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December 14, 2011

Ms. Molly C. Dwyer
Clerk of Court
U.S. Ninth Circuit Court of Appeals
95 7th Street
San Francisco, CA 94103

Re: Retired Employees Assoc. of Orange County v. County of Orange (09-56026)

Dear Ms. Dwyer:

Appellant Retired Employees Association of Orange County ("REAOC") respectfully submits this letter in response to the Court's December 1, 2011 request for letter-briefs from the parties regarding the following question: whether the Court should remand this case to the District Court for application of the legal principles confirmed by the California Supreme Court's in its answer to the question certified by this Court in June of 2010. *See Retired Employees Assoc. of Orange County v. County of Orange*, 52 Cal.4th 1171 (2011). For the reasons explained below, REAOC urges this Court *not* to remand this matter to the District Court, but instead to apply the California Supreme Court's guidance, and other relevant principles of federal and State law, to the settled evidentiary record already before it. *See* 28 U.S.C. § 2106 (federal appellate courts may affirm or reverse any judgment and may remand with instructions to enter any appropriate judgment).

A. Retirees Are In Urgent Need Of A Final Resolution Of This Litigation.

As this Court has twice recognized in granting County retirees' requests for calendar preference, this case presents a dispute that it extremely time-sensitive. What is at stake is a critical retirement health benefit that the County unilaterally revoked from some 6,000 retirees on January 1, 2008. The elimination of that benefit has caused the rate of retiree premium inflation to ***triple*** since 2007. A pre-Medicare retiree with one dependent in the County's Kaiser HMO plan pays $7,800 *more* in premiums this year than he or she did in 2007 (the total premium is $15,360). For the County's self-insured indemnity plan, the premium increase during that period was a staggering $12,000 per year (total premium of $25,100).[1] This retiree population receives, on average, just $30,000 per year in pension income. In short, the harm that retirees have suffered, and continue to suffer each month as this litigation drags on, is significant for all, and in many cases is severe.

[1] *See* Request for Judicial Notice, Exh. A, at ¶ 18.

Moreover, according to the County, on average 17 of its retiree employees die every month.[2] Assuming that proceedings on remand will consume one year's time, another *200 or more* retirees will have died awaiting a final determination in this dispute.

A remand is certain to cause a delay of many months—perhaps more than a year—in the final resolution of this litigation. In 2009 the District Court held the parties' cross-motions for summary judgment under submission for a full *six months*, only to issue an Order that did not examine any of the evidentiary record, but instead relied on an erroneous ruling—that California law forbade implied-in-fact contract terms in public employment. Presumably the parties can expect an even longer wait after remand if the District Court this time around examines, and applies the correct legal principles to, the evidentiary record.

B. Remand Will *Not* Serve The Interests Of Efficient Judicial Administration, But Instead Will Be An Unnecessary Exercise That Invites More Rounds Of Appeals And Remands.

Remand will serve no practical purpose, either to the parties or the administration of justice. This Court will review *de novo* whatever conclusion the District Court reaches on remand, applying the very same standards to the very same facts that have already been developed. *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). Neither the District Court's interpretation of legal principles, nor its application of those principles to the record, will receive the slightest deference in that (inevitable) appeal. *Id.*

More importantly, the District Court has repeatedly expressed the view that this Court's framing of the certified question "largely overlooked" the salient legal issue presented by this case, and has opined that the certified question fails to squarely address the District Court's rationale for granting the County's summary judgment motion. In the District Court's view, this dispute is *not* about implied-in-fact contract obligations, but rather about "authorization by elected officials."[3] It will invite more useless delay, and further rounds of appeals and remands,

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[2] *Id* at ¶ 22.

[3] *See* RJN, Exhibit B (August 2, 2010 hearing in related class action case *Harris v. County of Orange* (Appeal No. 11-55669; SACV 09-0098) at 3:22-4:18; Exh. C (October 4, 2010 hearing) at 2:10-15 (noting "tension" between certified question and District Court's view of dispositive legal issue); Exh. D (June 14, 2010 hearing) at 5:22-6:20 (opining that this Court was not "focusing on" the crux of the District Court's summary judgment order in *REAOC*).

to remand this case with the California Supreme Court's answer to what the District Court clearly views as the *wrong question*.[4]

Further, because the District Court relied on a *per se* rejection of REAOC's implied-in-fact contract theory in ruling on the parties' cross-motions for summary judgment, there is no indication that it is any more familiar with the evidentiary record than is this Court. Now that this Court has that record before it, it would be far more efficient to proceed with the same analysis that it would have to conduct, perhaps years from now, after a lengthy remand to the District Court.

Conclusion

The County retirees whose benefits are at stake in this litigation waited six months for the District Court to rule on the parties' cross-motions for summary judgment, only to see those claims dismissed based on what has proven to be a misapprehension of California law. Despite generous grants of calendar preference from this Court and the California Supreme Court, these retirees have been forced to wait an additional two years for that mistake to be corrected. Fairness and efficiency dictate that this Court not remand this matter, and thereby compound those delays, for proceedings that will add little to the ultimate resolution of this dispute.

Respectfully submitted,

LAW OFFICE OF MICHAEL P. BROWN

/s/ Michael P. Brown_____
Attorney for Appellants

[4] In REAOC's view, the California Supreme Court confirmed that a board may properly "authorize" express *and* implied-in-fact contract terms when it passes legislation adopting labor agreements. *REAOC*, 52 Cal.4th at ---; 2011 WL 5829598 at *7 ("That matters of compensation must be addressed by resolution does not necessarily bar recognition of implied terms concerning compensation."), *8 ("A contractual right can be implied from legislation in appropriate circumstances."), and *9 (rejecting County's "lack of board authorization" argument because "REAOC claims that that the contract was presented to the Board—and approved by a majority of Board members . . . but that it included terms that are not express."). However, the District Court's comments strongly suggest that this legal issue may remain unsettled, in its view, notwithstanding the answer to the certified question. This is precisely the risk that this Court should avoid by resolving this case without remand.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/EF system. I certify that all participants in the case are registered C1VI/EC users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael P. Brown
Michael P. Brown