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(ENDORSED)
FILED
APR 29 2013
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
BY _____ DEPUTY

J. Coe-Plawton

Attorneys for Relator-Plaintiff
San Jose Police Officers' Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,

Defendants.

No. **113CV245503**
VERIFIED COMPLAINT IN *QUO WARRANTO*;
AND ATTACHED LEAVE TO SUE

[CODE CIV. PROC. § 803; CAL. CODE REG TITLE 11, SECTION 2(A)]

Prepared April 23, 2013

1 The People of the State of California *ex rel.* SAN JOSE POLICE OFFICERS’
2 ASSOCIATION complain of Defendants, and for cause of action allege as follows:

3 1. This action is brought pursuant to Section 803 of the Code of Civil
4 Procedure.

5 2. At all times herein mentioned, Defendant the CITY OF SAN JOSE (“the
6 City”), was a municipal corporation existing, qualifying, and acting under a charter
7 granted by the Legislature of the State of California and adopted pursuant to the
8 Constitution of the laws of the State of California.

9 3. At all times herein mentioned, Defendant the CITY COUNCIL OF SAN
10 JOSE (“City Council”) was a municipal corporation existing, qualifying, and acting under
11 a charter granted by the Legislature of the State of California and adopted pursuant to the
12 Constitution of the laws of the State of California.

13 4. The relator in this action is the SAN JOSE POLICE OFFICERS’
14 ASSOCIATION (“SJPOA”, “Plaintiff” or “Relator”).

15 **The Parties and Their Collective Bargaining**
16 **Relationship Under the Meyers-Milias-Brown Act,**
17 **Government Code Section 3500 *et seq.***

18 5. Labor-management relations and the process of bargaining between the
19 SJPOA and the City are governed by the Meyers-Milias-Brown Act (“the MMBA” or “the
20 Act”), Government Code section 3500, *et seq.*

21 6. The SJPOA is, and was at all relevant times, a non-profit corporation
22 organized and existing under the laws of the State of California, with its principal place of
23 business in the County of Santa Clara. The SJPOA is the “recognized employee
24 organization” for all police officer classifications in Bargaining Units 11, 12, 13 and 14
25 (collectively “Police Officers”) employed by the City of San Jose to work in the San Jose
26 Police Department, pursuant to the Meyers-Milias-Brown Act, Government Code section
27 3500 *et. seq.* (“MMBA”). As one of its functions, the relator represents public employees
28 on matters related to their employment conditions, including wages and hours. Plaintiff’s

1 approximately 1100 members perform all law enforcement functions for the nearly 1
2 million residents of the City of San Jose.

3 7. By reason of the facts stated in the prior paragraph, the SJPOA is
4 beneficially interested in the City's faithful performance of its obligations under the
5 MMBA. The SJPOA brings this action on behalf of itself and its members, having
6 standing to do so under the doctrine articulated by the California Supreme Court in
7 *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of*
8 *Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

9 8. At all times relevant, the City is and has been the employer of the
10 SJPOA's members and a "public agency" within the meaning of the MMBA. As a charter
11 city, in addition to being bound by the MMBA in regard to its labor-relations with the
12 SJPOA, the City is governed by the San Jose City Charter.

13 9. The MMBA requires that the City meet and confer in good faith with the
14 SJPOA over the wages, hours, and other terms and conditions of employment for Police
15 Officers, including retirement benefits. (Gov. Code §§ 3504, 3505.) When negotiations
16 result in agreement between the parties, the MMBA requires that the agreement be
17 reduced to a mutually-signed writing known as a "memorandum of agreement" ("MOA").
18 (Gov. Code § 3505.1.)

19 10. The MMBA further states that "knowingly providing a recognized
20 employee organization with inaccurate information regarding the financial resources of
21 the public employer, whether or not in response to a request for information, constitutes a
22 refusal or failure to meet and negotiate in good faith." (Gov. Code § 3506.5(c).)

23 11. The MMBA also prohibits the City from taking unilateral action on
24 matters impacting wages, hours, and other terms and conditions of employment for Police
25 Officers without first providing the SJPOA with reasonable notice and an opportunity to
26 bargain, resolve any differences, and reach agreement prior to implementation. (Gov.
27 Code § 3504.5.) "The duty to bargain requires the public agency to refrain from making
28 unilateral changes in employees' wages and working conditions until the employer and

1 employee association have bargained to impasse.” (*Santa Clara County Counsel*
2 *Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537.) Thus, for example, it is well-
3 established that an MMBA-covered city is “required to meet and confer with [a union
4 representing impacted employees] before it propose[s] charter amendments which affect
5 matters within their scope of representation.” (*People ex rel. Seal Beach Police Officers*
6 *Assn. v. City of Seal Beach* (“*Seal Beach*”) (1984) 36 Cal.3d 591, 602.)

7 12. Where there is no imminent need to act prior to a deadline to place a
8 proposed measure on an election ballot, doing so without first satisfying the bargaining
9 obligation violates Government Code section 3504. (*Santa Clara County Registered*
10 *Nurses Assoc.* (2010) PERB Decision No. 2120-M, pp. 15-16.)¹ In order to demonstrate
11 that financial difficulties create a compelling operational necessity permitting unilateral
12 action prior to satisfying the bargaining obligation, the employer must demonstrate “an
13 actual financial emergency which leaves no real alternative to the action taken and allows
14 no time for meaningful negotiations before taking action.” (*Id.* at p.16.) “The mere fact
15 that [a public employer] thought the inclusion of the measure on the ... ballot was
16 desirable does not constitute a compelling operational necessity sufficient to set aside its
17 bargaining obligation.” (*Id.* at 17.)

18 13. Even after bargaining has reached a state of impasse, the bargaining
19 obligation does not end permanently. Rather, “impasse is always viewed as a temporary
20 circumstance and the impasse doctrine ... therefore, is not a device to allow any party to
21 continue to act unilaterally or to engage in the disparagement of the collective bargaining
22 process.” (*McClatchy Newspaper* (1996) 321 NLRB 1386, 1398-1390.) “An impasse
23 does not constitute a license to avoid the statutory obligation to bargain collectively where
24 the circumstances which led to the impasse no longer remain in status quo.” (*Kit*

25
26 ¹ The Public Employment Relations Board (“PERB”) is the California administrative
27 agency generally charged with construing and administering the MMBA. (Gov. Code §§
28 3501 and 3509.) While PERB does not have jurisdiction over cases involving labor
associations representing police officers (Gov. Code § 3511), Courts give great deference
to its construction of the MMBA. (*Banning Teachers Assn. v. Public Employment*
Relations Bd. (1988) 44 Cal.3d 799, 804–805.)

1 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*
2 (1962) 138 NLRB 1290, 1294.) Thus, “[a]nything that creates a new possibility of fruitful
3 discussion (even if it does not create a likelihood of agreement) breaks an impasse.” (*Gulf*
4 *States Mfg. Inc. v. N.L.R.B.* (5th Cir. 1983) 704 F.2d 1390, 1399 [citations omitted].)²
5 Thus, when a party has made a significant bargaining concession, impasse will be broken.
6 Likewise, when an employer’s financial condition has improved substantially, impasse
7 will be broken. (See, e.g., *Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l*
8 *Assoc., Local 213, AFL-CIO* (1962) 138 NLRB 1290, 1294-1295.)

9 14. On or about March 6, 2012, the defendants submitted to the electorate of
10 the City of San Jose a ballot measure designed to dramatically reduce the pension
11 benefits of SJPOA-represented Police Officers by forcing current employees into a new
12 retirement plan that, *inter alia*, severely reduces accrual rates, dramatically increases
13 minimum retirement age and service requirements, cuts the maximum cost-of-living
14 adjustment in half (from 3% to 1.5%), and slashes survivorship and disability retirement
15 benefits.

16 15. On or about June 5, 2012, a majority of the electorate approved the
17 foregoing resolution. The charter amendment thus approved was thereafter filed with the
18 Secretary of State.

19 16. The proceedings described in Paragraphs 14 and 15, which were taken by
20 the defendants to amend its charter, were defective and violative of Government Code §
21 3500 *et seq.* in that defendants (1) failed to meet and confer in good faith with the SJPOA
22 to discuss the proposed cuts to the benefits prior to arriving at the ballot measure and
23 engaged in bad-faith bargaining by, *inter alia*, insisting that the SJPOA was required to
24

25 ² Decisions by the federal courts and the National Labor Relations Board (“NLRB”)
26 construing the Labor Management Relations Act are persuasive in construing similar
27 California labor relations statutes. (See, e.g., *Public Employment Relations Board v.*
28 *Modesto City School District* (1982) 136 Cal.App.3d 881, 895-896; *J. R. Norton Co. v.*
ALRB (1987) 192 Cal.App.3d 874, 908.) Decisions interpreting similar provisions of
other California labor statutes are also persuasive. *County Sanitation Dist. No. 2 v. Los*
Angeles County Employees’ Assn. (1985) 38 Cal.3d 564, 572-573.

1 convince the City to undo its *fait accompli* and asserting that the City was under no
2 obligation to bargain with the SJPOA in any event, (2) deliberately overstated the extent
3 of its pension liabilities—by in excess of \$250 million dollars—to create enormous public
4 and media pressure on the SJPOA to make concessions and inhibit the parties’ ability to
5 reach agreement (which is a per se unfair labor practice pursuant to Government Code
6 section 3506.5) and (3) failed and refused to return to bargaining on the asserted basis that
7 the parties were at impasse even after significantly changed circumstances required a
8 resumption of bargaining, including an improved financial outlook for the City, greatly
9 improved pension fund performance, and significant monetary concessions by the SJPOA.
10 These allegations are set forth in further detail below.

11 **The Defendants Violated the Meyers-Milias-Brown Act, Government Code**
12 **Section 3500 *et seq.*, by Deciding to Place Measure B Before the Voters Without**
13 **First Providing the SJPOA With Notice and an Opportunity to Bargain**

14 17. In the spring and early summer of 2011, during collective bargaining
15 negotiations, SJPOA and the City had lengthy negotiations over retirement benefits. The
16 parties agreed to create a program through which current employees could voluntarily
17 choose to opt out of the current level of pension benefits into a lower level of benefits
18 (“the SJPOA opt-in”).

19 18. The parties also agreed that either side could continue to “meet and
20 confer” (the technical term for collective bargaining and used herein interchangeably with
21 the term “bargaining”) on pension and retiree health care benefits for current and future
22 employees, notwithstanding that they had reached an agreement on other terms and
23 conditions of employment.

24 19. Notwithstanding this agreement, and almost before the ink on it was dry,
25 the City’s Mayor, Chuck Reed, began a campaign to have the City Council declare a fiscal
26 emergency.

27 20. Concurrently, the Mayor and other City Council members proposed a
28 ballot measure that would unilaterally reduce retirement benefits of all city employees,
including those represented by SJPOA. On May 13, 2011, the City published a

1 Memorandum re: Fiscal Concerns wherein Mayor Chuck Reed asserted that the City's
2 pension costs were projected to grow to \$650 million annually by 2016 and recommended
3 that the City Council approve a ballot measure to amend the San Jose City Charter to
4 dramatically decrease retirement benefits for current retirees and current/future employees,
5 as well as to require voter approval of future increases in retirement benefits for these
6 same employees. The Mayor recommended setting a maximum level of retirement
7 benefits (that, in some cases, were less than current employees and retirees earn currently)
8 that could not be exceeded without voter approval.

9 21. At a meeting on May 24, 2011, the City Council approved the Mayor's
10 recommendation and directed City Council staff to draft a proposed ballot measure that, if
11 approved by the voters of the City of San Jose, would implement the Mayor's
12 recommendations.

13 22. The Mayor began a frenzied political and media campaign warning of
14 impending fiscal disaster for the City as a result of projections for escalating pension
15 costs. The Mayor and his staff repeatedly asserted, including in official city documents
16 put forward as part of the City's bargaining position, that by Fiscal Year 2015-16, the
17 City's retirement contribution could reach \$650 million per year, from a 2010-11 level of
18 \$245 million in Fiscal Year 2010-2011. This figure was used approximately 38 times,
19 including in press releases and interviews in the New York Times and Vanity Fair
20 magazine.

21 23. Throughout these discussions, the City continued to represent that its
22 pension costs were projected to increase annually to approximately \$650 million by 2016.
23 As detailed below, these representations were knowingly false and without basis.

24 24. As recently as February 24, 2012, the Mayor asserted that the City's
25 pension liability could still reach \$650 million by 2015-16.

26 25. In response to the City's ballot measure, SJPOA and other San Jose labor
27 unions invoked their statutory and City Charter rights to meet and confer about the ballot
28 measure. Concurrently, SJPOA, in coalition with IAFF, Local 230 ("Local 230"),

1 representing firefighters employed by the City of San Jose, bargained over retirement
2 benefits and the SJPOA opt-in.

3 26. In mid-July, the SJPOA and the City began bargaining over retirement
4 benefits. The negotiations concerned retirement benefits, the ballot measure and SJPOA's
5 opt-in.

6 27. Throughout the meet and confer process, the City's position was that it
7 would vote on sending the ballot measure to the public at a Special Election, planned for
8 March 2012.

9 28. The original ground rules contemplated that the parties would complete
10 bargaining on the July 5, 2011 ballot measure by October 31, 2011. Thereafter, if no
11 agreement had been reached, the parties would enter mediation.

12 29. The negotiations were made more difficult by the City's own
13 acknowledgement that the changes to retirement benefits being proposed by the ballot
14 measure were of questionable legal validity.

15 30. Despite the difficulty, over the following four (4) months, the parties met
16 and conferred at least 13 times, including on July 13, August 2, 25, 30, and 21, September
17 13, 15, and 27, and October 5, 12, 14, 17, and 20. During the Retirement Negotiations,
18 the parties bargained over various proposals put forth by the SJPOA and the City
19 regarding retirement generally, along with bargaining about the specific language of the
20 proposed ballot measure. In the course of the negotiations, the City passed proposals on
21 the following subjects unrelated to the ballot measure: Retirement benefits for New
22 Employees; Retiree Healthcare Benefits For New Employees; Supplemental Retiree
23 Benefit Reserve ("SRBR"); Healthcare Cost Sharing; and Workers' Compensation Offset.
24 For example, the City proposed to change the retirement benefits for new employees, such
25 that the pension benefits formula for employees hired after April 1, 2012 would be 1.5%
26 per year of service, subject to a maximum of 60% of final compensation, and raising the
27 retirement year to 60 years old. The City also proposed to cap any cost of living
28

1 adjustments to 1% per fiscal year and to limit the City's maximum contribution to 9% of
2 pensionable compensation.

3 31. The SJPOA, in conjunction with the other labor unions, also made
4 various proposals in the course of bargaining unrelated to the ballot measure. For
5 example, on September 26, 2011, they proposed a three-tier retirement model that
6 maintained the *status quo* for active employees but created a second tier for new hires and
7 opt-ins with reduced retirement benefits.

8 32. The parties met and conferred until approximately October 31, 2011, but
9 unfortunately were unable to reach an agreement. On November 15-16, 2011, the parties
10 participated in mediation in an effort to resolve their differences. The mediation was not
11 successful.

12 33. Following mediation, in the run up to the Council's planned vote, the
13 City significantly changed its ballot proposal on November 22, 2011. In an email to all
14 employees, the City Manager Debra Figone described the revised ballot measure as "far
15 different than the earlier versions."

16 34. On November 11, November 18 and December 1, 2011, SJPOA and
17 Local 230 (described herein collectively as "the Unions") put forward new proposals
18 significantly amending their prior proposal. The Unions asked to resume bargaining over
19 the revised ballot measure and the Unions' revised proposals. But the City refused to
20 bargain, or deviate from its original plan to vote on its proposed ballot measure on
21 December 6.

22 35. No bargaining has taken place at any time over the City's revised
23 November 22, 2011 ballot measure or the Unions' proposals of November 11, November
24 18 and December 1, 2011.

25 36. On December 1, 2011, the independent actuary for the Retirement Plan
26 issued an updated report with projections for prospective City retirement contributions.
27 The report showed that the City's retirement contributions would be far less than
28 previously estimated and far less than the City had been relying on as justification for both

1 its proposed Declaration of a Fiscal Emergency and its ballot measure. The report showed
2 that—just for the Police and Fire Retirement Plan—the City’s contributions for Fiscal
3 Year 2012-13 would be approximately \$55 million *less than* previously expected.

4 37. On approximately December 5, 2011, the Mayor withdrew his proposal
5 to have the City Council declare a Fiscal State of Emergency.

6 38. But notwithstanding the Unions’ new proposals or the greatly reduced
7 pension contribution projections, the City Council voted to place the November 22, 2012
8 ballot measure before the voters.

9 39. On December 6, 2011, the City Council adopted Resolution 76087 and
10 approved a ballot measure for the June 2012 election ballot, which, *inter alia*, would
11 implement dramatic reductions in Police Officers’ retirement benefits beginning June 24,
12 2012. The draft ballot measure language approved by the City Council was prepared on
13 December 5, 2011, and though largely based on the November 22 version, was approved
14 by the Council the following day, without providing the SJPOA with notice and an
15 opportunity to bargain, as required by the MMBA. (Gov. Code § 3504.5 [requiring notice
16 and opportunity to bargain before adoption of “ordinance, rule, resolution, or regulation
17 directly relating to matters within the scope of representation proposed to be adopted by
18 the governing body”]; *Seal Beach, supra*, 36 Cal.3d at 602.)

19 40. The ballot measure language approved by the City Council on December
20 6, 2011, dramatically reduces the pension benefits of SJPOA-represented Police Officers
21 by forcing current employees into a new retirement plan that, *inter alia*, severely reduces
22 accrual rates, dramatically increases minimum retirement age and service requirements,
23 cuts the maximum cost-of-living adjustment in half (from 3% to 1.5%), and slashes
24 survivorship and disability retirement benefits. Police Officers who elect not to go into
25 the misnomered “Voluntary Election Program,” would be punished by slashing their
26 salaries and requiring that they pay 50% of existing unfunded liabilities.

27 41. The City took the unusual step, however, of seeking to put the ballot
28 measure before the voters in June of 2012, not March 2012, as previously planned. The

1 City Council then essentially directed City staff to engage in after-the-fact mediation—but
2 not bargaining—with the SJPOA and other City unions.

3 42. The SJPOA subsequently met with the City on two occasions in late
4 December, 2011 and early January 2012, but the City refused to agree to bargain, taking
5 the position that the parties remained at impasse.

6 43. On February 21, 2012, the City, through its Director of Labor Relations,
7 provided the SJPOA with a copy of a revised version of its ballot measure and informed
8 the SJPOA that the City Council intended to take a final vote on language for a June 2012
9 ballot measure at its regularly-calendared session on March 6, 2012. *Inter alia*, the
10 measure language was amended to move its effective date to June 23, 2013.

11 44. On February 24, 2012, the SJPOA made a request to bargain about the
12 February 21, 2012 ballot measure. The letter noted that the February 21, 2012 revised
13 measure contained significant changes from the December 6, 2011 version and
14 specifically referenced a concession by the City Manager that it contained “many
15 significant changes and movement from earlier drafts.” The SJPOA noted that it “had no
16 opportunity to bargain about this new ballot language.”

17 45. On February 27, 2012, the City’s Labor Relations Director, Alex Gurza
18 responded to the SJPOA’s February 24 communication by conditioning any resumption of
19 bargaining on the Association (1) making a concession that the City deemed in its
20 subjective opinion to be “sufficient” and (2) that such concession be capable of being
21 “ratified prior to March 6.”

22 46. On March 2, 2012, SJPOA and Local 230 presented a new proposal—
23 designed to meet the City’s concern about the un-guaranteed nature of prior union
24 proposals—which guaranteed tens of millions of dollars in savings to the City annually.

25 47. The City rejected the proposal on March 5, 2012—*i.e.*, within 72 hours—
26 without any meeting or bargaining about the proposal.

1 48. On March 6, 2012, the San Jose City Council adopted a resolution to
2 place the February 21, 2012 version of the pension ballot measure on the June 2012
3 election ballot.

4 49. The ballot measure language approved by the City Council on March 6,
5 2012, dramatically reduces the pension benefits of SJPOA-represented Police Officers in
6 the same ways as the prior version approved by the City Council on December 6, 2011.
7 The February 21, 2012 version of the pension reduction ballot measure adopted by the
8 City Council on March 6, 2012 also includes new language dictating that the City will file
9 as lawsuit seeking a declaration as to the legality of the various pension reduction
10 provisions delineated in the measure.

11 50. These actions and plans were made by the City unilaterally and without
12 providing the SJPOA with notice and an opportunity to “meet and confer ... before [the
13 City] proposed charter amendments which affect matters within their scope of
14 representation.” (*Seal Beach, supra*, 36 Cal.3d at 602.)

15 **The City Misrepresented Its Projected Pension Costs and Pushed**
16 **Toward Declaring a So-Called “Fiscal State of Emergency”**

17 51. On April 13, 2011, San Jose Mayor Chuck Reed and Vice Mayor Nguyen
18 issued a press release announcing that “San José’s retirement director has projected that
19 [pension] costs could rise to \$650 million per year by fiscal year 2015-2016” This
20 statement knowingly and recklessly misrepresented the City’s potential pension liability.

21 52. On May 13, 2011, the City published a Memorandum re: Fiscal Concerns
22 wherein Mayor Chuck Reed asserted that the City’s pension costs were projected to grow
23 to \$650 million annually by 2016. Again, there was no basis for this assertion.

24 53. The \$650 million figure was communicated by the Mayor and the City
25 again and again in press releases, reports, and official City documents until approximately
26 mid-November 2011.

27 54. The communications referenced in the preceding paragraphs were made
28 even though the City’s retirement director—the only source for the \$650 estimation

1 according to the Mayor—had expressly disavowed any \$650 million projection and had
2 told the Mayor and the City that it should NOT be relied upon. The City had no other
3 actuarially sound basis for projecting a \$650 million pension projection for 2015-16.

4 55. The intent of the City in continuing to communicate the false \$650
5 million projection was to whip-up public, media and political sentiment to support the
6 City’s plan to declare a fiscal emergency (discussed *infra*) and slash retirement and other
7 benefits for Police Officers and other City civil servants. At all times that these
8 representations were made, the City was aware that they were false and without any
9 reasonable actuarial basis, such that the City “knowingly providing [the SJPOA] with
10 inaccurate information regarding the financial resources of the public employer ...
11 constitute[d] a refusal or failure to meet and negotiate in good faith.” (Gov. Code
12 § 3506.5(c).)

13 56. On February 8, 2012, NBC Channel 11, a San Jose area television station
14 produced an investigative report alleging that the City had deliberately overstated its
15 potential pension liability for political reasons. The report suggested that the City’s
16 overstatements were deliberate, and designed to support both the Mayor’s budget proposal
17 and his proposal for the Declaration of Fiscal Emergency. To wit, in an interview with
18 NBC, when asked the basis for the \$650 million city pension liability projection, Mayor
19 Reed acknowledged that the sole source for the \$650 million figure was the City’s
20 Retirement Services Director, Russell Crosby. In the same interview, Mr. Crosby stated
21 about the \$650 million estimation: “That was a number off the top of my head.” He also
22 stated that: “The Mayor was told not to use that number ... that the number was 400
23 [million dollars].”

24 57. In fact, on approximately February 21, 2012, the City’s own retirement
25 system’s actuaries estimated that the actual future projection figure for Fiscal Year 2015-
26 16 is approximately \$310 million, less than half the level the City had consistently and
27 knowingly misrepresented. In light of the developments regarding the City’s improved
28 financial condition and the dramatically-reduced projections of retirement related costs

1 over the next few years, any ostensible bargaining impasse was broken. (See *Kit*
2 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*
3 (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition
4 breaks impasse].)

5 58. Undeterred, as recently as February 24, 2012, Mayor Reed was still
6 publicly estimating that the City's pension liability could reach \$650 million.

7 59. On February 28, 2012, five California State Assembly members and two
8 State Senators requested that the California Legislature's Joint Legislative Audit
9 Committee conduct an audit into the City's general finances and current and future
10 pension obligations ("the State audit request"). They asked that: "The audit should focus
11 on all projections used by the City and/or its elected officials that include, but may not be
12 limited to, \$400 million, \$431 million, \$570 million, and \$650 million."

13 60. On March 7, 2012, the State of California's Joint Legislative Audit
14 Committee ordered a state audit to determine, *inter alia*, whether the Mayor, City Council,
15 or other officials engaged in any wrongdoing or legal violations in referencing the false
16 \$650 million projection. The committee directed the state auditor to give the audit
17 priority status.

18
19 **The City Continued to Refuse to Bargain Even After Its So-Called "Fiscal State of
Emergency" Proved to be a Myth**

20 61. As noted above, on approximately February 21, 2012, the City revised its
21 estimate for the City's pension liability projection for Fiscal Year 2015-16 to
22 approximately \$310 million, less than half the level the City had consistently and
23 knowingly misrepresented. In light of the developments regarding the City's improved
24 financial condition and the dramatically-reduced projections of retirement related costs
25 over the next few years, any ostensible bargaining impasse was broken. (See *Kit*
26 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*
27 (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition
28 breaks impasse].)

1 62. Despite these revelations, the City continued to refuse to meet and confer
2 with the SJPOA regarding its proposed ballot measure.

3 63. At all times mentioned herein, the defendants were able to perform its
4 obligations under the MMBA. Notwithstanding such ability, the defendants failed and
5 refused to perform its statutory duty under the MMBA.

6 64. Instead, the defendants submitted to the electorate of the City of San Jose
7 a ballot measure designed to dramatically reduces the pension benefits of SJPOA-
8 represented Police Officers, over which there had been no bargaining.

9 65. As the ballot measure passed on June 5, 2012, commencing on or about
10 June 6, 2012, defendants have undertaken to act under color of the above-described
11 defective and invalid charter amendment and, in doing so, has usurped, intruded into, and
12 unlawfully held and exercised powers not belonging to it.

13 **PRAYER**

14 WHEREFORE, Plaintiff prays for the following relief:

15 1. For judgment determining that the above-described charter amendment is
16 null and void and of no legal effect;

17 2. For any and all actual, consequential, and incidental damages according
18 to proof, including but not limited to damages that have been or may be suffered by
19 members of the SJPOA and all costs incurred by the SJPOA in attempting to invoke the
20 statutory rights of the association and its members;

21 3. For attorneys' fees pursuant to California Code of Civil Procedure §
22 1021.5, Government Code § 800, or otherwise;


23 4. For costs of suit herein incurred and other fines pursuant to California
24 Code of Civil Procedure § 809; and
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5. For such costs and further relief as the Court deems just and proper.

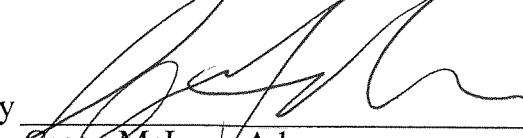
Dated: 4/25, 2013

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Supervising Deputy Attorney General
MARC J. NOLAN
Deputy Attorney General

By 
MARC J. NOLAN
Deputy Attorney General
*Attorneys for the Attorney General of the
State of California*

Dated: April 23, 2013

CARROLL, BURDICK & McDONOUGH LLP

By 
Gregg McLean Adam
Jonathan Yank
Jennifer Stoughton
*Attorneys for Relator-Plaintiff
San Jose Police Officers' Association*

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VERIFICATION

I, Jonathan Yank, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at 44 Montgomery Street, Suite 400, San Francisco, CA 94104.

I am one of the attorneys of record for Relator-Plaintiff SAN JOSE POLICE OFFICERS' ASSOCIATION (SJPOA) in the above-entitled matter.

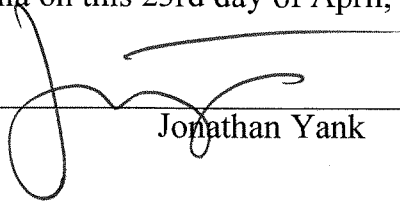
SJPOA is absent from the county in which I have my office and for that reason I am making this verification on his behalf.

I have read the foregoing VERIFIED COMPLAINT IN *QUO WARRANTO*; AND ATTACHED LEAVE TO SUE and know the contents thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California on this 23rd day of April, 2013.



Jonathan Yank

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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11

12
13 **THE PEOPLE OF THE STATE OF
14 CALIFORNIA ex rel. SAN JOSE POLICE
OFFICERS' ASSOCIATION,**

Plaintiff,

15
16 v.
17

18 **CITY OF SAN JOSE and CITY OF SAN JOSE
19 CITY COUNCIL,**

Defendants.
20

Case No: _____
LEAVE TO SUE

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22 As more fully set forth in Attorney General Opinion 12-506, a copy of which is attached
23 hereto, Leave to Sue is hereby granted to Relator-Plaintiff (Plaintiff) SAN JOSE POLICE
24 OFFICERS' ASSOCIATION, and to Plaintiff's attorneys Gregg McLean Adam, and Carroll,
25 Burdick & McDonough LLP, to file the original Verified Complaint in Quo Warranto and this
26 Leave to Sue. Plaintiff may use the name of THE PEOPLE OF THE STATE OF CALIFORNIA
27 *ex rel.* SAN JOSE POLICE OFFICERS' ASSOCIATION as plaintiff in this proceeding. No
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1 amended complaint shall be filed unless it has been approved by the Attorney General. At any
2 time, the Attorney General may either dismiss or assume the management of this action. Upon
3 any adverse judgment, approval of the Attorney General must be obtained before Plaintiff may
4 file a notice of appeal. Copies of all documents filed in this action by any party must be served on
5 the Attorney General.

6 This Leave to Sue is granted upon the condition that neither the PEOPLE OF THE STATE
7 OF CALIFORNIA, nor the Attorney General, shall be liable for any damages, costs, charges, or
8 counsel fees in the proceeding. (Code Civ. Proc. § 810.) In this regard, this Leave to Sue has
9 been issued only upon Plaintiff's acknowledgement and agreement—accompanied by a deposit in
10 the sum of Five Hundred Dollars (\$500.00)—that, without limitation, any judgment for damages,
11 costs, charges, or fees that may be recovered against Plaintiff, and/or any associated costs and
12 expenses incurred in this action, will be borne and paid by Plaintiff.

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14 Respectfully Submitted,

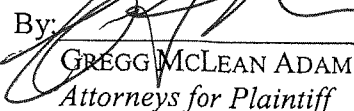
15 Dated: April 25, 2013

KAMALA D. HARRIS
Attorney General of California
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MARC J. NOLAN
Deputy Attorney General

19 By: 
20 MARC J. NOLAN
21 Deputy Attorney General
22 *Attorneys for the Attorney General of the
State of California*

23 Dated: April 23, 2013

CARROLL, BURDICK & McDONOUGH LLP
GREGG MCLEAN ADAM

25 By: 
26 GREGG MCLEAN ADAM
27 *Attorneys for Plaintiff*

28 Leave to Sue12-506.041813

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 12-605
	:	
of	:	April 15, 2013
	:	
KAMALA D. HARRIS	:	
Attorney General	:	
	:	
MARC J. NOLAN	:	
Deputy Attorney General	:	
	:	

THE SAN JOSE POLICE OFFICERS' ASSOCIATION has requested leave to sue the CITY OF SAN JOSE in quo warranto on the following question:

Did the City of San Jose fulfill its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits?

CONCLUSION

Leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits.

ANALYSIS

We are once again asked to consider whether the enactment of a ballot measure addressing public employee pension reform gives rise to an action in quo warranto.¹ In this instance, voters of the City of San Jose (City) recently passed an initiative measure (Measure B) that amended the City's charter to add a new article entitled "The Sustainable Retirement Benefits and Compensation Act."² Among other things, Measure B increased retirement contribution levels for current City employees who do not change to an alternative and less expensive retirement plan, and lowered pension benefits and increased retirement contributions and minimum retirement ages for new City employees.

Noting that its peace officer members are City employees whose compensation and benefits are affected by the enactment of Measure B, Proposed Relator the San Jose Police Officers' Association (SJPOA) now seeks our permission to sue the City in quo warranto on the question whether the City sufficiently met and conferred with SJPOA—as it is required to do under the Meyers-Milias-Brown Act (MMBA)³—before the City Council voted to place Measure B on the ballot. While the City acknowledges as a general matter that an action in quo warranto may be the appropriate means by which to test whether a given charter amendment was validly enacted, it maintains that we should deny SJPOA's request in this instance because the City bargained with SJPOA to impasse over the contents and terms of Measure B and that no further bargaining was legally required. The City also argues that leave to sue should be denied both on public policy grounds and to avoid a multiplicity of legal actions addressing the validity of Measure B.

The grounds for initiating a quo warranto proceeding are set forth in Code of Civil Procedure section 803, which provides in relevant part:

¹ See 95 Ops.Cal.Atty.Gen. 50 (2012) (quo warranto application submitted by organization representing retired employees of City and County of San Francisco); 95 Ops.Cal.Atty.Gen. 31 (2012) (quo warranto application submitted by Bakersfield Police Officers' Association).

² In the presidential primary election held June 5, 2012, Measure B was approved by 69.02 percent of the voters who voted on the question. The final tally was 95,716 voting "Yes," and 42,964 voting "No." City Clerk's Memo. to Mayor and City Council re Certification of the Results of Election held June 5, 2012 (Jul. 26, 2012). See http://www.sanjoseca.gov/clerk/Agenda/20120807/20120807__0207.pdf.

³ Govt. Code §§ 3500-3511.

An action may be brought by the attorney-general, in the name of the people of this state, upon his [or her] own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.

Where, as here, a private party seeks to file an action in quo warranto, that party must obtain the Attorney General's consent to do so.⁴ In determining whether to grant an application to file a quo warranto action in superior court, we do not attempt to resolve the merits of the controversy. Rather, we decide whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the public interest.⁵ In a proper case, a quo warranto action may be authorized to resolve allegations that a charter city unlawfully exercised its power to amend its charter.⁶ For the reasons discussed below, we grant leave to sue.

The California Supreme Court has held that a charter city must comply with the MMBA's meet-and-confer requirements—which govern relations between local public agency employers and local public employee organizations—before placing an initiative measure on the ballot that would affect matters within the scope of the Act.⁷ “The MMBA has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies.”⁸ To achieve these purposes, “the MMBA requires governing bodies of local agencies to ‘meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of

⁴ See *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 687, 693-698 (1985).

⁵ 95 Ops.Cal.Atty.Gen. at 51; 93 Ops.Cal.Atty.Gen. 144, 145 (2010); 86 Ops.Cal.Atty.Gen. 205, 208-209 (2003).

⁶ *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591, 595 & n. 3 (1984); see *City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th 82, 89 (1999); *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at 693-698; see also 95 Ops.Cal.Atty.Gen. at 32; 74 Ops.Cal.Atty.Gen. 77 (1991).

⁷ *Seal Beach*, 36 Cal. 3d at 602.

⁸ *Id.* at 597; see Govt. Code § 3500; *DiQuisto v. Co. of Santa Clara*, 181 Cal. App. 4th 236, 254 (2010).

employment’ and to ‘consider fully’ such presentations made by the employee organizations,” and to do so “prior to arriving at a determination of policy or course of action.”¹⁰

In *Seal Beach*, we granted city employee associations leave to sue the City of Seal Beach in quo warranto after Seal Beach voters passed a ballot initiative that amended the city’s charter to require the immediate firing of any city employee who participated in a strike.¹¹ Before addressing the merits of the controversy, the California Supreme Court observed that using a quo warranto lawsuit to test the regularity of the initiative measure’s enactment was “not questioned.”¹² And, in a later case, the Court of Appeal held that quo warranto is the *only* legal mechanism for attacking the legitimacy of a charter-amending initiative alleged to have been placed on the ballot in violation of the MMBA.¹³

We now turn our attention to the particular allegations at issue to determine whether a quo warranto suit should be authorized in the present case. First, the parties generally agree that: (1) a quo warranto action may be the appropriate means by which to resolve allegations that a city charter amendment was improperly enacted; (2) the City was required to comply with the MMBA’s collective bargaining requirements before placing an initiative measure on the ballot that would affect represented employees’ wages, hours and other conditions of employment; and (3) Measure B was in fact such a measure. The parties differ, however, in that the SJPOA contends that the City did not fulfill its bargaining obligations under the MMBA before it placed Measure B on the ballot, while the City counters that it was not legally required to do any further bargaining on the issue because the parties had reached an impasse in their discussions and negotiations.

Examining this dispute in more detail, it is clear from the parties’ submissions and recitations of the relevant facts that the parties did in fact meet and/or exchange proposals

⁹ *Seal Beach*, 36 Cal. 3d at 596 (quoting Govt. Code § 3505); see *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Rel. Bd.*, 35 Cal. 4th 1072, 1083 (2005); *Intl. Assn. of Firefighters Local Union 230 v. City of San Jose*, 195 Cal. App. 4th 1179, 1186 (2011).

¹⁰ Govt. Code § 3505.

¹¹ See *Seal Beach*, 36 Cal. 3d at 595.

¹² *Id.* at 595 & n. 3.

¹³ *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at 693-698; see also *City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th at 89.

on numerous occasions in 2011 and early 2012 regarding the terms of both a successor Memorandum of Understanding (or MOU) that would cover SJPOA members and the potential ballot initiative that would become Measure B. The City, however, contends that its MMBA obligations to meet and confer with SJPOA over the ballot measure ended on October 31, 2011, when, according to a June 2011 agreed-upon “framework” to its negotiations with SJPOA, the parties agreed to “utilize impasse resolution procedures . . . if the parties failed to reach agreement by [that date].” Since no agreement was reached by that date, the City maintains, no further bargaining was required under the MMBA or otherwise.

It is undisputed, however, that additional contact between the parties occurred during the time frame from October 31, 2011, through March 6, 2012, when the City Council voted to place Measure B on the June 2012 ballot. There were unsuccessful attempts at mediation; the SJPOA submitted proposals that it characterizes as “concessionary,” but which the City contends were insufficient to break the impasse; and the City disseminated revised versions of the proposed ballot measure, which it says were designed to facilitate mediation (as opposed to negotiation, which it continued to maintain had reached an impasse as of October 31, 2011), but which the SJPOA argues were unilateral steps affecting its members’ rights without a meaningful opportunity to bargain or negotiate.

Essentially, the City asserts that it had no further duty to bargain under the MMBA after October 31, 2011, and that nothing that occurred after that date ever revived such a duty. But the SJPOA maintains that its agreement to the above-referenced framework for negotiations was not an agreement to “prospectively stipulate” to an immutable state of impasse effective October 31, 2011, and that, in any event, the parties’ subsequent proposals broke any ostensible impasse. In particular, the SJPOA complains that it had no opportunity to bargain with the City with regard to the revised versions of Measure B that the City disseminated, including the final version that was placed before the voters.

On the one hand, the MMBA’s “duty to bargain requires the public agency to refrain from making unilateral changes in employees’ wages and working conditions until the employer and employee association have bargained to impasse”¹⁴ On the other, an impasse may be broken, and the duty to bargain revived, by a change in circumstances that suggests that bargaining may no longer be futile.¹⁵ In these

¹⁴ *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Relations Bd.*, 35 Cal. 4th 1072, 1083 (2005) (quoting *Santa Clara Co. Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 537 (1994)).

¹⁵ See *Pub. Empl. Rel. Bd. v. Modesto City Sch. Dist.*, 136 Cal. App. 3d 881, 899 (1982).

circumstances, then, was it reasonable, and in compliance with the MMBA, for the City to insist that negotiations reached an impasse on October 31, 2011, and that such an impasse was never broken, despite additional proposals from both parties? Was it reasonable for the SJPOA, having agreed at the outset of negotiations to utilize impasse resolution procedures if an agreement was not reached by October 31, 2011, to have any expectation that the City's duty to negotiate under the MMBA would continue after that date? Assuming the validity of declaring negotiations at an impasse, effective October 31, 2011, did any changed circumstances revive the duty to negotiate? In deciding whether a suit in quo warranto should be permitted to proceed, it is not our province to conclusively answer questions such as these, but only to determine whether such questions present substantial factual and legal issues and whether a suit in quo warranto is the proper forum in which to resolve them. We find this to be the case here.

Also at issue, we think, and interwoven with the question whether the parties' positions and actions were reasonable under the circumstances, is the parties' respective good faith toward the negotiations, the evaluation of which will depend on "primarily a factual determination based on the totality of the circumstances."¹⁶ We are not equipped (and it is not our role) to make such a determination at this juncture, but we find that a quo warranto proceeding will afford the parties an adequate opportunity to establish the validity of their positions before a neutral factfinder. Additionally, we find that resolving the question whether Measure B was validly enacted—in compliance with the MMBA's meet-and-confer requirements—is in the public interest.

In closing, we briefly address the City's contentions that leave to sue should be denied because (1) allowing the suit to proceed would in some sense punish the City for making what it views as concessionary proposals and therefore runs counter to a public policy that would encourage such concessions; and (2) other court proceedings and matters brought before the state Public Employment Relations Board (PERB) involve similar issues and allegations, and permitting this action will therefore result in a counterproductive multiplicity of proceedings. First, we have not adjudicated the merits of this dispute and express no view on whether a court will ultimately determine that, because of its own subsequent actions or other factors, the City had a duty to bargain with the SJPOA after it declared an impasse; thus, we have no occasion to consider a public policy argument such as the one articulated here, which is better addressed to the court that will address the merits. Second, we have reviewed the materials submitted to us concerning the other complaints and legal disputes involving Measure B, but those matters involve different complaining parties¹⁷ and/or different legal questions. Under the

¹⁶ *Placentia Fire Fighters v. City of Placentia*, 57 Cal. App. 3d 9, 25 (1976) (internal citation omitted); see 95 Ops. Cal. Atty. Gen. at 36.

¹⁷ PERB's jurisdiction over MMBA-related disputes involving local public employee

circumstances, we believe that the separate proceedings fail to present an adequate opportunity for these two parties to air their respective and opposing positions regarding the present MMBA-related dispute and have that dispute resolved.

Accordingly, leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits.

organizations does not extend to peace officer organizations, like the SJPOA. *See* Govt. Code §§ 3509, 3511.