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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC., **Plaintiff,** **v.** **COUNTY OF ORANGE,** **Defendant.**	**CASE NO. SACV 07-1301 AG (MLGx)** **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING AS MOOT PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**

In this case, Plaintiff Retired Employees of Orange County ("REOC") asks Defendant County of Orange (the "County") to pay for a promise that it never made: to continue using a favorable "pooling" methodology to calculate the health care premiums of its retired employees. REOC claims that the County's 23-year practice of annually authorizing this generous methodology morphed into an implied contract requiring the County to guarantee this benefit for life. The County insists that it never intended to grant a vested right to pooling, pointing out that no legislative enactment supports such an implied benefit.

The procedural history of this case is as serpentine as the issues it raises. This is the second time that the Court has considered the parties' cross-motions for summary judgment. *See Retired Emps. Ass'n. of Orange Cnty. v. Cnty. of Orange* ("*REOC I*"), 632 F. Supp. 2d 983 (C.D. Cal. 2009). After the Court granted summary judgment for the County the first time, an appeal wound its way up to the Ninth Circuit. *See Retired Emps. Ass'n. of Orange Cnty. v. Cnty. of*

Orange ("*REOC II*"), 610 F.3d 1099 (9th Cir. 2010). The Ninth Circuit then certified a question to the California Supreme Court. *See Retired Emps. Ass'n. of Orange Cnty., Inc. v. Cnty. of Orange* ("*REOC III*"), 52 Cal. 4th 1171 (2011). The question was answered and the matter returned to the Ninth Circuit, which then sent the case back to this Court.

In the meantime, this Court was also presiding over a companion case, *Harris et al. v. County of Orange*, No. SACV 09-0098 (C.D. Cal. filed Jan. 22, 2009), which involved the same counsel and many of the same issues. This Court issued a summary judgment in *Harris*, which was then reviewed by the Ninth Circuit and remanded to this Court. The *Harris* plaintiffs then brought a "Motion for Clarification" of the portion of the Ninth Circuit Opinion discussing matters related to the *REOC* cases. The Ninth Circuit recently denied the Motion for Clarification, so this Court now issues its decision in this *REOC* case.

Clearing away the winding substantive and procedural underbrush, it appears that both the California Supreme Court and the Ninth Circuit confirmed the bedrock foundation of this Court's original *REOC I* opinion. Under California Government Code Section 25300, any right to employee compensation must in some way be approved by the Board of Supervisors with a resolution or ordinance. Applying Section 25300, the California Supreme Court held that REOC bears the burden of proving that the relevant statutes or ordinances reflect "clear" legislative intent to enter into such a contract. *REOC III*, 52 Cal. 4th at 1187. Because REOC fails to make this showing, the Court must once again grant summary judgment in favor of the County.

The Court GRANTS the County's Motion for Summary Judgment on behalf of the County.

1. BACKGROUND

Plaintiff REOC is a California nonprofit organization representing over 4,600 Orange County retired employees and their spouses. On November 5, 2007, REOC filed this lawsuit challenging the County's decision to stop utilizing a favorable "pooling" methodology to calculate the health care premiums for retired employees. REOC claims that all employees

retired as of January 1, 2008–the date the County stopped implementing the policy–are entitled to receive the benefit of the pooling methodology for the rest of their lives. Although this promise does not appear in the County ordinances or resolutions, REOC argues that the County's past practice of using this methodology, combined with other facts, gave rise to an implied contractual obligation to provide the pooling benefit for life. The Court begins its factual summary by reviewing the origins of this dispute.

1.1 Resolutions 66-124, 68-329, and the 1991 *OCEA* Opinion

The County's Board of Supervisors ("Board") has full authority to establish the terms of compensation for its workforce. Cal. Const. art. XI, §§ 1(b), 4. All compensation must be approved by resolution or ordinance. Cal. Gov't. Code § 25300.

In 1966, the County first decided to provide group medical insurance to retired employees, approving this in Resolution ("Resolution") 66-124. *See Orange Cnty. Emps. Ass'n. v. Cnty. of Orange* ("*OCEA*"), 234 Cal. App. 3d 833, 839 (1991). In April 1968, Resolution 68-329 authorized the County to make premium payments on behalf of the retired employees. *Id.* In July 1978, the County ceased these premium payments under the theory that "contribution to retiree medical insurance premiums is not a vested right but rather is subject to the annual discretion of the Retirement Board." *Id.* In 1991, a California appellate court upheld the County's reasoning, finding that its "review of the entire statutory scheme discloses that the Legislature did not intend" to provide retired employees with the same benefits as active employees. *Id.* at 845. While they were not entitled to benefits on par with active employees, retired employees maintained their ability to enroll in group health care coverage, paying the premiums set by the Board. (Declaration of Patricia Gilbert, Dkt. No. 107 "Gilbert 107 Decl.," ¶ 7.)

1.2 Rate Resolutions and Resolution 84-1460

Each year, the Orange County Board of Supervisors ("Board") votes to formally approve the health care premiums for both retired and active employees for the following calendar year. (Gilbert 107 Decl., ¶ 25, 33, Ex. B.) In this process, the County staff presents the Board with a formal Resolution containing a schedule of the proposed premium rates. The Board then votes on the Resolution. (Gilbert 107 Decl., ¶ 25, 33, Ex. B.)

From 1966 through 1984, the County consistently approved one premium rate for active employees, and another for retired employees. (Declaration of Russell Patton, "Patton Decl.," ¶ 6.) In 1984, the Board decided to group, or "pool," retired and active employees together to calculate the 1985 annual premium rate. (Gilbert 107 Decl., Ex. B.) Under this methodology, there was only one combined premium rate for both groups. This decision was authorized in Resolution 84-1460. (Gilbert 107 Decl., Ex. B.)

The impetus for the "pooling" methodology was a $900,000 shortfall in the budget for retiree healthcare due to a large accounting mistake. (Patton Decl., ¶ 7); (Declaration of Gaylan Harris, Dkt. No. 128, "Harris 128 Decl.," ¶ 8.) The County had been erroneously reporting retiree medical insurance claims as active employee claims, which meant that premiums paid by retirees were far too low to cover the actual expenses. (Patton Decl., ¶ 7); (Harris 128 Decl., ¶ 8.)

The Agenda Item Transmittal ("AIT") portion of Resolution 84-1460, which contains the staff descriptions of the pending action items, briefly outlines the issue as follows:

> Unlike County employees, retirees pay all their costs for health insurance premiums. Historically [retired employees] have been rated separately and currently pay lower rates (approximately 55 percent) than employees. However, analysis of data of revenue from retirees is projected to be insufficient to cover expenditures for 1984. As a result, the reserves for the retiree indemnity health plan will be reduced by (approximately $900,000)."

(Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ03924.) The AIT then describes two ways to handle this budget shortfall: increase retiree premiums by 112%, or "equalize[]" retiree and employee rates, resulting in a 72% increase to retiree rates. (Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ03924.) Without further justification or discussion, the AIT states that table 5B incorporates the second recommendation.

Table 5B, titled "Retired Employees Monthly Premium Rates Effective January 1, 1985," has no further embellishment. It simply lists the premiums for calendar year 1985 for retired employees. (Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ04005.) It does not list rates for any other year. Nothing in Resolution 84-1460 indicates that pooling will continue beyond calendar year 1985.

Finally, the triggering language of Resolution 84-1460 states, without further commentary: "Approves the rate tables as contained in Exhibit 5, 5A, 5B," and "Authorize . . . the adoption of 1985 health rates." (Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ03921-22.)

Although the short-term impact of Resolution 84-1460 was to *raise* retirees' premiums by 72%, it provided a generous benefit to the retirees in the following years. By combining the relatively high premiums of retired employees with the lower premiums of the relatively more healthy active employees, the pooling methodology reduced the premium paid by retired employees by shifting the cost to active employees. The County paid the bulk of this shifted cost under its pre-existing policy of paying a large portion of active employees' premiums. (Harris 128 Decl., ¶ 6.); (Declaration of Shelley Carlucci, Dkt. No. 106 "Carulucci 106 Decl.," ¶ 33, Ex. B.) Thus, the net effect of pooling was that the County subsidized the premiums of retired employees (the "Subsidy").

1.3 The 1993 Plan

In 1993, the Board of Supervisors passed Resolution 93-369, adopting a new comprehensive retiree medical program called the "County of Orange Retiree Medical Plan" ("1993 Plan"). (Gilbert 107 Decl., ¶¶ 11-19, Ex. A.) Under the 1993 Plan, retired employees

received a monthly fixed-dollar stipend to defray their premium costs. (*Id.*) The 1993 Plan does not address the Subsidy or the premium-setting methodology, nor does it guarantee specific premium rates. (*Id.*) The 1993 Plan specifically states that it creates no vested rights. (*Id.*) It also specifically reserves the County's right to amend or terminate the 1993 Plan at any time. (*Id.*)

1.4 Other Related Legislative Enactments

After it passed the 1993 Plan, the Board continued to annually approve premium rates through the rate Resolutions. (Gilbert 107 Decl., Ex. B.) To support its Motion for Summary Judgment, the County submitted a complete record of rate Resolutions from 1981 through 2009, as well as salary and personnel Resolutions. (Gilbert 107 Decl., Ex. B); (Declaration of Shelley Carlucci, Dkt. No. 106 "Carulucci 106 Decl.," ¶¶ 3, 6-10, Exs. A-Z.) The County also submitted the corresponding record of approved memorandums of understanding ("MOUs)." (Carlucci 106 Decl., ¶¶ 3, 6-10, Exs. A-Z.) MOUs are tentative bilateral agreements between the Board negotiators and the labor unions, which become binding after they are officially approved by the Board. Cal. Gov't. Code § 3501.1. When an MOU has expired, the parties may negotiate changes to its provisions. *Id.*

These legislative materials reflect a yearly process of setting rates. In other words, each year the Board approved the premium rates for the upcoming year, but no further. There is no reference to any continuing obligation to maintain the policy beyond the upcoming calendar year. In fact, certain Resolutions explicitly refer to the pooling as a "policy" or "practice," and consider the effect of discontinuing this "policy." (Gilbert 107 Decl., Ex. B, p. OCMSJ04390.) For example, the 1997 Resolution states:

> The County's policy has been to set the required retiree rates at an amount equal to 100% of the average rate for active employees and retirees. . . . This practice has resulted in the active employee rates subsidizing the retiree rates. For 1998 the

> active rates will subsidize the retiree rates by approximately $2,550,000. If this subsidy was eliminated and not considering the fund balance, the retiree rates would increase by 58% with active rates decreasing by 2.4% (averaging to the required 7.8% increase, after considering the Fund Balance interest).

(Gilbert 107 Decl., Ex. B, p. OCMSJ04390.)

1.5 County's Decision to Terminate Pooling

In 2004, the County began a review of its retiree health care program. (Gilbert 107 Decl., ¶¶ 35, 36, 40.) The County formed a Retiree Medical Panel, with representatives from the labor unions. (Gilbert 107 Decl., ¶ 36.) After extended negotiations, the County reached a broad reform agreement, including an agreement to stop the pooled structure, which became effective January 1, 2008. (Gilbert 107 Decl., ¶¶ 41-58.) The County did not formally negotiate this agreement with the retired employees, although it did work with REOC to come up with alternative plans. (*Id.*)

2. PRELIMINARY MATTERS

2.1 Request for Judicial Notice

The parties filed various requests for judicial notice, both in their original briefing and after remand. (Dkt. Nos. 111, 144, 147, 220.) Most of those requests are unopposed, and concern legislative materials such as the relevant Resolutions. The County opposes some of Plaintiff's requests on the grounds that they are not official public records, and that they are irrelevant. (*See* Dkt. Nos. 168, 230.)

The Court may take judicial notice of documents under Federal Rule of Evidence 201(b). "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is

generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts may take judicial notice of "*undisputed* matters of public record," but generally may not take judicial notice of "*disputed* facts stated in public records." *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (emphasis in original); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (holding that courts can take judicial notice of pleadings and court orders that are matters of public record.)

Putting aside the issue of whether judicial notice is even necessary in relying on items like a board resolution, the Court GRANTS the parties' requests for judicial notice. In doing so, the Court does not decide that these documents constitute part of the official public record for purposes of its contract analysis. Defendant's relevancy arguments are addressed in the analysis that follows.

2.2 Evidentiary Objections and Requests to Strike Evidence

The parties submitted voluminous evidence supporting their papers. While much of the evidence was undisputed, there were also a substantial number of objections. (*See, e.g.*, Dkt. Nos. 136, 149, 162, 168.) On motions with voluminous objections "it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010) (a summary judgment case quoting *Doe v. Starbucks, Inc.*, 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009)). Further, many of these objections are made on relevancy grounds that go to the heart of the Court's analysis, and are thus addressed in the analysis. Because the Court can not rely on irrelevant facts, objections based on relevancy are redundant. *See generally Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006) (noting that parties may simply *argue* that certain facts are irrelevant, instead of objecting to them on relevance grounds).

The remainder of the objections are largely moot, because the Court did not rely on most

of the evidence under objection. *See, e.g., Smith v. Cnty. of Humboldt*, 240 F. Supp. 2d 1109, 1115-16 (N.D. Cal. 2003) (refusing to rule on the evidentiary objections in defendant's reply "because even if the evidence submitted by plaintiff is considered by this Court, plaintiff fails to state a colorable claim"). To the extent that the Court relied upon any evidence, the related evidentiary objections are overruled. *See Burch*, 433 F. Supp. 2d at 1118 (condemning the prevalent and time-consuming practice of "fil[ing] objections on all conceivable grounds" and concluding that "the court will [only] proceed with any necessary rulings on defendants evidentiary objections").

3. LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id*. at 269.

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322-23. If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

4. ANALYSIS

As noted, in June 2009 this Court issued an Order granting the County's motion for summary judgment. *REOC I*, 632 F. Supp. 2d at 987. This Court's original order found that proper deference to the taxpayers of Orange County, and provisions including California Government Code Section 25300 required it to rule in favor of the County. *Id.* at 985-86. *REOC I* ultimately resulted in *REOC III*, the California Supreme Court's opinion on the certified question. In *REOC III*, the California Supreme Court provided guidance but did not apply the law to the facts of this case.

The Court now reviews *REOC III*, as well as some of the cited caselaw. The Court also reviews the recent Ninth Circuit decision in *Harris*, the companion case. After this review, the Court proceeds to the merits of this case once again.

4.1 Guiding Caselaw

4.1.1 *REOC III*

The question the Ninth Circuit certified to the California Supreme Court was "[w]hether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees." *REOC III*, 52 Cal. 4th at 1176.

As an initial matter, the California Supreme Court agreed with this Court's original order that California Government Code Section 25300 required courts to "look to Board resolutions, including those resolutions approving or ratifying MOUs [], to determine the parties' contractual rights and obligations." *Id.* at 1185 (citing *Van Riessen v City of Santa Monica*, 63 Cal. App. 3d 193, 196 (1976) (holding that employee benefits would not be upheld "absent some specific statutory or other lawful authorization")). Unlike other cases where no such statutory mandate existed, "[S]ection 25300 . . . does constrain a county's discretion" to set compensation, requiring

it to act through a formal resolution or ordinance. *Id.* at 1184.

The California Supreme Court then found that, although the contractual intent must arise from the Board resolutions or ordinances, the "case law does not inexorably require that the intent be express." *Id*. at 1187. There are "limited circumstances" when "contractual rights may be implied from legislative enactments." *Id.* at 1185. These circumstances are necessarily limited because legislatures primarily use resolutions to establish revocable policies, not to enter into binding contracts. *Id.* at 1185-86; *see also Cal. Teachers Ass'n. v. Cory*, 155 Cal. App. 3d 494, 504 n.7 (1984) ("Legislatures, unlike private persons, have the power to create 'obligations' which are not contractual in nature."). "[T]o construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Id.* at 1185 (quoting *Nat'l R. Passenger Corp. v. Atchinson Topeka & Santa Fe Ry.*, 470 U.S. 451, 466 (1985)). There is thus a presumption that a legislature does *not* intend the obligations it sets forth in its resolutions to create private contractual rights. *REOC III*, 52 Cal. 4th at 1186.

This presumption places a "heavy burden" on a plaintiff to show implied contractual intent. *Id*. at 1190 (quoting *San Diego Police v. San Diego Ret. Sys.*, 568 F.3d 725, 740 (9th Cir. 2009)). Absent explicit language granting a contractual right, a plaintiff must show that "the statutory language or circumstances accompanying its passage *clearly* evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]." *Id.* at 1187 (emphasis added) (citations and quotations omitted); *see also Claypool v. Wilson*, 4 Cal. App. 4th 646, 670 (1992) ("[T]he implication of suspension of legislative control must be 'unmistakable.'") (quoting *Cal. Teachers Ass'n.*, 155 Cal. App. 3d at 509). This high bar "ensure[s] that neither the governing body nor the public will be blindsided by unexpected obligations." *REOC III*, 52 Cal. 4th at 1189.

4.1.2 Cases Cited in *REOC III*

The California Supreme Court noted that "numerous cases 'have implied contractual

obligations from the particular texts and contexts of the statutes at issue.'" *REOC III*, 52 Cal. 4th at 1186 (quoting *Cal. Teachers Ass'n*, 155 Cal. App. 3d at 505). This Court now reviews certain of those cases, as well as cases finding no implied right.

In *Valdes v. Cory*, 139 Cal. App. 3d 773 (1983), the Court of Appeal found that the state had an implied contractual duty "to make systematic, substantial monthly contributions to the PERS [Public Employees' Retirement System] fund[.]" *Id.* at 786. The duty to maintain an actuarially sound system fell just short of being explicit because the statute did not actually use the phrase "sound actuarial basis." *Id.* at 785-86 & 785 n.5. But there were statutory provisions mandating ongoing "compulsory employer contributions" in specific codified amounts, accompanied by a statement that these monthly contributions were "continuing obligations of the State." *Id.* at 782 (citations and quotations omitted). Relying on that clear statutory language, the Court of Appeal found an implied contract to contribute to the PERS fund on an ongoing basis.

The facts in *California Teachers Association* presented a closer call, leading to a dissenting opinion. There, the Court of Appeal considered whether Government Code Sections 23401 and 23402 manifested a clear intent to permanently fund the California Teacher's Retirement Fund. 155 Cal. App. 3d at 499-500. Those statutes, passed in 1978, contained a table listing the specific amount of money to be paid into the Teacher's Retirement Fund for every year from 1980 through 1995. *Id.* at 502 n.4. They also provided a formula for calculating funding in the ensuing years. *Id.*

The majority in *California Teachers Association* found that those tables constituted "a straight-out promise to pay fixed and determinable sums of money." *Id.* at 508. It also considered the fact that the enactment creating the obligation expressly repealed the conditioning of such funding upon appropriations in the State Budget Act. *Id.* at 506. It concluded that this repeal demonstrated a "commitment to permanency of funding" regardless of the contingencies of the annual budget. *Id.* But in a well-reasoned dissent, Justice Regan stated that he "fully agree[d] with the Governor that the statutory appropriations . . . do not create a contract[.]" *Id.* at 515 (J. Regan, dissenting). Justice Regan distinguished *Valdes* because the statutory language in that case clearly stated that the State had a "continuing obligation" to contribute to the retirement

fund, as no such language appeared in Sections 23401 and 23402. *Id.* at 517. Thus, he concluded that the statutes did not contain "an adequate manifestation of a promise giving rise to a contractual obligation." *Id.* at 518-19.

On the other end of the spectrum are cases where courts have found *no* clear intent to enter into a contractual arrangement, despite a policy and practice of providing benefits. In *Claypool*, the Court of Appeal held that statutes authorizing funds for cost of living ("Cola") programs did not create an implied promise of continued funding. 4 Cal. App. 4th at 652. The court's pointed analysis flatly held that it could not find any statutory language assuring future funding, nor any language confirming that the legislature would not decrease funding. *Id.* at 679. There was simply no textual hook for the implied right.

The *Claypool* court distinguished *Valdes* and *California Teachers Association*, where the decisions had "implied contractual obligations . . . [based] on the strength of assurances to be found in the language of the governing statutes . . . [showing] a 'commitment to permanency' of funding of 'critical importance' to the 'underlying contractual promise to pay the pensions[.]'" *Id.* at 670 (citing *Cal. Teachers Ass'n.*, 155 Cal. App. 3d at 506.) The statute at issue in *Claypool* did not include any assurances showing a commitment to permanency of funding. *Id.* The court further distinguished *Valdes* and *California Teachers Association* because the implied promises upheld in those cases were necessary to maintain the fundamental integrity of the pension system. *Id.* But in *Claypool*, plaintiff sought an implied right to a particular Cola funding methodology, which the court concluded amounted to a claim to "a vested right to control the administration of the plan[.]" *Id.* at 669. The court declined to imply such a right because it would place "a fundamental constraint on the freedom of action of the Legislature[.]" *Id.* at 670 (emphasis added) (citations and quotations omitted).

Likewise, the court in *Sappington v. Orange Unified School Distict*, 119 Cal. App. 4th 949 (2004) declined to find that the retired employees of the Orange County unified school district had an implied right to receive free lifetime PPO benefits. *Id.* at 956. Unlike the *Claypool* plaintiffs, the *Sappington* plaintiffs did cite specific statutory language purportedly granting their implied right. *Id.* The court extensively analyzed this statutory language and concluded that it

was ambiguous. *Id.* at 955. The court then considered the fact that the District had a 20-year policy of providing the PPO benefits. *Id.* The court concluded that the District's decision to "provide[] a free PPO benefit for 20 years–before health insurance premiums skyrocketed and the cost of PPO coverage began far outpacing the cost of HMO coverage–does not prove the District promised to provide that option forever." *Id.* The long-term practice of providing the benefit "reflect[ed] a magnanimous spirit, not a contractual mandate." *Id.* at 955.

4.1.3 Ninth Circuit Opinion in *Harris*

Harris, the companion case to this one, recently returned from an appeal to the Ninth Circuit of an order dismissing the case. *See Harris*, 682 F.3d at 1134. It provides an instructive application of the California Supreme Court's certified decision.

In the relevant portion of *Harris*, the Ninth Circuit considered whether the retired employees could state a claim for breach of an implied contract to receive a fixed subsidy (the "Grant") under the 1993 Plan. *Id.* The Ninth Circuit found that "[i]n order to state a claim for a contractual right to the Grant, the Retirees must plead specific resolutions or ordinances establishing that right." *Id.* at 1135 (citing *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, No. 09-04432, 2010 U.S. Dist. LEXIS 143345, at *9, 27 (N.D. Cal. Nov. 23, 2010) (dismissing case with prejudice, where none of the Board resolutions or Board-certified MOUs "explicitly provide[d] that Sonoma agreed to provide health insurance benefits to retirees in perpetuity, [and so] a contract to do so has not been formed.")). In other words, the Plaintiffs needed to identify specific "terms or provisions . . . guarantee[ing] the Grant will continue." *Id.*

On appeal, Plaintiffs identified two specific MOUs to support their allegations. But the Ninth Circuit found that neither one had any terms or provisions guaranteeing the continuation of the Grant. *Id.* To the contrary, the MOUs contained durational language. *Id.* In the absence of any specific MOUs supporting the allegations of an implied right, the Ninth Circuit concluded that the "Retirees have failed to plead facts that suggest that the County promised, in the MOUs or otherwise, to maintain the Grant as it existed on the Retirees' respective dates of retirement."

Id. The absence of this factual predicate meant that Plaintiffs had not even properly *alleged* an implied right. The Ninth Circuit granted leave to amend, but only to allow Plaintiffs "to set out specifically the terms of those MOUs on which their claim is predicated." *Id.* at 1137.

After reviewing the Ninth Circuit Opinion, the retired employees asked the Ninth Circuit to clarify that an implied contractual right to benefits could *also* arise from extrinsic "circumstances accompanying [the] passage [of the legislative enactment]." *Harris v. County of Orange*, No. 11-55669, slip op. at 3 (9th Cir. Jun. 12, 2012.) The Ninth Circuit refused, standing by its original Order requiring any amendment to cite *specific* MOUs. *Id.*, slip op. at 1 (9th Cir. Jul. 23, 2012.)

4.2 Application of *REOC III*

Ultimately, the California Supreme Court and the Ninth Circuit declined to weigh in on the proper outcome in this case, leaving it to this Court to apply the law to the facts. But in *REOC III*, the California Supreme Court did frame the relevant question as whether "a contractual right for the continuation of a single unified pool for purposes of setting health insurance premiums for retired Orange County employees can be implied from Board resolutions[.]" *REOC III*, 52 Cal. 4th at 1188. REOC bears the "heavy burden," *id.* at 1190, of demonstrating that "the statutory language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the governmental body." *Id.* at 1187 (citations and quotations omitted). The Court bears in mind the California Supreme Court's mandate, echoing the United States Supreme Court, to "proceed cautiously both in identifying a contract within the language of a . . . statute and defining the contours of any contractual obligation." *Id.* at 1188 (citing *Nat'l R. Passenger Corp.*, 470 U.S. at 466).

4.2.1 Statutory Language and Accompanying Circumstances

The Court begins its cautious review by examining Resolution 84-1460, which originated

the pooling practice. It is immediately apparent that Resolution 84-1460 contains no provisions comparable to those in *Valdes* or *California Teachers Association*. Unlike the provision in *Valdes*, there is no language indicating that pooling would be a "continuing obligation." *Valdes*, 139 Cal. App. 3d at 778. And unlike the tables in *California Teachers Association*, the County did not mandate the future amounts that it was required to contribute to the retired employees' health care premium rates. 155 Cal. App. 3d at 502 n.4. In fact, Resolution 84-1460 does not discuss pooling or the Subsidy for *any* period of time beyond the 1985 calendar year. It simply included a bare-bones table listing the premium rates for that year. The rates for the next year were not fixed in advance, but were to be determined and approved the following year.

The circumstances accompanying the passage of Resolution 84-1460 suggest that it did not arise out of a bargained-for exchange with employees. Rather, the County independently realized that it needed to correct its past accounting mistake. To rectify this error, the County had to raise retired employee premiums by either 72% or 112%. The County elected to raise them by the still hefty 72%, which was only achieved by pooling rates, indirectly resulting in the Subsidy. The bottom line is that pooling was an immediate solution to an immediate problem. The Subsidy was a by-product of the County's accounting clean-up. Nothing in Resolution 84-1460 indicates that the County intended to grant a lifetime benefit to retired employees. In fact, the immediate effect of Resolution 84-1460 was to *harm* retired employees by raising their premiums.

The later legislation is also devoid of any language reflecting a continuing obligation to provide the Subsidy. The Board approved the pooling policy on an annual basis, and limited its approval to the upcoming calendar year only. The legislation made no commitment to the years beyond. This tracks facts found relevant in other cases. *See, e.g, San Bernardino Public Emps. Ass'n. v. City of Fontana*, 67 Cal. App. 4th 1215, 1224 (1998) (finding no vested right to benefits because they "were earned on a year-to-year basis under previous MOUs that expired under their own terms"). Indeed, the later Resolutions explicitly calculate the impact of discontinuing this policy.

Overall, the legislative language reflects the Board's intent that the decision to continue

granting the Subsidy, or not, was its to make anew each year. This is consistent with the 1993 Plan, which authorized the Grant. REOC continually characterizes the Grant as the other half of the total "package" of retiree health benefit compensation. The 1993 Plan expressly states that it creates no vested rights, and reserves the County's right to amend or terminate the 1993 Plan at any time. This is explicit evidence of legislative intent regarding the question of vested retiree health benefits, and it falls squarely on the County's side.

Ultimately, this case is most akin to *Claypool*, where the court found no implied promise of continued funding in the Cola legislation. 4 Cal. App. 4th at 679. As here, the court in *Claypool* encountered a total lack of legislative language assuring future funding, or stating that current funding would not be decreased. *Id.* Like the *Claypool* plaintiff's claim to a particular Cola funding methodology, REOC's insistence on the pooling methodology amounts to an ill-favored demand for "a vested right to control the administration of the plan[.]" *Id*. at 670; *see also RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1148-49 (9th Cir. 2004) (for an implied contract to form the basis of Contract Clause claim, the "term must be so central to the bargained-for exchange between the parties . . . that it must be deemed to be a term of the contract") (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 188-89 (1992)). The particular premium methodology that the County chooses to employ does not alter the retired employees' fundamental right to enroll in the County health care program. This Order merely concludes, as the California Court of Appeal has already found, that retired employees are not entitled to the same benefit terms as active employees. *See REOC III*, 52 Cal. 4th at 1193 (summarizing REOC's argument on appeal to be that "health premiums for active and retired employees, however they are paid, must be equal."); *OCEA*, 234 Cal. App. 3d at 845 (holding that the County had no duty to provide equal health care benefits to active and retired employees).

This case is also similar to *Harris*, where the Ninth Circuit refused to find an implied vested right to the fixed Grant under the 1993 Plan. 682 F.3d at 1135. There, the two specific MOUs identified by the retired employees lacked any "terms or provisions" specifically guaranteeing that the right would continue. *Id.* Instead, the MOUs contained durational

language. *Id.* The Ninth Circuit found that the retirees "failed to plead facts that suggest that the County promised, in the MOUs or otherwise, to maintain the Grant as it existed on the Retirees' respective dates of retirement." *Id.* Faced with a similar record, this Court must reach the same conclusion in this case.

4.2.2 Extrinsic Evidence

Over the course of this case, REOC has essentially admitted that it can not point to any one specific statutory provision anchoring its purported right to the pooling benefit. Instead, REOC has argued that lifetime pooling rights were a hidden term lurking in *every* ratified MOU, understood but never clearly expressed. (*See* Declaration of Arther A. Hartinger, Ex. A) (responding to an interrogatory, REOC stated that "Plaintiff cannot reasonably be required to 'identify and specify the terms' of all of [the contracts at issue], because they comprise thousands of pages and cover a period of more than two decades."). REOC asks this Court to imply this hidden term, *not* from specific textual language, but from extrinsic evidence, such as the parties' post-1983 conduct, informal remarks, and informational booklets never incorporated into any formal resolutions.

This is the argument recently rejected by the Ninth Circuit in *Harris*. 682 F.3d at 1135 (requiring Plaintiffs "to set out specifically the terms of those MOUs on which their claim is predicated"), *request for clarification denied*, No. 11-55669, slip op. at 3 (9th Cir. Jun. 12, 2012) (refusing to address argument that implied right could be established outside of specific MOUs). As the nuanced opinions in *Valdes*, *California Teachers Association*, and *Claypool* make clear, any analysis of implied legislative intent must begin and end with the text of the legislation. *See Claypool*, 4 Cal. App. 4th at 670 (distinguishing *Valdes* and *California Teachers Association* because they had "implied contractual obligations . . . [based] on the strength of assurances to be found in the language of the governing statutes . . . [showing] a 'commitment to permanency' of funding"). Extrinsic evidence is proper to help decode unclear legislative language, but not to add missing terms that alter the statute's purpose. *See* Cal. Code Civ. P. § 1858 (when construing

a statute, the court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted"); *see also OCEA*, 234 Cal. App. 3d at 841 ("If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.") (citations omitted); *Ventura Cnty. Retired Emps. Ass'n v. Cnty. of Ventura*, 228 Cal. App. 3d 1594, 1598 (1991) (finding that the statutory scheme "does not require equal health care benefits for active employees and retirees. Had the Legislature so intended, it surely would have said so.").

REOC turns this analysis on its head by asking this Court to *begin* its inquiry with the parties' course of conduct and other extrinsic evidence. This Court refuses to cobble together evidence to manufacture a promise that the Board never made. *See* REOC, 52 Cal. 4th at 1185-86 ("[T]o construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislating body.") (quoting *Nat'l R. Passenger Corp.*, 470 U.S. at 466). Other courts, including the United States Supreme Court, have also firmly rejected this "reverse parol evidence rule" because it erroneously elevates extrinsic evidence above enacted language. *Garcia v. U.S.*, 469 U.S. 70, 78 (1984); *see also Shannon v. U.S.*, 512 U.S. 573, 583-84 (1994) (declining to give "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1081-82 (9th Cir. 1999) ("This circuit relies on official committee reports when considering legislative history, not stray comments by individuals or other materials unrelated to the statutory language or other committee reports."); *OCEA*, 234 Cal. App. 3d at 837 n.3 (in analyzing legislation, "the opinions of the author will not be considered as evidence in favor of a particular meaning because there is no assurance that other legislators shared those opinions") (citations omitted). Nor will this Court retroactively find an implied right based on the circumstances surrounding the 2008 termination of the pooling methodology. This post-hoc evidence merely reflects the view of a subsequent legislature, which is "not controlling" for purposes of determining "the meaning of a prior legislative enactment." *Cal. Teachers Ass'n.*, 155 Cal. App. 3d at 506-07 (citing *Del Costello v. State of Cal.*, 135 Cal. App. 3d 887, 893 n.8

(1982) ("Our task is to discern the intent of the statute from its applicable language and context.").

REOC's backwards analysis is particularly dangerous because it improperly shifts the burden of proof to the County. It is *REOC's* burden to show that the County intended to grant a vested right to such benefits, not the County's burden to prove that a long-standing generous benefits policy was not de facto deferred compensation. *See Sappington*, 119 Cal. App. 4th at 954-55 ("The fact that the District provided a free PPO benefit for 20 years . . . does not prove the District promised to provide that option forever."). Tellingly, the California Supreme Court joined with the Ninth Circuit in criticizing an appellate court for precisely this mistake, complaining that its "analysis was deficient in failing to focus explicitly on 'the legislative body's intent to create vested rights' or the plaintiff's 'heavy burden' to demonstrate that intent." *REOC III*, 52 Cal. 4th at 1190 (quoting *San Diego Police Officers Ass'n*, 568 F.3d at 740) (criticizing *Cal. League of City Emp. Ass'ns v. Palos Verdes Library Dist.*, 87 Cal. App. 3d 135, 140 (1978)).

Here, there is no legislative language expressing a continuing obligation to use the premium methodology, meaning that this Court's analysis has no further to go. *See, e.g*, *Hertzberg*, 191 F.3d at 1081-82 ("Where the meaning of a statute is clear from the text, we need look no further."). In that regard, this case must be distinguished from *Sappington*, which involved a statutory passage arguably expressing an intent to fund lifetime PPO benefits. 119 Cal. App. 4th at 956. Because the statutory language was ambiguous, the *Sappington* court properly considered extrinsic parol evidence arising from the District's 20-year policy of providing such PPO benefits, which was ultimately unavailing. *Id.* at 954 (stating that the analysis "begin[s] with the language of the policy itself," and only turning to extrinsic evidence once it found that the language "did not per se constitute a promise to pay"). It would be improper to resort to such evidence here because the Resolutions are not ambiguous. Under any reading, they do not reflect a clear intent to provide pooling. Thus, the extrinsic course-of-conduct evidence that REOC asks this Court to consider is necessarily irrelevant. Otherwise, informal course-of-conduct would trump legislative intent, allowing the exception to swallow the rule.

4.3 Conclusion

Concluding its cautious review, the Court must, once again, grant the County's motion for summary judgment, and find that no contractual right to vested pooling exists. Thus, the Court need not address whether that right is protected under the Contract Clause, nor whether the County substantially impaired that right.

While the Court finds that the County is not obligated to continue providing retirees with the benefits of the pooling methodology, the Court is sympathetic to the retirees' plight. As the *Ventura* court recognized, the spiraling cost of health care in America is "simply unconscionable," and often "results in disparate rates and medical coverage for those who can least afford it, including retirees." *Ventura*, 228 Cal. App. 3d at 1598.

But this sympathy cannot drive this Court's decision. "Were the recognition of constitutional contract rights to be based on the importance of benefits to individuals rather than on the legislative intent to create such rights, the scope of rights protected by the Contracts Clause would be expanded well beyond the sphere dictated by traditional constitutional jurisprudence." *San Diego Police Officers Ass'n*, 568 F.3d at 740. Politicians who approve benefits must do so clearly enough to be held accountable whenever possible to the voters and taxpayers who ultimately pay for the benefits. Implied rights are only proper when "neither the governing body nor the public will be blindsided by unexpected obligations." *REOC III*, 52 Cal. 4th at 1189. Here, no legislative enactment ever clearly alerted the voters and taxpayers that any such benefit ever existed.

Importantly, this decision does not leave the retirees without a remedy. They may petition the Board of Supervisors to revisit their claim in the political arena, facing the scrutiny of taxpayers and voters. In the political arena, competing interests seek limited government funds in a zero sum contest. If the Board of Supervisors finds that the retirees' claims are more just and worthwhile than competing claims, then the Board may clearly and publicly approve the

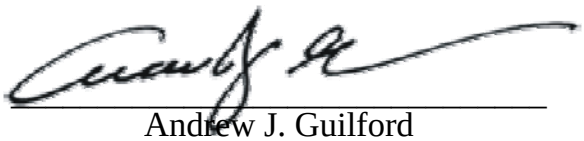
necessary funding.

5. DISPOSITION

The County's summary judgment motion is GRANTED, and REOC's summary adjudication motion is DENIED as moot. The County may submit a brief, concise proposed judgment to the Court within 14 days of this Order.

IT IS SO ORDERED.

DATED: August 13, 2012



Andrew J. Guilford
United States District Judge