No. 19-56387

IN THE 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.

Appeal from The United States District Court
Central District of California - Case No. SACV 09-0098 AG
Hon. Andrew J. Guilford

OPENING BRIEF OF APPELLANTS

Michael P. Brown, Cal. Bar No. 183609
GORDON TILDEN THOMAS CORDELL LLP
600 University Street, Suite 2915
Seattle, WA 98101
Tel. (206) 467-6477
Fax (206) 467-6292

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes

TABLE OF AUTHORITIES

Page

Other Authorities

Rules

I. INTRODUCTION

In this lawsuit, Appellants ("Retirees") challenge Appellee County of Orange's unilateral and drastic reduction, in 2008, of a retirement health benefit referred to as the 1993 Grant Benefit. That benefit was expressly promised to Retirees as an element of the compensation they earned while employed with the County. Retirees were entitled to continue to receive the 1993 Grant Benefit throughout their retirements, or, at a minimum, for as long as the bargained-for funding mechanism for that benefit lasted. The County's unilateral reduction of the benefit constituted breach of contract and a violation of the Contracts Clauses of the Federal and State constitutions.

Retirees filed this lawsuit in February of 2009. This is the third time the District Court has dismissed Retirees' grant-based claims. This Court reversed the first two dismissals, in 2012 and 2018, respectively. This latest appeal is from the District Court's November 13, 2019 grant of summary judgment in favor of the County. This Court should reverse the District Court again, for the following reasons.

First, the District Court held that Retirees' grant claims fail as a matter of law, because of certain "non-vesting" provisions in a document called the 1993 Plan Document. However, in *Harris IV*, this Court held that the 1993 Plan Document did ***not*** defeat Retirees' claims as a matter of law. It reasoned that,

while Retirees' claims arise under bilateral collective bargaining agreements (called Memoranda of Understanding, or "MOUs"), Retirees had alleged the 1993 Plan Document was ***unilaterally*** prepared by the County, outside the collective bargaining process and without the unions' assent. *Harris IV*, 902 F.3d at 1069 n.5. That holding is conclusively supported by California law, which forbids public employers to take unilateral action to limit or remove rights conferred under MOUs. After remand, Retirees proffered overwhelming evidence to support the allegations on which this Court relied. The County offered no contradictory evidence. There was no basis for the District Court's departure from this Court's holding.

Second, the District Court held that general duration clauses in the MOUs indicated that the County did not intend to confer rights to the 1993 Grant Benefits beyond the one-to-three year term of each contract. Here again, ***this*** Court clearly rejected the same "general durational term" argument in *Harris IV*. *Id.* at 1068-69. It reasoned that, in light of the funding mechanism and bargaining history related to the 1993 Grant Benefit, the County's position—that the benefit was limited to the short general duration of the MOU—was "considerably less plausible" than Retirees' assertion, of a continuing right to receive the benefit after the MOU expired. *Id.*

Third, the District Court failed to credit Retirees' extensive and compelling extrinsic evidence of the parties' intent, that the 1993 Grant Benefit formed a component of Retirees' deferred compensation and therefore vested upon retirement. Most obviously, this Court held in *Harris IV* that Retirees' alleged evidence "strongly reinforced" their claim, that the grant benefit was an element of "deferred compensation" that could not be reduced after retirement. *Harris IV*, 902 F.3d at 1069. Here again, these allegations were overwhelmingly supported by Retirees' evidence after remand. Retirees offered even more evidence of an intent to vest; the District Court did not address that evidence at all. The supreme courts of three states have concluded—on much less compelling evidence—that bargained-for retirement health benefits constitute deferred compensation, and as such vest upon retirement. The California Supreme Court would follow their lead.

Fourth, the District Court granted summary judgment on both of Retirees' alternative theories of liability—that they had a right to receive the 1993 Grant: (1) throughout their retirements or, at a minimum; (2) for as long as the bargained-for funding mechanism lasted. But the County's Motion addressed only the first theory; it made no mention at all of the second. The District Court was made aware of this, and yet nevertheless granted judgment on the second theory. That ruling was procedurally defective, because Retirees' obligation to adduce evidence supporting the second theory was never triggered. It was also substantively flawed,

because the evidence that was already in the record was more than sufficient to defeat summary judgment on both theories.

II. STATEMENT OF JURISDICTION

The District Court had jurisdiction over this dispute under 28 U.S.C. § 1331, because it includes a claim brought pursuant to 42 U.S.C. § 1983 and the Contracts Clause of the United States Constitution, and under 28 U.S.C. § 1367 because the state law claims form part of the same case or controversy. This Court has jurisdiction over this appeal because the District Court issued an order granting summary judgment in favor of Appellee on all claims, and entered judgment thereon. ER I, Tab A; ER II, Tab C. 28 U.S.C. § 1291. Plaintiffs timely appealed. ER II, Tab B; FRAP 4(a)(4).

III. ISSUES PRESENTED

1. Did the District Court err by relying on the 1993 Plan Document to grant summary judgment for the County, when: (1) this Court already held that document did ***not*** preclude Retirees' grant claim, if the County adopted it outside the collective bargaining process; and (2) Retirees' evidence clearly demonstrated that the County did, in fact, adopt it outside the collective bargaining process?

2. Did the District Court err by relying on the general durational terms of the MOUs to grant summary judgment for the County, when this Court had already

rejected the argument that these terms governed the duration of the 1993 Grant Benefit?

3. Did the District Court err by failing to credit Retirees' evidence of an intent that the 1993 Grant Benefit vest upon retirement, including evidence this Court already held "strongly reinforced" Retirees' claim that the grant benefit was deferred compensation?

4. Did the District Court err in granting summary judgment on the ARBA Theory, when the County failed even to mention that theory in its Motion or Reply?

5. In addition to reversing the District Court, should this Court rule that Retirees' evidence was sufficient to survive summary judgment on the ARBA Theory?

IV. STATEMENT OF THE CASE

A. The background and negotiations leading to the 1993 Grant Program

From 1991 through 1993, the County, the unions, and the Orange County Employee's Retirement System ("OCERS") negotiated over the implementation of new retiree medical benefits, that Retirees will refer to as the 1993 Grant Benefits. ER II, Tab J at ¶ 12. The backdrop of those negotiations is as follows.

In or about 1991, there was an ongoing dispute among the County, OCERS and the unions over what was to be done with some $200 million in surplus funds

held by OCERS. The County contended that it could do what it wished with the funds, while the unions argued they had to be used to benefit County employees and retirees, because much of the surplus represented money employees had paid into the system in the form of retirement contributions from their paychecks. The County wanted to reach a deal to gain access these surplus funds, for several reasons: (1) to relieve general budgetary pressures; (2) to placate the unions regarding their demands for retiree medical benefits; and (3) to settle ongoing litigation with the County's largest labor union, the Orange County Employee Association ("OCEA"). *Id.*, ¶ 14; ER II, Tab L at ¶¶ 16–18. In a series of negotiations involving the three parties, the County proposed to settle the dispute by instituting the 1993 Grant Program. *Id.*

The County had an additional motivation in promising the 1993 Grant Benefits: it wanted to reduce its active workforce. It knew the new medical grant benefits program would induce thousands of active employees to retire earlier than they otherwise would have, saving the County tens of millions of dollars. In the memorandum accompanying the MOU amendments adopted by the Board in 1993, reflecting new grant program, the Board acknowledged that "another benefit of the [grant] program was the added incentive for early retirement," and that the new program will "further the County's goal in reducing the work force through early retirement incentives." ER III, Tab U at 381, 360. Indeed, the County predicted

that, "[w]ith the implementation of the [grant] program, we anticipate an ***additional 400 retirements in the next fiscal year*** . . . with an annualized savings of approximately $15.5 million." *Id.* at 360 (emphasis added). That prediction represented the savings for just the first year of the program; the program continued for 12 years after that, presumably with similar annual savings to the County each year.

B. The terms of the 1993 Grant Program

The County ultimately proposed, and the Unions and OCERS accepted, the following terms:

- The County would be allowed to use $150 million of the $200 million OCERS surplus funds for its own general purposes.
- The 1993 Grant Program would be funded by the following:
    - The remaining $50 million of the OCERS surplus funds, together with future investment earnings thereon;
    - A mandatory ongoing 1% payroll contribution from gross wages of all active employees;
    - A contribution from the County of 1% of total County payroll (approximately $6 million contribution in 1993);
    - A commitment from the County to provide additional funding should the primary funding mechanisms ever prove insufficient.

  - The County represented to the unions that this funding mechanism would pay the 1993 Grant Benefits for more than 30 years.
- The County would grant a general one-time salary increase averaging approximately 1%.
- Retirees would receive the following benefits under the new program:
  - A monthly stipend, calculated initially by multiplying years of creditable service by $10;
  - An annual cost-of-living adjustment ("COLA"), up to a maximum of 5%, to ensure the $10 multiplier kept pace with insurance premium inflation; and
  - A lump-sum cash payment of an employee's 1% salary contributions, should he or she leave County employment before becoming eligible for the 1993 Grant Benefit.

ER II, Tab J at ¶¶ 13, 15; ER II, Tab L at ¶¶ 13, 14, 18; ER II, Tab I at ¶ 5; ER II, Tab H at ¶ 9. An exemplar of the new MOU provisions can be found at ER III, Tab U at 311-14.

The negotiated MOUs explicitly stated that eligible retirees "***shall*** receive" the promised benefits "[u]pon paid County retirement." *Id.* at 311 (emphasis added). They said nothing about the County retaining any right to reduce or eliminate those benefits after an employee retired and began receiving them. *Id.*

The negotiated agreement between the County and OCERS respecting the disposition of the $200 million in OCERS surplus funds was reflected in a "Memorandum of Understanding Agreement" between the County and OCERS, effective February 1, 1993. ER II, Tab R at 233-37. That MOU created an account to hold funds explicitly set aside ***exclusively*** for the purpose of retirement health benefits. *Id.*, at 233-34 (MOU states that the identified funds are "set aside exclusively for paying towards health insurance for present and future retirees" and are "for the exclusive purpose of" such retiree medical benefits). That account was called the "Additional Retirement Benefits Account," or "ARBA." *Id.*, at 234. As such, the agreement came to be known as the "ARBA Agreement." ER II, Tab H at ¶ 9.

C. The County's non-negotiated, unilaterally-prepared 1993 Plan Document.

Separate from the collective bargaining process, the County unilaterally prepared the 1993 Plan Document. ER II, Tab J at 113-135 (1993 Plan Document); ER II, Tab L at ¶ 15; ER II, Tab H at ¶ 6; ER II, Tab K at ¶ 8. The specific provisions of that document, on which the County relies, are Sections 1.3, 5.4 and 5.5. Section 1.3 states that the County, "by establishing and maintaining this Plan, does not give any Employee, Retiree or any other person any legal or equitable right against the County" or "any vested right to the benefits provided hereunder." ER II, Tab J at 116-17. Sections 5.4 and 5.5 purport to reserve to the County the

right to amend or terminate the Plan "in its sole discretion," ***but*** "subject to the terms of any Memorandum of Understanding" with a labor union. ER II, Tab J at 116-17, 133-34.

The County ***now*** contends that these provisions were intended to take away the very same rights the County conferred, in the negotiated MOUs, to the grant benefits. However, had that been the intent, the County would have been required, under California's collective bargaining statute, to give advance notice of that fact to the unions, and an opportunity to bargain over it. Cal. Gov't Code § 3504.5. The County did not provide any such notice. ER II, Tab L at ¶ 15; ER II, Tab H at ¶ 6; ER II, Tab K at ¶ 8.

The County refers to the 1993 Plan Document as the "1993 Plan." This is misleading, because it conflates two things that must remain separate for purposes of the analysis of Retirees' claims: (1) the program, or "plan," of benefits the County ***negotiated*** with the unions in 1992, and which is reflected in the bilateral MOUs that resulted from those negotiations; and (2) the ***document*** the County separately and unilaterally prepared, which contains the provisions which the County now insists took away the very rights conferred in those MOUs. The County benefits from this ambiguity, because it allows it to assert that the unions "agreed to the 1993 Plan," suggesting the unions agreed to ***these provisions*** in the 1993 Plan ***Document***. *See*, *e.g.*, ER II, Tab P at 204:25-26. In fact, while the

unions certainly did agree to the program of benefits as set forth in the MOUs, they did not even know about—let alone agree to—the 1993 Plan Document or Sections 1.3 or 5.4/5.5 thereof.

D. The County's long history of treating retiree medical grant benefits as vested once an employee retires.

From 1966 through 1978, the County had provided a different "grant" benefit to defray the cost of health insurance for retirees (the "1966 Grant"). ER II, Tab J at ¶ 19. That program was discontinued in 1978, but, importantly, those employees who had already retired at that time continued to receive that benefit throughout their retirements. *Id.* The County made this elimination of the 1966 Grant prospective only, recognizing that retirement health benefits of retired employees were not subject to change, unless that change resulted in retirees receiving a benefit of equal or greater value. ER II, Tab K at ¶¶ 16, 20-21.

When the 1993 Grant Program was implemented, there were a number of retirees still receiving the 1966 Grant. ER II, Tab J at ¶ 19. The County was concerned about what it believed was the vested nature of the 1966 Grant, and whether it was lawful to switch retirees from the old to the new benefit without their explicit permission. Ultimately, it decided it was permissible to treat a retiree's election of the 1993 Grant Benefit—with the disclosure that it would result in the relinquishment of the 1966 Grant—as consent to surrendering the

1966 Grant, especially because the 1993 Grant Benefit was of much greater monetary value. *Id.*

E. The County's raid on the ARBA Account for purposes other than retiree medical benefits.

The ARBA Account had a balance of roughly $70 million as of 1993. ER II, Tab R at 240. By the end of 2000, it had grown to $384 million. *Id.* at 260, 262. But by the end of 2003, the entire $384 million was gone, and the ARBA Account had a balance of zero. *Id.* at 271. Remarkably, the County now says it does not know what happened to that $384 million. ER II, Tab P at 192:11-15, 193:14-16. But the undisputed evidence demonstrated that the County used the money it took from ARBA for its own financial benefit, and for a purpose ***other than*** the one exclusively contemplated by the parties and set forth in the ARBA Agreement, that is, the funding of retiree benefits. ER II, Tab H at ¶¶ 2, 10.

F. The County's use of an alleged funding "crisis" to unilaterally reduce Retirees' 1993 Grant Benefit.

Once the ARBA Account was gutted, the County began a years-long effort to reduce the 1993 Grant Benefits, using as its excuse the alleged "financial crisis" in the then-current grant program. ER II, Tab R at ¶¶ 22-23. In fact, the only funding "problem" was the result of the County's raid on the ARBA Account. The County engaged in prolonged negotiations with the labor unions in order to get them to agree to cuts in the ***future*** grant benefits of then-current employees.

Eventually the unions agreed that the future grant benefits for those employees would be cut in half when they reached age 65, and that the annual cap on the agreed cost of living adjustment would be cut from five percent to three percent. In exchange for the unions' concessions on these points, the County gave active employees significant pay raises, and eliminated the 1% employee contribution to the grant benefit program. ER II, Tab Q, at 208:20-22; ER III, Tab U at 354-57.

However, having secured active employees' agreement, and having compensated them well for that negotiated concession, the County ***unilaterally*** imposed the same substantial benefit reductions on all then-current retirees (that is, Retirees in this lawsuit). Unlike active employees, Retirees received nothing in return for what was taken from them, because they were not represented by the unions and had no negotiating power. They had already provided their consideration to the County, in the form of their labor, their $150 million concession in 1993 and their 1% contributions, in exchange for promised grant benefits that the County was now gutting.

G. The County's admission that the 1993 Grant Benefit was intended to be a "lifetime benefit" once an employee retires.

In 2006 the County made a presentation to the Board regarding its proposed reductions in the 1993 Grant Benefits. Echoing representations made at the bargaining table in 1992, the County explicitly acknowledged that, once an

employee retires, the grant benefit "is a ***lifetime*** benefit." ER II, Tab M at 166 (emphasis added).

H. Procedural History

1. Procedural history of Retirees' grant-related claims prior to *Harris IV*.

Retirees filed this lawsuit in February 2009, challenging the County's reduction of the 1993 Grant Benefits, as well as its elimination of a second retiree medical benefit called the Retiree Premium Subsidy. The District Court dismissed those claims in March of 2011, on the County's Rule 12(c) motion. *Harris v. County of Orange*, 2011 WL 13131113 (C.D. Cal. March 30, 2011). Retirees appealed. This Court reversed in 2012. *Harris v. County of Orange*, 682 F.3d 1126 (9th Cir. 2012). The District Court dismissed the claims again in 2013, on another Rule 12(c) motion. *Harris v. County of Orange*, 2013 WL 12133889 (C.D. Cal. Jan 30, 2013). It reasoned that the claims failed as a matter of law "because there is no explicit legislative or statutory authority requiring the County to provide the retirement benefits associated with the Grant." *Id.* at *3. Retirees again appealed.

2. This Court's ruling in *Harris IV*.

In 2018, this Court again reversed the District Court's dismissal of the grant claims. *Harris v. County of Orange*, 902 F.3d 1061 (9th Cir. 2018) ("*Harris IV*").It observed that the District Court's imposition of an "explicit language" requirement was contrary to clearly-established law:

> To the extent it was unclear before, *Sonoma* clarified that, once a plaintiff identifies an express contract covering the substance of a benefit, it may rely on ***extrinsic evidence*** to prove the existence of an implied term requiring the continuation of that benefit in perpetuity.

Harris IV, 902 F.3d at 1068 (emphasis added). It went on to hold not only that Retirees' vested rights claim was "plausibly" supported by their alleged evidence, it was "strongly reinforced" by that evidence. *Id.* That evidence, alleged by Retirees and relied on by this Court, was as follows:

- "[T]he agreement allowing the County to access $150 million in disputed surplus investment earnings controlled by OCERS," in exchange for the 1993 Grant Benefit Program;
- The County's estimate that the funding mechanism for the 1993 Grant Program "would cover the costs of the Grant program for at least 30 years";
- The fact that "active employees were required to contribute 1% of their wages to fund the Grant Benefits, which "supports the notion that the parties intended the benefit to be available for employees ***throughout their retirements***," and
- The fact that active employees "recoup[ed] any wages they contributed if they separated from County service before becoming eligible to receive the Grant Benefit," which "***strongly reinforced***"

> Retirees' claim to vested lifetime benefits, because it indicated that the grant benefit "constitute[ed] a form of deferred compensation assured to those employees who continued working until they became eligible for retirement" and the grant benefits.

Id. at 1069 (emphasis added).

In that appeal, the County argued that Retirees' right to the 1993 Grant Benefits was limited to the general durational terms of the MOUs (one to three years). This Court rejected that argument, concluding that it was "considerably less plausible" than Retirees' argument, that "the County promised to provide the benefit for a longer term than the period covered by each MOU." *Id.*

The County also argued that Retirees' grant claims were precluded by Sections 1.3 and 5.4/5.5 of the 1993 Plan Document. This Court rejected that argument. It observed that Retirees' claims arise from express and implied terms in MOUs, while the 1993 Plan Document was "a separate document." *Id.* at 1069 n.5. Further, this Court held that the 1993 Plan Document "provides no basis" for finding that Retirees' claims fail as a matter of law, because Retirees alleged: (1) it "was unilaterally created by the County . . . [and] not incorporated into or referenced in the binding contracts between the County and the unions"; and (2) its contents were never "discussed with or disclosed to the unions during the negotiations that led to the adoption of those agreements." *Id.*

This Court once again reversed the District Court and remanded. *Id.* at 1070.

3. Proceedings after the latest remand.

After remand, the County moved for summary judgment. However, in its Motion (and Reply), it addressed ***only*** Retirees' Vested Rights Theory. It completely ignored the ARBA Theory. ER II, Tabs E, Q. Nevertheless, the District Court granted summary judgment on that theory. In doing so, it gave Retirees no opportunity to respond to the clearly flawed rationale it offered for that ruling. ER I, Tab A at 9. The District Court also granted summary judgment on the Vested Rights Theory.[1]

Retirees timely filed this third appeal.

V. SUMMARY OF ARGUMENT

A. *Harris IV* and settled California law precluded the District Court's holding, that the 1993 Plan Document defeated Retirees' claims.

In *Harris IV*, this Court correctly held that the 1993 Plan Document "provides no basis" for defeating Retirees' grant claims, if it was prepared by the County outside the collective bargaining process. *Harris IV*, 902 F.3d at 1069 n.5. Long-settled California law, governing public sector employment relations, mandates that conclusion. On remand, Retirees adduced overwhelming evidence

[1] The Honorable Andrew J. Guilford, U.S. District Judge, presided over all of the District Court proceedings in this case. Judge Guilford retired from the bench shortly after issuing the summary judgment ruling from which this appeal is taken.

that the 1993 Plan Document was indeed prepared outside the collective bargaining process and without the assent of the unions.

The District Court nevertheless relied most heavily on the 1993 Plan Document, to hold that Retirees' claims fail as a matter of law. It based this holding, first, on the entirely unsupported factual finding, that the MOUs "adopted" the 1993 Plan Document (they clearly did not). Second, it held that the County's failure to bargain over the non-vesting provisions in the 1993 Plan Document was irrelevant, because that document was adopted "publicly" via Board resolution. But California law makes perfectly clear that public adoption of legislation is no substitute for compliance with the statutory requirement of collective bargaining.

B. The District Court erred, and failed to heed this Court's holding in *Harris IV*, by relying on the general durational terms of the MOUs.

The District Court held that general duration clauses in the MOUs indicated that the County did not intend to confer rights to the 1993 Grant Benefit beyond the one-to-three year term of each contract. Here again, ***this*** Court clearly rejected the County's "general durational term" argument in *Harris IV*. *Id.* at 1068-69. It reasoned that the County's position—that the benefit was limited to the short general duration of the MOU—was "considerably less plausible" than Retirees' proposition, of a continuing right to receive the benefit after the MOU expired. *Id.* There was no reason for the District Court to depart from that holding.

C. The District Court erred in dismissing Retirees' clear and convincing evidence supporting the Vested Rights Theory.

The District Court further erred by failing to credit Retirees' extensive evidence of vesting. Most notably, it dismissed the very evidence that, according to this Court, "strongly reinforced" Retirees' argument, that the 1993 Grant Benefits were elements of vested, deferred compensation. As the California Supreme Court recently reaffirmed, deferred compensation is, by its very nature, intended to vest upon retirement. *Cal Fire Local 2881 v. California Public Employee Retirement System*, 6 Cal.5th 965, 984-85 (2019). The supreme courts of three other states have held that retirement health benefits, promised in CBAs, constitute deferred compensation and as such vest upon retirement. The California Supreme Court would reach the same result here. And the District Court failed even to address other important evidence of vesting proffered by Retirees. At a minimum, Retirees' evidence raised triable issues of fact regarding the parties' intent that the 1993 Grant Benefits vest upon retirement.

D. The District Court erred in granting judgment on the ARBA Theory.

Retirees' complaint clearly pleaded the ARBA Theory as the second theory of recovery. The County failed even to mention, let alone address, the ARBA Theory in its Motion. Retirees devoted a separate section of their Opposition to discussing the ARBA Theory. The County again ignored it in its Reply. Nevertheless, the District Court granted summary judgment on that theory, without

giving Retirees ***any*** opportunity to respond to its erroneous reasons for doing so. That was obvious error and requires reversal. However, for the sake of avoiding more delays in the resolution of this 2009 case, Retirees ask this Court to go further and hold that the evidence was sufficient to raise a triable issue of fact with respect to the ARBA Theory.

VI. STANDARDS

A. Burden of proof for underlying claims.

1. Retirees must adduce clear or convincing evidence of the parties' intent with respect to the duration of the 1993 Grant Benefits.

This Court has held that county retirees may establish the duration of an explicitly-promised retirement health benefit, by "clear" or "convincing" extrinsic evidence. *Sonoma County Ass'n of Retired Employees v. County of Sonoma*, 708 F.3d 1109, 1114-15, 1120 (9th Cir. 2013) (vesting must be grounded on "a clear basis in the [MOUs] or convincing extrinsic evidence") (quoting *REAOC v. County of Orange*, 52 Cal. 4th 1171, 1176, 1183, 1187 (2011) ("*REAOC III*")); *see also id.* at 1117 (retirees' evidence must "clearly evince" an intent to grant vested benefits). A fact is established to the satisfaction of the clear -and-convincing standard, "so long as there is a high probability that the [fact] is true." *Broadman v. Commission of Judicial Performance*, 18 Cal.4th 1079, 1090 (1998) (citing BAJI No. 2.62 (8th ed. 1994)).

2. The District Court erred if it applied a more onerous burden.

In the District Court, Retirees identified the "clear intent" standard applicable to their Vested Rights Theory. ER II, Tab F at 63:2-7; ER II, Tab G at 69:4-5. In its discussion of the "applicable standard," the County similarly identified the standard as "clear" or "convincing." ER II, Tab Q at 211:13-19; ER II, Tab E at 50:15-17. However, the County also used the term "unmistakable" in describing Retirees' burden. ER II, Tab E at 51:10-12. The District Court similarly used both "clear intent" and "unmistakable" to refer to the standard. ER I, Tab A at 6. Summary judgment should not have been granted under either standard. However, if the District Court applied a standard stricter than clear-and-convincing, that was error.

Retirees' claim presents the identical question this Court addressed in *Sonoma*, that is: what is the implied duration of a retirement health benefit expressly promised in an MOU? *Sonoma*, 708 F.3d at 1115, 1117, 1120. This Court described the evidentiary burden for such a claim—as established in *REAOC III*—as one requiring "clear" and "convincing" evidence. It did not once mention any heavier burden. *Id*. This conclusion is strongly reinforced by the California Supreme Court's recent opinion, in *Cal Fire Local 2881*, 6 Cal.5th at 979-83. There, the court reviewed its *REAOC III* decision, and repeatedly identified the applicable burden, when deriving contract rights from legislation, as requiring a

"clear" demonstration of legislative intent. Indeed, the court used the word "clear" to describe the burden no fewer than five times in three pages. *Id.* at 979-82. The opinion makes no reference to the word "unmistakable" or any other word that would suggest a higher standard than "clear."

B. Standards on summary judgment

1. Summary judgment is improper on a contract claim, where the parties' intent is at issue and turns on conflicting extrinsic evidence.

Where, as here, a contract claim involves a dispute over the parties' intent, "ordinarily summary judgment is improper because differing views of the intent of parties will raise genuine issues of material fact." *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 898 (9th Cir. 1993); *see also* Wright & Miller, 10B Fed. Prac. & Proc. Civ., § 2730.1 (4th ed. 2020) ("summary judgment will not be granted if issues are presented involving an inquiry into the state of mind of any of the contracting parties . . . [a] typical problem involving state of mind arises when the contract terms are ambiguous ***so that it is necessary to determine the intent of the parties to the contract***.") (emphasis added); *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, 618 F.3d 1066, 1077 (9th Cir. 2010) ("[W]hen there is a material conflict in extrinsic evidence supporting competing interpretations of ambiguous contract language, the court may not use the evidence

to interpret the contract as a matter of law, but must instead render the evidence to the factfinder for evaluation of its credibility.") (citations omitted).

2. Notwithstanding the higher burden, Retirees' evidence must be believed, and all justifiable inferences drawn in their favor.

Whatever the burden of proof will be at trial, in ruling on a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The fact that the underlying burden is a heightened one "does not denigrate the role of the jury," because even in such cases, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.*

C. Standard of review on appeal

This Court reviews the District Court's grant of summary judgment *de novo*. *Tauscher v. Phx. Bd. of Realtors, Inc.*, 931 F.3d 959, 962 (9th Cir. 2019).

VII. ARGUMENT

A. *Harris IV* and settled California law precluded the District Court's holding, that the 1993 Plan Document defeated Retirees' claims.

1. This Court correctly held that the 1993 Plan Document could not defeat Retirees' claims as a matter of law, if it was adopted outside the collective bargaining process.

In granting summary judgment, the District Court relied most heavily on the Sections 1.3, 5.4 and 5.5 and the 1993 Plan Document. As explained above, Section 1.3 states that the County, "by establishing and maintaining this Plan, does

not give any Employee, Retiree or any other person any legal or equitable right against the County" or "any vested right to the benefits provided hereunder." ER II, Tab J at 116-17. Sections 5.4 and 5.5 purport to reserve to the County the right to amend or terminate the Plan "in its sole discretion," but "subject to the terms of any Memorandum of Understanding" with a labor union. *Id.* at 133-34.

The District Court held that this language defeated Retirees' claim as a matter of law, because it reflects the Board's intent that the benefits not "vest" in perpetuity. This holding was clearly contrary to California law and to this Court's ruling in *Harris IV*.

In the last appeal, this Court considered—and explicitly rejected—the County's argument, that Sections 1.3, 5.4 and 5.5 should be read to defeat Plaintiffs' claims as a matter of law. *Harris IV*, 902 F.3d at 1069 n.5. It reasoned that:

- "Retirees' contract claims are premised on the express and implied terms of ***the MOUs***, not the Retiree Medical Plan, a separate document";
- "Unlike the MOUs, which were the product of collective bargaining, the Retiree Medical Plan was unilaterally created by the County"; and
- "Retirees maintain that '[t]he 1993 Plan Document,' including its anti-vesting provision, 'was not incorporated into or referenced in the binding contracts between the County and the unions, and there is no indication

that its contents were ever discussed with or disclosed to the unions during the negotiations that led to the adoption of those agreements.'" *Id.* (emphasis in original). Because of this, this Court held, the 1993 Plan Document "***provides no basis*** for holding Retirees' implied contract claims implausible as a matter of law." *Id.* (emphasis added); *see also Navlet v. Port of Seattle*, 194 P.3d 222, 236 (Sup. Ct. Wash. 2008) (retirees' rights to continuation of health benefits conferred via bilateral CBAs, was not limited by reservation-of-rights clauses contained in separate, non-negotiated documents).

There is a simple and compelling reason why provisions unilaterally prepared and adopted by the County cannot be construed to defeat claims arising under the negotiated MOUs. Under long-settled California law, terms and conditions of county employment are the product of a ***bilateral*** collective bargaining process. That process is mandated and governed by California's public sector collective bargaining statute—the Meyers Milias Brown Act ("MMBA"), Cal. Gov't Code § 3500 *et seq*. The MMBA was enacted "to promote full communication between employers and employees" over the terms and conditions of employment. *Boling v. Public Employment Relations Board*, 5 Cal.5th 898, 914 (2018) (quotations omitted). The County itself acknowledged, in this case, the critical importance of protecting the integrity of what it called "the collective

bargaining process that the California Legislature has enshrined in the MMBA." ER II, Tab Q at 219:28 – 210:1.

Under the MMBA, the collective bargaining process results in MOUs between public sector employers and their labor unions. Those MOUs are enforceable contracts. *REAOC III*, 52 Cal.4th at 1182-83; *Glendale City Employees' Assoc. v. City of Glendale*, 15 Cal.3d 328, 334-35 (1975). To ensure the bilateral nature of these agreements, and to promote the legislative goal of "full communication," the MMBA explicitly precludes public employers from doing what the County now attempts to do here: (1) bilaterally negotiate an employment benefit under the rubric of the statutorily-mandated collective bargaining process; and (2) attempt to limit or eliminate that very benefit by adopting legislation ***outside*** that mandated process. *See Boling*, 5 Cal.5th at 914 ("The duty to bargain requires the public agency ***to refrain from making unilateral changes*** in employees' wages and working conditions until the employer and employee association have bargained to impasse.") (emphasis added). Instead, public employers must notify labor unions in writing of any such proposed legislation, and provide a full opportunity to bargain over its terms:

> Except in cases of emergency as provided in this section, the governing body of a public agency . . . ***shall give reasonable written notice*** to each recognized employee organization affected of ***any*** ordinance, rule, resolution, or regulation directly ***relating to matters within the scope of representation*** proposed to be adopted by the

> governing body . . . and ***shall give the recognized employee organization the opportunity to meet*** with the governing body.

Cal. Gov't Code § 3504.5 (emphasis added). "The opportunity to meet with the governing body" is a reference to the requirement, set forth in Government Code § 3505, that public employers "meet and confer in good faith" with their labor organizations over all matters within the scope of representation, including retirement health benefits. *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App.3d 802, 822-23 (1980).

California courts have "quite zealously" enforced this statutory requirement, by declaring void any resolution or ordinance enacted without notice and compliance with the meet and confer obligation:

> The rule in California is well settled: a city's unilateral change in a matter within the scope of representation is a *per se* violation of the duty to meet and confer in good faith. The courts have not been reluctant to intervene when a public agency has taken unilateral action without bargaining at all. In such situations, ***courts have been quite zealous*** in condemning the unilateral action . . . ***unilateral action constitutes a per se violation of the MMBA, and must therefore be set aside*** until the "meet and confer in good faith" duty has been met by the employer.

Id. (emphasis added) (citing cases). There is no question that the 1993 Plan Document "directly relat[es] to matters within the scope of representation." According to the County, Sections 1.3 and 5.4/5.5 limit—and in fact ***divest***—

important and valuable rights conferred in the MOUs that set forth the 1993 Grant Benefits. As such, the County's proffered interpretation of those provisions renders them a legal nullity, unless the County complied with the MMBA in the process of creating and adopting them. *Vernon Fire Fighters*, 107 Cal. App.3d at 822-23 ("unilateral actions are ***void in their entirety*** for procedural violation" of the MMBA's meet and confer requirement) (emphasis added); 5 McQuillin, Mun. Corp., § 15:18 (3d ed.) (where a state statute applies to the subject matter of municipal legislation, the municipality "can enact only those ordinances which are consistent with the statute").

2. The evidence Retirees adduced after remand proved what they had alleged: Sections 1.3, 5.4 and 5.5 were neither disclosed to nor negotiated with the unions.

On remand, Retirees adduced clear, convincing, and even unmistakable evidence in support of their allegation, that the County created and adopted the 1993 Plan Document unilaterally, without giving notice to the unions or an opportunity to bargain over Sections 1.3, 5.5 or 5.5. That evidence came in the form of:

- Unrebutted and unequivocal eyewitness declarations from ***all three*** of the key County directors from the relevant period: Human Resources, Employee Benefits and Labor Relations. ER II, Tab H at ¶ 6; ER II, Tab L at ¶ 15; ER II, Tab K at ¶ 8.

- The Declaration of Paul Crost, the attorney who acted as bargaining representative for a bargaining unit of active employees before, during, and after the time the 1993 Grant Program was being negotiated and implemented. ER II, Tab N. Mr. Crost testified that, despite his close involvement in the negotiation process, he ***never*** heard mention of the 1993 Plan Document or Sections 1.3, 5.5 or 5.5 thereof. *Id.* at ¶ 7.
- The County's admission, in the form of Rule 30(b)(6) testimony, that: (1) it "***does not know***" if Sections 1.3, 5.4 or 5.5 were discussed with the unions during bargaining over the 1993 Grant Program; and (2) "it's ***not likely*** that the [1993 Plan Document] would have been presented to the unions during negotiations." ER II, Tab P at 195-200 (emphasis added).

3. The District Court made the manifestly erroneous factual finding, that the MOUs "adopted" the 1993 Plan Document.

On remand, the County argued that the MOUs "adopted" the 1993 Plan Document. But the County offered no evidence whatsoever in support of this assertion. Nevertheless, the District Court accepted the argument, with no mention of any evidence to support that finding. ER I, Tab A at 6. That was an obvious error.

The MOUs set forth in detail the benefits and terms of the 1993 Grant Program, but said ***not one word*** about the 1993 Plan Document or its no-vesting

and reservation-of-rights provisions. *See, e.g.,* ER III, Tab U at 311-14; *Baker v. Osborne Development Corp.,* 159 Cal.App.4th 884, 895 (2008) ("For the terms of another document to be incorporated into the document executed by the parties the reference ***must be clear and unequivocal*** [and] the reference must be called to the attention of the other party and he must consent thereto.") (emphasis added). Nor was there any evidence that the negotiations leading to the MOUs included any reference to that document or those provisions. Indeed, as explained above, the undisputed evidence is that the County did ***not*** disclose—let alone attempt to incorporate—the 1993 Plan Document during the bargaining process. ER II, Tab H at ¶ 6; ER II, Tab L at ¶ 15; ER II, Tab K at ¶ 8; ER II, Tab N at ¶ 7.

The District Court failed to address any of Retirees' evidence in its Order. Nor did it cite any evidence supporting its "incorporation" finding. ER I, Tab A. At a minimum, the issue whether the MOUs adopted the Plan Document was a disputed issue of fact that could not be resolved on summary judgment. *See Kapp v. National Football League*, 586 F.2d 644, 649 (9th Cir. 1978) (jury must decide incorporation issue where intention of parties is in dispute).

4. It is irrelevant that the Board "publicly" adopted the 1993 Plan Document.

Notwithstanding this Court's holding—that the 1993 Plan Document "provides no basis" for precluding Retirees' claims if it was not negotiated—the District Court held that the 1993 Plan Document "expressly precludes a vested

rights claim." ER I, Tab A at 6. To justify its departure from this Court's ruling, the District Court adopted the following argument, almost verbatim, from the County's Reply: (1) during the last appeal, "the Ninth Circuit was required to accept Plaintiffs' pleadings that the 1993 Plan [Document] was secret and never shared with the labor unions"; but (2) "now the record shows" that the document was not "secret" but was in fact adopted by the Board in public session at the same time it adopted the MOUs that promised the 1993 Grant Benefits. ER I, Tab A at 7. This reasoning is factually and legally erroneous.

First, in the prior appeal, Retirees did ***not*** allege—and this Court did not "accept"—that the 1993 Plan Document was "secret and never shared with the unions." Rather, Retirees pointed out that it was prepared and adopted by the Board of Supervisors outside the collective bargaining process. This Court made that perfectly clear in its ruling. It observed that the 1993 Plan Document was "unilaterally created by the County," was "not incorporated into or referenced in the binding contracts between the County and the unions," and was not "ever discussed with or disclosed to the unions ***during the negotiations*** that led to the adoption of those agreements." *Harris IV*, 902 F.3d at 1069 n.5 (emphasis added). There was no suggestion that Retirees alleged—or that this Court was "required to accept"—that the 1993 Plan Document was "secret" or that the unions were "never" aware of its existence.

Second, it is well settled under California law that "public adoption" of legislation does ***not*** satisfy the MMBA's strict requirements of prior written notice and meet-and-confer. The MMBA states that public employers "shall" give written notice and an opportunity to bargain ***before*** adopting legislation affecting terms of employment:

> The "meet and confer" procedure is intended to operate on decisions ***yet to be taken*** . . . Thus "reasonable written notice" is required of proposals "***to be adopted***" (§ 3504.5) so that the public agency may meet and confer with the employee organization "***prior to*** arriving at a determination of policy or course of action." (§ 3505.).

Stockton Police Officers' Assoc. v. City of Stockton, 206 Cal. App.3d 62, 66 (1988) (emphasis added). Indeed, the District Court's "public adoption" reasoning eviscerates § 3504.5 in its entirety. ***Whenever*** a public employer adopts legislation, it does so "publicly." If the mandates of Sections 3504.5 and 3505 could be satisfied merely by the "public" adoption of legislation, those statutes would be rendered meaningless.

5. Sections 1.3, 5.4 and 5.5 *can* be read in a manner consistent with the MMBA.

The County's failure to provide notice and the opportunity to bargain over §§ 1.3, 5.4 and 5.5 need not result in the nullification of the 1993 Plan Document or even of those specific provisions. It is the County's ***current*** proffered interpretation of those provisions that runs afoul of the MMBA, because that

interpretation purports to limit and remove important benefits conferred in MOUs. But the 1993 Plan Document may be read in a manner that protects the integrity of the MOUs and is therefore consistent with the MMBA. *See* Cal. Civil Code § 1643 ("A contract must receive such an interpretation as will make it lawful").

Section 1.3 says that "[t]he County, ***by establishing and maintaining this Plan***, does not give any Employee, Retiree or any other person any legal or equitable right against the County." It also says "***[t]his Plan*** does not create any vested right to the benefits provided hereunder." ER II, Tab J at 116-17 (emphasis added). But, as this Court noted in *Harris IV*, Retirees' claims do not arise from "this Plan," but instead arise from the MOUs. *Harris IV*, 902 F.3d at 1069 n.5 ("we note that Retirees' contract claims are premised on the express and implied terms of the MOUs, ***not the Retiree Medical Plan***, ***a separate document***.") (emphasis added). The plain language of the "separate" 1993 Plan Document says nothing about the scope of the rights conferred via the negotiated MOUs.

This reading of the 1993 Plan Document—as not purporting to trump rights conferred in the MOUs—is further supported by other provisions of the document. Section 1.3 states that the Plan confers no rights to any benefits, and that the County reserves the right to terminate or amend the Plan at its sole discretion "[a]s provided in Sections [5.4] and [5.5]." ER II, Tab J at 116-17. Sections 5.4 and 5.5 provide that, "***[s]ubject to the terms of any Memorandum of Understanding with***

an Employee Organization," the County may terminate or amend "this Plan." ER II, Tab J at 133-34 (emphasis added). As such, §§ 5.4 and 5.5 merely reserve to the County whatever powers it has not bargained away in the MOUs, and the MOUs have the first and last words with respect to Retirees' rights to the 1993 Grant Benefits. *See Navlet*, 194 P.3d at 236-37. This interpretation has the additional benefit of not ascribing to the County a bad-faith intent to violate the clear mandate of the MMBA, by unilaterally adopting legislation interfering with rights it conferred in bilateral MOUs. *See* 5 McQuillin, Mun. Corp., § 15:22 (3d ed.) (presumption that local governing bodies intend to comply with applicable state laws when they adopt legislation).

B. This Court already rejected the County's argument, that Retirees' rights were limited to the brief term of each MOU.

The County has repeatedly argued that Retirees' right to receive the 1993 Grant Benefit was limited to the brief duration of each MOU (one-to-three years). In *Harris IV*, this Court held that, in light of Retirees' allegations, that interpretation of the parties' agreement was "***considerably less plausible***" than Retirees' interpretation, that the right continued after the MOUs expired. *Harris IV*, 902 F.3d at 1068-69 (emphasis added). The allegations this court relied on included the following: (1) the unions expressly bargained for the ARBA funding mechanism; (2) the unions made concessions as to $150 million in surplus OCERS earnings, in exchange for the placement of the remaining $50 million of those

earnings into the ARBA Account for the exclusive purpose of funding the 1993 Grant Benefits; and (3) during negotiations, the County shared with the unions its projection that the ARBA mechanism would fund those Benefits for more than 30 years. *Id.* This Court concluded that, if these allegations were proven, they would "refute[] the County's year-by-year description of its obligation." *Id.* at 1069; *see also Navlet*, 194 P.3d at 235 (observing the implausibility of the argument, that duration of retirement health benefits promised in CBAs is limited to brief duration of the CBA, because "such a limit would effectively negate the compensatory nature of the deferred benefit altogether") (citing *Poole v. City of Waterbury, Ct.*, 831 A.2d 211, 228-29 (Sup. Ct. Conn. 2003)).

After remand, Retirees proffered undisputed evidence in support of ***all*** of the allegations this Court had relied on. ER II, Tab H at ¶¶ 8-10 & ER 0079-0080; Tab I ¶ 5; Tab J ¶¶ 12-15; Tab K ¶ 11; Tab L ¶¶ 13-18; The County offered ***no*** evidence to the contrary. Nevertheless, the District Court again accepted the County's argument, without so much as mentioning this Court's 2018 holding, let alone attempting to explain why it was not controlling. ER I, Tab A at 6. In light of the evidence, the County's "general duration" argument is even less "plausible" than it was when this Court rejected it in *Harris IV*.

C. At a minimum, Retirees' evidence raised a triable issue on the question whether the 1993 Grant Benefits were vested, deferred compensation.

1. The 1% rebate provision

a. The 1% rebate "strongly reinforced" Retirees' claim, that the 1993 Grant Benefit was vested, deferred compensation.

In *Harris IV*, this Court examined the MOU provision requiring the refund of the 1% employee contribution for those who left employment before becoming eligible for the 1993 Grant Benefits. *Harris IV*, 902 F.3d at 1069. It held that this provision "strongly reinforced" Retirees' Vested Rights Theory, because it indicated that the 1993 Grant Benefits "constitute[ed] a form of deferred compensation assured to those employees who continued working until they became eligible" to receive the grant benefits. *Id.* "To reduce the [grant] benefit during the retirements of the same employees who had funded it," this Court concluded, "breaches that implicit commitment." *Id.*

This Court's holding correctly reflected California law. The California Supreme Court recently reiterated the settled principle, that public employees have a constitutionally-protected right to receive ***all*** elements of their deferred compensation. *Cal Fire Local 2881*, 6 Cal.5th at 984-85 (retirement benefits are granted protection under the Contracts Clause where they "constitute a portion of the compensation awarded by the government to its employees, paid not at the time the services are performed but at a later time"). Indeed, where a retirement benefit forms an element of deferred compensation, courts need look no further for

additional evidence of the governing body's intent that they vest upon retirement. *Id.*

The *Cal Fire* court used the paradigmatic example of pension benefits to explain the rationale for this rule:

> Pension benefits, the classic example of deferred compensation, ***flow directly from a public employee's service, and their magnitude is roughly proportional to the time of that service***. Just as each month of public service earns an employee a month's cash compensation, it also earns him or her a slightly greater benefit upon retirement. ***In this way, pension benefits are, literally, earned by an employee's work***. Upon retirement, this additional component of his or her compensation is paid to the employee in the form of pension benefits.

Id., at 986 (emphasis added). The court was careful to note, however, that this "deferred compensation" rule was ***not*** limited to pension benefits: "We have consistently recognized that elements of public employee compensation other than pension benefits also may be entitled to this type of implied contractual protection." *Id.*, at 985.

Cal Fire reinforces Retirees' claim, that the 1993 Grant Benefits constituted a form of deferred compensation. In addition to the "strong" inference created by the 1% refund provision, the grant benefits indisputably "flow directly from employees' service," and the amount of the benefits were "roughly proportional to the time of that service." *Id.* ER II, Tab Q at 206:4-7. Indeed, Retirees adduced undisputed evidence that the County made presentations to the unions in 1992—to

convince them to agree to the 1993 Grant Program—in which the future cash value of the 1993 Grant Benefit was directly tied to "time of service." ER II, Tab H at 87-88. Further, in these charts the County explicitly equated the ***cash value*** of the grant benefit to the cash value of what the *Cal Fire* court identified as the paradigmatic form of deferred compensation—the pension benefit. The chart was entitled "Value of [Grant] Plan ***in Retirement Equivalent.***" ER II, Tab H at 88 (emphasis added). The County's Employee Benefits Director, who prepared these documents in 1992, testified that the term "Retirement Equivalent" meant "Pension Equivalent." *Id.*, ¶ 12. The County's intent in using that term was to convey that the 1993 Grant Benefit had a future cash value akin to a pension benefit, and as such was a form of deferred compensation. *Id.* The County offered ***no*** contrary evidence. Even standing alone, this evidence raised a factual dispute on the dispositive issue, whether the 1993 Grant Benefits constituted an element of Retirees' deferred compensation.

b. The District Court erred in dismissing the evidentiary weight of the refund provision.

Despite the importance this Court placed on the refund provision, as "strongly reinforc[ing]" Retirees' claims to their deferred compensation, the District Court's treatment of that evidence was limited to one sentence—a sentence that did not even mention the rebate provision by name: "And Plaintiffs make no showing that the adjustment had the net effect of causing them to lose all or part of

the value of their 1% contribution." *Id.* at 8. If this was the District Court's rationale for departing from the holding of *Harris IV*, it was clearly flawed. It is entirely irrelevant whether Retirees received "the value" of their 1% contributions.

This Court's holding in *Harris IV* was ***not*** that the rebate provision proves Retirees had a right to receive grant benefits of equal value to their 1% contributions. It was instead this: by providing an in-lieu cash benefit for employees retiring without grant eligibility, the parties intended that those who "did continue working until they became eligible" would receive the monthly 1993 Grant Benefit "throughout their retirements." As such, "[t]o ***reduce the benefit***" for Retirees breached that intent. *Harris IV*, 902 F.3d at 1069 (emphasis added). Accordingly, with respect to Retirees here—all of whom "did continue working until they became eligible for retirement"—the County was not free to unilaterally "reduce the benefit," even if it had already paid grant benefits of equal value to what the in-lieu cash benefit would have been.

2. The 1% wage contribution.

In *Harris IV*, this Court correctly observed that, under the express terms of the grant program, employees paid 1% of their wages to fund the 1993 Grant Benefit. It held that the 1% wage contribution—separate and apart from the 1% rebate—"supports the notion that the parties intended the benefit to be available for

employees ***throughout their retirement***." *Harris IV*, 902 F.3d at 1069 (emphasis added).

On remand, the County could not and did not dispute that employees had 1% of their wages taken each month to fund the 1993 Grant Benefits Program, from 1993 through 2007. It argued, however, that it had only "framed" the contributions as coming from employees, when in fact the County paid them. It paid them, the County argued, by virtue of having agreed to raise employee salaries by an "average" of "approximately" 1% at the same time the 1993 Grant Program was implemented. The County insisted this assertion was "undisputed." *Id*.

In fact, it was anything but "undisputed." Retirees plainly and repeatedly disputed it: in their Opposition, their Statement of Disputed Facts, ***and*** the Declaration of Gaylan Harris. *See* ER II, Tab F at 65:13-18 ("The fact that the County granted a 1% wage increase in 1993 does ***not*** mean that the County "paid for" employees' 1% salary contribution over the next 13 years.") (emphasis in original); ER II, Tab G at ¶ 3 (identifying as a material disputed fact issue "[w]hether the County 'paid for' the 1% employee contribution employees were required to make to the Grant Program during their employment."); ER II, Tab H at ¶ 7. Nevertheless, the District Court simply adopted the County's argument—including the statement that it was "undisputed"—with not one word of discussion of Retirees' counter-argument. ER I, Tab A at 7. As explained below, in so doing,

it improperly made a factual finding on disputed facts, on a critical issue, in the context of a summary judgment motion.

The fact that the County gave a one-time, approximate 1% raise at the same time the 1993 Grant Program was implemented, does ***not*** mean the County "paid for" all of the 1% employee contributions to the grant benefits. The evidence shows nothing more than the bare fact that the 1% employee contribution was agreed as part of a larger deal in which the roughly 1% raise was also agreed. There was ***no*** other evidence that the parties' intent was for the one-time, roughly 1% pay increase to constitute the County's ***forever*** "payment" of the 1% contribution.[2] As the County itself observed in its summary judgement briefing, in the context of collective bargaining it is often impossible to reliably parse each aspect of a large and complicated deal like the one that led to the 1993 Grant Program, and match each item of consideration given by one side to an item received by the other. ER II, Tab Q at 219: 21-23 (County observed that "the total package of benefits and tradeoffs" contained in a negotiated bargain over retiree medical benefits is "complex"). The fact that the final deal included two items with

[2] The detailed memorandum prepared for the Board by the County's Personnel Director, to explain the 1993 Grant Program, confirmed that the benefits were "***funded by employee contributions*** and excess earnings of the retirement system." ER III, Tab U at 383 (emphasis added). It said nothing about the employee contribution being intended as just a "framing," or about the County "actually" paying that contribution through a pay raise.

the quantifier "1%" does not mean, *ipso facto*, that one was intended to completely offset the other.

Tellingly, the County offered nothing but speculation as to ***why*** the parties would have structured the bargain to have the County "pay" the 1% contribution, while making it appear employees were making it. It conjectured, parenthetically, that the deal was "framed" in this misleading manner "***presumably*** to maximize the tax advantage to employees." ER II, Tab E at 59: 5-8 (emphasis added). Of course, summary judgment cannot be granted on the basis of facts merely "presumed" by the moving party. But the District Court nevertheless adopted this "presumption," verbatim, from the County's Reply. ER I, Tab A at 7-8.

Nor was there any evidence that the one-time, 1% pay raise ***in fact*** covered the employee contributions to the grant program for the subsequent 14 years. Salaries were subject to re-negotiation every few years when MOUs expired and were replaced by new ones. The one-time, 1% raise in 1993 can be said to have "covered" the ***ongoing*** 1% employee contribution, for the next 14 years, only if the County continued, throughout that period and under each successive MOU, to pay 1% ***more*** than it would have paid in the absence of the grant program. There was no evidence that the one-time, 1% raise continued to be reflected in employee salary in this manner. As such, there is no way to know whether the 1993 pay raise was subsumed (for example) by subsequent agreements to raise salaries to reflect

the market. Retirees offered the testimony of the County Employee Benefits Director from the relevant time period, explaining that it ***cannot*** be presumed that the 1% raise resulted in the County paying the 1% employee contribution. ER II, Tab H at ¶ 7. The County offered no rebuttal.

In short, the County came nowhere close to conclusively refuting what the plain language of the MOU states: that "***employees*** shall contribute 1% of their base salary" to fund the 1993 Grant Program. ER III, Tab U at 313 (emphasis added). At most, the County's argument respecting the 1% pay increase, raised a dispute of fact on this important issue.

3. The $200 million bargain that led to the 1993 Grant Program, and the County's 30-year minimum projection.

Retirees alleged: (1) the 1993 Grant Program resulted from a negotiated bargain under which the unions allowed the County to use $150 million of $200 million of OCERS funds in dispute, in exchange for the promise to pay the grant benefits; and (2) the County projected the funding mechanism for the program to last more than 30 years. ER II, Tab T at ¶¶ 18, 26. In *Harris IV*, this Court held that these allegations, if true, further support Retirees' grant claims. *Harris IV*, 902 F.3d at 1068-69.

After remand, Retirees produced ample and undisputed evidence to support these allegations. This included contemporaneous documents from the collective bargaining process in 1992, and declarations from the three County officials most

closely involved in those negotiations and the formation of the 1993 Grant Program. ER II, Tab H at ¶¶ 8-12 & pp. 80-81; ER II, Tab L at ¶¶ 16-18; ER II, Tab K at ¶ 11. The County offered ***nothing*** to undermine this showing.

Despite the importance this Court placed on these two allegations, and Retirees' unrebutted evidentiary support for them, the District Court dismissed them with no analysis. Instead, echoing the County's Reply brief verbatim, it simply cited this Court's opinion in *REAOC v. County of Orange*, 742 F.3d 1137 (9th Cir. 2014) ("*REAOC V*"), for the proposition that "evidence of projections offered in negotiations failed to meet the plaintiff's burden at summary judgment." ER I, Tab A at 7; ER II, Tab E at 9:17-19. But this Court's holding in *REAOC V* is irrelevant here, because it addressed a different benefit, different evidence, and a different legal issue:

- The health benefit at issue in *REAOC*—the Pooled Premium—was separate and distinct from the 1993 Grant Benefit.
- In *REAOC*, unlike here, the plaintiff had ***no*** evidence of: (1) the benefit being reflected in the express provisions of the MOUs; (2) projections that the benefit would be provided for any specific period of time, let alone more than 30 years; (3) a rebate provision of the sort this Court found so important in *Harris IV*; (4) the County's publicly-stated intent

that the benefit induce thousands of early retirements; or (5) public admissions that the benefit is "a lifetime benefit."

- In *REAOC*, the plaintiff was attempting to establish two things: (1) the existence of an implied contractual right to the continuation of the practice of pooling premiums, despite the fact that it had never been reduced to an explicit contractual promise; and (2) the "vesting" of that benefit upon retirement. This Court reached only the first issue, finding that the bargaining history did not support an inference that the Pooled Premium was part of any "bargained-for" exchange." It expressly declined to reach the question of vesting. *REAOC V*, 742 F.3d at 1142-44 & n.4 ("Because there is ***no implied term*** with respect to the pooled premium, we need not address the vesting claim.") (emphasis added). Here, by sharp contrast, the 1993 Grant Benefit was indisputably part of the bargained-for exchange; the only question is the duration of that benefit.

The District Court made no attempt to explain why the reasoning of *REAOC V* disposed of the claims in this separate case, despite these obvious and crucial differences. ER I, Tab A at 7.

4. The County's stated goal of inducing thousands of early retirements.

An explicit goal of the County's proposal for the 1993 Grant Benefit was to induce large numbers of employees to retire early. Indeed, the County explained, in public documents, that the new benefit was "an ***integral part*** of the County's continuing commitment to encourage reduction in the County work force by offering ***early retirement incentives***." ER III, Tab U at 359, 360 (emphasis added). The County estimated that the new grant benefit would induce "approximately 400 additional retirements" ***in just one year***, saving the County at least $15.5 million ***per year*** and "facilitat[ing] our continuing efforts to restructure County government." *Id.*

The fact that the County explicitly used the promise of the 1993 Grant Benefits to induce thousands of employees to retire early in reliance on the financial value of that benefit, is more strong evidence that its intent was to take on an obligation that lasted throughout employees' retirements, once they were so induced. *See Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329, 334 (S. Ct. Minn. 2005) (recognizing that promising retirement health benefits lasting only the one-to-three duration of a CBA, will not induce public employees to choose retirement over the financial benefits of remaining employed). A rational juror could certainly draw this conclusion. The County

never addressed this important piece of evidence, and the District Court likewise failed to discuss it in its Order.

5. The County's admission that the 1993 Grant was a "Lifetime Benefit."

The County publicly confirmed that the 1993 Grant Benefit was intended to be a lifetime benefit. A presentation to the Board during a meeting to discuss retiree medical changes, on June 20, 2006, clearly stated: "The [Grant] benefit ***is a lifetime benefit*** . . ."). ER II, Tab M at 166 (emphasis added). The County did not address this evidence; neither did the District Court.

6. The County's longstanding practice of treating retiree medical benefits as vested once an employee retires.

The fact that the parties intended the 1993 Grant Benefits to vest upon retirement, is further supported by the County's longstanding, uninterrupted practice (prior to 2007) of treating these benefits in that manner. The County had treated a grant benefit instituted in 1966 as vested upon retirement, both when it eliminated the 1966 Grant (prospectively only) in 1978, and when it implemented the 1993 Grant Program. ER II, Tab J at ¶ 19; ER II, Tab K at ¶¶ 16, 20-21.

7. The supreme courts of at least three other states have held—on much less evidence—that retirement health benefits constitute elements of vested, deferred compensation.

The supreme courts of three other states have held, in the context of public employment, that bargained-for retiree health benefits are a form of deferred compensation, and as such may not be reduced or eliminated once an employee

retires. *See Navlet*, 194 P.3d at 233 (Washington) ("We hold that retirement [health] benefits conferred in a collective bargaining agreement constitute deferred compensation ***where the parties negotiate for such benefits as part of the total compensatory package***. The compensatory nature of the benefits creates a vested right in the retirees who reached eligibility under the terms of the applicable CBA.") (emphasis added); *Roth v. City of Glendale*, 614 N.W.2d 467, 472 (Sup. Ct. Wis. 2000) ("Bargained for [retiree medical] benefits are not gratuities handed to the employee, but rather deferred compensation for past services rendered."); *Matthews v. Chicago Transit Authority*, 51 N.E.3d 753, 777 (Sup. Ct. Ill. 2016) (retirement health benefits promised in CBAs are "earned" by employees during employment, and therefore vest once employee becomes eligible for them under CBA terms) (citing *Navlet*).

There is every reason to believe that the California Supreme Court would reach the same result here, or, at a minimum, conclude that Retirees' claims survive summary judgment. Indeed, that court cited *Navlet* in *REAOC III*, as supporting the proposition that promised retirement health benefits are elements of deferred compensation. *REAOC III*, 52 Cal.4th at 1190-91. And, as explained above, Retirees have ***more*** evidence than did the retirees in *Navlet*, *Roth* or *Matthews*, demonstrating that the 1993 Grant Benefit was an element of vested, deferred compensation.

8. The District Court cited inapposite cases.

The District Court cited three cases for the proposition that, in cases like this, courts "generally grant summary judgment because of a lack of evidence demonstrating 'clear' intent on the part of a public agency to confer a vested right." ER I, Tab A at 6. All three cases are clearly distinguishable, and none is even instructive.

REAOC V is inapposite because it involved a different benefit, different extrinsic evidence, and a different legal question. *See* Section 3, *supra.* Similarly, *Sacramento County Retired Employee Assoc. v. County of Sacramento*, 975 F. Supp.2d 1150 (E.D. Cal. 2013), is inapposite because the plaintiffs there relied exclusively on a "course of conduct" of providing a retirement health benefit. As in *REAOC V*, the benefit at issue was never reflected in any MOU. *Id.* at 1165. Finally, *San Diego v. Haas*, 207 Cal. App.4th 472 (2012) did not even involve claims made by retired employees. There, the plaintiffs were ***active*** employees of the City of San Diego who challenged the city's elimination of a retirement health benefit from active employees only. San Diego had explicitly exempted retirees from the change. As such, the ***only*** issue presented by Retirees' claims here—whether a promised retirement health benefit vests ***upon retirement***—was not an issue in *Haas.* Further, the plaintiff-employees in that case were demanding certain retirement health benefits, despite the undisputed fact that, before they were hired,

their own union had lawfully bargained those benefits away. Those negotiations resulted in an MOU whose express terms "provided New Employees . . . were not eligible to receive" the benefits at issue. *Id.*, at 489.

In short, none of the cases on which the District Court relied in granting summary judgment involved a claim where, as here, retired employees attempt to demonstrate that explicitly-promised retirement health benefits constituted deferred compensation and therefore vested upon retirement. And, at least one California court has ***denied*** summary judgment on such a claim, following an appellate reversal of a demurrer on that claim. *See Requa v. Regents of U.C.*, 2017 WL 10309282 (Super. Ct. Cal., Nov. 27, 2017) (denying summary judgment); *Requa v. Regents of U.C.*, 213 Cal. App.4th 213 (2012) (applying *REAOC III* to reverse trial court's previous grant of demurrer).

D. The District Court erred by granting summary judgment on Retirees' ARBA Theory.

1. The District Court improperly granted judgment on the ARBA Theory despite the fact that the County ignored it in its Motion.

Plaintiffs' Complaint plainly alleged the ARBA Theory as an alternative theory of contractual liability. ER II, Tab T at ¶¶ 26-27. The County's Motion simply ignored the ARBA Theory. ER II, Tabs Q & S. Retirees' Opposition Brief again clearly identified the ARBA Theory as an alternative theory of liability. ER

II, Tab F at 66-67, Tab G at 70, ¶¶ 7-9. The County again ignored the ARBA Theory in its Reply. ER II, Tab E.

The District Court's Tentative Ruling granted summary judgment on Plaintiffs' entire case, without even mentioning the ARBA Theory. Appellants' Request for Judicial Notice, Ex. A. At the hearing, Retirees explained that the District Court could not grant summary judgment on the ARBA Theory, when that theory was not even mentioned in the County's Motion. ER II, Tab D at 18-19. The District Court expressed surprise that there was a second theory of liability at issue in the case. *Id.* When challenged by the District Court, the County was unable to point to a single reference, in its Motion or Reply, to the ARBA Theory, let alone to any argument addressing that theory. *Id.* at 37-38. Nevertheless, the District Court went on to grant judgment on that theory. That was clear error.

Under Rule 56, the burden is first on the moving party to show an absence of a genuine issue of material fact, and the burden shifts to the non-moving party, to raise a triable issue, ***only*** if the moving party satisfies this initial requirement." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986) (emphasis added). This Court has held that, "[i]n order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). If a moving party fails to carry its initial burden in its

motion, "the nonmoving party ***has no obligation to produce anything***," and "may defeat the motion for summary judgment ***without producing anything***." *Id.* (emphasis added).

Where, as here, a moving party fails even to address a theory of liability in its motion, it has not carried its initial burden and has not triggered the non-moving party's obligation to respond. A number of courts have reached this unsurprising conclusion. *See, e.g.*, *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp.2d 802, 814-15 (C.D. Cal. 2010) (where defendant moved for summary judgment on entire claim, but failed to "squarely address" one theory of liability, "the Defendants have not carried their initial *Celotex* burden," and the plaintiff's burden of production with regard to that theory "was never triggered"); *United States v. Approximately 1,784,000 Contraband Cigarettes*, 2016 WL 7387094 at *5 (W.D. Wash., Dec. 12, 2016) (denying summary judgment where the defendant "failed to address" the plaintiff's second theory of liability); *Macneil Automotive Products Limited v. Cannon Automotive Limited*, 2014 WL 12797852 at *1 (N.D. Ill., Aug. 7, 2014).

Faced with the County's failure to address one of Retirees' two theories of liability, the District Court could properly have: (1) denied the Motion; (2) called for further briefing and evidentiary submissions; or (3) given notice under Rule 56(f) that it intended to consider summary judgment *sua sponte*, ***after*** giving

Retirees "reasonable notice that the sufficiency of [the ARBA Theory] would be at issue" and a fair opportunity to adduce evidence to support that theory. *See Nick's Garage Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 116 & n.4 (2d Cir. 2017); Fed. R. Civ. P. 56(f). What the District Court was ***not*** permitted to do is what it did here, that is, grant the Motion as to the unaddressed theory, without giving Retirees a full and fair opportunity to defend that theory with argument and evidence. *Id.*; *see Bement v. Cox*, 689 Fed. Appx. 491 (9th Cir. 2017) ("The district court erred in granting summary judgment on a ground not raised in the Appellees' initial motion because the district court did not give [Appellant] 'notice and a reasonable time to respond.'").

2. This Court should rule that the record had sufficient evidence to raise a triable issue as to the ARBA Theory.

a. This Court may deny summary judgment in the first instance, rather than remand for further summary judgment proceedings.

Because the District Court granted summary judgment without proper notice, this Court should reverse that order. But it can, and should, go further and rule that the evidence that ***was*** in the record is sufficient to raise a triable issue of fact. *See Arce v. Douglas*, 793 F.3d 968, 976-77 (9th Cir. 2015).

b. The ARBA funding was a critical negotiated component of the exchange that led to the 1993 Grant Program.

As explained above, the ARBA Account—and the funds that were placed in it for funding retirement medical benefits—were a critical component of the deal

the County struck with the unions in 1992, to settle the dispute over surplus OCERS funds and the unions' demand for better retirement health benefits. ER II, Tab H at ¶¶ 8-10; ER II, Tab J at ¶¶ 17-18. The ARBA Agreement itself ***repeatedly*** states that the funds in the ARBA Account would be used "***exclusively***" for retiree health insurance benefits. ER II, Tab R at 234 (emphasis added). And OCERS expressly recognized, in its annual published discussion of the ARBA Account, that "the amounts maintained in the ARBA are to be applied to health insurance or other supplemental benefits for OCERS' retirees." *See* ER II, Tab R at 244, 247, 250, 254, 257. No other purpose for the funds is mentioned.

While the unions were not parties to the contract that contained this explicit restriction, that commitment formed a critical component of the bargained-for exchange between it and the unions. It is undisputed that, during the negotiations in 1992, the County ***expressly*** made the ARBA funding commitment and provided the unions with projections of how long it would cover the 1993 Grant benefits. ER II, Tab H at ¶¶ 8-10 and pp. 80-81; ER II, Tab I at ¶ 5. It did this for the purpose of inducing the unions to agree to allow the County to use the remaining $150 million as it wished. ER II, Tab H at ¶ 9.

In the last appeal, this Court recognized that "the course of negotiations for the Grant Benefit" is evidence that may support a finding of an implied contract right to the 1993 Grant Benefits. *Harris IV*, 902 F.3d at 1068; *see also IBEW Local*

47 v. Southern California Edison Co., 880 F.2d 104, 107 (9th Cir. 1989) ("In ascertaining the intent of the parties to a collective bargaining agreement, the trier of fact may look to . . . the preceding negotiations"). The promise to establish a dedicated funding mechanism for the 1993 Grant Benefits, made at the same time and as part of the same transaction that established the benefits themselves, is clear and strong evidence of the County's commitment to provide the promised benefits for at least as long as that funding mechanism (properly managed) lasted. And there is no reasonable way to interpret the parties' agreement as permitting the County to: (1) take the benefit of the bargain—the $150 million; and then (2) use the $50 million it committed to ARBA, as part of the same deal, for purposes ***other than*** retirement health benefits. *See Harris IV*, 902 F.3d at 1069.

California courts have long recognized that a dedicated funding mechanism for a promised retirement benefit, can itself form an implied component of the bargained-for exchange between public employers and their employees. This happens where "there is a palpable element of exchange involving funding" of the benefit. *California Teachers Assn. v. Cory*, 155 Cal. App.3d 494, 505 (1984). Here, there is no question that the funding of the 1993 Grant Program—along with the benefit itself—was the product of bargaining between the County and the unions.

c. The County breached its contractual commitment by using $384 million in ARBA funds for purposes *other than* retiree medical benefits.

The $50 million initially set aside in the ARBA Account grew to $384 million by 2002. ER II, Tab R at 265. But by 2003, ***every dollar*** was taken from the ARBA Account, and used for purposes other than the funding of retiree medical insurance benefits. *Id.* at 268; ER II, Tab H at ¶ 10; ER II, Tab P at 192; ER II, Tab R at ¶ 19. Because of the depletion of the ARBA funds, the County unilaterally instituted cuts to Retirees' 1993 Grant Benefits, effective January 2008, despite the fact that Retirees were promised those benefits for at least as long as the funding mechanism, properly used and preserved, lasted. Retirees suffered substantial harm as a result, and have continued to suffer that harm for the last 11 years. The County cannot, and did not, dispute these facts.

3. Retirees would have proffered additional strong evidence in support of the ARBA Theory, had their burden to do so been triggered.

The evidence discussed above was in the District Court record. But Retirees had additional evidence that they would have proffered, had the County's Motion addressed the ARBA Theory. *See Arce*, 793 F.3d at 976 (where district court improperly granted summary judgment without adequate notice to plaintiffs, this Court considered evidence on the record ***and*** evidence plaintiffs contend they "would have presented" had they been given proper notice).

This evidence included contemporaneous notes from the relevant collective bargaining sessions, notes that underscore how critical the issue of funding the 1993 Grant Program was to the unions. The unions' position was that much of the $200 million OCERS surplus constituted their "deferred wages," because it was funded by employee pension contributions. The County's chief negotiator—David Carlaw—responded by provided the unions with a copy of the ARBA Agreement, including its explicit provisions repeatedly stating that the ARBA funds were to be used "exclusively" for retiree medical benefits. He also represented to the unions that the use of ARBA to fund the 1993 Grant Benefits Program was the way to "get $ back to those employees" who had helped create the OCERS surplus.

4. The District Court's reasons for granting judgment on the ARBA Theory were erroneous.

It is not clear whether the District Court relied on the 1993 Plan Document as a basis for granting judgment on the ARBA Theory. If it did, that was erroneous for the same reasons discussed in Section VII-A, *supra.* Further, as explained below, the only reasons the District Court did explicitly provide for dismissing the ARBA Theory were manifestly erroneous.

First, the District Court observed that Retirees discussed the ARBA Theory "briefly . . . at the end of their Opposition." ER I, Tab A at 8. But the reason Retirees discussed the ARBA Theory only "briefly" and at "the end of their Opposition," is that the County ***did not mention it at all*** in its Motion. The County

made no arguments for Retirees to "oppose" with respect to that theory, and Retirees had no obligation to discuss that theory at all in their Opposition. *Nissan Fire & Marine*, 210 at 1102-03; *TYR Sport,* 709 F. Supp.2d at 814-15.

Second, the District Court relied on the fact that the word "ARBA" does not appear in the Third Amended Complaint. ER I, Tab A at 8. This is baffling. As explained above, the term "ARBA Agreement" is merely a shorthand, used by ***both*** parties, for the 1993 document entitled "Memorandum of Understanding Agreement" between the County and OCERS, pertaining to the account created for from surplus OCERS earnings for the exclusive purpose of funding the 1993 Grant Benefits. In the TAC, Retirees used the full formal name—"Memorandum of Understanding between the County and OCERS"—to refer to the ARBA Agreement. ER II, Tab T at ¶ 26. However, the County certainly understood that this "Memorandum of Understanding" was just another term to refer to the "ARBA Agreement."

Indeed, in a declaration it filed in support of its Motion, the County ***explicitly equated*** these two terms, explaining that "[t]he Memorandum of Understanding [between the County and OCERS] will hereafter be referred to as the 'ARBA Agreement.'" ER II, Tab R at ¶ 5. Further, citing that same declaration passage, the District Court ***itself*** expressly recognized the close connection between the "Memorandum of Understanding" and the word "ARBA," when it

observed that "[t]he MOU references an Additional Retiree Benefit Account ("ARBA")." ER I, Tab A at 3.

VIII. CONCLUSION

For the foregoing reasons, Retirees respectfully request that the Court reverse the District Court's grant of summary judgment, and remand for trial on the merits.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Opening Brief of Appellants contains 13,900 words, exclusive of the cover page and tables.

Respectfully submitted this 5th day of March, 2020.

GORDON TILDEN THOMAS & CORDELL
Attorneys for Plaintiffs

By: s/ *Michael P. Brown*

Michael P. Brown, Cal. Bar No. 183609
600 University Street, Suite 2915
Seattle, Washington 98101
206.467.6477
Email: mbrown@gordontilden.com

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 March 5, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Michael P. Brown*
Michael P. Brown, WSBA #45618