions in the promised benefits. *Id.*

separate plan and risk pool, and thus driving down the average age of the existing plan and risk pool, it could save costs on premiums. *Id.* at 0313-0315.[3]

The County made its motivation clear in documents filed in the REAOC Lawsuit. ER III at 0314-0315. In that action the County filed a sworn declaration from its Employee Benefits Director (Patricia Gilbert), and a brief in support of its summary judgment motion, both of which confirmed that its decision to "split the pool" was motivated by these stereotypes regarding the average age and health of retired employees, as compared to the average age and health active employees. *Id.* For example, in explaining the Retiree Premium Subsidy that resulted from the commingled premium pool, and its decision to eliminate that subsidy by splitting the pool in 2008, the County referred to its active employees as "younger" and "healthier" than its retired employees. *Id.* Further, Ms. Gilbert explained that the County's decision to split the pool was in reaction to increases in health insurance costs resulting from the "aging population" of its health plans. *Id.* The County has offered no explanation for its decision to segregate retirees into a separate premium pool, *other than* its assumption that retirees were older and therefore less healthy than active employees. *Id.*

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[3] The reason that the County saved costs by evicting these "older" and less "healthy" participants was this: the County paid most of the premiums for active employees, but retirees paid for their premiums out-of-pocket. Thus, by targeting Retirees for removal from the commingled plan, it would drive down the premium costs for which it was responsible, and shift that cost onto the backs of Retirees.

These admissions from the *REAOC* lawsuit only underscored what is clearly demonstrated in a critically-important contemporaneous document, and undisputed declaration testimony from persons close to the decision-making process that led to the splitting of the pool. In 2004 the Board commissioned a report on the costs of its retiree medical program, and formed a Retiree Medical Panel (the "Panel") to examine those costs and propose alternatives for reducing same. ER II at 0151-0153; ER III at 0264-0266. The report is called the "2004 County of Orange Postretirement Medical Benefit Valuation" (the "2004 Report"). *See* ER III at 0276-0280. It was provided to the Board and it formed the basis for the Panel's analysis, deliberations and ultimate recommendation to segregate the health plan and premium pool. ER III at 0264-0266.

Page 9 of the 2004 Report is reproduced below. ER III at 0278. It discusses "Retiree Medical Benefits Liabilities." It explains that the valuation of the County's retiree medical liabilities includes "the value of the subsidy provided to retirees by extending medical benefits to retirees at the same rate charged to active employees." Below that appears a chart that "illustrates the *expected medical claims based on age . . .*" (emphasis added). The horizontal axis of the chart reflects the "Age" of plan participants and the vertical axis reflects the "Cost" of insurance. A line slanting from low to high, left to right, reflects "Expected Claims By Age," and shows that a 45 year-old can be expected to have less than $3,000

per year in claims, while a 60 year-old would have well over $4,000 per year. At the bottom of page 9 the report explains that, because of the link between increased age and increased claims expense, the inclusion of retirees in the commingled premium pool results in a 43% higher average premium cost compared to the cost of rating retirees separately.

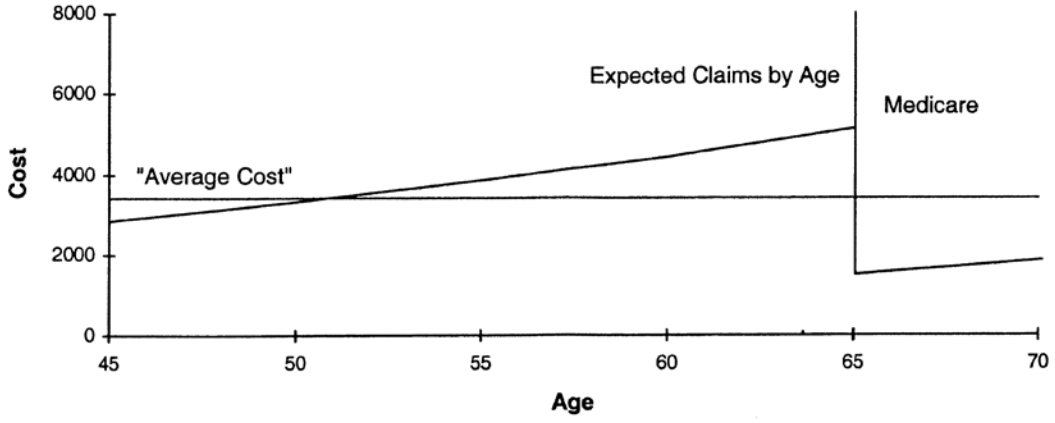
Supplemental Information

Section 1.1

Retiree Medical Benefit Liabilities (Continued)

Included in the liabilities for retiree medical benefits is the value of the subsidy provided to retirees by extending medical benefits to retirees at the same rate charged to active employees. The following chart illustrates the expected medical claims based on age and the effect of Medicare payments after age 65.

Expected Claims



The difference between the expected claims and the average cost (or premiums charged) is often called a "hidden subsidy". The 2004 premium renewal indicated that retiree premiums would be 43% higher if the County did not provide this hidden subsidy.

Pages 17 and 18 of the 2004 Report reflect "Participant Data" for the active and retired employees in the commingled plans and premium pool. ER III at 0279-0280. The chart on page 17 breaks the County's active employee population (18,098 employees) into age groups representing 5 year "bands" of age. It reports that the average age of active employee participants is 43.4 years. Page 18 breaks down the population of retired employee plan participants (5,205 total) according to age, also in five-year increments, and reports that the average age of a retired employee plan participant is 69.8 years—26.4 years, or 61%, older that the average active employee.

Page 23 of the 2004 Report reflects the County's prediction of 2004 premium rates for retirees as a separate group. ER III at 0281. To estimate those rates and simulate the split-pool structure that would eventually result from these deliberations, the 2004 Report started with the current "commingled" premium rates and then "adjust[ed] for *differences in average ages of retirees compared to active employees*." (emphasis added). In other words, to estimate the cost savings that would result from splitting the pool, the Panel relied *exclusively and directly* on assumptions regarding age. *Id.*

Robert Griffith, a three-term elected member of the Board of the Orange County Employee Retirement System, was a member of the Panel. ER II at 151-153; ER III at 0272-0273. He confirmed in a sworn declaration that these age-

based assumptions reflected in the 2004 Report guided the Panel's evaluation, deliberations and recommendations to the Board. *Id.* Frank Madrigal also sat of the Panel. *Id.* He also confirmed that the operating assumptions of the Panel were that retirement status and old age are linked, as are older age and higher health claims expenses. *Id.*

The Board's legislative records clearly demonstrate that it was briefed on the Panel's deliberations on several occasions. ER III at 0282-0286, 0287-0291. Retirees further alleged that the Board was apprised that the Panel's deliberations and recommendations were informed by the 2004 Valuation. ER III at 0266. Ultimately, the Board accepted the Panel's recommendation to drive down the average age of the health plan for which it paid the premiums, by driving Retirees out of that plan and into a separate "retiree-only" plan and premium pool.

Retirees further alleged that the Board's consideration of age, as the motivating factor behind its decision to split the pool, is evidenced by comments made during public Board sessions in which retiree medical restructuring was discussed and deliberated. ER II at 0151-0152; ER III at 0267. At an April 19, 2005 session, Supervisor Lou Correa noted that the retiree medical liability issue was part of a broader problem governments face "as our population continues to grey and as we continue to grey." *Id.* Supervisor Norby observed that the County's retiree medical benefits liability is growing larger because "people are

living longer . . . life expectancy has now grown by about 20 years . . . [s]o we have to face this liability, and it's not easy to do so." *Id.* In other words, the commingled plan and premium pool were becoming more of a burden because, with increased life expectancy come more "old" people, and therefore relatively fewer "healthy" people, in the County's commingled health plan.

Based on the foregoing, Retirees alleged that the County's decision to segregate retirees into a separate premium pool was motivated *not* be "retirement status" *per se*, but rather by its assumptions and stereotypes about age. ER III at 0315. Retirement status served as a direct and explicit, and therefore unlawful, proxy for age.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss brought under Rule 12(b)(6). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). In reviewing the District Court's Rule 12(c) dismissal, this Court must consider all of Retirees' factual allegations as true and, construing those allegations in a light most favorable to Retirees, determine whether they "plausibly suggest" that Retirees are entitled to relief. *Recinto v. U.S. Dept. of Veterans Affairs*, 706 F.3d 1171, 1177 (9th Cir. 2013), *citing Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

SUMMARY OF ARGUMENT

Retirees ask this Court to reverse the District Court's dismissal of their Grant Benefit claims and age discrimination claim. With respect to each of those claims, Retirees' complaint met and exceeded the requirement that they allege facts that "plausibly suggest" their entitlement to relief. With respect to each of those claims, the District Court failed to follow clear, controlling precedent in granting the County's Rule 12(b)(6) motion.

This Court recently set forth the rules that govern the evaluation of Retirees' claims to the Grant Benefit. In *Sonoma II*, this Court held that county retirees can plead claims for vested contractual rights to retirement health benefits by alleging (1) the existence of an express contract relating to the benefit at issue; and (2) extrinsic evidence suggesting that the parties intended the benefit to "vest" upon retirement. *Sonoma II*, 708 F.3d at 1114-1116 & n.4. This is precisely what Retirees have done here. They allege—and the county does not dispute—that they worked under MOUs and PSRs that included the express promise that they would receive a Grant Benefit, the amount of which would be determined by a specific formula set forth in those MOUs. And they allege that express provisions of those MOUs and PSRs, combined with extrinsic evidence of the parties' intent, demonstrate that the Grant Benefit, as it was defined in the 1993-2007 MOUs, vested for each employee when her or she retired. Retirees' allegations are on all

fours with *Sonoma II*, and the District Court erred in refusing to apply that controlling guidance.

With regard to Retirees' claim for age discrimination, FEHA prohibits an employer to discriminate "because of . . . age," against any "person," with respect to the "terms, conditions or privileges of employment." Gov't Code § 12940(a). The District Court correctly held that Retirees are "persons" within the meaning of FEHA, and that their participation in the commingled health plan and risk pool was a "term, condition or privilege of employment." That left only one question to answer: did Retirees allege facts that plausibly suggest that, when the County targeted them for elimination from the commingled health plan and risk pool, it did so "because of age"?

While there is no authority applying FEHA in these circumstances, the United States Supreme Court *has* established the test for determining whether an employer discriminates "because of age" when it does what the County admits to doing here, that is, targets retired employees for disparate treatment. The Court has resolved this issue with the following formulation. An employer does not engage in unlawful discrimination when it targets persons with a certain retirement status *purely* because of their retirement status, and in that process "*ignores*" age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (emphasis added); *see also Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 142-143 (2008). However,

an employer *does* engage in unlawful age discrimination when it targets persons with a certain retirement status "on the assumption that [they] are likely to be older" or, stated another way, when it "suppose[es] a correlation between [age and retirement status] and act[s] accordingly." *Hazen Paper*, 507 U.S. at 612-613. "In such a case . . . age, not pension status, would have 'actually motivated' the employer's decisionmaking." *Kentucky Retirement Systems*, 554 U.S. at 142-143, *quoting Hazen Paper*, 507 U.S. at 613.

Here, it cannot reasonably be disputed that the County targeted Retirees *not* simply because they were retirees, but rather based on its stereotyped assumptions that a retiree is likely to be older than an active employee, and that older people are likely to have higher health care costs than younger people. Indeed, the County expressly admitted that these were the assumptions that motivated its decision to evict Retirees from the commingled health plan and risk pool in 2008. And those admissions are amply supported by contemporaneous documents, witness testimony and statements made by members of the Board of Supervisors in connection with that decision. The District Court was unwilling to apply this clear precedent, and strained to find a rationale for refusing to do so. But, as Retirees demonstrate below, in light of their allegations and proffered evidence, there *is no* valid rationale for dismissing their FEHA claims under Rule 12(b)(6).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING RETIREES' GRANT BENEFIT CLAIMS.

A. The District Court Failed to Apply This Court's Recent Holding in *Sonoma II*, That Retired County Employees May Resort to Extrinsic Evidence to Prove Vested Rights to a Health Benefit.

In their SAC, Retirees allege that the express terms of the MOUs and PSRs under which they worked and retired included express promises that they would receive a monthly Grant Benefit, and an express formula for calculating the amount of that benefit. ER III at 0324-0325. The County does not and cannot dispute the accuracy of these allegations.

What is disputed is Retirees' claim that they were entitled to receive the Grant Benefit—as that benefit was defined in the pre-2008 MOUs—throughout their retirement. The MOUs contain no express provisions defining the "duration" of the Grant Benefit. However, Retirees allege that the express terms of the MOUs and PSRs, combined with extrinsic evidence of the parties' intent, plausibly suggest that the parties' agreement included an *implied* promise that the Grant Benefit "vested" upon each Retiree's retirement. ER III at 0324-0330. The County's position regarding vesting is this: (1) it could not alter the future Grant Benefit of an active employee, without negotiating any such changes with the unions to get their agreement to do so; but (2) once an employee retired, it was free

at any time to unilaterally reduce or revoke his or her Grant Benefit, without negotiation, at its sole discretion.

1. The District Court Incorrectly Ruled in Favor of the County in its January 30, 2013 Order.

On January 30, 2013 the District Court ruled in favor of the County, concluding that as a matter of law Retirees could not rely on extrinsic evidence to establish an implied promise of vesting. The District Court held that Retirees were required, but failed, to plead "*explicit* legislative or statutory authority requiring the County to provide the [Grant benefit]." ER I at 0023-0024 (emphasis added). The District Court explained that it was applying the same reasoning it had applied to grant summary judgment in favor of the County, a second time, in the *REAOC* Lawsuit. *Id.*; s*ee* Retirees Request for Judicial Notice, Ex. A. In that August 13, 2012 summary judgment order, the District Court concluded that extrinsic evidence of the parties' intent is "necessarily irrelevant," and that the court's analysis "has no further to go," unless and until Retirees identified an express legislative promise, in this case that the Grant Benefit was vested. *Id.* at 0020.[4]

In reaching its holding, the District Court purported to find support from this Panel's ruling in the first appeal in this case, *Harris v. County of Orange*, 682 F.3d

[4] The District Court's latest grant of summary judgment in favor of the County is also currently on appeal before this Court. *REAOC v. County of Orange*, Appeal No. 12-56706. As of the date of this filing, the briefing is closed and the parties are awaiting the expedited scheduling of oral argument.

1126 (9th Cir. 2012) ("*Harris II*"). ER I at 0023-0024. It reasoned that, in *Harris II*, this Panel held that Retirees as a matter of law cannot premise a claim to vested Grant Benefits with extrinsic evidence of the parties' intent, but instead must identify express terms "guarantee[ing] the Grant will continue." *Id.*

The District Court's reasoning was incorrect at the time it was issued, for two reasons. First, it was contrary to the California Supreme Court's core holding in *REAOC III*: that Retirees *may* establish that a retirement health benefit vested upon retirement, by resort to explicit legislative language *or* extrinsic circumstances evidencing the parties' intent. *REAOC III*, 52 Cal.4th at 1189-1190 (noting lack of legal authority for prohibiting retirement benefits to "vest" by implication, and holding that retirees *can* prove vesting by resort to statutory language *or* "convincing extrinsic evidence").

Second, in *Harris II* this Panel did *not* purport to rule on the question presented by the SAC, that is, whether Retirees could prove an implied MOU term promising that they would receive the Grant Benefit throughout their retirement, by resort to extrinsic evidence of the parties' intent. Rather, this Panel's holding was twofold: (1) that Retirees had "failed to plead facts that suggest that the County promised, in MOUs or otherwise, to maintain the Grant as it existed on the Retirees' respective dates of retirement"; and (2) "Retirees should be given an opportunity to amend their Complaint to set out specifically *the terms of those*

MOUs on which their claim is predicated." *Id.* (emphasis added). This Panel's use of the phrase "in MOUs *or otherwise*" left open the opportunity for Retirees to allege, on remand, facts *extrinsic* to the express terms of the MOUs that suggest that the Grant Benefit was vested upon retirement. And this Panel's use of the phrase "the terms of those MOUs" did not foreclose Retirees from alleging, on remand, facts that suggest that the MOUs included *implied* terms promising to maintain the Grant for each Retiree as it existed under the original (1993) Grant Program.

Indeed, the ruling in *Harris II* cannot be read as precluding Retirees from relying on implied contract terms established by extrinsic evidence of intent, because there is no indication that this Panel considered any such theory during the first appeal. The County acknowledged this fact during the proceedings before this Panel in 2010. In opposing Retirees' Request for Clarification of the Panel opinion, the County argued that clarification was unnecessary *because* "the Retirees here *did not pursue an implied contract theory* for their Grant claims"). ER III at 0371 (emphasis added). The District Court likewise observed that this Panel did not reach the issue of implied-in-fact contract rights. In its second summary judgment order in *REAOC*, the District Court correctly characterized *Harris II* as "*refusing to address* the argument that implied right could be

established" by extrinsic evidence of parties' intent. Retirees' RJN, Ex. A at 0018 (emphasis added).

"It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court." *People v. Harris*, 47 Cal.3d 1047, 1071 (1989); *see also Arizona Christian School Tuition Organization v. Winn*, --- U.S. ---, 131 S.Ct. 1436, 1448-1449 (2011). And the mandate of an appellate court governs *only* those matters that were "determined by the appellate court." *United States v. Kellington*, 217 F.3d 1084, 1092-1094 (9th Cir. 2000), *quoting U.S. v. Nguyen*, 792 F.2d 1500, 1502 (9th Cir. 1986). Thus, because the issues of implied-in-fact vesting and the use of extrinsic evidence were not before this Panel in the first appeal (as the County conceded), *Harris II* did not affect Retirees' right to plead those theories on remand.

2. The Errors in the District Court's Reasoning Became Undeniable After This Court's Ruling in *Sonoma II*.

These errors in the District Court's holding became undeniable just three weeks after it was issued, when this Court filed its ruling in *Sonoma II*. *Sonoma II*, 708 F.3d 1109. *Sonoma II* was this Court's first opportunity to apply the teaching of *REAOC III* to a claim for implied vested contract rights to retirement health benefits. In that case, to prove their claim that benefits vested by implication, the retirees relied on extrinsic evidence of the parties' intent, including the parties' course of conduct, and testimony of county officials involved in the drafting of

relevant documents. *Id.* at 1115-1117 & nn.4, 6. The district court dismissed the retirees' claims, based on precisely the same reasoning that the District Court applied here: that to establish a vested contract right to retirement health benefits, a plaintiff must identify MOUs or other legislative enactments that "*explicitly provide* that [the County] agreed to provide health insurance benefits to retirees in perpetuity." *See Sonoma County Assoc. of Retired Employees v. Sonoma County* ("*Sonoma I*"), 2010 U.S. Dist. LEXIS 143345, at *9, 27 (N.D. Cal. Nov. 23, 2010) (emphasis added); *see* ER I at 0023 (District Court here quoting *Sonoma I* to support its dismissal of Retirees' claims).

On February 25, 2013 this Court rejected that holding and reversed *Sonoma I*. *Sonoma II*, 708 F.3d 1109. It reasoned as follows:

First, under the California Supreme Court's ruling in *REAOC III*, the retirees could state a claim for vested rights to retirement health benefits by alleging that Sonoma County: "(1) entered into a contract that included implied terms providing healthcare benefits to retirees that vested for perpetuity; and (2) created that contract by ordinance or resolution." *Sonoma II*, 708 F.3d at 1115.

Second, the retirees met the first requirement by plausibly alleging that "(1) the County entered into a contract; (2) the contract provided healthcare benefits to retirees; and (3) *the contract included an implied term that the benefits were vested for perpetuity*." *Id.* (emphasis added).

Third, the retirees plausibly alleged that the express benefits vested "by implication," by identifying extrinsic evidence of the parties' intent with regard to vesting, such as their longstanding course of conduct with regard to retiree health benefits and testimony from County officials who drafted the relevant documents. *Id.* at 1116 & n.4.

Finally, "[t]aken as a whole, the amended complaint includes factual content that is . . . substantial enough to allow a court, accepting the allegations as true, to make a reasonable inference that the County implicitly bound itself to provide healthcare benefits to retirees in perpetuity." *Id.*

In reaching these holdings, the *Sonoma II* Court explicitly addressed, and rejected, the reasoning the District Court applied to dismiss Retirees' claims here. First, it rejected the premise that retirees must allege express promises regarding the vested nature of a retirement health benefit. *Id.* It observed that this reasoning "conflated" what are two separate questions that a court must ask after *REAOC III*: (1) did the Board create a contract by ratifying an MOU by resolution or ordinance?; and (2) if so, does extrinsic evidence (such as course of conduct and testimony of former officials) establish that the contract included implied *terms*, such as a promise that retirement benefits vest upon retirement? *Id.*

The *Sonoma II* Court also explicitly rejected the District Court's interpretation of *Harris II*. Like the County here, Sonoma County had argued that

Harris II required that retirees "prove the existence of a contract with express terms promising vested health benefits." *Id.* at 1119. This Court disagreed, holding that *Harris II* it "did not purport to rule on a theory premised on implied terms" related to vesting, and therefore that *Harris II* "does not affect our analysis" of claims based on implied promises regarding vesting. *Id.* at 1119 & n.7 ("In *Harris*, we rejected the retirees' argument that certain MOUs *expressly* gave retirees a vested right to healthcare benefits in perpetuity . . .") (emphasis added).

3. The District Court Erred in Refusing to Reconsider its Ruling in the Light of *Sonoma II*.

Shortly after this Court issued *Sonoma II*, Retirees moved for reconsideration of the District Court's dismissal of their Grant Benefit claims. Retirees explained that the District Court's rationale—that retirees cannot establish implied vested rights to retirement benefits by resort to extrinsic evidence—did not survive *Sonoma II* any more than the rationale of *Sonoma I* survived *Sonoma II*. The District Court denied the motion, for the following erroneous reasons. ER I at 0005-0007.

First, it reasoned that *Sonoma II* "did not change the legal standards set by the Ninth Circuit in *Harris II* or by the California Supreme Court in *REAOC III*." ER I at 0006. While it is true that *Sonoma II* did not "change" the applicable legal standards, it is this Court's first, and only authoritative, *interpretation* of *REAOC III* and the relationship between *REAOC III* and *Harris II*. As explained above,

that interpretation cannot be squared with the District Court's views. The District Court's views must yield.

Second, the District Court reasoned that it need not reconsider its ruling because that ruling was based on *its* interpretation of *REAOC III*. ER I at 0006. But this misses the point. The District Court's interpretation is directly at odds with this Court's interpretation. The District Court was required, but refused, to abandon its view and apply this Court's guidance.

Third, the District Court stated that "there is no need to give Plaintiffs additional leave to amend to consider" *Sonoma II*. ER I at 0006. But Retirees never asked for leave to amend to consider *Sonoma II*. They asked that *Sonoma II* be applied to their existing allegations.

Finally, the District Court observed that "in this 2009 case, as the Court deals with decisions bearing titles that reveal the spawning of multiple generations of cases, like "*Harris II*," "*REAOC II* (and *III*)," and "*Sonoma [II]*," the need to focus and resolve issues is apparent." ER I at 0007. However, the *reason* that the District Court is forced to "deal with . . . multiple generations" of decisions like *REAOC III* and *Harris II* is this: the District Court's holdings in *REAOC I* and *Harris I* were rejected on appeal, and the cases remanded for further proceedings. The need to "focus" and "resolve issues" in "this 2009 case" is hardly a fair or satisfactory rationale for "resolving issues" in favor of the County.

It is worth noting that the District Court for the Northern District of California has applied *Sonoma II* correctly, in *Retiree Support Group of Contra Costa County v. Contra Costa County*, 2013 WL 1915661 (N.D. Cal. May 8, 2013). In that case, the county (like Sonoma and Orange counties) argued that the plaintiffs were required to allege *express* promises of vested retirement benefits. *Id*. at *3. The district court held that the "[r]ecent authority" from *REAOC III* and *Sonoma II* "compels the court to reject these arguments." *Id.*

It held that the retirees had satisfied *Sonoma II*'s test by alleging—as Retirees have done here—explicit promises to provide retirement health benefits, *and* implied promises supported by extrinsic evidence, such as the parties "longstanding practices" and testimony from former County officials. *Id.* at *3-4; *see also Sacramento County Retired Employees Assoc. v. County of Sacramento*, 2012 WL 1082807 at *2-4 (E.D. Cal. March 31, 2012) (plaintiff retiree association stated an implied contract claim under *REAOC III* by alleging extrinsic evidence of contractual intent—the county's long-standing practice of providing medical and dental benefits to retirees).

B. Under *Sonoma II* Retirees' Allegations "Plausibly Suggest" That the Grant Benefit Vested Upon Retirement.

Retirees' allegations included precisely the sort of facts that *Sonoma II* (and *Retiree Support Group*) held were sufficient to support a claim for vested retirement health benefits: (1) the County's longstanding practice of treating

retirement health benefits as vested with respect to current retirees but negotiable with respect to future retirees (active employees);[5] (2) the County's admission that it could not change the terms of the promised future Grant Benefit for active employees without negotiating such changes at the bargaining table; (3) the fact that, while they were active employees, pursuant to the MOUs Retirees paid 1% of their wages *into* the Grant Program, in exchange for the Grant Benefit as promised in those MOUs; (4) the fact that active employees surrendered a claim to $150 million of disputed pension surplus funds, in exchange for the Grant Benefit as promised in the MOUs. ER III at 0327-0329. Despite the clear holding of *Sonoma II*, the District Court dismissed all of these allegations as *irrelevant* "'circumstantial evidence' of legislative intent." ER I at 0024.

Retirees also alleged that written provisions in the MOUs supported their claim that the Grant Benefit vested by implication. ER III at 0326-0327. For example, the fact that eligibility for the Grant Benefit was expressly tied to pension eligibility suggests that the "duration" of both benefits was coterminous, that is, for Retirees' lifetimes. *Bower v. Bunker Hill Co.*, 724 F.2d 1221, 1224 (9th Cir. 1994)

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[5] These are not merely allegations. The evidentiary *record* in the *REAOC* Lawsuit includes declarations from the chief County officials involved in the negotiation and establishment of the Grant Program, confirming that it was the Board's historic practice to consider retiree medical benefits to be "vested" once an employee retired. *See, e.g.*, ER III at 0387 (declaration from Director of Human Resources during the period that the Grant Benefit was negotiated and implemented).

(intent to create vested retirement health benefit can be inferred from collective bargaining agreement's linkage of that benefit to pension benefits). And the MOUs expressly stated that employees "shall receive" the Grant Benefit upon retirement, and that the *amount* of the Grant Benefit "*shall be an amount based on*" the formula ($10 times years of service, with the $10 to be adjusted annually up to 5% per year). ER III at 0326 (emphasis added). Nothing in the MOUs suggested that the County could unilaterally change the formula, to an employee's detriment, once he or she retired.

In light of these allegations, this Court can and should repeat its holding of *Sonoma II* here: "Taken as a whole, the amended complaint includes factual content that is . . . substantial enough to allow a court, accepting the allegations as true, to make a reasonable inference that the County implicitly bound itself to provide [the Grant Benefit] to retirees in perpetuity." *Sonoma II*, 708 F.3d at 1116.

II. THE DISTRICT COURT ERRED IN HOLDING THAT RETIREES FAILED TO STATE A CLAIM FOR AGE DISCRIMINATION.

Section 12940(a) prohibits an employer to discriminate "because of . . . age," against "any person" with respect to "compensation" or "terms, conditions, or privileges of employment." In a FEHA age discrimination case, at the pleading stage a plaintiff bears only a "minimal" burden of alleging facts that support an inference that age motivated a decision. *Schechner v. KPIX-TV*, 686 F.3d 1018, 1022, 1023 (9th Cir. 2012); *see also Lyons v. England*, 307 F.3d 1092, 1112 (9th

Cir.2002) ("[t]he burden of establishing a prima facie case of disparate treatment is not onerous."). As explained below, Retirees stated a claim for age discrimination because (1) retired employees are "persons" within the meaning of FEHA; (2) retirement health benefits are "compensation" or "terms, conditions or privileges of employment"; and (3) the County acted "because of age" when it targeted retired employees for elimination from the health plan and premium pool based on age and age-related stereotyped assumptions. The District Court agreed with the first two premises, but clearly erred in rejecting the third.

A. Retired Employers Are "Persons" Within the Meaning of FEHA.

The District Court correctly held that Retirees are protected "persons" within the meaning of the plain language of section 12940(a). ER I at 0010-0012. The County had vigorously argued that retired employees are *not* "persons" within the meaning of FEHA, and that therefore all of the statute's protections cease the moment an employee retires. The sole basis for the County's argument was that certain portions of statements of FEHA's "legislative purpose" refer to the fact that discrimination creates "obstacles to employment," and discrimination against *retired* employees does not present such an obstacle.

As Retirees argued (and the District Court agreed), the consequences of accepting the County's argument are alarming. Under its reading of FEHA, an employer has *carte blanche*, for example, to expel all Jewish retirees from its

health plans, or to deny dependent health insurance coverage for any retiree who entered into a mixed-race marriage.[6] Not surprisingly, *every* relevant authority is contrary to the County's position.

Every court to address the question has held that retired employees *are* covered under employment discrimination statutes. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1079 (1983) (Court had "no hesitation in holding" that Title VII protects retirees from discrimination), *citing Retired Public Employees Association of California v. State of California*, 799 F.2d 511, 513 (9th Cir. 1986) (references to eliminating "barriers to employment," in statements of legislative purpose, "do not establish a requirement that the challenged practice be a practical barrier to employment in order to establish a Title VII violation"); *Erie County Retirees Assoc. v. County of Erie, Pennsylvania*, 220 F.3d 193 (3rd Cir. 2000) (reaching "obvious" conclusion that the members of the plaintiff class—retired county employees—were "individuals" within the meaning of the ADEA,

[6] Retirees do not mean to suggest that the County's age discrimination here is as odious as the religious, ethnic and racial animus at work in these hypothetical scenarios. This Court is not called upon to draw such comparisons. Retirees' intent is to elucidate the ramifications of the County's argument, for the interpretation of a statute that (subject to narrow exceptions) treats age discrimination *the same* as discrimination based on race, gender, *etc.*

noting that a contrary reading of the ADEA was "inconceivable," and specifically rejecting the "obstacles to employment" argument deployed by the County here).[7]

Further, the Equal Employment Opportunity Commission ("EEOC") *and* California's Department of Fair Employment and Housing ("DFEH") likewise construe the ADEA and FEHA, respectively, to forbid discrimination against retirees. *See* 72 Fed. Reg. 72938 at 72940 (Dec. 26, 2007) (under a discussion entitled "Coverage for Retirees," the EEOC explained that "all of the anti-discrimination statutes also protect former employees when they are subjected to discrimination arising from the employment relationship."); ER III at 0377 (DFEH observes that under existing law FEHA prohibits employers to discriminate on the basis of age with regard to the health benefits of retirees).

Finally, the Legislature amended FEHA in 2010 to create a narrow "safe harbor" that expressly permits employers to discriminate against their retired employees based on age, but only in the limited circumstance of providing retirement health benefits that expire when retirees reach age 65 and become Medicare-eligible. Gov't Code § 12940(a)(5)(B). If FEHA did not protect retired employees generally, there would have been no need to create a safe harbor for a

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[7] *See also Passer v. American Chemical Soc.*, 935 F.2d 322, 330 (D.C. Cir. 1991) ("[t]he term 'employee' . . . includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship."); *Lawrence v. Town of Irondequoit*, 246 F.Supp.2d 150, 161 n.3 (W.D.N.Y. 2002).

specific *type* of discrimination against retired employees. *See Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990) (when legislature exempts a specific sub-type of a thing from statute's scope, it can be presumed that the broader category to which the sub-type belongs *is* covered by the statute); *United States v. Miami University*, 294 F.3d 797, 813-814 (6th Cir. 2002) (same).

B. Retirement Health Benefits Are "Compensation" or "Terms, Conditions, or Privileges of Employment."

It appears that the District Court concluded, without discussion, that retirement health benefits such as the Retiree Premium Subsidy are "compensation" or "terms . . . or privileges of employment," within the meaning of FEHA. The County had strained to argue to the contrary, but the District Court's conclusion was compelled by caselaw, administrative interpretations of FEHA and the ADEA, and common sense. *See Erie County*, 220 F.3d at 208 ("health coverage and other benefits which a retired person receives from his or her former employer" fall within the definition of "compensation, terms, conditions or privileges of employment," even though they are received during retirement); *Knight v. Hayward Unified School Dist.*, 132 Cal.App.4th 121, 128 (2005) (under FEHA, "terms and conditions" of employment "include fringe benefits such as healthcare insurance"); ER III at 0377 (DFEH opining that "[u]nder existing law, the FEHA prohibits all employment decisions made on the basis of age—including the decision to *reduce or eliminate retiree health benefits*") (emphasis added).

And, here again, if FEHA did not apply to retirement health benefits generally, there would have been no reason for the Legislature to exempt a certain *type* of age discrimination with regard to retirement benefits in section 12940(a)(5)(B).

C. The County Discriminated "Because of Age" When It Evicted Retirees From the Integrated Health Plan and Premium Pool.

Because retirees are "persons" within the meaning of section 12940(a), and retirement health benefits are "compensation" or "terms . . . of employment," the only remaining question is whether Retirees' allegations and evidence "plausibly suggest" that the County acted "because of age" when it evicted Retirees from the commingled health plan and premium pool. As explained below, the answer is a clear "yes."

1. Employers Engage In Unlawful Age Discrimination When They Target Retirees "On the Assumption" That They "Are Likely to Be Older."

The United States Supreme Court has twice addressed the question of how to apply age discrimination statutes to an employer's decisions relating to retirement benefits. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135 (2008). The question can be a tricky one because of the close relationship between retirement status and age. On the one hand, retirement status correlates with age, such that an employer in a practical sense targets "age" *any* time that it targets people with "retirement" status. *Hazen Paper*, 507 U.S. at 611. On the other hand, a plaintiff bringing a

disparate treatment claim must plead facts plausibly alleging discrimination *because of age*, that is, that "age played a role" in the employer's decision-making process and had "a determinative influence on the outcome." *Kentucky Retirement Systems*, 554 U.S. at 141-142, *citing Hazen Paper*, 507 U.S. at 610.

The Supreme Court has resolved this issue with the following formulation. An employer does not engage in unlawful discrimination when it targets persons with a certain retirement status *purely* because of their retirement status, and in that process "*ignores*" age. In that instance, the "prohibited stereotype ('Older employees are likely to be _____') would not have figured into the decision . . ." *Id.* at 612. However, an employer *does* engage in unlawful age discrimination when it targets persons with a certain retirement status "on the assumption that [they] are likely to be older" or, stated another way, when it "suppose[es] a correlation between [age and retirement status] and act[s] accordingly." *Id.* at 612-613. "In such a case . . . age, not pension status, would have 'actually motivated' the employer's decisionmaking." *Kentucky Retirement Systems*, 554 U.S. at 142-143, *quoting Hazen Paper*, 507 U.S. at 613.

2. Under *Hazen Paper* and *Kentucky Retirement Systems*, Retirees' Allegations at the Very Least "Plausibly Suggest" That the County Split the Pool Because of Age.

Once the County formulated its decision to evict Retirees from the historically-integrated premium pool *because* of their age, it "labeled" its decision

in terms of an anodyne distinction between "active" and "retired" employment status; it did not overtly mention age on that label. But *Hazen Paper* and *Kentucky Retirement Systems* require courts to look to circumstances *beyond* the label that the employer places on its policy or decision, to determine whether that label serves as a "proxy" for an underlying age-related motivation.

To make this determination regarding the County's underlying intent, and to discover whether it premised its decision on "assumptions" regarding Retirees' age, the Court must make a "sensitive" and "practical" inquiry into the "totality of the circumstances" surrounding the challenged policy. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-267 (1977) (determining whether prohibited stereotype was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425-426 (2d Cir. 1995) ("Discriminatory intent may be inferred from the totality of the circumstances . . ."); *Hallmark Developers, Inc. v. Fulton County, Ga.*,466 F.3d 1276, 1283 (11th Cir. 2006) (because "explicit statements" of discriminatory motivation are decreasing, "circumstantial evidence must often be used to establish the requisite intent"). Circumstances relevant to determining motivations and assumptions include (1) the historical background of the decision; (2) the "specific sequence of events leading up to the challenged decision"; (3) "contemporary

statements by members of the decisionmaking body"; (4) evidence of the motives and assumptions of those who are advising the legislative body; and (5) substantive departures from past practice, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *LeBlanc-Sternberg*, 67 F.3d at 425-426.[8]

Retirees' allegations regarding the circumstances leading up to the splitting of the premium pool *at least* plausibly suggest that, when the County took that action, it "supposed a correlation" between age and retirement status, and a correlation between age and health care expenses, and "acted accordingly." *Hazen Paper*, 507 U.S. at 612. Indeed, Retirees introduced evidence placing the truth of those allegations beyond dispute.

As explained above, the County's Employee Benefits Director, Patricia Gilbert, served as the functional leader of the Retiree Medical Panel. In 2008 Ms. Gilbert submitted a declaration, under oath, explaining the Board's decision to create a separate "retiree-only" health plan and premium pool. In clear and certain terms, Ms. Gilbert explained that in 2008 the Board evicted Retirees from the historically-integrated health plan and premium pool *for the purpose* of addressing

[8] Even at first glance, this Court should be skeptical of a dismissal, without leave to amend, of a claim whose resolution turns on this sort of multi-factor factual inquiry regarding a defendant's intent. *See In re Magnetic Audiotape Antitrust Litigation*, 334 F.3d 204 (2nd Cir. 2003) (claims involving multi-factor tests are generally inappropriate for dismissal at the pleading stage).

financial strains caused by the "*aging population*" of that plan and premium pool. ER III at 0314, 0396 (emphasis added). She explained why the County believed that evicting "retirees" from the plan and pool would ameliorate this "aging" problem and make the plan and pool, on average, younger and therefore cheaper to insure:

> [b]etween 1985 and 2007, the County used a pool that combined retirees with active employees. Because the cost of active employee health care is generally less than that of *older, retired persons*, this had the general effect of increasing the cost of premiums for active employees (because they would be combined with an *older and more expensive population* in terms of health care expenses). Conversely, it had the effect of decreasing the cost of premiums for retirees because their rates would be based on a population that includes *younger persons*, who are *comparably less expensive* on average in terms of health care expenses.

Id. at 0395 (emphasis added). The County, through its attorneys, echoed Ms. Gilbert's sworn declaration testimony in a 2008 summary judgment brief, explaining that the commingled premium pool placed a financial burden on the County because it meant that retirees were integrated with the "generally *younger, healthier*" population of active employees. ER III at 0314, 0401. In the words of the *Hazen Paper* Court, the County's admissions leave no doubt that its decision to split the pool was premised on the "prohibited stereotype" that "older" plan participants "are likely to be (_____)." *Hazen Paper*, 507 U.S. at 612.

Retirees brought this FEHA claim in January 2009. The County has *never* contested the truth of Ms. Gilbert's sworn testimony. Nor has it proffered any alternate, non-age-based, motivation for its decision to target Retirees for eviction from the plan and premium pool. ER III at 0315.

Further, Ms. Gilbert's sworn testimony is conclusively confirmed by contemporaneous documents generated for and used by the Board-appointed Retiree Medical Panel in its deliberations and ultimate decision to expel Retirees from the commingled plan and premium pool. As explained above, those documents included clear, graphical presentations demonstrating the direct links that the County made—between retirement status and age, and age and health care costs—as the *foundation* of that decision. *See supra* pp. 16-19. They show that, to estimate the cost savings that would result from evicting "retirees," the Panel relied *exclusively and directly* on assumptions and stereotypes regarding *age*. These facts are confirmed by testimony from members who served on that Panel and recall the Panel's use of these documents and its application of these stereotyped assumptions. *Id.*

Retirees allegations also included the (indisputable) allegation that, at public sessions dealing with the Board's consideration whether to evict Retirees from the commingled health plan and risk pool, Board *members* expressly focused on age (not retirement status) in making the decision to evict Retirees from the

commingled plan and risk pool. ER II at 0151-0152; ER III at 0267. These comments confirmed that the commingled plan and premium pool were becoming more of a burden to the County *not* because Retirees were retirees, but because retirees were getting older, and therefore there were more "older" people in the historically-integrated health plan.

3. An Illustrative Hypothetical

The fact that the County acted "because of age" when it targeted Retirees may be illustrated by a hypothetical scenario that assumes the same historically-commingled County health plan and premium pool, but replaces "age" with "gender" as the relevant targeted classification. Suppose that, in 2006, the County's efforts to reduce health insurance costs focused on assumptions that (1) women on average have a larger number of health insurance claims than men; and (2) women made up 70% of the County's retiree population, but only 50% of its active employee population. Suppose that, based on *these* assumptions, the County decided to target all "retirees" for elimination from the commingled plan and pool, *not* because they were retirees, but because they were as a group "too female," and therefore drove up the costs of the commingled premiums. Suppose that retirees challenged *that* decision under FEHA, and proffered allegations and evidence conclusively establishing that these gender-based stereotypes were the County's explicit, and only, motivation in taking that action.

Under this scenario, there is no doubt that the County would have unlawfully acted "because of gender," despite the fact that it ostensibly targeted only a "retirement status."[9] Nor is there any doubt that the Court would be required to look beyond the sanitized "retired vs. active" *label* that the County placed on its decision, and examine the assumptions and motivations that informed and animated that distinction. Under FEHA, age discrimination is prohibited to the same extent and in the same manner as gender discrimination; employers cannot make decisions "based on" either classification, whether overtly *or* by proxy. Gov't Code §§ 12940(a); 12941. If these hypothetical allegations and proffers plausibly suggest gender discrimination, then Retirees' allegations and evidence at a minimum plausibly suggest age discrimination.

D. The District Court Erred In Concluding That the County Did Not Target Retirees "Because of Age" Within the Meaning of FEHA.

The District Court appeared to acknowledge that the only disputed question presented by Retirees' FEHA claim is whether the County targeted Retirees solely as retirees, or *because* of its stereotyped assumptions regarding their age. *See* ER I at 0013 ("In *Kentucky Retirement Systems v. E.E.O.C.*, the Supreme Court stated that 'discrimination on the basis of pension status could sometimes be unlawful

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[9] *See City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978) (employer engages in unlawful gender discrimination when its policies regarding retirement benefits are premised on "true" stereotypes about women) (discussed further *infra*).

under the ADEA, in particular where pension status served as a 'proxy for age,' but only when the differences in treatment were 'actually motivated' by age, rather than pension status."). However, in the analysis that followed that recognition, the District Court failed to do what *Kentucky Retirement Systems* and *Hazen Paper* require, that is, look beyond the facial distinction that the County applied ("retired" *vs.* "active" employees), to the alleged motivations and assumptions that led to that distinction. Every portion of the District Court's rationale is infected with this fundamental error.

1. The District Court Misapplied ADEA Precedents

Retirees agree that ADEA precedents must guide the analysis of their FEHA claims. However, in granting the County's Rule 12(b)(6) motion here, the District Court misinterpreted and misapplied the teaching of three such cases.

a. *Kentucky Retirement Systems*

In *Kentucky Retirement Systems*, 554 U.S. at 142-143, the Court was asked to decide whether Kentucky's enactment of an amendment to a pension statue violated the ADEA. The existing pension laws provided that an employee vested in his or her pension after completing five years of service *and* reaching the age of 55. Under the challenged amendment a "hazardous position" State worker who became disabled on the job before age 55 would have extra years of service imputed to "make" him or her 55 years old and therefore pension-eligible. *Id.* at

138-139. The plaintiff was a hazardous position worker who became disabled at age 61, after securing pension status under the existing system. He argued that the amendment violated the ADEA because it did not provide him with any "imputed" years of service, as it would have for a younger worker in his situation. *Id.*

The Court analyzed six separate circumstances surrounding the enactment of that particular law, to determine whether Kentucky had used pension status as a "proxy for age." Those factors, *combined with* the fact that the plaintiff adduced no evidence that an age-based motive lurked *behind* the face of the statute, led the Court to conclude that this was a "quite special case," where an employer distinguished based on pension status, and pension status is a function of age, but the employer did not use pension status as a "proxy for age." *Id.* at 148.

Here, the District Court purported to apply the fact-driven conclusion of *Kentucky Retirement Systems* to support its holding, that County's motive was not age-based. The sum total of the District Court's analysis is this one sentence:

> Many of those [*Kentucky Retirement Systems*] factors also *suggest* that, in this case, "splitting the pool" would not be unlawful under the *Kentucky Retirement Systems* standard. *Id.* at 144, 146 (noting that the disputed action was not "an individual employment decision, but a set of complex systemwide rules" and that "the disparity turns on pension eligibility and nothing more").

ER I at 0013. The District Court's application of *Kentucky Retirement Systems* is erroneous, for a number of reasons.

First, the District Court was forbidden to grant the County's Rule 12(b)(6) motion based on *its* view of what the alleged facts "suggest." If the alleged facts "plausibly suggest" that the County *did* take account of age (or failed to "ignore age") when it targeted Retirees, the District Court was required to deny the County's motion and allow the claim to proceed. This is true even if for some reason the District Court was confident that the alleged facts "suggest" something different. *See Anderson News v. American Media, Inc.*, 680 F.3d at 185 (2d Cir. 2012) ("[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion," even if the Court "finds the defendant's version more plausible").

Second, in examining the circumstances surrounding the challenged Kentucky pension amendment, the Supreme Court had before it a fully-developed summary judgment record. *Kentucky Retirement Systems*, 554 U.S. at 140 ("The District Court, making all appropriate *evidence-related* assumptions in [plaintiff's] favor, *see* Fed. R. Civ. Proc. 56, held that [the plaintiff] *could not establish age discrimination*, and in granted summary judgment in the defendant's favor.") (emphasis added). Here, the District Court dismissed Retirees' claim on a Rule 12(b)(6) motion. It is a clear mistake of law to hold that, because the plaintiff in one case failed to adduce evidence of an age-based motive, a different plaintiff, in

a different case, involving different circumstances, should be denied the *opportunity* to adduce such evidence to support its claim.

Third, a key consideration that led the *Kentucky Retirement Systems* Court to hold that the State was entitled to summary judgment was this: the plaintiffs had failed to offer *any* evidence that aged-based assumptions or motivations lay behind the State's challenged statute's *facial* (and facially lawful) distinction between employees with differing "retirement" statuses. *Kentucky Retirement Systems*, 554 U.S. at 147 ("the Plan does not, *on its face*, create treatment differences that are 'actually motivated' by age . . . [and] we accept the District Court's finding that the [EEOC] has pointed to *no additional evidence* that might permit a factfinder to reach a contrary conclusion") (emphasis added). Here, by stark contrast, Retirees alleged—and proffered supporting evidence—that by the County's own admission its facial distinction between active and retired employees was actually motivated by its stereotyped assumptions regarding Retirees' relative age, and traits that "older" people are likely to have.

Fifth, the *Kentucky Retirement Systems* Court stressed, twice, that is was *all six* of the factors that in combination "eliminate the possibility" that age-related assumptions informed the drafting and enactment of the challenged pension amendment. *See Kentucky Retirement Systems*, 554 U.S. at 143 ("the following circumstances, *taken together*, convince us that, *in this particular instance*,

differences in treatment were not 'actually motivated' by age") (emphasis added); *id.* at 147 ("The above factors *all taken together* convince us" that the differences in treatment were not actually motivated by age) (emphasis added). Here, the District Court grafted the *conclusion* of the Supreme Court's six-factor analysis onto its analysis of Retirees' FEHA claim, based on the bare, parenthetical mention to only two of those six factors.

Fifth, the District Court plainly erred even in its application of the two factors that it chose to mention. It suggested that, like the pension statute amendment at issue in *Kentucky Retirement Systems*, the Board's eviction of Retirees from the commingled health plan and premium pool was "not an individual employment decision," but rather a "set of complex systemwide rules." ER I at 0013. But there was no evidence before the District Court, or even argument from the County, that the decision to segregate Retirees into their own plan and premium pool was *at all* similar in "complexity" to Kentucky's amendment of its statewide pension scheme. In fact, there was *nothing* complex about the County's decision, or about the express motivations and assumptions that motivated it. The County simply "suppose[ed] a correlation" between age and retirement status "and act[ed] accordingly." *Hazen Paper*, 507 U.S. at 612-613. The fact that these suppositions and actions were directed at thousands of older

persons does not render them more "complex," or any more lawful, than if the target was one older "individual."

The second factor to which the District Court alluded was the fact that the "disparity" created by the Kentucky pension amendment "turn[ed] upon pension eligibility *and nothing more*." ER I at 0013 (emphasis added), *quoting Kentucky Retirement Systems*, 554 U.S. at 146. However, that statement in *Kentucky Retirement Systems* was a factual *conclusion* that followed the Court's (1) extended analysis of the "facial" motivations behind the challenged law, and (2) acknowledgement that the plaintiffs presented no evidence age-related stereotypes were at work behind those facial motivations. *Kentucky Retirement Systems*, 554 U.S. at 144-146. And that analysis included the Court's observation that "[t]here is a clear *non-age-related rationale* for the disparity here at issue . . . [a]ge factors into the disability calculation *only because* the normal retirement rules themselves permissible include age as a consideration." *Id.* at 145 (emphasis added). Here, by sharp contrast, (1) the County has never even suggested a "non-age-related rationale" for its decision to split the pool; and (2) age "factored" into the County's decision not only secondarily and incidentally, but expressly and as its *sole* motivation.

b. *Doyle v. City of Medford*

In *Doyle v. City of Medford*, 2011 WL 4894077 (D. Or. Oct. 13, 2011), the plaintiffs alleged that the city engaged in disparate treatment and disparate impact age discrimination in violation of the ADEA, when it decided to switch to a health plan that did not include coverage for retired city managers and police officers. *Id.* at *1. With regard to the disparate treatment claim, the district court in *Doyle* granted summary judgment in favor of the city on the grounds of issue preclusion. The plaintiffs had lost at trial in state court on their parallel state law disparate treatment claim, when they failed to prove that age played a role in the city's decision. *Id.* at *2 (quoting state trial court factual finding that "Defendant dealt with these plaintiffs in their status as retirees, *not because of the age of these plaintiffs*") (emphasis added). Observing that the ADEA disparate treatment claim presented the same issue of the city's motive, the district court held that the plaintiffs were barred from relitigating it in federal court. *Id.* This Court affirmed that ruling, holding that "[a] state court has already decided that the City's policy does not treat retirees differently based upon the protected characteristic of age, and the district court correctly gave preclusive effect to that prior decision." *Doyle v. City of Medford*, 2013 WL 1039107 at *1 (9th Cir. 2013) (emphasis added).

The *outcome* in *Doyle*, after trial, does not answer the question presented by the County's Rule 12(b)(6) motion in this case: did Retirees *here* allege facts that

plausibly suggest that the County targeted them because of its assumptions regarding their age? By relying on *Doyle*'s summary judgment/post trial ruling to grant a Rule 12(b)(6) motion on the pleadings, the District Court short-circuited the required analysis, failed to look beyond the face of the County's decision, and denied Retirees the right to present *their* evidence of age-based motive.

Indeed, the procedural history of *Doyle* undercuts the District Court reliance on its outcome. In 2007, the district court in *Doyle* had granted summary judgment in favor of the city, finding that as a matter of law it had discriminated purely on the basis of retirement status, not on the basis of age. *Doyle v. City of Medford*, 2007 WL 2248161 (D. Or. 2007), *citing Hazen Paper*, 507 U.S. at 611. On appeal this Court reversed, holding that the district court should have granted the plaintiffs a continuance to develop *evidence* regarding the city's intent. *See Doyle v. City of Medford*, 327 Fed.Appx 702 (9th Cir. 2009). It was after remand from this Court that the district court granted summary judgment a second time in 2011, this time because, in the interim, the trial in state court had established as a matter of fact that the city did not have an age-based motive. This Court's 2009 reversal necessarily recognized that, under *Hazen Paper*, discriminating based on retirement status is not *per se* lawful, and the plaintiffs were entitled to a fair opportunity to *prove* that the city used retirement status as a proxy for age.

Further, the holding from *Doyle* on which the District Court relied—that the city "may distinguish between active and retired employees without violating the ADEA"—was the *Doyle* court's holding regarding the plaintiffs' disparate *impact* claim, and it was based on the fact that the city established the "reasonable factor other than age" defense under the ADEA. A disparate impact claim presents different issues than a disparate treatment claim. *See Turman v. Turning Point of Cent. California, Inc.*, 191 Cal.App.4th 53, 61 (2010) ("Disparate treatment and disparate impact are different theories of discrimination, requiring different proof."). The latter focuses on evidence the employer's motives and assumptions; the former asks whether, "regardless of motive," a policy disproportionately affects members of a protected class and is not justified by reasonable business considerations unrelated to age. *Id.*

The District Court made no effort to explain why or how this holding regarding a disparate impact claim is relevant to Retirees' disparate treatment claim. And the County has never even contended that *its* decision to target Retirees for disparate treatment was based on any "reasonable factor" at all.

c. *County of Erie*

After warning that what it was about to say was "obviously" dicta, the Third Circuit in *County of Erie* offered the following speculation, regarding a

hypothetical employer's hypothetical decision to provide different retirement health benefits to active and retired employees:

> We do note, however, that it *would seem* difficult to contend that such a distinction *would be* based on any "individual's age," *as it would be* predicated instead on the individual's employment status.

County of Erie, 220 F.3d at 216 (emphasis added). The District Court cited this passage as further support for its refusal to permit Retirees to adduce evidence to prove their FEHA claim. This was error.

The *County of Erie* court may have been correct in musing, from the point of view of pure speculation, that non-age-based considerations could motivate an employer to distinguish between active and retired employees with regard to health benefits. For example, an employer might exclude retirement coverage simply wish to avoid the additional administrative costs that come with maintaining a *larger* employer-sponsored health plan. In such a case, its decision to "draw the line" between active and retired employees would have an age-related *effect* (because retirees as a group tend to be older than active employees), but it would not have been motivated by age or age-based stereotypes.

However, these general observations are of little use where, as here, a court is tasked with examining specific allegations regarding an actual employer's actual decision to discriminate on the basis of retirement status with regard to health insurance benefits. *Hazen Paper*, *Kentucky Retirement Systems* and *Doyle*—all of

which were decided after *County of Erie*—teach that the lawfulness of an employer's decision to discriminate on the basis of retirement status must be determined by an examination of the particular circumstances surrounding each such decision. The dicta from *County of Erie* is no justification for a district court to rely on *a priori* notions and speculation about what those underlying motives might "seem" to be, as a substitute for a careful examination of what they actually were.

2. The District Court Erred in Disregarding Retirees' Compelling Allegations Regarding the Central Role That Age-Related Stereotypes Played in the County's Decision.

As discussed above, in 2008 the County submitted a declaration from its Employee Benefits Manager, Patricia Gilbert, in connection with its summary judgment motion. In that declaration, Ms. Gilbert explained the County's decision to "split the pool" was motivated by financial concerns related to the "aging population" of its health plans, and she explained the *direct* link between that "aging population" problem and the County's historic practice of maintaining an integrated health plan and premium pool that included active and retired employees. ER III at 0395-0396. The County echoed Ms. Gilbert's sworn declaration testimony in a 2008 summary judgment brief, in which it explained that the pooling of active and retired employees from 1985 through 2007 resulted in retiree rates being lower "because their [claims] experience was commingled with

the experience of the active (generally *younger, healthier*) population." ER III at 0401 (emphasis added).

The District Court looked at these clear admissions and drew the *factual* inference, in favor of the County, that they did not suggest that the County's motive was age-based. ER I at 0015. The District Court provided three reasons for reaching this conclusion. All are baseless.

First, the District Court observed that these admissions "originated after this litigation began." ER I at 0015. It is true that they originated after the *REAOC* Lawsuit began, but that hardly undercuts their weight or validity. Presumably, a great many evidentiary admissions are made during litigation by or against the party who made them. Indeed, the fact that the County made these admissions under the close guidance of outside counsel, who are expert in the field of employment discrimination (and especially public-sector employment discrimination), would appear to lend *extra* credence to the truth of the matters admitted.

Second, the District Court opined that the admissions "*appear to be* responsive to statements" that Retirees made in their complaint regarding the County's motivation, "rather than reflective of impermissible age discrimination." *Id.* (emphasis added). Retirees are at a loss to understand why a party admission is not *really* an admission if it is "responsive" to a statement made by the other party.

Perhaps the District Court was suggesting that the County's characterizations, of its own reasons for targeting Retirees, "appeared" to reflect only the County's mindless parroting of *Retirees*' characterization of those reasons. If that was the Court's thinking, it clearly overstepped the bounds of a Rule 12(b)(6) motion. On such a motion district courts are *not* to choose among differing interpretations of alleged facts (and proffered evidence). *See Anderson News v. American Media, Inc.*, 680 F.3d at 185 (2d Cir. 2012) ("[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion," even if the Court "finds the defendant's version more plausible"). Even assuming *arguendo* that the District Court's interpretation of the County's admissions is a plausible one (it is not), it is also *at least* plausible that the Ms. Gilbert *meant* what she said in her declaration sworn under penalty of perjury, and that the County meant what it said in its filed summary judgment brief.

Third, the District Court opined that the admissions were nothing more than "general, uncontested statements about retirement and aging." ER I at 0015.[10] Here again, a Rule 12(b)(6) motion is no place for a district court to rely on its interpretation of allegations and evidence, so long as the plaintiff's interpretation is plausible. It is plausible, to say the least, that the County's sworn statements

[10] It is not clear what the District Court meant by "uncontested."

explicitly tying (1) its stereotyped assumptions about "retirement and aging" to (2) its employment decision to evict retirees from the health plan and premium pool, plausibly suggest that the County's decision *was tied* to those stereotyped assumptions. Indeed, the District Court's interpretation—that these were nothing more than "general . . . statements about retirement and aging"—unconnected to the County's employment decision—is manifestly *im*plausible.

The District Court compounded these errors by simply failing to discuss Retirees' additional compelling allegations, which confirm that the County's decision-making process was steeped in stereotyped assumptions regarding age and traits that "older" people are likely to share. Retirees alleged (and demonstrated) that the deliberations and recommendations of the Board-appointed Retiree Medical Panel, and the ultimate decision of the Board to split the pool, were founded on the *express* assumptions that (1) retirees were on average older than active employees; and (2) older people tend to have higher health care costs than younger people. ER II at 0151-0153; ER III at 0264-0266 *and* 0276-0280.

Those assumptions appeared in black-and-white in the 2004 Report, which included graphs and text clearly showing the relationship between retirement status, age, and health care costs. Retirees proffered declarations from two of the members of the Panel, confirming that the 2004 Report guided its deliberations. These allegations and this evidence reinforce the County's admissions, and at least

"plausibly suggest" that, when the County targeted Retirees, it did so based on the express assumption that they are "likely to be older" than active employees and therefore likely to have higher health care costs. *Hazen Paper*, 507 U.S. at 612-613; *Kentucky Retirement Systems*, 554 U.S. at 142-143.

3. The District Court Erred in Concluding, as a Matter of Law, That the County's Conduct Is Not the Sort of Age-Based Stereotyping That FEHA Is Intended to Prevent.

The District Court suggested that, even if the County did target Retirees based on stereotyped assumptions regarding their age and health care costs, this is not the sort of discrimination that the Legislature intended to be "*actionable* age discrimination under FEHA." ER I at 0012 (emphasis added). The court offered the following as support for its conclusion:

> The Court does not see how prohibiting employers from distinguishing between benefits plans for active employees and benefit plans for retired employees will reduce "stereotypes" that retired employees are generally older than most active employees and more likely to require more significant healthcare . . . even Plaintiffs and the many courts that have considered this case and the related REAOC case have repeatedly noted that retired employees tend to be older on average than active employees and that older people tend to have higher healthcare expenditures.

ER I at 0015. The District Court's reasoning is flawed, for several reasons.

First, the District Court began with the false premise, that the County *only* discriminated based on a distinction between active and retired employees. Here

again, this premise sidesteps the "discrimination by proxy" issue, begins with a conclusion regarding the County's intent, and therefore misses the thrust of Retirees' FEHA claim. As explained above, a disparate treatment claim under FEHA turns on the *motivation* behind an employer's policy or decision, not merely on the manner in which it chooses to characterize that policy or decision. The "purpose" of FEHA may not be well-served by prohibiting employers *in every circumstance* to distinguish between active and retired employees with regard to health benefits. But it *is* well-served by forbidding them to base such a decision explicitly on age-related assumptions and stereotypes.

Second, FEHA's stated purpose is *not* to "reduce stereotypes" in some general and amorphous way, but rather to remedy "the practice of denying employment opportunity and *discriminating in the terms of employment*" on the basis of age (or race, gender, *etc.*). Gov't Code § 12920 (emphasis added). Accordingly, if targeting retirees *because of* stereotyped assumptions regarding "older" people constitutes discrimination "because of age" (the Supreme Court has said it does), then the application of section 12940(a) to that conduct *will* accomplish the legislative purpose identified in section 12920, by "provid[ing] effective remedies that will eliminate these discriminatory practices." *See People v. Strong*, 87 Cal.App.4th 328, 337 (2001) ("Where strict adherence to a statute's

plain language also furthers its statutory purpose, such an interpretation can be safely said to effectuate its legislative intent.").

Finally, by observing that Retirees (and the courts) have "noted" the link between retirement and age, and between older age and higher health care costs, the District Court appeared to suggest that the "truth" of these stereotypes excuses the County's reliance on them in making its decision to split the pool. If that was the District Court's intent, it clearly erred. The United States Supreme Court has twice rejected that reasoning, concluding that anti-discrimination statutes forbid employers to premise employment-related decisions even on stereotypes that (1) are generally recognized as true, and (2) may lawfully form the basis for decisions and policies *outside* the realm of the employment relationship.

In *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), the employer argued that it was entitled to adjust pension contributions based on an employee's gender, to account for the fact that women as a group tend to outlive men. The Court disagreed. It held that, although the employer's policy "involves a *generalization that the parties accept as unquestionably true*," Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 707 (emphasis added). The Court explained that this proposition "is of critical importance in this case because there is no assurance that *any individual woman* working for the Department will actually fit the

generalization on which the Department's policy is based," and "[m]any of those individuals will not live as long as the average man." *Id.* (emphasis added). "Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." *Id.*

The Court repeated that holding in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), another case in which the employer sought to apply different pension pay-out formulas for women and men, again to account for the "true" fact that women, as a group, tend to live longer than men. The Court applied *Manhart* to conclude that this policy also constituted unlawful gender discrimination: "What we said in *Manhart* bears repeating: "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." *Id*. at 1083-1084. Accordingly, "[e]ven a true generalization about [a] class cannot justify class-based treatment." *Id.* at 1084. The Court noted that actuarial studies would undoubtedly find that life expectancy differs among members of different races as well. But the "truth" of such generalizations would hardly make it lawful for an employer to premise its policies on them. *Id.*

Here, it is true that, *as a group*, Retirees were older than active employees and that on average older age correlates with higher health care costs. But to use the phrasing from *Manhart*, "there is no assurance that any individual [Retiree] will actually fit the generalization on which the [County's] policy is based," and

"[m]any of those individuals will not" have higher health care costs than the average active employee. *Id.* Thus, "[i]ndividual risks, like individual performance, may not be predicted by resort to classifications proscribed by [FEHA]." *Id.*

The District Court attempted, but failed, to distinguish *Manhart*. It reasoned that *Manhart* dealt with a policy premised on "improper treatment of individuals as simply components of" a (protected) class of persons, whereas here the County "created a distinction based on retirement status, not a protected class." ER I at 0015-0016. But here again the District Court begs—but fails to address—the salient question. Yes, the County "created a distinction" that *on its face* was "based on retirement status." But Retirees allege that the County used retirement status as a "proxy for age," through which it acted on its age-related stereotyped assumptions. There is no reason for "truth" to be a defense in proxy discrimination cases any more than it is in direct discrimination cases. If the County made its "retired *vs*. active" distinction based on assumptions regarding Retirees' age, then it engaged in unlawful age discrimination, no matter how "true" its assumptions were. *Id*.; *Manhart*, 435 U.S. at 707.

This point can be highlighted by returning to the hypothetical "gender" illustration set forth above. If the County had targeted "retirees" as a class on the assumptions that (1) as a group they are more "female" than active employees, and

(2) women have higher health care costs than men, *Manhart* and *Norris* would undoubtedly compel a finding of unlawful gender discrimination. The fact that the County would have used "retirement" as a proxy for gender, rather than targeting gender directly, would provide no principled basis on which to distinguish the Supreme Court precedents.

CONCLUSION

For the foregoing reasons, Retires have met and exceeded the requirement that they allege facts plausibly suggesting that they are entitled to relief. Retirees respectfully request that this Court reverse the District Court's dismissal of their Grant Benefit and age discrimination claims.

DATED: August 9, 2013

Respectfully submitted,

LAW OFFICE OF MICHAEL P. BROWN

By: */s/ Michael P. Brown*
Attorney for Appellants

STATEMENT OF RELATED CASES

This appeal is related to *REAOC v. County of Orange*, SACV 07-1301 (C.D. Cal.), Ninth Circuit Appeal No. 12-56706, currently pending in this Court. Like this case, *REAOC* is before this Court on a second appeal.

DATED: August 9, 2013

Respectfully submitted,

LAW OFFICE OF MICHAEL P. BROWN

By: */s/ Michael P. Brown*
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 9, 2013. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: August 9, 2013

Respectfully submitted,

LAW OFFICE OF MICHAEL P. BROWN

By: */s/ Michael P. Brown*
Attorney for Appellants

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Signature of Attorney or Unrepresented Litigant: s/ Michael P. Brown

("s/" plus typed name is acceptable for electronically-filed documents)

Date: August 9, 2013

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