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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.,

Plaintiff,

vs.

COUNTY OF ORANGE,

Defendant.

Case No. SACV 07-1301 AG (MLgX)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

Date: **December 22, 2008**
Time: **10:00 a.m.**
Court: **10D (Hon. Andrew J. Guilford)**

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INTRODUCTION

The parties agree to two fundamental premises involved in this litigation: first, that post-employment benefits, such as retirement health benefits, comprise elements of employee compensation; and second, that elements of employee compensation cannot be removed, once earned, without violating the constitutional prohibition against impairment of contract.

The parties disagree as to whether the Subsidy was a post-employment benefit, and therefore an element of compensation. REAOC contends that it was, based on the nature of the benefit, controlling law and the parties' decades-long course of dealing. The County *now* contends that it was not a post-employment benefit, or an element of compensation, but instead was a mere gratuity that the Board chose to confer upon retirees, each year for 23 consecutive years.

The historical record and the law are firmly on REAOC's side. It is undisputed that for decades the County treated the Subsidy as a post-employment benefit and an element of compensation in all of the following contexts, among others: (1) at the bargaining table with the labor unions, when the County saw an opportunity to "leverage" the Subsidy as an element of "total" or "global" employee compensation; (2) in financial reports, when it characterized, quantified and reported the Subsidy as a post-employment benefit and element of compensation; (3) when it billed the cost of the Subsidy—as an "employee benefit" and an element of "compensation"—to the State of California, the federal government and other local municipalities pursuant to contracts and government programs under which the County provided services; (4) when it issued an RFP for litigation counsel to advise on the legality of eliminating "post-employment benefits," including the Subsidy; and (5) on the *current* website of its Auditor-Controller and in its current Public Annual Financial Report, where the County refers to elimination of the Subsidy as a restructuring of the "post-employment benefits" it provides.

Now that the County recognizes the ramifications of its history of (correctly) characterizing the Subsidy, it asks the Court to indulge in an exercise of redefinition. Thus, the County concedes that the Subsidy was a "benefit," but not a *post-employment* benefit promised to employees as an element of their compensation. Rather, this "benefit" was nothing more than a gratuity—a gift that the Board was "pleased to provide" *retirees* every year for 23 years—but without the *obligation* that would attend the provision of a *real* post-employment benefit. There are two problems with this attempted sleight-of-hand. First, it strains credulity to accept a definition of "benefit" that is so at odds with the history in this case and with the common understanding of that term in the employment context. (Indeed, it is at odds with the definition of "benefit" clearly provided by the County's own long-time employee benefits expert, Mike Wilson.) Second, if the Subsidy were a mere gratuity conferred on retirees, with no *obligation* on the County's part to provide it in compensation for employees' services to the County, then the County has for decades given its retirees an unlawful gift of public funds, *and* has charged the federal and state governments, and contracting municipalities, for most of the cost of that gift. The Court should not accept the County's semantic argument when it leads to such an absurd and illegal result.

The County also argues that the Subsidy was not a post-employment benefit or element of compensation because it was not contained in the language of any Board resolution. But California law is clear in recognizing the primacy of binding, bilateral *contracts* between counties and their labor unions—Memoranda of Understanding ("MOUs"). Once the Board exercises its legislative authority by adopting an MOU, that agreement governs the rights and obligations of both employer and employee, and the County is no longer free to set the terms of compensation unilaterally by resolution.

The County next argues that post-employment benefits, like other elements of employee compensation, must be conferred by express, precise and unequivocal

language. But, that is the standard for deriving contractual promises *from statutory provisions*. It is not the standard for construing government *contracts*, such as MOUs between counties and their employees. The Ninth Circuit has instructed that MOUs must be interpreted according to *contract* principles to include express terms *and* terms implied from the parties' past practices. Applying those principles, there is no dispute that the parties' longstanding, consistent and recognized practice created an implied term in the MOUs reflecting the Pooled Rate Structure and the Subsidy.

ARGUMENT

I. THE UNCONTROVERTED EVIDENCE ESTABLISHES THAT THE SUBSIDY WAS AN ELEMENT OF EMPLOYEE COMPENSATION.

In its opening brief REAOC explained that elements of employee compensation, once earned, cannot be removed without impairing the contractual rights of the employee or retiree. *See Olson v. Cory*, 27 Cal.3d 532, 535-36 (1980) ("[p]ublic employment gives rise to certain obligations which are protected by the contracts clause of the Constitution . . . [p]romised compensation is one such protected right"). The County does not dispute this established legal principle.

In addition, the County recognizes that post-employment benefits such as the Subsidy comprise a key element of employee compensation. See County's Opening Brief at 8:21-10:22; *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburg Plate Glass Co*., 404 U.S. 157, 180-181 (1971) ("To be sure, the future retirement [health] benefits of active workers are part and parcel of their overall compensation."); *Thorning v. Hollister School Dist*., 11 Cal.App.4th 1598, 1606 (1992) (retirement health benefits are protected as compensation because they are "fundamental" to the bargained for exchange between employer and employee); *Navlet v. Port of Seattle*, 194 P.2d 221, 232 (S.Ct. Wash. 2008) ("In the reality of the employment relationship, welfare

[health] benefits make up a part of the core compensatory benefits package offered in exchange for continued service.").

What the County *does* attempt to dispute is a simple fact supported by a plethora of evidence: that the Subsidy was an element of employee compensation. The County's effort to deny this fact fails for several reasons.

A. The County Cannot Escape Its Treatment Of The Subsidy As A Post-Employment Benefit And Therefore Part Of An Employee's Compensation.

In its opening brief REAOC set out evidence demonstrating that, before this litigation, the County had *expressly* treated the Subsidy as an element of employee compensation. *See* REAOC Opening Brief at 28-30. For example, when the County approached the Unions in 2005 with a proposal to eliminate the Subsidy from the package of retirement health benefits that active employees could expect to receive, it couched those proposals as changes to employees' "total compensation" or "global compensation." Brown SA Decl., Exh. T; Crost SA Decl., ¶ 8. Specifically, the County offered to increase employees' cash compensation significantly in exchange for their agreement to surrender the deferred compensation that the Subsidy represented. Crost SA Decl., ¶ 8.

Also, when the County decided that the Subsidy fit GASB's definition of an "Other Than Pension Post Employment Benefit" ("OPEB"), it acknowledged that the Subsidy was a post-employment benefit *earned* as part of employees' compensation, but not *paid* until after retirement. Brown SA Decl., Exh. R at 1-2. Indeed, the expert that the County retained for advice on GASB 45 explained that "GASB 45 requires recognizing OPEB . . . as employees render service (and consequently *earn the benefit*) rather than when [the benefits] are paid," i.e. after retirement. Brown SA Decl., Exh. S at 5, 7, 10 (emphasis added). The County itself referred to the Subsidy as a "benefit[] being *earned* in the current year," as the employee renders service, even though it is not paid until retirement. Brown SA Decl., Exh. R at 3-4 (emphasis added); *see also* Brown Decl., Exhs. P, S;

Declaration of Rachel Sater ("Sater Decl."), ¶ 6, Exh. E [Beckett Depo. at 20:5-21:2].

In addition to these explicit admissions, the County has repeatedly acknowledged the Subsidy as a *post-employment benefit,* and therefore an element of compensation by the County's admission and as a matter of law:

- In the late 1980s the County countered the Unions' demands for greater retirement health benefits by pointing to the Subsidy as an existing post-employment benefit provided by the County. Patton SA Decl., ¶ 11.
- During the 6-year litigation between the County and OCEA regarding the Unions' demands for greater retirement health benefits, the County again pointed to the cost and value of the Subsidy as a post-employment benefit it *already* provided. Patton SA Decl., ¶ 12; *see Orange County Employee Association v. County of Orange*, 234 Cal.App.3d 833, 837-38 (1991) ("*OCEA*"). (noting that the County "subsidized" retiree medical insurance through the Pooled Rate Structure, as part of the "comprehensive [health insurance] plan offered to employees and retirees").
- In 1991 and 1992, during labor negotiations leading to the implementation of a new retirement health benefit (the 1993 Grant Benefit), the County again stressed to the Unions the value and cost of the Subsidy as an existing retirement health benefit. Carlaw SA Decl., ¶¶ 12-15 & Exhs. A-G; Carlaw Opp. Decl., ¶¶ 2-3 & Exhs. A-B.
- The County insists it negotiates with the Unions only regarding post-employment benefits *promised to current employees* (future retirees), *not* benefits provided to current retirees. See, e.g., County Opp. at 28:10-12; Crost Decl., ¶ 3. Therefore, by the County's admission, its negotiations with the Unions regarding the Subsidy qualify the Subsidy as a post-employment benefit promised to current employees. Those negotiations include: (1) from 1986 through 1990, When the County used the Subsidy to counter the Unions' demands for greater post-

employment benefits; (2) in 1991 and 1992, when it used the Subsidy to "sell" the value of the total retirement health benefits package (the Subsidy plus the Grant); and (3) in 2005 and 2006, to secure employees' agreement to *relinquish* their *future* rights to the Subsidy.

- In 1998 the County's benefits consultants prepared an actuarial report on the County's retirement health benefits, and expressly identified the Subsidy as a separate benefit promised and provided by the County. Brown SA Decl., Exh. Q.
- For decades, the County characterized the Subsidy as an *employment benefit* and element of compensation, for purposes of (1) billing its services to other agencies with whom it contracts; (2) billing for personnel services it provides to the State Superior Courts in Orange County; and (3) billing the federal and State governments for reimbursement of costs associated with services provided by the County under federally-funded and state-funded grants. Declaration of Linda Robinson ISO Reply, ¶¶ 2 - 4, Exh. A; Declaration of Chuck Hulse ISO Reply, ¶¶ 3- 5, Exh. A.
- In 2006, the County sought litigation counsel to defend against the retiree lawsuit that it knew would ensue from its unilateral elimination of the Subsidy. Brown SA Decl., Exh. II. County Counsel issued an RFP stating that the County "currently offers the following *post-employment benefits*: . . . (2) Health Insurance Rate Pooling." *Id*. at 2-3. While noting that the Subsidy was not *expressly* reflected in labor agreements or plan documents, Counsel nevertheless described it as a "program" under which the County subsidized retiree rates. *Id.*
- David Sundstrom, the County's Auditor-Controller, who helped restructure the County's retiree medical benefits program, explains on the Auditor-Controller's website and in the County's "Public Annual Financial Report" that the County "significantly altered *post-employment health care benefits*" by eliminating the Subsidy from active employees in 2006. RJN, Exh. B (emphasis added).

In its Opposition Brief the County does not even *attempt* to controvert these repeated admissions. Instead, it attempts to (1) re-cast the Subsidy as just "something nice" that the Board did for *retirees* (every year for 23 years), rather than a post-employment benefit promised to employees;[1] and (2) invent a special requirement that the County confer elements of compensation by express provisions in Board resolutions.[2] The County's attempted about-face must fail.

B. The Subsidy Was A Promised Post-Employment Benefit, Not A Mere Gratuity Conferred Upon Retirees.

The Subsidy was either a post-employment benefit given to current employees in exchange for their labor (i.e., compensation), or it was a gift given to retirees. As shown above, the evidence demonstrates it was the former.[3] And the law prohibits the latter. *See Sturgeon v. County of Los Angeles*, 167 Cal.App.4th 630, 637 (2008) (Article XVI, section 6 of the California Constitution prohibits counties "from making or authorizing any gift of public funds for private purposes."). According to the County's litigation position, it gave away an unlawful gift worth millions of dollars per year to its retirees annually from 1985 through 2007. *Lamb v. Board of County Peace Officers Retirement Comm'n*, 29 Cal.App.2d 348, 350 (1938) (pension benefit is an unlawful gratuity *unless* conferred in exchange for services rendered while pension statute was in effect); *Atchley v. City of Fresno*, 151 Cal.App.3d 635, 651 (1984) (same).

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[1] *See* County Opp. at 2:2-3 ("the Board was pleased to offer this benefit to retirees over the years").

[2] *See* County Opp. at 16:25-17:14.

[3] *See Wang v .Chinese Daily News, Inc.*, 435 F.Supp.2d 1042, 1049 (C.D. Cal. 2006) (Marshall. J.) (employer cannot deny that vacation time was "accrued," for purposes of Labor Code provision, when documents showed that employer *itself* had referred to it as "accrued" and parties treated it as such during course of dealing).

C. There Is No Requirement That Promised Employment Benefits Be Expressly Contained In Board Resolutions.

The County also claims that elements of compensation, such as post-employment benefits, must be *expressly* conferred by particular Board resolutions, and that the Board did not do so here. Of course, this argument runs counter to the County's history of characterizing and treating the Subsidy as a post-employment benefit and element of compensation. In addition, the argument is contrary to controlling law, which establishes the primacy of *bilateral employment agreements*—MOUs—over local government prerogative.

REAOC has no quarrel with the County's proposition that the Board has authority over "[t]he regulation of the . . . compensation of officers and employees of the County of Orange," which it exercises "by resolution." County Opp. at 15:1-5. But counties may and often do exercise that authority by entering MOUs with their labor unions. *Dimon v. County of Los Angeles*, 166 Cal.App.4th 1276, 1284 (2008) ("Government Code section 25300 provides: 'The board of supervisors shall prescribe the compensation . . . of county employees' . . . [t]hat is precisely what happened here . . . the County entered an MOU covering deputy probation officers."). Once a county does no, *those bilateral agreements* define the rights and obligations of employer and employee.

The California Supreme Court so held in *Glendale City Employees' Association v. City of Glendale*, 15 Cal.3d 328 (1975). In *City of Glendale*, the city asserted the right unilaterally to "interpret" the compensation provisions of its MOUs, pointing to its general legislative authority over matters of compensation, and the rule that the courts will not disturb the exercise of that authority unless it was an abuse of discretion. *Id*., at 339. In rejecting that contention, the Court explained:

> This argument, however, misses the point . . . [w]e deal here with a mutually agreed covenant, a labor management contract. We know of no case that holds that one party can impose his own interpretation upon a two-party labor-management contract.

Id. at 339.[4]

The California Supreme Court again confirmed the supremacy of MOUs over local legislative prerogative in *Voters For Responsible Retirement v. Board of Supervisors of Trinity County*, 8 Cal.4th 765 (1994) ("*Voters*"). In *Voters*, the Court held that the State Legislature had the authority to prohibit local referenda from interfering with MOUs entered between counties and their labor unions. *Id*., at 780-83. While recognizing that the compensation of county employees is, in the first instance, a matter of local concern, the Court nevertheless held that the State had a superior interest in guaranteeing that MOUs—including compensation terms contained therein—*bound* local governments. The Court found that if the bargaining process "is to have its purpose fulfilled . . . then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty" of subsequent local legislation. *Id*. at 782.[5]

D. Rules Governing Interpretation Of Contracts Apply Where The Legislative Body Approved The Underlying Contracts.

The County argues that the Court must apply principles of statutory construction to determine whether retirees had a contractual right to the Subsidy. County Opp. at 15:8-16:23. It contends that retirees could not have a right to the Subsidy because statutes create contractual rights only to the extent that they contain a "clear" and "unequivocal" indication of the legislature's intent to be contractually bound. *Id*. But the County's argument misapprehends the

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[4] S*ee also Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 304-05 (1979) (MOUs terms, including terms relating to compensation, are "indubitably binding" on government agency; legislative interference with those provisions constitutes unlawful impairment of contract).

[5] Indeed, the Bankruptcy Court of this District has held that the MOUs between the County and the Unions were enforceable *even during the County's bankruptcy*. *See In re County of Orange*, 179 B.R. 177, 183 (C.D. Cal. 1995) (County forbidden to "unilaterally breach collective bargaining agreements" during bankruptcy, because "once these contract rights are incorporated into the MOUs and approved by the municipal authority, they become binding and enforceable.") (*citing Voters*, *supra*).

fundamental nature of this dispute. REAOC alleges that retirees had rights arising *under contracts*, not statutes. The rules of interpretation differ in the two contexts.

The Ninth Circuit case on which the County relies—*Robertson v. Kulongoski*, 466 F.3d 1114, 1115-17 (9th Cir. 2006)—demonstrates the mistake in the County's argument. In *Robertson*, the Ninth Circuit held that alterations in Oregon's pension statute—limiting which formula would be applied to determine benefits—did not interfere with contractual rights employees enjoyed *under that statute*. The court set forth the standard for determining what contractual rights are deemed to be conferred by *statutory* provisions: "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* Applying that standard, the court found no contractual impairment because, while the prior version of the pension statute *did* create a contractual right to "receive service retirement allowances calculated under whichever formula yields the highest pension amount for that member," it did not create a more particular right in each employee to choose *which* formula would be applied. *Id* at 1119.

Manifestly, the *Robertson* test does not apply where, as here, the issue is *contractual* interpretation. Indeed, the *Robertson* court expressly relied on the fact that the contract rights at issue there arose from statutory provisions, rather than from contracts, and expressly declined the plaintiffs' request to apply a standard appropriate for claims arising under contracts. *Id*., at 1118-1119.

Because REAOC's claims are premised on rights and duties arising from contracts—the MOUs— *Robertson's* "strict construction" standard and "presumption against contract" do not apply. Rather, the contracts must be

construed according to standard rules of contract interpretation,[6] and special rules for interpretation of collective bargaining agreements, to determine whether the County's actions impaired any rights or obligations thereunder.[7]

E. In Interpreting Public Contracts, Courts Consider Both Express And Implied Terms.

The Ninth Circuit has clearly established that, for purposes of contracts clause challenges, government contracts must be interpreted in accordance with (1) the express terms contained therein; *and* (2) implied terms related to the express terms and derived from the parties' past practices and course of dealing. That rule of construction applies to both standard government contracts *and*—with special force—to public sector collective bargaining agreements.

In *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1102 (9th Cir. 1999), the court held that the state university impaired the contractual rights of its faculty employees when it changed its practice of paying their salaries on the fifteenth and final days of each month, by delaying payments for one or two days. The written agreement made "no specific mention of the dates on which [employees] are to be paid." *Id*. Nevertheless, the court held that "the timing of payment is part of the collective bargaining agreement," because "[f]or over twenty-five years, the State and its employees had a course of dealing

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[6] Indeed, the California Civil Code *mandates* that government contracts be "interpreted by the same rules" as private contracts, "except as otherwise provided by [the Civil] Code." Cal. Civil Code § 1635.

[7] The County cites *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 154 Cal.App.4th 1536, 1548-49 (2007) for the proposition that public employees are entitled only to the compensation "expressly provided by statute or ordinance." (County Opp. at 16:20-24.) But that case actually *confirms* REAOC's point. In holding that the plaintiffs were not entitled to the vacation payouts provided in department policies, the court relied on the fact that the policies conflicted with a County ordinance *and a provision in the applicable MOU* that "underlies" the ordinance. *Id.* at 1549. The court expressly relied upon *and quoted* the holding of *City of Glendale*, *supra:* a "memorandum of understanding, once adopted by the governing body of the public agency, becomes a binding agreement." *Id.*

under which it was understood that employees would be paid on the fifteenth and last days of every month." It reasoned that, under collective bargaining principles, "[a] course of dealing can create a contractual expectation." *Id*.[8]

In *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003), the court was asked to examine a contract between the utility and the city, under which the utility had the express right to excavate under city streets to lay pipes in exchange for paying the city a percentage of its profits. Many years after the contract was entered, the city imposed new fees on the utility for excavating under city streets. The utility alleged that the fees impaired its right under the contract to excavate and perform repairs *without* paying a special fee. The city responded that the contract contained no *express* term relating to excavation or repair fees.

The court agreed with the utility. Applying *Cayetano*, it held that "[e]ven adjustments in *implicit* financial terms can constitute substantial impairment" under the contracts clause. *Id*. at 890 (emphasis added). The rights to excavate and to repair without paying additional fees were such "implicit financial terms" because (1) they were "closely related" to rights expressed in the written terms of the agreement; and (2) the parties had an established "past practice" of allowing the utility to excavate and repair *without* paying such fees. *Id*., at 891-893; *see also Pacific Gas & Electric Co. v. City of Union City*, 220 F.Supp.2d 1070, 1086-87 (N.D. Cal. 2002) (applying *Cayetano* to reach same result with respect to cable operator's right to excavate without fees).[9]

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[8] Numerous other courts held that an established past practice can become an implied term in a CBA. *See*, *e.g.*, *Bonnell/Tredegar Indus*. v. *National Labor Relations Board* , 46 F.3d, 339, 344 (4th Cir. 1995) ("An employer's established past practice can become an implied term of a CBA . . . [p]ast practices rise to the level of an implied agreement when they have ripened into an established and recognized custom between the parties"). *See* REAOC's Opening Brief at 33 and n. 22 (listing other cases)

[9] In *Rui One Corporation v. City of Berkeley*, 371 F.3d 1137, 1149 (9th Cir. 2004), the court cited *Cayetano* with approval but concluded that the city's new

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The County contends that *Cayetano* is nothing more than the Ninth Circuit's interpretation of Hawaii state law. Opp. at 25:5-17. But the *Cayetano* court relied on state law *and* general principles of construction of labor agreements, as set forth by the United States Supreme Court in such cases as *Steelworkers v. Warrior & Gulf*, 353 U.S. 574 (1960). *Cayetano*, 183 F.3d at 1102. Moreover, the cases cited above make it clear that *Cayetano*'s reach is circuit-wide and that nothing in *Cayetano*'s analysis conflicts with California contract law.[10]

F. Under *Cayetano* And Its Ninth Circuit Progeny, The MOUs Include An Implied Right To Subsidized Retirement Premiums.

For 23 years every MOU between the County and the Unions provided that employees could continue their coverage in County-sponsored health insurance plans upon their retirement, using broad language. *See, e.g.*, Declaration of Shelly Carlucci ISO County Motion for Summary Judgment, Exh. U at G-87 - G-88 ("Employees will be given the opportunity to change medical plans at date of retirement."); G-86 ("In all health plans the County shall provide a one (1) month period each year for open enrollment of . . . retirees."). The MOUs were silent on the closely related subjects of what premiums would be charged to active or retired employees, or what method would be used to calculate those premiums. *Id*. at G-86 - G-91. However, uncontroverted evidence of the parties' course of dealing

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wage ordinance did *not* interfere with an existing commercial lease because the lessor's employee pay scale at the time of entering the lease was not an "implied term" because it was not "closely connected to the express provisions of the lease agreement."

[10] PERB also construes MOUs to include express as well as implied terms. *See Eureka Teachers Association v. Eureka City School Dist.*, 11 PERC 18099 at 12 (ALJ) (1987) ("According to traditional labor relations principles, a practice can be an implied term in an agreement . . . if it is clearly established and ascertainable over time, and if it is accepted by the parties."); *cf. California School Employees Assoc. v. Hacienda La Puente Unified School Dist.*, PERB Decision No. 1186 at p. 13 (1997) (same test for determining whether a past practice is "binding" for purposes of determination whether one party changed a "term or condition of employment" unilaterally).

establishes that the implied "financial" term was that *all* premiums—for active and retired employees—would be based on the Pooled Rate Structure.

Under *Cayetano*, a practice becomes an implied term in a collective bargaining agreement when it is (1) longstanding; (2) important; and (3) a subject of bargaining. *Cayetano*, 183 F.3d at 1102-03. There is no dispute that the Subsidy meets these criteria. First, the County concedes that it set premiums based on the Pooled Rate Structure for 23 consecutive years.[11] Second, the County concedes that the Subsidy was a topic of discussion in labor negotiations, from the late 1980s through 1993 and again from 2005 through 2007.[12] Third, the County does not dispute that the Subsidy was "important" to retirees; there is no doubt that it had a significant cash value to retirees.[13]

The result is the same under this Circuit's application of *Cayetano* to *non*-collectively bargained government contracts. *See City of Santa Ana*, 336 F.3d at 890; *City of Union City*, 220 F.Supp.2d at 1086-87. Those cases stand for the proposition that, when a government contract includes an express term granting a right to a party, but is silent regarding the financial terms related to that right, the court will look to the parties' past practice to supply the missing financial term.

Thus, for example, a contract with an *express right* to excavate to lay pipes

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[11] *See* County Statement of Genuine Issues In Dispute ("GI") No. 1 (at 1:17-2:19). In *Cayetano*, the practice had been in place for 25 years. *Cayetano*, 183 F.3d at 1102. In *Youngman v. Nevada Irrigation District*, 70 Cal.2d 240 (1969) the California Supreme Court held that a *two-year* unwritten practice regarding employee compensation could establish a contractual commitment.

[12] *See* GI No. 4 (at 3:28-4:13.) Indeed, this case is stronger than *Cayetano* because in *Cayetano* the court found that the parties need not have *actually* bargained over the subject of pay dates; all that was required was that the topic was a *potential* topic of negotiations. 183 F.3d at 1102.

[13] *See* GI No. 3 (at 3:12-27.) Indeed, it would be difficult for the County to argue that it was costing $10 million per year to fund the Subsidy for 4,700 retirees, and at the same time claim that the Subsidy did not financially benefit retirees. In *Cayetano*, the court found that the "significance" requirement was met when employees faced no *actual loss* of wages or benefits, but rather a one or two day *delay* in receiving full payment. 183 F.3d at 1102.

or cable will be read to include an *implied right* to excavate *without cost*, if the parties' practice for decades was to permit excavation without cost. The government's attempt to impose a new cost—at variance with that past practice—impairs a contract right. Similarly here, the MOUs expressly conferred rights to continue to participate in County health plans upon retirement, but were silent regarding how premiums would be determined for that participation. The court must supply the missing "financial term," by looking to the parties' decades-long established and recognized practice of permitting retirees to participate at the same premium rates as active employees. The County's imposition of a new cost—at odds with the historic practice—unconstitutionally impairs retirees'contract rights. *City of Santa Ana*, 336 F.3d at 890; *City of Union City*, 220 F.Supp.2d at 226-27.

G. The County Acknowledged That MOUs Prior To The Retiree Medical Restructuring Contained An Implied "Pooled Premium" Term.

The County's own documents and witnesses acknowledge that the MOUs in effect prior to the elimination of the Subsidy contained an implied term reflecting the Pooled Rate Structure. After the County secured the Unions' agreement to surrender the Subsidy for current employees, it prepared and submitted to the Board the newly-negotiated MOUs along with short documents that highlighted the changes from the existing MOUs (the "MOU Change Sheets"). Brown SA Decl., Exh. V. The MOU Change Sheets described the elimination of the Subsidy as a *change* to the terms of the prior MOU, and the body of the MOUs themselves included the new "split pool" term in bold font, both drawing the Board's attention to the "new and different" terms in the new MOUs. *Id.* Tom Mauk, the County's CEO and an active participant in the labor negotiations regarding the elimination of the Subsidy, confirmed that this was in fact the purpose and meaning of these documents. Brown SA Decl., Exh. V; Sweet Opp. Decl., Exh. M [Mauk Depo. at 93:12-95:5].

Shelly Carlucci, the County's Person Most Knowledgeable on the topic of labor negotiations, testified that the County's proposal to eliminate the Subsidy (by splitting the pool) constituted a proposal to change the terms of the MOUs that were then in effect: "We had to negotiate the changes [to the Retiree Medical Program] with the labor organizations. *The program was in our MOU. We were making changes with the MOU* . . ." Brown Decl. Exh. A [Carlucci Depo. at 122:16-123:6 (emphasis added); 96:13-23; 97:8-98:1 ("one of the changes [she] negotiated to the MOU" between the County and that union "was the splitting of the pool.")].[14]

II. THE COUNTY DOES NOT CREATE A GENUINE DISPUTE AS TO THE REMAINING ELEMENTS OF REAOC'S CONTRACTS CLAUSE CLAIMS.

There is no material dispute as to the "substantial" nature of the County's impairment of retirees' contract rights. The County contends that upon elimination of the Subsidy retiree health insurance premiums increased an average of 41%, or $159 per month, from 2007 to 2008—6% of the average 2008 monthly pension check. While REAOC asserts that the increase was significantly larger—more than 8% of the average retiree pension—under either party's calculation there can be no doubt that the County removed a "substantial" financial benefit. *See* GI No. 3 (at 3:12-27); *Cayetano*, 183 F.3d at 1102 (substantial impairment found where employees forced to wait an extra day or two to receive their *full* wages);[15] *City of*

[14] The County claims that when Ms. Carlucci's referred to the "program," she was *not* referring to a bundle of retiree health benefits including the Subsidy. Supp. Carlucci Decl, ¶ 5. But her testimony could hardly have been clearer. On several occasions, both before and after she gave the testimony quoted above, she stated that the "program" about which she was testifying included the Subsidy. Sater Decl., ¶ 2, Exh. A [Carlucci Depo. at 56:13-57:1; 73:14-74:12; 100:14-101:6; 129:16-130:10; 148:5-23]. Her supplemental declaration cannot create a triable issue of fact by contradicting her deposition testimony. *Kennedy v. Allied Mut. Ins. Co*., 952 F.2d 262, 266 (9th Cir. 1991).

[15] The County's own declarants concede that splitting the pool caused significant increases in retiree health insurance premiums. GI ¶ 3; see also Gondo Decl. ISO County Opp. ¶¶ 4.b., 4.f. ("[T]he splitting of the pool caused Mr. Lutito's Premier Wellwise PPO premium to increase by $301.12").

Santa Ana, 336 F.3d at 890 ("When assessing substantial impairment, we need not resolve the 'question of valuation' in terms of dollars if an important financial provision is impaired; impairment of a public contract "is substantial if it deprives a private party of an important right, defeats the expectations of the parties, or *alters a financial term*.") (citations omitted, emphasis added).[16]

Nor has the County raised a material dispute regarding its failure to provide "comparable new benefits" to make up for the benefit it eliminated. The County makes the ridiculous argument that it provided "comparable new benefits" by "invest[ing] nearly $1 million *in education and outreach to its retirees*." County Opp. at 5:23-25 (emphasis added). The County cites no authority for the glib proposition that the government confers a "comparable new benefit" by "educating" or "reaching out to" the people from whom it confiscated an important contractual right. The County further contends that it conferred comparable new benefits by offering "five new health plans" to retirees. *Id.* at 23-24. But there is no dispute that those health plans came with a very large increase in premiums, or less medical coverage, or much higher deductibles and copayments, or some combination of these detriments. Harris Opp. Decl., ¶ 4. *See Duncan v. Retired Public Employees of Alaska Inc.*, 71 P.3d 882, 891-92 (S.Ct. Alaska 2003) (analysis of substantial impact and comparable new benefits must include comparison of health benefits provided, "merely comparing old and new premium costs does not establish equivalency"). Finally, while the County strains to establish that one or two retirees could have "mitigated" the harm they suffered by the removal of the Subsidy, there is *no* dispute that, as a group, retirees have not received anything resembling "comparable" new benefits from the County. *See* GI

[16] Further, it is undisputed that the increase in *premiums* was not the only impairment of retirees' rights, as many retirees accepted less medical coverage and/or much higher deductibles and copayments to cope with the increase in premiums. Harris Opp. Decl., ¶ 4

No. 7 (at 5:5-22); *Duncan*, 71 P.3d at 891-92 (to determine if "comparable new" health benefits have been provided, court must focus on the group-wide impact of the changes).

Nor does the County come close to establishing that it faced a financial emergency that would justify the removal of the Subsidy.[17] *See Cayetano*, 183 F.3d at 1107 (court should give less deference to government claims of "emergency" when it is impairing its own contracts; mere desire to reduce financial obligations is not sufficient to excuse impairment); *AFSCME Local 2957 v. City of Benton, Arkansas*, 513 F.3d 874, 882 (8th Cir. 2008) ("crisis" defense to contract impairment must be based on "unprecedented emergency" and a "broad and generalized economic or social problem").

III. THE COUNTY'S REMAINING ARGUMENTS ARE UNAVAILING.

A. The 1993 Plan Document Has No Effect On The Subsidy.

The County's reliance on language in the 1993 Plan Document—which purports to prevent the vesting of the Grant Benefits but says nothing about the Subsidy—is unavailing for two reasons. County Opp. at 28:17-18. First, these non-vesting provisions, by their express terms, apply *only* to the specific benefits provided under "the Plan." Harris SA Decl., ¶ 17 & Exh. B at Art. 1.3, 5.4, 5.5. The County has conceded what the Plan Document itself makes clear: that the Subsidy was *not* one of those "Plan" benefits. *Id*. at Art 4 (defining and listing plan "benefits"); Brown SA Decl., Exh. N. Further, there is no dispute that the Subsidy and the Grant were separate benefits, with separate accounting and separate administration. Harris Reply Decl., ¶ 3. In fact, the Subsidy existed for *eight years* before the 1993 Grant Program was adopted. Nothing in the 1993 Plan Document suggests that it was meant to have any effect on that pre-existing

[17] GI No. 8 (at 5:23-6:22); REAOC's Opposition, Argument VI.B., and evidence cited therein; *see also* Sater Decl., Exh. E (Beckett Depo. at 55:9-24, 73:15-20).

benefit, and the person who drafted that document confirms that the County had no such intent. Harris Reply Decl., ¶ 4.

Second, the 1993 Plan Document is ineffective even as to the Grant Benefit. It is undisputed that (1) the County did not negotiate the non-vesting provisions in the 1993 Plan Document with the Unions; (2) the County never introduced the Plan Document into the bargaining process leading to the 1993 Grant Program; (3) the MOUs and PSRs that reflect the parties' *bilateral* intent regarding the 1993 Grant Program say nothing about the County's reservation of rights or its position that the Grant Benefits were not vested; (4) the course of dealing between the County and its employees was to treat retirement health benefits as vested for existing retires; (5) the County never provided the 1993 Plan Document to employees or to the Unions.[18] Moreover, the very documents that the County used to educate its employee benefits staff regarding retiree medical benefits make *no mention whatsoever* of the 1993 Plan Document or its reservation of rights or non-vesting provisions. Sater Decl., ¶ 3, Exh. B [Summary of Benefits]; ¶ 4, Exh. C [Gilbert Depo. at 73:10-77:16].[19] Indeed, David Sundstrom—the County's Auditor-Controller and an architect of the retiree medical restructuring—admitted several times in an email exchange that the *grant* benefits *were* vested for any employee who met the 10-year eligibility requirement contained in the express terms of the MOUs. Sater Decl., ¶ 5, Exh. D, at 1, 3 (regarding the "retiree medical grant," Sundstrom stated "[a]nyone here over ten years is vested.").

B. Government Code Section 31693 Is Inapplicable

Government Code section 31693 states that a county providing benefits "under this article"—meaning under section 31691—shall give retiree

[18] *See* Patton SA Decl., ¶ 15; Carlaw SA Decl., ¶ 8; Harris Decl., ¶ ¶ 17-18.

[19] Indeed, the Document refers the reader to the MOUs and PSRs for "full details" regarding employee benefits. It is undisputed that the MOUs and PSRs say nothing about a reservation or rights or non-vesting.

organizations advance notice of significant changes to retiree medical benefits. The County did not provide the Subsidy, or any other benefits, pursuant to section 31691. Indeed, section 31691 requires that counties provide benefits under that statute "by ordinance," rather than by resolution. Cal. Gov't Code § 31691.[20] The County never passed such an ordinance. In fact, the County provided the Subsidy pursuant to section 53201, which does *not* require an ordinance, but instead states that "[t]he legislative body of a local agency . . . may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees . . . who elect to accept the benefits . . ." *See OCEA*., 234 Cal.App.3d at 837 n.1 (applying section 53200 *et seq*. to Orange County's retiree medical benefits plan). Section 31693 simply does not apply.[21]

CONCLUSION

For all the foregoing reasons, the Court should grant REAOC's motion for summary adjudication.

Dated: December 15, 2008

Respectfully Submitted,

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[20] *See Midway Orchards v. Butte County*, 220 Cal. App.3d 765, 801 (1990) (in state legislation, requirement that local agency act by "ordinance" means that resolution is insufficient); 5 McQuillin, Municipal Corporations, § 15:2 (3d Ed 1999) (same).

[21] Even where it does apply, the statute establishes that notice to retirees is necessary; it does not say that notice is sufficient, or does it purport to remove whatever contractual rights retirees had to their health benefits.