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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION  
10

11 RETIRED EMPLOYEES  
ASSOCIATION OF ORANGE  
12 COUNTY (“REAOC”),

13 Plaintiff,

14 v.

15 COUNTY OF ORANGE,

16 Defendant.  
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Case No. SACV 07-1301 AG

**PLAINTIFF’S MEMORANDUM OF  
POINTS AND AUTHORITIES ON  
REMAND**

Date: March 19, 2012

Time: 10:00 a.m.

Place: Courtroom 10D  
411 West Fourth Street  
Santa Ana, CA 92701

Judge: Hon. Andrew J. Guilford

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1 **I. INTRODUCTION**

2 REAOC filed this suit in November 2007 to challenge the decision by the  
3 County of Orange (“the County”) to eliminate the Retiree Premium Subsidy, a  
4 retirement health benefit that it had provided to its retirees, and promised to its  
5 employees, for 23 consecutive years. REAOC acknowledged from the outset that  
6 the promise was not set forth in the express provisions of a written contract or other  
7 piece of legislation. It argued, however, that established principles regarding the  
8 law of *implied in fact* contract demanded that the County continue to provide this  
9 critical benefit to those employees who had retired on or before the County changed  
10 its policy, on January 1, 2008.

11 The County insisted that it was not subject to the law of implied-in-fact  
12 contract, because, it argued, all terms of public employment must be set forth  
13 expressly in Board legislation. This Court accepted that argument, but the  
14 California Supreme Court has now confirmed what REAOC has argued all along:  
15 that implied-in-fact contract rights *may* arise in public employment, if the parties’  
16 course of conduct clearly demonstrates that the practice became a component of  
17 their contractual exchange.

18 As explained below, REAOC has adduced evidence that clearly and  
19 convincingly shows that the 23-year practice of pooling active and retired  
20 employees for purposes of setting retiree health premiums, and the Retiree Premium  
21 Subsidy that resulted, became a substantial component of the contractual exchange  
22 between the County and its employees. The parties’ course of dealing also compels  
23 the conclusion that, while the County was free to, and in fact did, negotiate with  
24 active employees to eliminate this benefit *prospectively*, its contractual obligations  
25 prohibited it from revoking the benefit, unilaterally, from existing retirees. The  
26 application of the California Supreme Court’s opinion can reasonably lead to only  
27 one result: REAOC is entitled to summary adjudication on its claims for  
28 impairment of contract.

1 **II. PROCEDURAL BACKGROUND**

2 In November 2007 REAOC filed this lawsuit seeking declaratory and  
3 injunctive relief for the County’s elimination of the Retiree Premium Subsidy.  
4 [Docket No. 1] REAOC’s claims for breach of contract and violation of the  
5 contracts clauses were premised solely on the theory that pre-2008 retirees had an  
6 implied-in-fact contract right to continue to receive that benefit throughout their  
7 retirements. [*Id.*] This Court denied the County’s motion to dismiss REAOC’s  
8 claims, acknowledging that REAOC was entitled to rely on a theory of implied-in-  
9 fact contract based on the County’s historic practice of pooling active and retired  
10 employees for purposes of calculating health premiums. [Docket No. 25 at 6-7  
11 (“Plaintiff references Defendant’s long-term *practice* of pooling, and the *implied*  
12 *promise* that it would continue ... *Plaintiff has alleged an implied contract to*  
13 *maintain the Pooling Benefit*”) (emphasis added).]

14 After months of discovery, in November 2008 the parties filed cross-motions  
15 for summary judgment. This Court heard argument on the motions on December  
16 22, 2008. In June 2009, this Court issued an order granting the County’s motion for  
17 summary judgment, and denying REAOC’s motion. *REAOC v. County of Orange*,  
18 632 F. Supp. 2d 983 (C.D. Cal. 2009) (“*REAOC I*”). This Court acknowledged that  
19 “public employees are absolutely entitled to retirement benefits provided in  
20 contracts properly offered, approved and accepted” by the Board. *Id.* at 983. It  
21 held, however, that under California law there existed a *per se* prohibition on  
22 reading such contracts to include terms that did not receive the Board’s express  
23 approval. *Id.* at 986-87 (“cases finding such contractual obligations regarding  
24 public pensions base their findings on explicit language in statutes or legislative  
25 enactments”). REAOC appealed.

26 The Ninth Circuit concluded that the law in California regarding implied  
27 terms in public employment contracts was unsettled. *REAOC v. County of Orange*,  
28 610 F.3d 1099, 1101 (9th Cir. 2010) (“*REAOC II*”). It certified the following

1 question to the California Supreme Court: “Whether, as a matter of California law,  
2 a California county and its employees can form an implied contract that confers  
3 vested rights to health benefits on retired county employees.” *Id.* The California  
4 Supreme Court accepted the certification.

### 5 **III. THE SUPREME COURT’S UNANIMOUS RULING IN *REAOC III***

6 On November 21, 2011 the California Supreme Court provided its unanimous  
7 answer to the Ninth Circuit’s question: *Yes*, a county and its employees may enter  
8 into contracts under which employees, by implication, earn the right to receive  
9 certain health benefits throughout their retirement. *REAOC v. County of Orange*, 52  
10 Cal. 4th 1171 (2011) (“*REAOC III*”). The Court’s holding is described in more  
11 detail below.

#### 12 **A. Implied-In-Fact Contract Terms May Arise From Parties’ Course 13 Of Dealing And Past Practices, And Implied Terms Stand On 14 Equal Footing With Express Terms.**

14 The Court began its analysis with a review of the fundamental tenets of  
15 California law with respect to implied-in-fact contract. “A contract is either express  
16 or implied,” and implied contract obligations arise “from mutual agreement and  
17 intent to promise where the agreement and promise have not been expressed in  
18 words.” *REAOC III*, 54 Cal. 4th at 1178. Further, “even where a written contract  
19 exists, evidence derived from experience and practice can now trigger the  
20 incorporation of *additional, implied terms*,” which “ordinarily stand on equal  
21 footing with express terms.” *Id.* at 1178-1179 (emphasis added), citing *Scott v.*  
22 *Pacific Gas & Electric Co.*, 11 Cal. 4th 454, 563 (1995).

23 In *Scott*, the Court had noted that the “modern trend in contract law” was for  
24 courts to “seek to enforce the actual understanding of the parties to a contract.”  
25 *Scott*, 11 Cal. 4th at 463. In so doing, courts should not limit themselves to the  
26 parties’ express written contract, but instead “may inquire into the parties’ conduct”  
27 to determine if it demonstrates additional, implied terms. *Id.* In the specific context  
28 of employment contracts, “this realistic approach to contract interpretation means



1 that courts will not confine themselves to examining the express agreements” but  
2 “will also look to the employer’s policies, practices, and communications in order to  
3 discover the contents of an employment contract. *Id.* (emphasis added). “[T]here is  
4 no rational reason,” the Court concluded, “why an employer’s policy ... cannot  
5 become an implied term of an employment contract.” *Id.* at 464.

6 The *REAOC III* Court went on to observe that this incorporation of implied-  
7 in-fact terms arising from policies and practices is especially appropriate in the  
8 context of collective bargaining. “[I]t is well understood” that in the context of  
9 collective bargaining, “resort may be had, in appropriate circumstances, to the  
10 parties’ practice, usage and custom in interpreting the agreement” and that “such  
11 agreements *often* contain implied, as well as express, terms.” *REAOC III*, 52 Cal.  
12 4th at 1179 (emphasis added), citing *Consolidated Rail Corp. v. Railway Labor*  
13 *Executives*, 491 U.S. 299, 311-312 (1989) (“collective-bargaining agreements may  
14 include implied, as well as express, terms ... [i]n this case, Conrail’s contractual  
15 claim rests *solely upon implied contractual terms, as interpreted in light of past*  
16 *practice.*”) (emphasis added).

17 Underscoring its recognition of the special attributes of collective bargaining  
18 agreements, the *REAOC III* Court cited its decision in *Glendale City Employees’*  
19 *Association v. City of Glendale*, 15 Cal. 3d 328 (1975). *REAOC III*, 52 Cal. 4th at  
20 1183. In *City of Glendale*, the Court held that MOUs must be construed to give  
21 effect to the mutual intent of the parties at the time of contracting, *and* that MOU  
22 interpretation should be guided by recognition of the unique nature of collective  
23 bargaining agreements. *City of Glendale*, 15 Cal. 3d at 339-340 & nn. 15-16 (1975),  
24 citing *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 177-178 (1962) (express  
25 words of collective bargaining agreement are not “the exclusive source of rights and  
26 duties” of the parties thereto).

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1           **B. Public Sector Employment Contracts May Include Implied-In-Fact**  
2           **Terms Relating To Retirement Health Benefits Because Such**  
3           **Terms Are Not Prohibited By Statute.**

4           The *REAOC III* Court next examined, and rejected, the County’s attempts to  
5 use its status as a municipality to escape the application of these settled principles of  
6 contract law. First, the Court noted the general rule that “[a]ll contracts, whether  
7 public or private, are to be interpreted according to the same rules unless otherwise  
8 provided by the Civil Code.” *REAOC III*, 52 Cal. 4th at 1179, citing Cal. Civil  
9 Code § 1635 and *M.F. Kemper Construction Co. v. City of Los Angeles*, 37 Cal. 2d  
10 296, 704 (1951) (“California cases uniformly refuse to apply special rules of law  
11 simply because a governmental body is a party to a contract.”).

12           Next, the Court rejected the County’s argument, under *Markman v. County of*  
13 *Los Angeles*, 35 Cal. App. 3d 132, 134-35 (1973), that “the public employee is  
14 entitled only to such compensation as is expressly provided by statute or ordinance.”  
15 *REAOC III*, 52 Cal. 4th at 1180-1181. It held that this generic statement about  
16 statutory employment rights did not apply where, as here, employees work under  
17 binding, bilateral *contracts* such as MOUs. *REAOC III*, 52 Cal. 4th at 1182-1183.  
18 Where the relationship *is* governed by contract, “a county may be bound by an  
19 implied contract (or by implied terms of a written contract), as long as there is no  
20 statutory prohibition against such an agreement.” *Id.*, citing *Youngman v. Nevada*  
*Irrigation Dist.*, 70 Cal. 2d 240, 246 (1969).

21           Having established that *Youngman*—rather than *Markman*—supplies the rule  
22 of decision for REAOC’s claim, the Court went on to dismantle, one by one, the  
23 County’s attempts to point to a “statutory prohibition” that would preclude that  
24 claim. First, it held that the statutory requirement, that county employee  
25 compensation be provided for via board resolutions, did *not* “prohibit” implied-in-  
26 fact compensation terms. *REAOC III*, 52 Cal. 4th at 1184. Rather, “[u]nder  
27 California law, contractual rights *may be implied* from legislative enactments [such  
28 as resolutions] under limited circumstances.” *Id.* (emphasis added); *see also id.* at

1 1185 (“A contractual right may be implied from legislation in appropriate  
2 circumstances ...”).

3       Second, the Court held that Government Code section 3505.1, which requires  
4 that MOUs be presented to the Board “for determination,” says nothing about  
5 whether those same MOUs, once presented and approved, could be construed to  
6 include implied as well as express terms. *Id.* at 1188. In a similar vein, the Court  
7 concluded that the recognition of implied terms in MOUs does not violate the “open  
8 meeting” requirements of the Ralph M. Brown Act, Government Code section  
9 54953. *REAOC III*, 52 Cal. 4th at 1188. So long as the MOUs on which REAOC  
10 relies were themselves approved in open meetings, the Act was not implicated by  
11 *interpreting* those MOUs to include implied-in-fact terms. *Id.*

12       In short, the Court acknowledged that county employee compensation must  
13 be provided for by way of Board-approved resolutions. It held, however, that when  
14 the Board adopts an MOU, the “legislative approval” requirement—about which  
15 this Court expressed great concern in *REAOC I*—is satisfied, not only with respect  
16 to the express terms of that contract, but also with respect to any terms that were  
17 properly part of that contract *by implication*.

18       **C. There Is No Special Rule For Implied “Vested” Contract Rights.**

19       Throughout this case the County has argued that “vested” contract rights must  
20 be treated differently from other contract rights, for purposes of determining  
21 whether such a right can arise by implication. It repeated that argument in  
22 *REAOC III*, and was soundly rebuffed. First, the Court noted that that the County  
23 had failed to offer “any legal authority for this distinction” between “vested” and  
24 other contract rights. *REAOC III*, 54 Cal. 4th at 1189. It observed that, in the  
25 context of this litigation, the term “vested” means only that, once an employee  
26 retires under an MOU that contains a promise to provide a retirement health benefit,  
27 he or she has earned the right to *receive* that benefit during his or her retirement. *Id.*  
28 at 1189 & n.3. And it held that, contrary to the County’s argument, “public

1 employee benefits, in appropriate circumstances, could become vested by  
2 implication,” and that “vesting remains a matter of the parties’ intent.” *Id.* at 1189-  
3 1190.

4 **D. To Prevail On Its Implied Contract Claim, REAOC Must Adduce**  
5 **“Clear” Extrinsic Evidence To Support Its Claims.**

6 While reaffirming the settled principle that public employment contracts may  
7 include implied terms arising from past practices and course of dealing, the  
8 *REAOC III* Court instructed that courts should “proceed cautiously” in identifying  
9 such obligations. *REAOC III*, 52 Cal. 4th at 1188. Thus, to prevail here REAOC is  
10 required here to make a “clear showing,” from the express terms of relevant Board  
11 resolutions *or* from the extrinsic “circumstances accompanying [their] passage,” that  
12 the County and its employee unions intended that the Retiree Premium Subsidy *not*  
13 be a mere gratuity that the Board decided to dole out to retirees each year for 23  
14 consecutive years, but instead an element of their bargained-for exchange, of labor  
15 for compensation. *Id.* at 1186-1189, citing *California Teachers Association v. Cory*,  
16 155 Cal. App. 3d 494 (1984) (“In California law, a legislative intent to grant  
17 contractual rights can be implied from a statute if it contains an unambiguous  
18 element of exchange of consideration by a private party for consideration offered by  
19 the state.”). As explained below, REAOC’s extrinsic evidence meets and exceeds  
20 this rigorous standard.

21 **IV. THERE IS NO DISPUTE THAT PRE-2008 COUNTY RETIREES HAD**  
22 **A CONTRACTUAL RIGHT TO RECEIVE THE RETIREE PREMIUM**  
23 **SUBSIDY THROUGHOUT THEIR RETIREMENT.**

24 As the *REAOC III* Court determined, REAOC’s claims here present two  
25 separate, albeit related, questions: (1) whether a promise to provide the Retiree  
26 Premium Subsidy during retirement was an implied-in-fact term in the MOUs in  
27 effect during the relevant period; and (2) if so, whether that promise expired when  
28 each of those MOUs expired, or “vested” as to those employees who retired while  
each of those MOUs was in effect. *See REAOC III*, 52 Cal. 4th at 1176-1177.

1 REAOC will address each question in turn.

2 **A. The Retiree Premium Subsidy Was An Implied-In-Fact Term In**  
3 **The MOUs In Effect Between 1985 and 2007.**

4 While the *REAOC III* Court confirmed that the “circumstances  
5 accompanying” the passage of legislation can create private contractual rights, it did  
6 not specifically address, in that portion of its opinion, what sorts of circumstances  
7 give rise to such implied rights in the context of public sector collective bargaining  
8 and legislation related to same. *REAOC III*, 52 Cal. 4th at 1185-1191. However,  
9 early in its opinion, the Court observed that “evidence derived from [the parties’]  
10 *experience and practice* can now trigger the incorporation of additional, implied  
11 terms.” *REAOC III*, 52 Cal. 4th at 1178-1179, quoting *Scott*, 11 Cal. 4th at 463-64  
12 (1995) (“implied employment contract terms may arise from the employer’s official  
13 and unofficial policies and practices”); *see also Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th  
14 317, 336-37 (2000) (“The contractual understanding need not be express, but may  
15 be implied in fact, arising from the parties’ conduct,” including “the personnel  
16 policies or practices of the employer”).

17 The *REAOC III* Court also noted that, in interpreting collective bargaining  
18 agreements, “resort may be had, in appropriate circumstances, to the *parties’*  
19 *practice, usage and custom,*” and that “such agreements *often* contain implied, as  
20 well as express terms.” *REAOC III*, 52 Cal. 4th at 1179, quoting *Conrail, supra*,  
21 491 U.S. at 311-312 (emphasis added); *see also United Steelworkers of America v.*  
22 *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960) (the source of parties’  
23 rights and obligations under CBAs “is *not confined* to the express provisions of the  
24 contract,” because past practices are “*equally a part of the collective bargaining*  
25 *agreement* although not expressed in it.”) (emphasis added).

26 Finally, the Court cited *Sappington v. Orange Unified School Dist.*, 119 Cal.  
27 App. 4th 949, 954-955 (2004) for the proposition that, in the context of public sector  
28 employment, courts may resort to “extrinsic evidence of the parties’ course of

1 conduct” to determine whether the employment agreement included an implied  
2 promise to provide a particular retiree health benefit throughout retirement.  
3 *REAOC III*, 52 Cal. 4th at 1190. While *Sappington* did not involve collective  
4 bargaining agreements, the *REAOC III* Court observed that *Sappington’s*  
5 “analytical approach” to the question “belies” the County’s argument that vested  
6 retirement benefits cannot be implied, from past practices, in the public employment  
7 context. *Id.*

8         The analysis mandated by *REAOC III* has long been followed by the  
9 California Public Employment Relations Board (“PERB”), the body charged with  
10 administering the MMBA and disputes involving the interpretation of MOUs.  
11 PERB decisions plainly recognize that MOUs contain both express terms and  
12 implied-in-fact terms arising from the parties’ practices. *See Eureka Teachers*  
13 *Association v. Eureka City School Dist.*, 11 PERC 18099 at 12 (ALJ) (1987)  
14 (“According to traditional labor relations principles, a practice can be an implied  
15 term in an agreement ...”). Indeed, PERB has specifically held that a county’s  
16 historic practice of *subsidizing retiree healthcare* created an implied-in-fact term in  
17 the MOU that the county could not alter, as to active employees, without resort to  
18 the bargaining process. *Sacramento County Attorneys Assoc. v. County of*  
19 *Sacramento*, PERB Dec. No. 2043 at 11 (2009) (noting “the established principle  
20 that a binding policy may be established through a consistent course of conduct that  
21 is a historic and accepted practice”).

22         This Court is asked to determine whether the “context” or “circumstances  
23 accompanying” the Board’s passage of legislation—its adoption of MOUs and its  
24 perpetuation of the pooled rate structure/Retiree Premium Subsidy—created an  
25 implied-in-fact contract right. The above authorities demonstrate that one key  
26 “circumstance” to which this Court should look is the past practice, or course of  
27 dealing, between the parties with respect to that purported right. Of course, not just  
28 any “past practice” becomes an implied-in-fact promise. Courts have derived

1 standards by which to evaluate past practices, to determine whether they can fairly  
2 be said to comprise an element of the parties' contractual exchange.

3 **1. The Duration And Consistency Of The Practice**

4 The primary factor that courts consider is the duration and consistency of the  
5 practice at issue. For example, in *Southern California Gas Co. v. City of Santa Ana*,  
6 336 F.3d 885 (9th Cir. 2003), the Ninth Circuit held that a contract between the gas  
7 company and the city included an "implicit financial term" that arose from the  
8 parties' decades-long course of dealing. The contract (a franchise agreement  
9 entered by way of a city ordinance) explicitly granted the gas company the right to  
10 excavate city streets as needed to provide gas services to city residents, so long as it  
11 made necessary repairs after such work was completed. *Id.* at 887. The express  
12 terms said nothing about whether the city could charge the gas company to exercise  
13 that right to excavate. However, for decades the parties' practice had been to allow  
14 the gas company to excavate and repair *without* paying fees to the city. *Id.* at 891-  
15 93. The Court held that the city's attempt, in 2001, to begin charging the gas  
16 company an "excavation" fee violated the Contracts Clause because it worked an  
17 "adjustment to *implicit financial terms*" in the parties' contract, terms that had been  
18 established by the parties' long, repeated and consistent course of dealing with  
19 regard to the issue of excavation fees. *Id.* at 890-93 (emphasis added); *see also*  
20 *Pacific Gas and Elec. Co. v. City of Union City*, 220 F. Supp. 2d 1070, 1087-88  
21 (N.D. Cal. 2002) (same for 30-year practice of allowing gas company to excavate  
22 and repair streets for free).

23 In *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096  
24 (9th Cir. 1999), the collective bargaining agreement between the state and its  
25 employees was silent as to which days of the month employees were to receive their  
26 paychecks. However, the established practice between the parties was for  
27 employees to receive their paychecks on the 15th and final days of each month. The  
28 Court held that the state's attempt to change that policy, by instituting a "pay lag,"

1 was an unlawful impairment of contract. It reasoned that, while the express terms of  
2 the CBA were silent regarding pay dates, “[a] course of dealing can create a  
3 contractual expectation” protected by the Contracts Clause. *Id.* at 1102. It focused  
4 on the fact that the state’s practice of paying on the same two days every month had  
5 been consistently followed throughout the preceding 25 years. *Id.* at 1102-1104. As  
6 such, the past practice had become an “implicit financial term” in the parties’  
7 agreement. *Id.*

8         PERB decisions likewise have held that the duration and consistency of a  
9 practice is critical to determining whether it has become an implied term in an  
10 MOU. In *Sacramento County Attorneys Assoc.*, PERB Dec. No 2043 at 11, the  
11 Board held that a county’s consistent, 20-year practice of subsidizing retiree  
12 healthcare was established and longstanding enough to ripen into an implied MOU  
13 term. *Id.* In reaching that conclusion, the Board distinguished a case in which the  
14 Eighth Circuit held that an employer’s “practice” of giving bonuses in three of the  
15 prior five years was in the nature of a “gift,” and was *not* sufficiently longstanding  
16 and consistent to give rise to an implied-in-fact term requiring that such bonuses  
17 continue. *Id.* at 9 n.6, citing *N.L.R.B. v. Wonder State Manufacturing Co.*, 344 F.2d  
18 210, 214 (8th Cir. 1965).

19         Here, there is no dispute that the County maintained the pooled rate  
20 structure—and provided the Retiree Premium Subsidy that resulted from that  
21 structure—for 23 consecutive years. [Docket No. 135 at 2:20-24.] Indeed, that  
22 benefit was paid to retirees every month for **276 consecutive months**—each time a  
23 retiree paid a medical premium that reflected the County-provided rate subsidy.  
24 [*Id.*] Under the precedents discussed above, this undisputed duration and  
25 consistency provide “clear” and “convincing” evidence that the practice of  
26 providing the Retiree Premium Subsidy became an implied promise in the MOUs in  
27 effect during those 23 years. *See Cayetano*, 183 F.3d at 1099 (25-year practice  
28 established implied-in-fact term); *AFSCME Local 2957 v. City of Benton, Arkansas*,



1 513 F.3d 874, 877-879 (8th Cir. 2008) (city’s 15-year practice of paying retiree  
2 premiums became implied promise in CBA); *Bonnell/Tredegear Industries, Inc. v.*  
3 *N.L.R.B.*, 46 F.3d 339, 343-45 (4th Cir. 1995) (employer’s use of same formula to  
4 determine Christmas bonus for over eighteen years became a term of the collective  
5 bargaining agreement); *Intermountain Rural Electrical Assoc. v. N.L.R.B.*, 984 F.2d  
6 1562, 1568 (10th Cir. 1993) (seven-year practice of using paid time off as part of  
7 overtime calculation became an implied term of collective bargaining agreement).

## 8                   2.     **The Parties’ Bargaining History**

9           The contracting parties’ history of negotiations can provide further evidence  
10 that a practice was intended to be an element of their contractual exchange. In  
11 *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), General Motors argued that  
12 its right to withhold workers’ compensation benefits from employees, pursuant to a  
13 1981 Michigan statute regarding coordination of benefits, was an implied-in-fact  
14 term in the CBAs between it and its unions. The United States Supreme Court  
15 rejected that argument. It first reaffirmed the settled rule that “the terms to which  
16 the contracting parties give assent may be express or implied in their dealings.” *Id.*  
17 at 188. It held, however, that the company’s right to withhold under the 1981 statute  
18 could *not* have been such an implied term in those CBAs, because they had been  
19 negotiated *prior to* the 1981 statute. *Id.* As such, the Court reasoned, the parties  
20 could not possibly have considered the matter of benefits coordination in their  
21 negotiations, and the unions had no opportunity to indicate assent, or objection to,  
22 the company’s practice. *Id.* By contrast, in *Cayetano, supra*, the Ninth Circuit held  
23 that the state’s practice of paying employees on same two days of each month *had*  
24 become in implied promise in the CBAs because, *inter alia*, “at the time the  
25 collective bargaining agreement was negotiated, the timing of the payroll was a  
26 *negotiable matter.*” *Cayetano*, 183 F.3d at 1102 (emphasis added).

27           Here, there is no dispute that the structure of the insurance premium rate pool,  
28 and more specifically the County’s subsidization of retiree health premiums, was a

1 “negotiable” matter between the parties throughout the relevant period. Indeed, it is  
2 undisputed that, from the very early days of the Retiree Premium Subsidy, that  
3 benefit was explicitly discussed at the bargaining table. [Docket No. 128 at ¶ 11(b);  
4 Docket No. 124 at ¶ 11; Docket No. 125 at ¶ 6.]

5 Moreover, it is undisputed that during extensive labor negotiations between  
6 1991 and 1993 over retiree health benefits, the Board used the existence of the  
7 Retiree Premium Subsidy, *and* a representation that it would continue to provide it,  
8 to convince the unions to agree to its proposal for financing a new retiree health  
9 benefit (the “Grant” benefit). [Docket No. 128 at ¶¶ 14-16; Docket No. 124 at  
10 ¶¶ 16-18; Docket No. 125 at ¶¶ 10-11, 14-15 & Exhs. D-G.]<sup>1</sup> During those  
11 negotiations, the Board’s authorized chief negotiator quantified the monthly cash-  
12 value of that benefit to each employee/retiree (approximately \$270 per month in  
13 1992), and placed the benefit and its cash value on a chart along with the average  
14 monthly pension benefit and the value of the proposed new Grant benefit. [Docket  
15 No. 125 at ¶¶ 12-13, Exhs. A-C; Docket No. 150 at ¶¶ 2-3 & Exhs. A-B.]

16 The fact that the Retiree Premium Subsidy was “equally a part of the  
17 collective bargaining agreement although not expressed in it,” *Warrior & Gulf*, 363  
18 U.S. at 579, was re-confirmed by the County and the unions in 2005 through 2006,  
19 when they negotiated to *remove* that term from the existing MOUs to permit the  
20 Board to split the pool and segregate retirees into their own rate pool. In sworn  
21 testimony, the County’s chief labor negotiator—Shelly Carlucci—expressly  
22

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23  
24 <sup>1</sup> Central to that negotiation was a dispute over who had rights to a \$200 million  
25 pension reserve fund. [*Id.*] The County argued that the money belonged to it, while  
26 the unions argued that it belonged to employees. [*Id.*] Using the promises relating  
27 to the Retiree Premium Subsidy, *inter alia*, the Board’s negotiator convinced the  
28 unions to agree to the County’s proposal to set aside \$50 million to fund the new  
Grant benefit, and give the County the remaining \$150 million. [*Id.*]

1 acknowledged that the Board could not *unilaterally* split the pool because (1) the  
2 Retiree Medical Program—which included the Retiree Premium Subsidy—“was in  
3 our MOU,” and as such the proposed changes to that program involved “making  
4 changes with the MOU”; and (2) any changes to the MOUs had to be negotiated  
5 with active employees through their unions. [Docket No. 127-2, Exh. A at 24-25.]  
6 Ms. Carlucci further testified that during that period “one of the changes [she]  
7 negotiated to the MOU was the splitting of the pool.” [*Id.* at 20:24-21:1.] Further,  
8 she confirmed that, when the proposed new MOUs were submitted to the Board for  
9 review, those MOUs included notations directing the Board’s attention to the fact  
10 that the splitting of the pool (that is, the elimination of the Retiree Premium  
11 Subsidy) was a “change” to the terms of the prior MOUs. [*Id.* at 22:10-23:23.]

12         These facts demonstrate, clearly and convincingly, that the Retiree Premium  
13 Subsidy was made a part of the employment *bargain* between the County and its  
14 employees, along with the (express) promises of pension and Grant benefits. Or, to  
15 use the words adopted by the California Supreme Court in *REAOC III*, this evidence  
16 of bargaining history provides the “context” to prove that the practice of pooling  
17 rates had taken on an “unambiguous element of *exchange* of consideration” between  
18 the County and its employees. *REAOC III*, 52 Cal. 4th at 1186, quoting *California*  
19 *Teachers Assoc.*, *supra*, 155 Cal. App. 3d at 505 (emphasis added).

### 20                 **3.         Whether The Practice Was “Recognized”**

21         Another factor to which courts look in deciding whether a practice became an  
22 implied promise is whether the practice was “recognized” and “accepted” by the  
23 parties during the period in question. *See Bonnell/Tredegart*, 46 F.3d at 344 (“Past  
24 practices rise to the level of an implied agreement when they have ripened into an  
25 established and *recognized custom* between the parties.”) (emphasis added);  
26 *Sacramento County Attorneys Assoc.* PERB Dec. No. 2043 at 11 (noting “the  
27 established principle that a binding policy may be established through consistent  
28 course of conduct that is a historic *and accepted practice*”) (emphasis added);

1 *Brotherhood of Maintenance of Way Employees v. Chicago & North Western*  
2 *Transp. Co.*, 827 F.2d 330, 334 (8th Cir. 1987) (“the parties’ longstanding and  
3 *recognized* custom and practice ... has become an implied term in the agreement of  
4 the parties”). Here again, the undisputed facts demonstrate that the Retiree Premium  
5 Subsidy was well-recognized by the parties.

6 First, as discussed above, there is no dispute that the Board and the unions  
7 “recognized” the pooled rate structure, and the Retiree Premium Subsidy that  
8 resulted from it, from the inception of that practice. [Docket No. 124 at ¶¶ 10-11;  
9 Docket No. 125 at ¶¶ 5-6; Docket No. 128 at ¶¶ 9-11.] Indeed, these matters were  
10 specifically discussed during litigation between the County and its unions over the  
11 subject of retiree health benefits. *See Orange County Employees Assoc. v. County of*  
12 *Orange*, 234 Cal. App. 3d 833, 838 (1991) (“because retirees, who are not rated  
13 separately from active employees, present a substantially higher medical risk than  
14 active employees, their premiums are lower than if they were rated separately.  
15 Thus, their rate is, in essence, subsidized by county.”) (emphasis added). There is  
16 no dispute that the Board and the unions recognized the Retiree Premium Subsidy,  
17 and its substantial value to employees as a future retirement benefit, during the labor  
18 negotiations over retiree medical benefits that took place from 1991 through 1992.  
19 *See supra* section 2.

20 And there is no dispute that the Board “recognized” its policy and practice of  
21 pooling rates, and thereby subsidizing retiree premiums, *every time* it expressly  
22 approved annual health premium rates for the “pooled” health plan, from 1985  
23 through 2007. The County’s employee benefits consultant prepared, at the Board’s  
24 request, annual memoranda regarding the premium rates that the Board was about to  
25 approve. [See Docket No. 128-2 at 9; Docket No. 127-4 at 1-96.] Those  
26 memoranda were appended to the rate legislation that the Board reviewed before  
27 approving each year’s rates. The 1990 version explained that “[t]he County’s *policy*  
28 has been to set the required retiree contributions at an amount equal to 100% of the

1 average rate for active employees and retirees ... [t]his *practice* has resulted in the  
2 following ... retirees ... *are being subsidized by the County.*” [Docket No. 128-2 at  
3 9.] It went on to quantify the cost of the Retiree Premium Subsidy for that year  
4 (\$1.5 million) and explained that retiree premiums would more than double if the  
5 County stopped providing that benefit. [*Id.*] The Board received and reviewed 15  
6 similar memoranda *every year* throughout the relevant period; each one (1) repeated  
7 the explanation of the pooled rate structure and the resulting retiree subsidy;  
8 (2) characterized it as the Board’s “policy” and “practice”; and (3) quantified its  
9 projected cost. [Docket No. 127-4 at pp. 1-97.]

10 The Board not only recognized the “practice” of rate-pooling and subsidizing  
11 retiree premiums, it recognized this practice *as a benefit of employment* that it  
12 offered its employees, that is, as an element of the bargained-for exchange of labor  
13 for compensation. This is reflected, first, in the Board’s characterization of the  
14 Retiree Premium Subsidy (through its authorized labor negotiator) during the 1991 -  
15 1993 labor negotiations, as a benefit that, like pensions and the new Grant benefit,  
16 had significant monthly cash value. [Docket No. 125 at ¶¶ 12-13 & Exhs. A-C;  
17 Docket No. 150 at ¶¶ 2-3 & Exhs. A-B.] It is also reflected in a 1998 actuarial  
18 report that the Board commissioned to study its future retiree medical liabilities.  
19 That report described the Retiree Premium Subsidy as a “Retiree Medical *Benefit*”  
20 no fewer than seven times. [Docket No. 127 at p. 3:19-22; Docket No. 127-5 at 6-  
21 10.] It treated the Subsidy as a “benefit *earned* based on service rendered,” and  
22 quantified the value of that benefit for an individual 62 year-old retiree in 1997  
23 (\$329 per month), 1998 (\$354 per month) and 1999 (\$378 per month). [Docket No.  
24 127-5 at 6, 15 (emphasis added).]

25 Finally, the Board’s recognition of the Retiree Premium Subsidy as a benefit  
26 is plainly reflected in a Request for Proposal that the County Counsel prepared in  
27 2006 to recruit litigation counsel to defend the Board’s decision to “split the pool.”  
28 [Docket No. 127 at 5:25-28; Docket No. 127-8 at 69-71.] In that RFP, County

1 Counsel explained that the Retiree Premium Subsidy was one of the “*post-*  
2 *employment benefits*” that the County “currently offers” its employees. [Docket No.  
3 127-8 at 70-71 (emphasis added).] It went on to characterize the Subsidy as a retiree  
4 medical benefits “program,” despite the fact that it was “not expressly included in  
5 the Plan or any memorandum of understanding or other agreement with employee  
6 bargaining units.” [Docket No. 127-8 at 71 (emphasis added).]

7 **B. Every Employee Who Retired Between 1985 and 2008—While The**  
8 **Retiree Premium Subsidy Was An Implied Term In The MOUs—**  
9 **Earned The Right To Receive That Benefit Throughout His Or Her**  
10 **Retirement Years.**

11 As set forth above, REAOC has established, clearly and convincingly, that the  
12 Retiree Premium Subsidy was an implied-in-fact term in the MOUs in effect from  
13 1985 through 2007. Accordingly, for this second portion of the analysis—the issue  
14 of the “duration” of that promise—the MOUs in question must be read as if they  
15 *expressly stated* that retiree health insurance premiums would be calculated based  
16 on the commingled pool of active and retired employees. *REAOC III*, 52 Cal. 4th at  
17 1178 (there is “no difference in legal effect” between implied-in-fact terms and  
18 express terms, and that the former “ordinarily stand on equal footing” with the  
19 latter); *Youngman*, 70 Cal. 2d at 246 (in context of public sector employment,  
20 holding that “the only significant difference” between implied and express terms “is  
21 the evidentiary method by which proof of their existence is established”); *Bonnell/*  
22 *Tredegar*, 46 F.3d at 346 (CBA terms derived from past practice are “as binding and  
23 enforceable as express terms of the agreement”).

24 The County’s apparent contention is that, even if the Retiree Premium  
25 Subsidy was an implied promise in the MOUs, that promise “expired” when each  
26 MOU expired (approximately every two years) throughout the relevant period. As  
27 such, an employee who retired while one of these MOUs was in force had, at most,  
28 a contractual right to receive the benefit for the duration of *that* MOU (that is, for  
one day to, at most, two years). That argument cannot be correct.

1 As the *REAOC III* Court made clear, not once but twice, vesting “is a matter  
2 of the parties’ intent,” and that intent can be demonstrated through the parties’ past  
3 practices and course of dealing. *REAOC III*, 52 Cal. 4th at 1177; *id.* at 1190 (noting  
4 that in *Sappington, supra*, “the court relied on ... extrinsic evidence of the parties’  
5 course of conduct” to determine whether a retiree medical benefit was “vested” as to  
6 particular retirees); *see Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir.  
7 1994) (finding that extrinsic evidence, including provision of retiree health benefits  
8 after CBA expired, indicated intent that such benefits vest as to retirees); *Arizona*  
9 *Laborers, Teamsters & Cement Masons Local 395 v. Conquer Cartage Co.*, 753  
10 F.2d 1512, 1517-18 (9th Cir. 1985) (“In ascertaining the intent of the parties to a  
11 CBA, the trier of fact ... may consider the parties’ conduct subsequent to contract  
12 formation ... *and such conduct is to be given great weight.*”) (emphasis added).  
13 Here, extrinsic evidence clearly and convincingly establishes that the parties  
14 intended the Retiree Premium Subsidy to “vest” as to each employee who retired  
15 while it was in effect and an implied term in the MOUs.

16 **1. The Parties’ Course of Dealing With Respect To “Vesting”**

17 It is undisputed that the parties’ practice for 23 years was for retired  
18 employees to continue to receive the Retiree Premium Subsidy *indefinitely* after  
19 they retired, and after the MOU under which they retired had “expired” with respect  
20 to its other terms and conditions. [Docket No. 135 at 2:20-24.] Further, REAOC  
21 adduced evidence in the form of testimony from former senior County human  
22 resources senior managers that it was the County’s historic policy and practice *not*  
23 to significantly alter retirement health benefits of *existing* retirees. [Docket No. 125  
24 at ¶ 16; Docket No. 128 at ¶ 21; Docket No. 124 at ¶¶ 20-21.] That course of  
25 dealing demonstrates that the parties intended that employees who retired under an  
26 MOU that contained this retiree medical benefit, would receive the benefit not just  
27 for the duration of their “last” MOU, but throughout their retirement. *See Jensen v.*  
28 *SIPCO, Inc.*, 38 F.3d at 945, 951 (8th Cir. 1994) (“all the changes [employer]

1 unilaterally made to its retiree benefits ... were prospective only,” and employer’s  
2 “policy of not changing the benefits of prior retirees” is “consistent with the concept  
3 of vested benefits”); *Angotti v. Rexam, Inc.*, 2006 WL 1646135 at \*10 (N.D. Cal.  
4 2006) (“extrinsic evidence of intent to vest” included employer’s “conduct prior to  
5 this dispute, which never involved a significant termination or reduction in  
6 benefits”).

## 7                   2.       **Extrinsic Documentary Evidence**

8           Health plan documents that the County provided to employees indicated that,  
9 “[w]hen you retire from the County and receive a monthly retirement check, you  
10 will be eligible to continue with the [health] plans” that active employees participate  
11 in. [Docket No. 128-3 at 6; 128-3 at 73; 128-2 at 56.] There was no mention of any  
12 “limit” on employees’ rights to remain enrolled in those plans. By contrast, the very  
13 next paragraph in these booklets specifically states that, upon *termination* of  
14 employment (other than retirement), “coverage ends on the last day on which you  
15 were employed by the County.” [*Id.*]

16           Further still, these documents expressly link a retiree’s eligibility to remain  
17 enrolled in the health plans during retirement, with eligibility to receive a pension  
18 check. [*Id.*] The Ninth Circuit has held that this linkage tends to indicate that the  
19 two rights are coterminous, that is, both last for the duration of a retiree’s lifetime.  
20 In *Bower*, in examining extrinsic evidence of an intent that retirement health  
21 benefits vest, the Ninth Circuit observed that “[a] small booklet distributed to all  
22 employees,” which described the company’s retirement benefits, “stated only one  
23 eligibility requirement for receiving insurance: that the applicant be ‘receiving a  
24 pension from the Bunker Hill Company.’” *Bower*, 724 F.2d at 1224. The Court  
25 concluded that, “[s]ince the pension is lifelong, *employees may have viewed the*  
26 *related insurance also to be a lifelong benefit.*” *Id.* (emphasis added); *see also*  
27 *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006)  
28 (linkage of retirement health benefit eligibility with pension eligibility indicates that



1 parties intended for *current* employees’ future retirement health benefits to be  
2 subject to changes through collective bargaining, but that “someone *already retired*  
3 *under a particular CBA* continues to receive the benefits provided therein despite  
4 the expiration of the agreement itself”) (emphasis added).

5 If the duration of the right to remain enrolled in the health plans was not  
6 limited to the duration of the “retirement” MOU, but instead was throughout  
7 retirement, then the closely related implied right to remain in the “commingled  
8 plans,” and thereby pay premiums based on the pooled rate, must be as well. In fact,  
9 the Health Plan Booklets did address the subject of retiree *premiums*, by stating that  
10 “retiree rates are based on the full monthly premium for each plan.” [Docket No.  
11 128-3 at 6; 128-3 at 73; 128-2 at 56.] While “full monthly premium” is not defined  
12 in the booklet, the parties’ 23-year course of dealing clearly defined that term as full  
13 monthly premium *based on* the commingled health plans.

### 14 3. The Nature Of Retirement Benefits

15 Another compelling item of extrinsic evidence is the nature of retirement  
16 benefits, and the role they play in the contractual employment relationship. For  
17 decades federal courts have recognized that retirement health benefits are an  
18 element of “promised compensation,” and therefore represent contractual rights of  
19 employees and retirees. *Allied Chemical and Alkali Workers of America, Local*  
20 *Union No. 1 v. Pittsburg Plate Glass*, 404 U.S. 157, 180-81 & n.20 (1971) (“To be  
21 sure, the future retirement [health] benefits of active workers are part and parcel of  
22 their overall compensation,” and “under established contract principles,” those terms  
23 “may not be altered without the pensioner’s consent”); *International Broth. of Elec.*  
24 *Workers, AFL-CIO Local 1245 v. Citizens Telecom. Co.*, 549 F.3d 781, 786-87 (9th  
25 Cir. 2008) (citing *Pittsburg Plate Glass* to conclude that “future retirement benefits  
26 are part and parcel of an active employee’s compensation”).

27 The California Supreme Court likewise has held that retirement health  
28 benefits are a form of deferred compensation, which “do not derive from the

1 beneficence of the employer, but are properly part of the *consideration earned by*  
2 *the employee.*” *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 780 (1982)  
3 (emphasis added). The *REAOC III* Court cited its prior *Suastez* decision twice  
4 regarding the status of post-employment benefits as a form of deferred  
5 compensation. *REAOC III*, 54 Cal. 4th at 1185, 1190-1191. The *REAOC III* Court  
6 also noted the Washington State Supreme Court’s holding (in the context of public  
7 employment) that, “[i]n the reality of the employment relationship, welfare [health]  
8 benefits make up a part of the *core compensatory benefits package* offered in  
9 exchange for continued service.” *See Navlet v. Port of Seattle*, 194 P.3d 221, 232  
10 (S.Ct. Wash. 2008) (emphasis added) (cited in *REAOC III*, 52 Cal. 4th at 1191).  
11 Finally, “PERB decisions have held that future retirement benefits for employees are  
12 ... part of an employee’s *compensation package*,” and that “employees can take  
13 their compensation as current wages, present health benefits, *or future*  
14 *health/pension benefits.*” *California School Employees Assoc. v. Madera Unified*  
15 *School District*, PERB Dec. No. 1907 at 2-3 (2007) (emphasis added).

16       The County itself has admitted that the Retiree Premium Subsidy was an  
17 element of employee compensation. Indeed, until recently, the core of the County’s  
18 defense in this case has been that a promise to pay a retirement health benefit is *by*  
19 *definition* a promise to pay *compensation*, and as such must be “expressly  
20 conferred” in Board legislation. Even during the hearing before the California  
21 Supreme Court, the County’s attorney characterized the Retiree Premium Subsidy as  
22 “compensation of sorts.” *REAOC RJN*, Exh. A at 21:7-20.

23       Further, in its attempt to explain why providing the Retiree Premium Subsidy  
24 for 23 years was *not* an unlawful “gift of public funds,” the County argued that the  
25 benefit fell within an established exception for public expenditures that “serve a  
26 public purpose.” *REAOC RJN*, Exh. B at 47. The “public purpose” that the County  
27 invoked was this: the provision of retirement benefits to public employees allows  
28 the government to recruit and retain the workforce that it needs to conduct its

1 business. *Id.*, quoting and citing *Sturgeon v. County of Los Angeles*, 167 Cal. App.  
2 4th 630, 637-38 and 640 (2008). Of course, to use a retirement benefit for the  
3 public purpose of “recruiting and retaining” employees is necessarily to make that  
4 benefit an element of promised *compensation*.<sup>2</sup>

5 The fact that the Retiree Premium Subsidy was an element of employee  
6 compensation is convincing evidence that the parties intended it to be paid  
7 *throughout* an eligible employee’s retirement. It would make little sense for the  
8 parties to a contract to bargain for an exchange of labor for compensation, when one  
9 element of that compensation—compensation deferred until retirement—simply  
10 disappeared shortly after the employee retired. Indeed, as the *REAOC III* Court  
11 noted, in *Navlet* the Washington Supreme Court found this “reasonable expectation”  
12 factor to be dispositive with regard to the duration of public sector retirement health  
13 benefits. *REAOC III*, 52 Cal. 4th at \*11. In *Navlet*, the court held that, unless an  
14 employee who retired under a CBA secured a right to retirement health benefits  
15 throughout his or her retirement, at the moment of retirement he or she would “lose  
16 his or her ability to protect *any* retirement benefit conferred in that agreement *less*  
17 *than three years after receiving the benefit.*” *Navlet*, 194 P.3d at 233 (emphasis  
18 added). It observed that “[a]n employee would reasonably expect that negotiated  
19 retirement [health] benefits will continue beyond the current agreement because the  
20 employee has no real ability to negotiate for the continuation of such benefits after  
21 he or she retires.” *Id.* (emphasis added).

22 In reaching that common-sense holding, the *Navlet* court relied on the Sixth  
23 Circuit’s decision in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476,  
24

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25 <sup>2</sup> In a 2007 Annual Financial Report posted on the County’s website, the County  
26 acknowledged that the Retiree Premium Subsidy was “an important component of  
27 the *total compensation package* the County offers to *attract and retain the skilled*  
28 *workforce ...*” [Docket No. 147 at p. 30 (emphasis added).]

1 1482 (6th Cir. 1983). In that case, the court held that one significant item of  
2 evidence regarding the “vesting” of retirement health benefits was the fact that  
3 retirement benefits are “status” benefits, and “when the parties contract for benefits  
4 which accrue upon the achievement of retiree status,” they “likely intended those  
5 benefits to continue as long as the beneficiary remains a retiree.” *Id.* The Ninth  
6 Circuit approvingly cited *Yard-Man* in a case in which it held that the question of  
7 the “vesting” of retirement health benefits should be answered by resort to extrinsic  
8 evidence. *Bower*, 725 F.2d at 1223; *see also Alday v. Raytheon Co.*, 2008 WL  
9 3200774 at \*5 (D. Ariz. 2008) (“This Court will look to *Yard-Man* as a contextual  
10 guide for interpreting the CBAs ... the *Yard-Man* court recognized that after *Allied*  
11 *Chemical* ... when active employees bargain for retirement benefits it would be  
12 unlikely that they would leave these benefits to the contingencies of future  
13 negotiations, especially because retirement benefits are ‘typically understood as a  
14 form of delayed compensation or reward for past services’).

15 **4. The County’s “Vesting” Cases Support REAOC’s Position.**

16 The County has relied on *San Bernardino Public Employees Assoc. v. City of*  
17 *Fontana*, 67 Cal. App. 4th 1215 (1998), for the proposition that public sector  
18 retirees have no contractual right to their retirement health benefits. However, *City*  
19 *of Fontana* said *nothing* about retirement medical benefits at all, let alone the rights  
20 of current retirees to such benefits. In fact, there is no indication in that case that the  
21 city was *attempting* to alter the medical benefits of current retirees, and the court  
22 expressly declined to address the legality of the city’s proposed changes to *current*  
23 employees’ *future* retirement health benefits, because the parties were still  
24 negotiating that matter. *Id.* at 1221, 1226.

25 What the court did address in *City of Fontana* was current employees’ rights  
26 under the Contracts Clause to block changes—even negotiated changes—to the  
27 rules under which they would continue to accrue personal leave and longevity  
28 benefits *prospectively*. *Id.* at 1222-1223. The court deemed these benefits to be

1 “rights of employment,” which are earned “on a year to year basis.” *Id.* While an  
2 employee has a protected right to such benefits to the extent that they accrued under  
3 the prior MOU, he or she has no contractual right to *continue* to accrue additional  
4 benefits on those same terms. *Id.* Rather, with regard to the new rules that will  
5 apply prospectively, the parties are free to negotiate. *Id.*

6 In reaching this conclusion, the court observed that, by contrast, “rights of  
7 retirement” *are* protected by the Contracts Clause. *Id.*, citing *Vielehr v. State of*  
8 *California*, 104 Cal. App. 3d 392, 395-96 (1980) (change in rules governing what  
9 employees may do with funds in their pension account when they leave employment  
10 *other than by retirement* do not implicate Contracts Clause because, when a person  
11 makes this election, “[h]e does so as an employee, not as a retiree.”). Thus, a  
12 careful reading of *City of Fontana* clearly *supports* REAOC’s position. To state the  
13 obvious, in the taxonomy of *City of Fontana* and *Viehler*, the Retiree Premium  
14 Subsidy is a “right of retirement,” rather than a “right of employment.”<sup>3</sup> As such,  
15 the County was not free to reduce or eliminate that benefit without impairing a  
16 protected contractual right.

17 The County also relies on *San Diego Police Officers’ Assoc. v. San Diego*  
18 *City Employees’ Retirement System*, 568 F.3d 725 (9th Cir. 2009) (“*SDPOA*”).  
19 However, in *SDPOA*, the city had imposed its changes on retiree health benefits  
20 *prospectively* only, that is, on current employees (future retirees). *Id.* at 739. The  
21 court took care to make this observation at the beginning of its discussion. *Id.*  
22 Further, the *SDPOA* Court premised its holding—that current employees had no  
23 vested right to “freeze” the current terms of their future benefits—based on one  
24 crucial observation: the evidence of the parties’ course of dealing indicated that the

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25  
26 <sup>3</sup> For example, once retired, an employee *cannot* “negotiate” new terms under which  
27 he or she will “accrue” retirement health benefits prospectively, and when retirees  
28 exercised their rights to receive health benefits, they do so “as retirees.”

1 future health benefits of *current employees* “were considered a term of employment  
2 that *could be negotiated through the collective bargaining process.*” *Id.* at 740  
3 (emphasis added), citing *City of Fontana, supra.*

4 Here again, the County’s authority supports REAOC’s position. If the future  
5 retirement health benefits of active employees are not vested *because* they can be  
6 “negotiated through the collective bargaining process,” then by the same token the  
7 retirement health benefits *of retirees* must *be* vested, because, by everyone’s  
8 admission, those benefits are *cannot be and were not* subject to negotiation.

9 **V. CONCLUSION**

10 For the foregoing reasons, the Court should grant REAOC’s motion for  
11 summary adjudication of its contract and Contracts Clause claims.

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13 DATED: February 6, 2012

Respectfully submitted,

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LAW OFFICE OF MICHAEL P. BROWN

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By: */s/ Michael P. Brown*

Michael P. Brown

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