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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JOE REQUA, WENDELL G. MOEN, JAY DAVIS AND DONNA VENTURA, Petitioners, v. REGENTS OF UNIVERSITY OF CALIFORNIA, and DOES, 1 through 99, inclusive, Respondents. _______________________________________ /	No. RG 10530492 OPPOSITION TO DEMURRER Date: Dec 6, 2010 Time: 9:00 a.m. Dept: 31

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Introduction

Stated succinctly, the Regents assert that the Petition for a Writ of Mandate dos not state a claim because Petitioners have not identified any "specific legislative documents" that give them a right to receive the same health benefits as other UC retirees. Resp. Br. pp. 5-6, 8. A demurrer tests the sufficiency of the pleadings, and Petitioners' pleadings are more sufficient to state cognizable claims entitling them to relief. Contrary to the Regents' assertions, the issue is not whether Petitioners have identified – at this stage and before any discovery – documents they may need to prove their case at trial (documents which the Regents themselves clearly have).[1]

Facts Alleged by Petitioners

Petitioners are retired employees of the University of California ("UC") who worked at Lawrence Livermore National Laboratory ("Livermore Lab"). Since retiring, they have been receiving pensions from the UC Retirement Plan. Petition, ¶¶ 6-8, 11-12, 16-18, 21-14.

During the 1960s, the Regents authorized medical benefits for UC employees and retirees, including those from Livermore Lab. *Id.* ¶ 31. Until 2007, they provided "the same medical benefits to active and retired employees [from] Livermore Lab as they provided to other active and retired [UC] employees." *Id.* ¶ 32. Retiree health care is "a form of deferred compensation," which the Regents provided "to induce Petitioners to remain at the Livermore Lab." *Id.* ¶¶ 51, 58. Petitioners "reasonably believe[d] they were entitled to and would receive the same medical benefits as other UC retirees." *Id.* ¶¶ 34, 52.

The Regents managed the Livermore Lab for more than 60 years under a contract with the Department of Energy ("DOE"), *id.* ¶ 27, but in 2007, DOE awarded the contract to Lawrence Livermore National Security ("LLNS"), "a newly-created private consortium." *Id.* ¶ 37. Shortly thereafter, the Regents terminated UC health benefits for Livermore retirees.

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[1] It is worth noting that nowhere have the Regents offered any reason why they should be permitted to single out 5,000 former University employees who worked at Livermore Lab and remove them – and only them – from UC's retiree health programs. The Regents suggest their reason is because DOE has contracted with LLNS to provide benefits. But LLNS has slashed Petitioners' health care and has told them their health care benefits can be changed or eliminated at any time.

They did so because DOE entered in a separate agreement with LLNS under which LLNS is to provide retiree health to Livermore retirees. *Id.* ¶¶ 8, 11, 16, 22, 38-39.

The Regents assured Petitioners that LLNS would provide them with "substantially equivalent" benefits. *Id.* ¶ 38. However, LLNS has since informed Petitioners that it can change or terminate these benefits at any time and that "going forward, benefits for UC retirees who worked at Livermore Lab 'may not be equivalent to those offered by the University.'" *Id.* ¶ 36. In fact, LLNS has not provided benefits "substantially equivalent" to the benefits Petitioners received from UC and which the Regents are providing to other UC retirees. *Id.* ¶¶ 39-40.

Misinformation via Judicial Notice

The Regents ask the Court to take judicial notice of "relevant sections" of two documents: (1) a DOE Request for Proposal ("RFP"), and (2) an "Agreement of Transfer" that provides "UCRP retirees will become members of the health plans of LLNS" on November 1, 2007. Regents' RJN, Exhs. A & B.[2] The Regents suggest that these documents show they had no choice but to terminate Petitioners' benefits because DOE has required the new Contractor to provide retiree health benefits. Resp. Memo., pp. 3-4, citing RJN, Exh. A.[3] But DOE did not (and could not) require the Regents to abrogate their legal responsibility to provide retiree medical benefits. Further, as pointed out in the accompanying Objection, the Regents fail to inform the Court that LLNS promptly sought a modification of the Contract to change the "substantially equivalent" requirement to an undefined "industry practices" standard.

By asking the Court to consider these additional documents, the Regents use an improper "speaking" demurrer to bring what amounts to a motion for summary judgment, before discovery, and based only on documents *they* wish the Court to consider.

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[2] Along with this Response, Petitioners have filed an Objection to these documents and do not acquiesce in the Court's considering them. Petitioners have also filed their own RJN to be considered *only* if the Court considers the Regents' RJN.

[3] Note that the first DOE document provides that "The Contractor shall become the sponsor and be responsible for: management and administration of a retiree medical benefit plan that will ... provide medical insurance benefits (including dental) substantially equivalent to those provided by the predecessor contractor..." The proposal LLNS submitted reads that the Regents will *terminate* benefits and LLNS will provide "substantially equivalent" benefits.

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Standard of Review

As the Regents note, "A demurrer tests the legal sufficiency of the pleading." Resp. Br. p. 4. Thus, the court assumes that "properly pleaded material allegations are true" and considers the pleading "as a whole and all its parts in their context." *Thorning v. Hollister Sch. Dist.*, 11 Cal. App. 4th 1598, 1603 (1992). Although the court *may* consider documents "appropriate for judicial notice," *ibid.*, a "demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." *Joslin v. H.A.S. Ins. Brokerage*, 184 Cal. App. 3d 369, 374 (1986); Witkin, *Cal. Procedure.*, 5th ed., Pleading, § 948. Further, "[A] plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action." *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d 240, 245 (1969).[4] There is no need for greater specificity in light of "modern discovery procedures." *Semole v. Sansoucie,* 28 Cal. App. 3d 714, 719 (1972).

The Regents Terminated the Retiree Medical Benefit

Although *LLNS* is providing benefits, *the Regents* are the legally responsible party. They have not been relieved of their contractual obligation to Petitioners simply because they entered into a separate agreement with two other entities (LLNS and DOE) – under which *LLNS* is to provide Livermore retirees with "industry standard" benefits. While the Regents accuse Petitioners of advancing "novel theories," the notion that a public agency can privatize obligations to Petitioners that are protected by the Contract Clause, simply by entering in an agreement with two entities unrelated to Petitioners, is truly "novel."

Petitioners Have Alleged Vested Rights Protected by the Contract Clause

The Regents make one primary argument: Petitioners have not identified any "source" – "not a single sentence or a single piece of paper" – for their claim of a "vested right." Resp.

[4] See *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 879 (1963) ("The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff.").

1 Memo., p. 5. This claim is more than a little disingenuous. Having thwarted Plaintiffs'
2 requests for the Minutes of Regents' meetings from the 1960s at which retiree medical
3 benefits were authorized and expanded,[5] the Regents want this Court to sustain their demurrer
4 because Petitioners do not have the very documents the Regents decline to provide. They
5 should not be permitted to profit by this conduct.

6 Nor are Petitioners required to provide these documents *at the pleading stage*. "We
7 are not concerned with a plaintiff's possible inability to prove the claims made in the
8 complaint, the allegations of which are accepted as true and liberally construed with a view
9 toward attaining substantial justice." *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal.
10 App. 4th 592, 602 (2000). Petitioners need only *plead facts* which, if proven, will establish
11 they are entitled to relief. *Williams v. Beechnut Nutrition Group*, 185 Cal. App. 3d 135, 139
12 (1986). And they have done so here.

13 **The Law Is Well Settled that Public Employee Benefits**
14 **Give Rise to Contractual, Vested Rights**

15 Services performed by public employees in exchange for promised benefits create a
16 contractual obligation under the Contract Clause of the California Constitution. *Kern v. City
17 of Long Beach*, 29 Cal. 2d 848, 852-853 (1947); *California Teachers Ass'n v. Cory*, 155 Cal.
18 App. 3d 494, 505-506 (1984); *Creighton v. Regents of University of California*, 58 Cal. App.
19 4th 237, 243 (1997) ("a statutory grant to public employees of pension rights in return for
20 services has long been held to imply a contractual obligation").[6] For nearly a century, courts
21 have protected vested retirement benefits of public employees under the Contract Clause.

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23 [5] The Regents' Minutes for any meeting before 1997 are not available on line. See Regents website at: www.universityofcalifornia.edu/regents/minutes. Pre-1997 Minutes are available only on microfiche and only
24 by appointment at the Office of the Secretary of the Regents. Since these Minutes are available only on microfiche, it is almost impossible to find the relevant documents. Recently, when Counsel met and conferred
25 with respect to the case management conference, Counsel for Petitioners asked if the Regents would provide documents relating to the authorization for the retiree medical benefits. The Regents declined. We now know
26 why. (In their brief, the Regents go so far as to brazenly trumpet that "Petitioners have identified no legislation or Board resolution (*as there is none*) which compels the University to provide LLNL retirees,
27 forevermore, with a UC-administered medical plan offering the same medical benefits and coverage as other UC retirees who worked at other UC facilities." Resp. Br. p. 13; emp. added.)

28 [6] "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." Cal. Const., art. I, § 9.

1 *O'Dea v. Cook*, 176 Cal. 659 (1917); *Aitken v. Roche*, 48 Cal. App. 753 (1920). "Once
2 vested, the right to compensation cannot be eliminated without unconstitutionally impairing
3 the contract obligation." *Olson v. Cory*, 29 Cal. 3d 532, 538 (1980).

4 Contrary to the Regents' contention,[7] contractual obligations of a public body may be
5 implied. *Cal. Teachers Ass'n,* at 505-506 ("three quarters of a century of cases … have
6 *implied* contractual obligations from the particular texts and contexts of the statutes at issue").
7 "Once an implied contract of the state is demonstrated, it is of equal dignity with an express
8 contract for purposes of the prohibitions against impairment." *Cal. Teachers Ass'n,* at 505.

9 Retirement benefits vest upon *acceptance of* employment. "A public employee's
10 pension constitutes an element of compensation, and a vested contractual right to pension
11 benefits accrues upon acceptance of employment. Such a pension right may not be destroyed,
12 once vested, without impairing a contractual obligation of the employing public entity."
13 *Creighton*, 58 Cal. App. 4th at 243, *Kern*, 29 Cal. 2d at 852-853, *Legislature v. Eu*, 54 Cal. 3d
14 492, 534 (1992), *Ass'n of Blue Collar Workers v. Willis*, 187 Cal. App. 3d 780, 786-787
15 (1986). This is so "even though the right to immediate payment of [the benefit] may not
16 mature until certain conditions are satisfied." *Miller v. State of California*, 18 Cal. 3d 808,
17 815 (1977).[8]

18 These principles have been applied to retirement benefits other than pensions –
19 including ***retiree health benefits***, *Thorning v. Hollister School Dist.*, 11 Cal. App. 4th 1598, at
20 1602, disability retirement, *Frank v. Board of Administration*, 56 Cal. App. 3d 236, 243
21 (1976), and even longevity salary increases, extra vacation pay, and sabbatical leave.
22 *Creighton*, at 243, citing *Cal. League of City Employee Ass'ns v. Palos Verdes Library Dist.*,
23 87 Cal. App. 3d 135, 137, 139-140 (1978).

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[7] "California courts have been clear in holding that, absent a clear intent on the part of the public
26 entity, such a long-term financial commitment for retiree medical benefits cannot be implied." Resp. Br., p. 6.

27 [8] If benefits are increased during an employee's career, the improvements will vest as well. "An
employee's contractual pension expectations are measured not only by benefits in effect when employment
28 commences, but also by those conferred during the employee's subsequent tenure." *Betts v. Bd. of
Administration*, 21 Cal. 3d 859, 866 (1978).

Provisions granting retirement benefits are liberally construed to accomplish their "beneficent purpose" and protect the "reasonable expectations of those whose reliance is induced." *Bellus v. City of Eureka*, 69 Cal. 2d 336, 350 (1968); and see *O'Dea v. Cook*, 176 Cal. 659, at 662, *United Firefighters of Los Angeles v. City of Los Angeles*, 210 Cal. App. 1101, 1102 (1989), and *Creighton*, 58 Cal. App. 4th at 244.

While the Regents repeatedly say Petitioners "fail to state any facts" to support their claim to a "vested right," Resp. Br. pp. 1, 2, 5, 8, 11, 12 & 14, this is simply not so. Petitioners allege that:

- In the 1960s, the Regents authorized medical benefits for all UC employees and retirees, including those who worked at and retired from Livermore. Petition, ¶ 32.
- For more than 50 years, until 2007, "the Regents provided the same medical benefits to active and retired employees who had worked at the Livermore Lab as they provided to other active and retired University employees." *Id.* ¶ 33.
- In 2007, the Regents unilaterally removed Plaintiffs and other Livermore retirees from UC's retiree health benefit program. *Id.* ¶¶ 8, 11, 16, 22, 38-39.
- The Regents purported to shift responsibility for providing Petitioners with retiree health benefits to LLNS, a private consortium. *Id.* ¶ 37.
- Since the shift, LLNS has cut health benefits and provided coverage that is inferior to the benefits that UC provides its other retirees. *Id.* 39-40.
- LLNS claims that it can change or terminate health coverage at any time. *Id.* ¶ 36. And:
- The Regents have singled out Livermore retirees and subjected them to different treatment than other UC retirees in providing retire health care. *Id.* ¶ 39.

The Regents' Mischaracterize Several Important Cases

The Regents cite *Sappington v. Orange County Unified School Dist.,* 119 Cal. App. 4th 949 (2004), for the proposition that "a long-term practice of providing such benefits, made year by year in paying for retiree health premiums, [does not] create a contract or a vested right." Resp. Br., p. 9. *Sappington* says no such thing. The schools district's policy provided: "The School District shall underwrite the cost of the District's Medical and Hospital Insurance Program for all employees who retire from the District." *Id.* at 951.

Historically, the district had offered retirees two options, an HMO and a PPO, both free. When the district eliminated the PPO option, the plaintiff-retirees sued.

Finding the policy "curiously brief and unspecific," the court held that the district was obligated "only to provide a program – there is no requirement the program include any particular kind of insurance." *Id.* at 954. The retirees argued that their "acceptance" of PPO coverage for 20 years demonstrated that both parties believed that the policy required "both a PPO and HMO plan." The court disagreed, noting the retirees did not "cite any *evidence* that they… had a reasonable expectation the District would always provide free PPO coverage…." *Id.* at 954-955; emp. added. The District had to provide retirees with "a medical insurance program… and to subsidize their costs in one of the plans offered," *id.* at 955, but the policy did not require both a PPO and an HMO.

The Regents misconstrue *Sappington* in arguing "the school district had made no such promise to provide free PPO coverage 'forever.'" Resp. Br. p. 6. In fact, there was no dispute that the *Sappington* retirees had a vested right to "*a* medical insurance program," and although the policy did not use the word "forever," it is apparent the retirees enjoyed this right for life. The Regents equate elimination of the PPO option in *Sappington* with their *termination* of retiree medical benefit. This is a misreading of the case.

According to the Regents, *Creighton* and *Bunnett v. Regents of the University of California,* 35 Cal. App. 4th 843, 851-852 (1995), stand for the proposition that, "even when there is a contract, if the language itself only refers to existing benefits, an extension to include future benefits is not implied." Resp. Br., p. 9. Once again, the Regents misstate the holdings of these cases.

Creighton involves an early retirement incentive program, offering enhanced service credit and lump sums to eligible employees willing to retire during a three-month period. *Before* any employee accepted the offer, the Regents changed its terms. The court allowed the modification, finding that the benefit was not "governed by the *Kern-Betts* line of cases, none of which concerned a one-time, special, elective incentive offered to eligible employees

1 during a short, specified 'window' period…" *Id.* at 243-244. The Regents acknowledged that
2 the benefit would vest once an employee began receiving benefits under the plan. *Id.* at 245.
3 *Creighton* does not hold that, if contract language refers only "to existing benefits,"
4 future benefits cannot be "implied." Resp. Br., p. 9. On the contrary, it explicitly recognizes
5 that "contractual pension expectations are measured not only by benefits in effect when
6 employment commences, but also by those conferred during the employee's subsequent
7 tenure." *Creighton*, 58 Cal. App. 4th at 243, citing *Betts*, 21 Cal. 3d at p. 866.
8 The Regents say *Bunnett v. Regents of University of California*, 35 Cal. App. 4th 843,
9 rejects a "claim for future retirement benefits because contract did not expressly refer to
10 future benefits." Resp. Br., p. 8. Once again, this is not what the court said. At issue was a
11 three-year "Phased Retirement" agreement signed by Prof. Bunnett which provided: "During
12 phased retirement, your eligibility for personnel benefits and benefit programs offered by the
13 University will continue." *Id.* at 850. During the three-year phased retirement, the Regents
14 offered a better early retirement plan ("Plus 5"), which Bunnett argued was a "personnel
15 benefit or program" in which he was entitled to participate. The court found otherwise. *Id.* at
16 851, 852. "Since Plus 5 was not a benefit in existence at the time plaintiff agreed to Phased
17 Retirement, it was not a benefit that plaintiff was eligible for under his phased retirement
18 agreement." *Id.* at 852. *Bunnett* does not say a "contract" must "expressly refer to future
19 benefits" to be effective. It says Prof. Bunnett's contract did not allow him to accept a benefit
20 that was not in existence when he signed.
21 *Ventura County Retired Employees Ass'n v. County of Ventura*, 228 Cal. App. 3d
22 1594 (1991) fairs not better. The Regents claim *Ventura* shows that a public body is not
23 obligated to provide any benefit that is not "mandated by statute" and that vested benefits
24 cannot be implied. Resp. Br., p. 6. But *Ventura* involved the interpretation of the Cal. Gov.
25 Code § 53205.5, which has no application here. The statute requires county governments to
26 "give preference" to retiree health plans that "do not terminate upon retirement … and which
27 provide the same benefits for retired personnel as for active personnel." *Ventura*, at 1591, fn.
28 1. The Regents cite *Ventura* as holding that "absent a clear intent on the part of the public

entity, such a long-term financial commitment for retiree medical benefits cannot be implied." Resp. Br., p. 6, citing *Ventura*, at 1598. *Ventura* does not hold that such obligations cannot be implied. Indeed, over the last 75 years California courts consistently have found "*implied* contractual obligations from the particular texts and contexts of the statutes at issue." *Cal. Teachers Ass'n v Cory*, 155 Cal. App. 3d at 505-506. [9]

The Regents assert that, *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215 (1998), shows that the protection accorded to pensions "does *not* extend to other types of longevity benefits that are renegotiated through collective bargaining from contract to contract." Resp. Br., p. 6. But here, the benefits were not collectively bargained for; nor is there a labor agreement. Nor did *San Bernardino* make any ruling on retiree medical benefits.[10] And we have previously cited a number of cases, like *Thorning*, where California courts have held that retiree health and similar longevity benefits are vested.

The Regents contend that in *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*, 568 F.3d 725 (9th Cir. 2009), "the Ninth Circuit specifically held that retiree health benefits are 'longevity benefits' that do *not* become permanently and irrevocably vested absent special and specific circumstances," and that a "state's statutory language must evince a clear and unmistakable indication that the legislature intend[ed] to bind itself contractually before a state legislative enactment may be deemed a contract for purposes of the Contracts Clause." Resp. Br., p. 10, quoting 568 F.3d at 737.

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[9] A number of cases have found implied contractual obligations in the public arena and have not hesitated to enforce these. In *County of San Luis Obispo v. Gage*, 139 Cal. 398, 406-407 (1903), the court found an implied contract between the county and state under a law that provided maintenance and support of orphans. In *California Med. Assn. v. Lackner*, 117 Cal. App. 3d 552 (1981), the court found an implied contract between the state and Medi-Cal providers. *Id.* at p. 560, fn. 8, quoting *Longshore v. County of Ventura*, 25 Cal.3d 14, 23 (1979) ("'[T]he right to compensation vest[ed] upon performance of the ... work ...'")

[10] *San Bernardino* did not address *retiree health benefits* at all. There, union members ratified a Memorandum of Understanding (MOU) that reduced "personal leave, longevity pay and retiree insurance benefits." *Id.* at 1219. The union argued that these benefits were vested. While recognizing that these benefits could vest, the court noted that they were provided by MOUs with specified expiration dates. Once the MOUs expired, "the employees had no legitimate expectation that the longevity-based benefits would continue unless they were renegotiated as part of a new bargaining agreement." *Id.* at 1223. The court was careful to exclude "retirement medical benefits" from its decision, since these were left untouched and were "not ripe for review." *Id.* at 1226.

1 The issue in *San Diego Police Officers' Ass'n.* was whether the city breached the
2 *federal* Contract Clause[11] by implementing its last and final offer on "retiree health benefits."
3 The court "declined to exercise supplemental jurisdiction over Association's state law claims."
4 *Id.* at 732. For this reason, only *federal* claims were before the court. Under Ninth Circuit
5 precedent, federal Contract Clause claims are evaluated under *Robertson v. Kulongoski*, 466
6 F. 3d 1114 (9th Cir. 2006).

7 The court found the employees had not established a federal Contract Clause violation
8 under *Robertson*. In reaching this conclusion, the court criticized *Cal. League of City*
9 *Employee Ass'ns v. Palos Verdes Library Dist.*, 87 Cal. App. 3d 135, "because there the court
10 did not acknowledge the heavy burden on a plaintiff to 'overcome [the] well-founded
11 presumption' (*Robinson*, 468 F. 3d at 1118) that a legislative body does not intend to bind
12 itself contractually, nor did it look to the legislative body's intent to create vested rights (*id.*,
13 at 1117)," 568 F.3d at 740, and said *San Bernardino* "is far better attuned to the principles
14 that we have articulated in *Robertson*." *Id.* at 740.[12]

15 Since the holding of *San Diego Police Officers Ass'n* is limited to *federal* law, the case
16 is not controlling with respect to the application of California law here. Further, it is worth
17 pointing out that the court there did make a mistake when it said that, "as with the benefits
18 at issue in *San Bernardino*, Appellees have presented evidence showing the *retiree medical*
19 *benefits* were considered a term of employment that could be negotiated through the collective
20 bargaining process." *Id.* at 740. As noted, *San Bernardino* did *not* to hold that retiree
21 medical benefits are subject to bargaining. The court expressly exempted these benefits and
22 directed the trial court to revise its order so as not to cover them. 67 Cal. App. 4th at 1226.
23 Further, even if the Retirement System did present "evidence" that retiree medical benefits
24 were subject to collective bargaining, the "evidence" would have been unavailing because the
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26 [11] U.S. Const., art. I, § 10, cl. 1.

27 [12] The court's comments on *Palos Verdes* and *San Bernardino* was not necessary because "federal
rather than state law controls as to whether state or local statutes or ordinances create contractual rights
28 protected by the *Contracts Clause*," *id.* at 737, 739, so the issue was controlled by *Robertson*, not either of
these cases.

law is clear in California that, once an employee retires, s/he is no longer part of the bargaining unit and no longer represented by the union.[13]

Finally, it is worth pointing out that the Ninth Circuit has expressly not decided the issue under California law and recently certified the following question to the California Supreme Court: "Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees." *Retired Employees Ass'n of Orange County v. County of Orange*, 610 F.3d 1099 (9th Cir. 2010). The case is pending.

Promissory Estoppel

The Regents move for dismissal of Count II (promissory estoppel) for the same reason as Count I: Petitioners have not provided any documents to establish their rights. However, even the Regents acknowledge that "a demurrer tests the legal sufficiency of the pleading,"[14] and Petitioners have alleged facts "with particularity sufficient to acquaint a defendant with the nature, source, and extent of his cause of action." *Ludgate*, at 608. Petition, ¶¶ 31-32, 34, 52, 55-61. Though estoppel usually does not apply to a public body, courts have applied estoppel to protect vested retirement benefits of public employees. In *Longshore v. County of Ventura*, 25 Cal.3d 14, 28 (1979), the court stressed,

> the unique importance of pension rights to an employee's well-being, and [cases] have frequently arisen after employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations by their employers. In each of these instances the potential injustices to employees or their dependants clearly outweighed any adverse affects on established public policy.

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[13] In 1984, the Cal. Public Employment Relations Board (PERB) ruled that retirees are not "employees" and unions may not bargain for them. *San Leandro Unified School Dist.*, 9 PERC ¶ 16,017 (1984). Federal law is to the same effect. See *Allied Chem. & Alkali Workers of America, Local 1 v. PPG*, 404 U.S. 157, 191 (1971) (retirees not in the bargaining unit and "vested retirement rights may not be altered without the pensioner's consent"); and see *Bokunewicz v. Purolator Products*, 907 F.2d 1396 (3rd Cir. 1990) (union cannot abrogate vested rights); *Terpinas v. Seafarer's Int'l Union*, 722 F.2d 1445, 1447-1448 (9th Cir. 1984) (same).

[14] Resp. Br. p. 4.

See *Baillargeon v. Dept. of Water & Power of the City of Los Angeles*, 69 Cal. App. 3d 670, 680-81 (1977), and *Crumpler v. Bd. of Admin. Employees' Ret. Sys.*, 32 Cal. App. 3d 567, 581 (1973).

The courts differentiate between a public entity's role as employer and as legislative body. See *Shoban v. Bd. of Trustees of Desert Center Unified School Dist*, 276 Cal. App. 2d 534, 544-45 (1969):

> Were the issue here one arising between a private employer and its employee, there is little doubt that estoppel would be invoked. We cannot discern any overriding public policy or public interest which would compel a different result in the instant case merely because the employer is a public agency.

See also *Crumpler*, 32 Cal. App. 3d 567, 581-82 (1973).

The Regents cite *Poway Royal Mobilehome Owners Ass'n v. City of Poway,* 149 Cal. App. 4th 1460 (2007), but there, while noting that estoppel will not be applied against a public body "if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public,'" the court acknowledged that estoppel *may be applied* "in those special cases where the interests of justice clearly require it." *Id.* at 1471, citing *City of Long Beach v. Mansell,* 3 Cal. 3d 462, 495, fn. 30 (1970), and *City of South San Francisco v. Cypress Lawn Cemetery Ass'n*, 11 Cal. App. 4th 916, 923 (1992).

Here, the Regents were acting as an employer when they terminated Petitioners' health benefits. This change conferred no benefit on the public, nor did it advance a "strong rule of policy." Restoring Petitioners' UC retiree health plan will serve the "interests of justice" and "protect the public." *Kajima/Ray Wilson v. LA County Metro. Transp. Auth.*, 23 Cal. 4th 305, 316 (2000). Further, "Estoppel is a question of fact to be resolved by the trier of fact." *Bertorelli v. City of Tulare*, 180 Cal. App. 3d 432, 440 (1986). Here, "neither the pleadings nor the judicially noticed materials conclusively negate these alleged facts." *US Ecology v. State of California*, 92 Cal. App. 4th 113, 136-137 (2001). Accordingly, the demurrer should be denied.

Declaratory Relief

Respondents argue that a right to declaratory relief turns on the facts alleged, but articulate no reason why such relief is not warranted here. Resp. Br., p. 12, citing *Hoyt v. Bd. of Civil Serv. Com'rs*, 21 Cal. 2d 399 (1942). But *Hoyt* found that declaratory relief *was* appropriate. "There are many cases in which declaratory relief has been sanctioned in this state with respect to municipal corporations and counties, or agencies thereof." *Id.* at 401.

Entitlement to Writ

Respondents say Petitioners must plead that the Regents "failed to perform an act despite a clear, present and ministerial duty to do so, and that petitioner has a clear, present and beneficial right to that performance." Resp. Memo., p. 12, citing *City of Dinuba v. County of Tulare*, 41 Cal. 4th 859, 868 (2007), and *Riverside Sheriffs Ass'n v. County of Riverside*, 106 Cal. App. 4th 1285, 1289 (2003). Petitioners have done so here.

In *City of Dinuba*, the court held that mandamus was appropriate to compel a county to allocate tax revenue according to statute. "It is undisputed that defendants had a duty to correctly calculate and distribute the tax revenue. Nor can it be disputed that plaintiffs had a beneficial right in defendants' doing so." *Riverside Sheriffs' Ass'n* denied a writ but only because petitioners did not show an established past practice to support their claim. *Id.* at 1291-1292.

The Regents cite *Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan*, 150 Cal. App. 4th 1487 (2007), where the District established a *defined benefit pension plan* (Pension Plan) in 1969 to provide retirees with an annuity (based on GATT rate). In 1995, the District added a lump sum distribution option. In 1999, it (1) replaced the GATT with a fixed 7% rate, and (2) added a new *defined contribution plan* (Contribution Plan). In 2001, the District *terminated* the Pension Plan, and allowed employees to (1) transfer the value of their accrued benefit to the Contribution Plan, or (2) receive a deferred annuity payable upon retirement. Plaintiffs chose the former. *Id.* pp. 1490-1491.[15]

[15] The principal issue in *Canova* was whether plaintiffs had to comply with the Gov. Claims Act, Gov. Code § 900, *et seq.*, which does not apply to the Regents.

Although mandamus was not available to challenge the rate adjustment (GATT o 7%), or the "equity adjustment," because plaintiffs had an adequate remedy at law, *id.* 1492-1494, 1994-1497, mandamus *was* available to challenge the termination of the Contribution Plan. Plaintiffs alleged they had *vested rights* in this Plan. Restoring those rights and reinstating the Plan would involve a ministerial duty property subject to mandamus. "While such relief, if granted, may ultimately result in money being transferred between the two systems [the Pension Plan and Contribution Plan], such relief does not render the request a claim for money or damages…" *Id.* at 1498, citing *Bd. of Admin. v. Wilson*, 52 Cal. App. 4th 1109, 1125-1126 (1997) (mandamus appropriate to enforce duty to fund retirement system).

Canova makes clear that mandamus is appropriate here. "[I]f the amount of the claim is fixed by law, and the act of drawing the paying the warrant is a ministerial duty, mandamus will lie to compel it." Witkin, *Cal. Procedure*, 4th ed. 1997, "Extraordinary Writs, § 89, citing *ABC Fed. of Teachers v. ABC Unified School Dist.*, 75 Cal App. 3d 332, 341 (1977), and see § 91, "Illustrations," citing *Glendale City Employees Ass'n v. Glendale*, 15 Cal. 3d 328 (1975). Indeed, mandamus has been the court-ordered remedy in virtually every retiree benefit case.[16]

Conclusion

For the reasons set forth above, the demurrer should be overruled.

DATED: Nov 22, 2010

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[16] *Betts* v. *Bd. of Administration,* 21 Cal. 3d 859, 862 (1978) ("writ of mandate"); *Bd. of Administration v. Wilson,* 52 Cal. App. 4th 1109, 1117 (1997) ("mandamus action"); *Cal. Teachers Assn.* v. *Cory,* 155 Cal. App. 3d 494 (1984) ("mandamus proceeding"); *Dickey* v. *Retirement Board,* 16 Cal. 3d 745,748 (1976) ("peremptory writ of mandate"); *Newman* v. *City of Oakland Retirement Bd.,* 80 Cal. App. 3d 450, 455 (1978) ("petition for mandamus"); *Thorning* v. *Hollister Sch. Dist.,* 11 Cal. App. 4th at 1603 ("mandamus is an appropriate remedy"); *Valdes* v. *Cory,* 139 Cal. App. 3d 773,776 (1983) ("peremptory writ of mandate"); *Willens* v. *Comn. on Judicial Qualifications,* 10 Cal. 3d 451, 454 (1973) ("writ of mandate").

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Proof of Service

I say and declare:

1. My name is Marisela Ibarra. I am over the age of 18 years and not a party to this action. My business address is 300 Frank H. Ogawa Plaza, Suite 160, Oakland, California.

2. On November 22, 2010, I served the accompanying OPPOSITION TO DEMURRER, OBJECTION TO REQUEST FOR JUDICIAL NOTICE, and DECLARATION OF JOE REQUA on the person(s) described below by depositing true and correct copies thereof in the United States Mail, with postage prepaid, and addressed as follows:

Dorothy S. Liu
Hanson Bridgett LLP
425 Market St., 26th Floor
San Francisco, CA 94105

Allison Woodall
Regents of University of California
Office of the General Counsel
1111 Franklin St., 8th Floor
Oakland, CA 94607

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed by me on November 22, 2010, at Oakland, California.

MARISELA IBARRA