Docket No. 12-56706

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY

Plaintiff and Appellant,

vs.

COUNTY OF ORANGE

Defendant and Appellee.

On Appeal from the United States District Court
for the Central District of California
Honorable Andrew Guilford
U.S.D.C. Case No. SACV-07-1301 AG (MLGx)

DEFENDANT/APPELLEE'S ANSWERING BRIEF

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County of Orange

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Appellee County of Orange ("County") states that the County is a governmental agency and thus Federal Rule of Appellate Procedure 26.1 does not apply to it.

DATED: May 16, 2013

Respectfully submitted,

MEYERS NAVE RIBACK SILVER & WILSON

By: /s/ Arthur A. Hartinger
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I. STATEMENT OF JURISDICTION

Appellee County of Orange agrees with appellant Retired Employees Association of Orange County's statement of jurisdiction. (Circuit Rule 28-2.2.)

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court properly find that the Retired Employees Association of Orange County did not satisfy its initial burden under contractual impairment analysis of establishing that the County of Orange entered into an enforceable contract giving retirees a lifetime right to the pooling subsidy? The pooling subsidy here refers to retiree health plan premiums that were generally lower than actual expenses when active and retired employees were pooled for purposes of determining their premiums.

III. PERTINENT STATUTE AND ORDINANCE

California Government Code section 25300:

"The board of supervisors shall prescribe the compensation of all county officers and shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees. Except as otherwise required by Section 1 or 4 of Article XI of the California Constitution, such action may be taken by resolution of the board of supervisors as well as by ordinance."

Codified Ordinances of Orange County, Title 1, Div. 3, Art. 1, § 1-3-2:

"The regulation of the method of employment, terms of employment, conditions of employment, working hours, leaves of absence, compensation of officers and employees of the County of Orange, the Orange County Flood Control District and the Orange County Harbors, Beaches and Parks District shall, effective July 1, 1965, be fixed by resolution of this Board."

IV. STATEMENT OF THE CASE

A. Nature of the Case

Appellant Retired Employees Association of Orange County ("REAOC" or "REOC") requests that the Court find that appellee County of Orange ("County") granted a vested right, by implication, to have retiree health premiums set through a pooling methodology. A review of the legislative record shows that the County's Board of Supervisors never adopted a resolution that either expressly or impliedly conveyed a lifetime right to pooled rates. The district court applied the California Supreme Court's opinion in this case, and rejected REAOC's claims.

B. Course of Proceedings

On November 5, 2007, REAOC filed its Complaint for declaratory and injunctive relief against the County. (Appellant's Excerpt of Record, Volume II, pages ER23-33 ("II ER22-33").) It asserted seven causes of action, two of which

alleged impairment of contract under the United States and California Constitutions, respectively. (*Id.*)

On June 19, 2009, the district court granted the County's summary judgment motion, and denied REAOC's summary adjudication motion as moot. *Retired Emps. Ass'n of Orange Cnty., Inc. v. Cnty. of Orange*, 632 F.Supp.2d 983, 984 (C.D. Cal. 2009) ("*REAOC I*"). On June 30, 2009, REAOC appealed the order to this Court, challenging the district court's ruling on the Contract Clause claims only. (See Ninth Circuit Case No. 09-56026.)

On June 29, 2010, this Court issued an order asking 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 Emps. Ass'n of Orange Cnty. v. Cnty. of Orange*, 610 F.3d 1099, 1101 (9th Cir. 2010) ("*REAOC II*").

On November 21, 2011, the California Supreme Court answered that "under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution," but it declined to decide "[w]hether those circumstances exist in this case...." *Retired Emps. Ass'n of Orange Cnty., Inc. v. Cnty. of Orange*, 52 Cal.4th 1171, 1194 (2011) ("*REAOC III*"). It also declined to decide "whether County, in light of

Government Code section 25300 and the County ordinance cited above, may form an implied contract with its employees on matters of compensation" because REAOC "was seeking recognition only of an implied *term* of an existing contract (and not the recognition of an implied *contract*)." *Id.* at 1185 (emphasis in original). The court provided guidance for determining the existence of the "limited circumstances" under which "contractual rights may be implied from legislative enactments." *Id.* This guidance is discussed in detail below.

On December 19, 2011, this Court remanded the case "for further proceedings consistent with the answer provided by the California Supreme Court." (9th Cir. Case No. 09-56026, Dkt. 63-1.) On June 8, 2012, this Court issued an opinion in related case *Harris v. County of Orange*, 682 F.3d 1126 (9th Cir. 2012).

C. Disposition Below

On August 13, 2012, after conducting further proceedings and applying the answer provided by the California Supreme Court, the district court granted the County's motion for summary judgment and denied REAOC's motion for summary adjudication as moot. (I ER1-22.) Judgment was entered on August 28, 2012, and REAOC filed a notice of appeal of the judgment on September 6, 2012.

V. STATEMENT OF FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

The County is a charter county existing pursuant to the provisions of the California Constitution. (II ER25, ¶ 7; Codified Ordinances of Orange County, Charter.) The County's Board of Supervisors ("Board") acts only by majority vote. *County of Sonoma v. Superior Court*, 173 Cal.App.4th 322, 344-346 (2009). The Board holds plenary authority under the California Constitution to establish the terms of compensation for its workforce, except that its discretion is constrained by Government Code section 25300's requirement to prescribe compensation by ordinance or resolution. *REAOC III*, 52 Cal.4th at 1184; Cal. Const. art. XI, §§ 1(b), 4; Cal. Gov't Code § 25300. The County has exercised its discretion to require all compensation of County officers and employees to be approved by Board resolution. *Id.* at 1184-1185; Codified Ordinances of Orange County, Title 1, Div. 3, Art. 1, § 1-3-2.

The Board approves compensation by adopting memoranda of understanding ("MOU") for its organized employees and personnel and salary resolutions ("PSR") for all County employees. (V ER783-785, ¶¶ 3-7.) "MOUs are tentative bilateral agreements between the Board negotiators and the labor unions, which become binding after they are officially approved by the Board." (I ER6:15-17, citing Cal. Gov't. Code § 3505.1.) The majority of the County's

workforce is organized, and is represented by about seven different unions, the largest of which is the Orange County Employees Association ("OCEA"). (VI ER1020, ¶¶ 5-6.)

A. 1966 Resolution Established Group Medical Insurance for County Retirees, and 1968 Resolution Ended County's Payment of Retiree Premiums

In 1966, by Board Resolution No. 66-124, the County began providing "group medical insurance" to retirees. (Appellee's Supplemental Excerpts of Record, pages 27-28 ("SER27-28"), filed herewith.) Initially, the County paid all or a portion of retirees' monthly medical insurance premiums. (*Id.*) In 1968, by Resolution No. 68-329, the County relinquished any responsibility for making premium payments, and the Board of Retirement took over retiree premium payments. *Orange Cnty. Emps. Ass'n. v. Cnty. of Orange,* 234 Cal. App. 3d 833, 839 (1991). In 1976, the Board of Retirement reduced the amount of its payments, and in 1978, it voted to stop making payments for employees retiring after June 28, 1979. *Id.* The County thereafter refused the union's request to pay the retiree premiums. *Id.* (IV ER705-710.) One basis stated in the record was that "the Retirement Board's contribution to retiree medical insurance premiums is not a vested right but rather is subject to the annual discretion of the Retirement Board and is further subject to availability of 'surplus' funds." *Id.* There is no indication

from the legislative record that the Board of Retirement was legally required to stop payments prospectively because of vesting or for any other reason.

B. California Courts Upheld the County's Decision to Not Pay Retiree Premiums

In April 1987, OCEA and others petitioned for a writ of mandate in state court to compel the County to pay the premiums that the Board of Retirement stopped paying in 1979. (SER19-26.) In October 1987, the trial court dismissed the contractual impairment claim, stating, "The pension cases relating to vested rights do not apply to health benefits." (SER18, SER20-24, ¶¶ 20-27.) This aspect of the decision was not appealed. In September 1991, the court of appeal ruled in favor of the County, holding that California Government Code section 53205.2 did not mandate that the County "provide retired county personnel with health care benefits equal to those provided to active employees, at no additional out-of-pocket cost to the retirees." *OCEA*, 234 Cal. App. 3d at 836-837, 841.

C. The Board of Supervisors Has Adopted Active and Retirce Health Plan Rates Each Year for One Plan Year Only

Each year, the County's Board of Supervisors exercises its legislative discretion and approves group health plan rates for the following year – "but no further" – by formal Board action. (I ER6:19-23; VI ER1026-1027, ¶¶ 32-33; SER59-238.)

D. 1984 Resolution Approved Equalized Rates for 1985

In 1984, County staff informed the Board through an Agenda Item Transmittal accompanying the proposed rate resolution for 1985 that it recommended "[s]ubstantial rate increases for retirees who participate in the County Indemnity Fund." (SER63.) The legislative staff report explained the basis for the recommendation:

> "Unlike County employees, retirees pay all their costs for health insurance premiums. Historically they have been rated separately and currently pay lower rates (approximately 55 percent) than employees. However, analysis of data of revenue from retirees is projected to be insufficient to cover expenditures for 1984. As a result, the reserves for the retiree indemnity health plan will be reduced by (approximately $900,000).
> "Retiree rates need to be increased to a level that covers expenses and recoups the draw down on reserves. To accomplish this goal the rates can be increased in either of the following ways:
>
> "1. Retiree rates can be increased to recover claims experience, inflation and reserves all in one year. This would result in an increase in rates for retirees averaging 112%. The resulting retiree rates would exceed employee rates by about 25% and in 1986 would likely need to be lowered.
>
> "2. Retiree rates can be increased to recover claims experience, inflation and a portion of the needed reserves. By equalizing retiree rates with employee rates approximately 20% of the reserves can be recouped during 1985. This represents an increase averaging 72% for retirees as opposed to the 112% increase under option

1. The retiree table 5B incorporates this recommendation."

(*Id.*) The staff report did not include "further justification or discussion" for incorporating the second recommendation into its proposed "table 5B." (I ER5:1-5.)

The Board adopted the rate resolution for the 1985 plan year, Resolution 84-1460, as proposed by the staff report. (SER59-68.) As to retiree rates, Resolution 84-1460 simply "approve[d] the rate tables as contained in Exhibit ...5B." (SER60, 68.) "Table 5B, titled 'Retired Employees Monthly Premium Rates Effective January 1, 1985,' has no further embellishment." (I ER5:6-8; SER68.) "It simply lists the premiums for calendar year 1985 for retired employees." (*Id.*) "It does not list rates for any other year." (*Id.*) "Nothing in Resolution 84-1460 indicates that pooling will continue beyond calendar year 1985." (I ER5:9-10.)

E. After 1985, the Board Continued Approving Rates Annually, Considering the Costs of Using the Pooling Methodology

In each year that followed Resolution 84-1460, the Board continued to approve rates on an annual basis, either by resolution, motion, or minute order. On September 10, 1985, the Board adopted by motion the "table of rates for retired County employees enrolled in health plans for 1986." (SER69.) On September 10, 1986, the Board adopted by motion the "table of rates for retired County

employees enrolled in health plans for 1987." (SER77.) On November 3, 1987, the Board adopted by motion the "1988 Retiree Rate Tables." (SER82, 88-90.) On September 13, 1988, the Board adopted by motion "the 1989 Retiree Rate Table." (SER91, 95.) On September 12, 1989, the Board adopted by Resolution 89-1296 "the 1990 Retiree Rate Table." (SER96-97, 103.) On September 11, 1990, the Board adopted by Resolution 90-1175A "the 1991 Retiree Rate Table." (SER104-105, 110.) On October 1, 1991, the Board adopted by Resolution 91-1142 "the 1992 Retiree Health Plan Rate Table." (SER127-128, 133.) On September 22, 1992, the Board adopted by Resolution 92-1043 "the 1993 Retiree Health Plan Rate Table." (SER136, 139.) As shown below, the Board continued to approve rates annually after it adopted the 1993 Retiree Medical Plan.

In considering approval of the rates, the Board received consultant recommendations for rates for the County's indemnity (self-insured) plans, which were attached as exhibits to the County staff reports or "Agenda Item Transmittals." (See VI ER1025-1027, ¶¶ 30, 32-33; VI ER1177-1179, ¶¶ 4, 6.) The reports would explain the pooling subsidy, project the cost, and sometimes project the effect of eliminating it. (See, e.g., SER111, 118.)

For example, the consultant report attached to the staff report for the resolution approving the 1991 rates informed the Board that pooling rates meant

that "Retirees not eligible for Medicare are not footing the whole bill; they are being subsidized by the County and by active employees who contribute toward dependent's coverage," and "[t]he active employee rates as a result, are adversely affected by the retiree experience." (SER111, 118.) The consultant projected "that the active subsidy of non-Medicare retiree rates will be $1,500,000 in 1991," meaning that "rates for active employees are overstated by $1,500,000 while rates for non-Medicare retirees are understated by this amount." (SER118.) It concluded that the "effect of eliminating this subsidy would be a decrease of 6.6% to active rates with the corresponding significant increase to retiree non-Medicare rates (approximately 115%)." (*Id.*)

F. 1993 Resolution Established the Retiree Medical Grant Plan to Help Offset Retiree Premiums, and the Board Approved MOUs Incorporating the Plan, But Neither the 1993 Plan Nor the MOUs Included a Pooling Methodology

On April 6, 1993, the Board, by Resolution No. 93-369, adopted a new retiree medical program, titled "the County of Orange Retiree Medical Plan" ("1993 Plan" or "Grant Plan"), effective August 1, 1993. (SER33-58; VI ER1021-1023, ¶¶ 11-19].) The 1993 Plan provides for a monthly grant to help offset retiree premiums. (*Id.*) It also reserves to the County the right to amend or terminate the plan, and provides that it creates no vested rights. (SER38-39, 55-56.) Article 1.3 of the 1993 Plan provides, in part, "The County, by establishing and maintaining

this Plan, does not give any Employee, Retiree or any other person any legal or equitable right against the County or the Administrator.... *This Plan does not create any vested rights to the benefits provided hereunder* on the part of any Employee, Retiree or any other person..." (SER38-39, emphasis added.) Article 5.4 provides, "Subject to the terms of any Memorandum of Understanding with an Employee Organization, the County of Orange reserves the right at any time to terminate this Plan by action of its Board of Supervisors, in its sole discretion, without prior notice to any Participant or other person." (SER55-56.) Article 5.5 provides, "Subject to the terms of any Memorandum of Understanding with an Employee Organization, this Plan and any or all benefits provided hereunder may be amended at any time or from time to time, in whole or in part, by the Board of Supervisors of the County of Orange, in its sole discretion, without prior notice to any Participant or other person." (SER56.)

The terms of the 1993 Plan were incorporated into the MOUs between the Board and the County's employee associations. (V ER785-788, ¶ 8.) By the express terms of the MOUs approved just before the Board approved the 1993 Plan, the MOU's "Retiree Medical Benefit" could not be implemented until and unless the Board approved the 1993 Plan. (V ER908, ER910 [Section 5.A.1 of MOU Amendment, effective May 18, 1993: "The provisions set forth in this

Section shall not be implemented unless the Board of Supervisors adopts a Retiree Medical Program ..." and Section 5.B.1.: "Effective approximately July 1, 1993 or such later date as may be adopted by the Board of Supervisors, the County will implement a Retiree Medical Insurance Grant plan...."].)

After the Board passed the 1993 Plan, the MOUs simply incorporated the terms of the approved plan. (V ER914, ER919 [MOU adopted August 3, 1993], ER924-957 [MOUs covering 1994 through 2007].) There was no provision under "Retiree Medical Benefit" in any of these MOUs for a pooling methodology. (*Id.*)

Before the Board adopted the 1993 Plan, the only provision related to retiree medical benefits in the MOUs had been language identical or similar to: "Employees will be given the opportunity to change medical plans at date of retirement." (V ER791-792, ER876 [MOU between the County and OCEA for the County General Unit, 1985-1987]; ER888, ER894 [1987-1989 MOU]; ER898, ER900, ER905 [1989-1991MOU]; ER903, ER905[1991-1993 MOU].) This same language carried over into the post-1993 MOUs. (V ER918, ER927, ER937, ER945, ER952 [MOUs between the County and OCEA covering 1993 through 2007].) The 1989-1991 and 1991-1993 MOUS contained a Retiree Health Insurance Reopener, stating only, "Upon the agreement of the County and OCEA, negotiations shall be reopened for the sole purpose of considering retiree health

insurance issues." (V ER901, ER906.) There was no language in these MOUs related to rates or a pooling methodology.

Finally, each MOU contained a duration and integration clause on its face sheet – confirming that the MOU "sets forth the terms of agreement" for a limited period of time. (E.g., V ER792, ER888, ER898, ER903, ER916, ER926, ER935, ER944, ER951.) The 1993-1994 MOU, for example, between the County and OCEA has the following integration and duration clause: "This Memorandum of Understanding sets forth the terms of agreement reached . . . for the period beginning July 23, 1993 through June 23, 1994." (V ER916.) See *Harris*, 682 F.3d at 1135 n.4.

G. After 1993, the Board Continued Approving Rates Annually, Considering the Costs of Using the Pooling Methodology and the Effect on Rates of Eliminating It

After the Board adopted the 1993 Grant plan and the MOUs that incorporated it, it did not change its annual approval of health plan rates, nor did it stop considering the cost of the pooling subsidy or the effect of its elimination.

On August 17, 1993, the Board adopted by Resolution 93-909 the "1994 Retiree Health Plan Rate Tables." (SER140-141, 145.) On August 30, 1994, the Board adopted by Resolution 94-1010 the "1995 Retiree Rate Table." (SER154, 160.) On September 12, 1995, the Board adopted by motion the "1996 Retiree

Health Plan Rate Tables." (SER163, 166.) On September 10, 1996, the Board approved by Minute Order the "1997 Employee and Retiree Health Plan Rates." (SER169, 172.) On September 9, 1997, the Board adopted by Minute Order the "1998 Retiree Health Plan Rate Table." (SER175, 178.) On September 1, 1998, the Board adopted by Minute Order the "1999 Retiree Rate Table." (SER181, 184.) On September 14, 1999, the Board adopted by Minute Order the "2000 Retiree Health Plan Rate Table." (SER187, 191.) On August 22, 2000, the Board adopted by Minute Order the "2001 Retiree Health Plan Rate Table." (SER194, 197.) On August 28, 2001, the Board approved by Minute Order the "2002 Retiree Health Plan Rate Table." (SER200, 205.) On July 23, 2002, the Board adopted by Minute Order the "retiree rate tables for 2003." (SER208, 212.) On August 12, 2003, the Board approved by Minute Order the "2004 Retiree Health Plan Rates." (SER215, 219.) On August 24, 2004, the Board adopted by Minute Order the "2005 Retiree Health Plan Rate Table." (SER223, 229.) On August 23, 2005, the Board adopted by Minute Order the "Retiree Health Plan Rate Tables for 2006." (SER232, 236.)

After implementation of the 1993 Grant Plan, for the next eight years, the consultant reports continued to advise the Board of the costs of pooling as well as the effect on rates if the subsidy was eliminated. For 1994, the consultant report

stated that the "active subsidy of retiree rates [was reduced] to $290,000" and that "[i]f this subsidy was eliminated retiree rates would increase by 7% with active rates decreasing by 1%." (SER141, 143, 146, 152.) For 1995, the consultant report estimated that "the active rates will subsidize the retiree rates by approximately $600,000," and that "[i]f this subsidy was eliminated ... the retiree rates would increase by 15.3% with active rates decreasing by 2.5%." (SER154, 161-162.) For 1996, the consultant report estimated the subsidy at "approximately $3,300,000," and wrote that "[i]f this subsidy was eliminated ..., the retiree rates would increase by 74% with active rates increasing by 3% ..." (SER163-164, 167-168.) For 1997, the consultant report estimated the subsidy at "approximately $2,100,000," and wrote that "[i]f this subsidy was eliminated ... the retiree rates would increase by 59% with active rates increasing by 7% ..." (SER169-170, 173-174.) For 1998, the consultant report estimated the subsidy at "approximately $2,550,000," and wrote that "[i]f this subsidy was eliminated ..., the retiree rates would increase by 58% with active rates decreasing by 2.4% ..." (SER175-176, 179-180.) For 1999, the consultant report estimated the subsidy at "approximately $3,650,000," and wrote that "[i]f this subsidy was eliminated ..., the retiree rates would increase by 72.5% with active rates decreasing by 4.5% ...." (SER181-182, 185-186.) For 2000, the consultant report estimated the subsidy at "approximately

$3,575,000," and wrote that "[i]f this subsidy was eliminated ... the retiree rates would increase by 66.1% with active rates decreasing by 4.0% ...." (SER187-188, 192-193.) For 2001, the consultant report estimated the subsidy at "approximately $3,479,000," and that "[i]f this subsidy was eliminated ..., the retiree rates would increase by 70.4% with active rates increasing by 9.5% ...." (SER194-195, 198-199.)

For 2002, the consultant report estimated that "the active rates will subsidize the retiree rates by approximately $4,500,000." (SER200-201, 206-207.) For 2003, the subsidy was estimated at $5,795,000. (SER208-209, 213-214.) For 2004, the subsidy was estimated at $5,182,000. (SER215, 220-221.) For 2005, the "current active subsidy of retirees is estimated at $9,800,000. (SER223, 230-231.) And for 2006, the subsidy was estimated at $8,100,000. (SER235, 237-238.)

There is no reference in the legislative materials to any continuing obligation to maintain the policy of pooling rates beyond the upcoming calendar year. (I ER6:19-21.)

H. Board's Restructuring of the Retiree Medical Program

In 2004, after the Government Accounting Standards Board ("GASB") published new accrual accounting and financial reporting requirements, the County determined that the 1993 Grant Plan was critically underfunded in that the

projected revenues would not cover the dramatically increasing costs. (VI ER1027, ¶ 35.) The County's actuaries were estimating a $1.4 billion unfunded liability, about $374 million of which was attributable to the "Implied Subsidy." (VI ER1104, ¶ 6; IV ER548.) The actuaries noted that the Retiree Healthcare "plan is assumed to be ongoing for cost purposes," but "[t]his does not imply that an obligation to continue the plan exists." (IV ER540, ER567.)

The County formed a Retiree Medical Panel to review options to solve the funding problem, with representatives from the labor unions, the retirement board, and REAOC. (VI ER1028, ¶¶ 36-37, ER1038-1039; ER1104, ¶ 7.) The Board held two public sessions on financing options for the retiree medical plan. (VI ER1028, ¶¶ 38, 40; ER1041-1060; ER1062- 1095.)

The County ultimately reached agreements with its labor unions to restructure the retiree medical program, including an agreement to stop the pooled rate structure, effective January 1, 2007, for one union, and January 1, 2008, for all but one of the remaining unions. (VI ER1029-1030, ¶¶ 41-47.) County staff negotiated "splitting the pool" with the labor unions because it was part of the overall retiree medical restructuring package, and they met and conferred concerning the impact of this decision to split the pool on bargaining unit members' wages. (III ER296-297; VI ER1153-1155, ¶¶ 5-7.) While adding new language to

"split the pool" did not change any existing term of any MOU, other aspects of the restructuring package did include changes to express provisions in the MOUs, such as those reflecting the 1993 Grant Plan. (V ER914, ER919-957 [MOUs covering 1993 through 2007].) The restructuring package included changes to the Grant that required specific amendments to language in existing MOUs, changes to pension contributions, and the establishment of a trust. (VI ER1029, ¶ 41, VI ER1098-1099.)

I. Impacts of Retiree Medical Restructuring

County retirees continue to have the opportunity to participate in the County's group health plans, and eligible retirees continue to receive monthly grants to help offset their premiums. (Appellee County's Motion to take Judicial Notice ("CRJN"), filed herewith, Exhs. A, B [see Board agenda staff reports recommending 2013 Rates for Retiree Health Plans and referencing ongoing provision of the "grant" under "Financial Impact"].) As of November 2007, 5,764 retirees had enrolled in County health plans for 2008. (SER31-32, ¶ 27.) As of mid-2012, when the Board approved the rates for 2013, the enrollment for the retiree plans was 5,668. (CRJN, Exh. A [total of 2,926 subscribers in insured retiree plans]; Exh. B [2,742 subscribers in County self-funded retiree plans in May 2012].)

J. REAOC's Factual Claims Not in the Record

REAOC's brief is replete with conclusions and citations that have no support in the record. REAOC refers, for example, to "the Board's repeated and express promise to continue to provide the Retiree Premium Subsidy," but it does not provide any citation to the record. (Op. Br. at 49.) As shown from the legislative record above, there is no possible citation to any Board action or agenda staff report of even one express or implied promise to continue pooled rates beyond one plan year. When REAOC does cite to the record for its conclusions about the Board's actions and intentions, its citations are mainly to the recollections of REAOC members and not to anything in the legislative record such as resolutions, motions, minute orders, or agenda staff reports. (See, e.g., Op. Br. at 11-12, citing II ER49:5-18, 172:17-23; Op. Br. at 17, citing II ER60:9-12, 157-168.) These problem citations are discussed in more detail where relevant in the analysis below.

VI. STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo, and may be affirmed on any ground supported by the record." *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1096-1097 (9th Cir. 2003).

VII. SUMMARY OF THE ARGUMENT

REAOC requests that the Court find that the County granted a vested right, by implication, to have retiree health premiums set through a pooling methodology.

The question whether it is possible under California law to confer a vested right by implication was decided by the California Supreme Court at this Court's request. In the state supreme court, REAOC confirmed "that it was seeking recognition only of an implied term of an existing contract (and not the recognition of an implied contract)." With this representation, the California Supreme Court answered the question in the abstract – concluding that it was "possible" that the County could be bound by an implied contract commitment. The court outlined the "heavy burden" facing litigants seeking to prove a vested implied contract right.

REAOC's vituperative attack of the district court's opinion is misplaced. The district court followed the California Supreme Court's decision precisely, with the benefit of the related Ninth Circuit decision in *Harris v. County of Orange*. It is troubling that REAOC misrepresents the district court's holding in various ways, but it is even more troubling that REAOC mischaracterizes the underlying record. By stitching together snippets of recollections from various REAOC members,

REAOC's current story about how the County allegedly committed itself to the pooling subsidy is grossly imprecise and unsupportable.

REAOC's primary mistake is its failure to recognize the impact of California Government Code section 25300 ("Section 25300"). The California Supreme Court held that this statute imposes a limitation on creating enforceable contract rights, and that the "County is therefore correct that a court must look to Board resolutions, including those resolutions approving or ratifying MOU's (see Gov. Code, § 3505.1), to determine the parties' contractual rights and obligations." REAOC all but ignores this direction. It is undisputed that an implied right could stem from a resolution, but REAOC must first identify the resolution – which of course is express – and follow the California Supreme Court's guidance on how to overcome the "heavy burden" to prove an implied commitment arising from the resolution. This is the standard faithfully employed by the district court: Pursuant to Section 25300, the plaintiff must first identify a resolution, and then analyze whether "the statutory language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]."

Rather than acknowledging Section 25300, REAOC builds its story primarily from parole evidence, mainly the recollections of REAOC declarants,

and then weaves those recollections into its abstract description of legislative intent. This analysis is backwards because REAOC must begin with the actual text and legislative file accompanying a resolution, and then analyze whether an implied contract commitment arises from the resolution. REAOC attacks the district court for seeking to identify an express resolution, but this is exactly what the state supreme court held based on Section 25300.

In the district court, REAOC initially identified resolutions setting health plan rates each year to support its claim and later argued that the pooling benefit should be implied into memoranda of understanding. None of these resolutions or memoranda of understanding can legitimately form the basis for an implied vested right to pooling. The after-the-fact recollections by the REAOC declarants of what these resolutions were really "intended" to do at the time, and what they really mean, are completely unavailing.

With respect to the rate resolutions, REAOC ignores what they specifically say, and instead relies on various observations about what the circumstances allegedly were at the time. It is important to recognize that the resolutions simply establish the health insurance rates, and they say absolutely nothing about a commitment to pool rates. The 1984 resolution that REAOC points to as

establishing a commitment to pool, actually raised the rates on retirees by over 70%.

Similarly, the resolutions that adopted the memoranda of understanding and the MOUs themselves all say nothing about a pooling commitment. And the circumstances accompanying the adoption of the MOUs upon which REAOC relies show just the opposite of a commitment because the retiree medical plan adopted concurrently expressly reserves the right to revise and repeal any aspect of the retiree medical plan. While the California Supreme Court recognized the possibility of an implied contract commitment, the court also recognized that an implied commitment cannot contradict express language.

The district court carefully applied the California Supreme Court's opinion, and based on the entire record, concluded that the extrinsic evidence presented by REAOC was insufficient to support its claims. REAOC's representation that the district court did not examine any of its extrinsic evidence is false. The district court simply found the evidence to be insufficient to overcome REAOC's "heavy burden."

The district court's decision is correct and consistent with the state supreme court's guidance. It should be affirmed.

VIII. ARGUMENT

Summary judgment is proper where "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), citing Fed. R. Civ. Proc. 56(c). "Conclusory allegations unsupported by factual data will not create a triable issue of fact." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

A. REAOC Cannot Establish the Existence of the First Element Essential to Its Case: An Enforceable Contract to Continue Using the Pooling Methodology for Life

1. The Threshold Inquiry Under Both Contract Clause Claims is Whether There Was a Contractual Agreement Regarding the Specific Terms At Issue

To prove contractual impairment under the federal and state Constitutions, "REAOC must establish that the County entered into an enforceable contract giving retirees a right to the pooling subsidy and that the County substantially impaired that right." *REAOC II*, 610 F.3d at 1102; U.S. Const., art. I, § 10, cl 1; Cal. Const., art. I, § 9. "'Laws that substantially impair state or local contractual

obligations are nevertheless valid if they are reasonable and necessary to serve an important public purpose.'" *Id.*, quoting *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*, 568 F.3d 725, 737 (9th Cir. 2009).

"The first sub-inquiry is not whether any contractual relationship whatsoever exists between the parties, but whether there was a 'contractual agreement regarding the specific . . . terms allegedly at issue.'" *Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir.2006). "[F]ederal rather than state law controls as to whether state or local statutes or ordinances create contractual rights protected by the [federal] Contracts Clause." *San Diego Police Officers' Ass'n*, 568 F.3d at 737. "Under federal law the state's statutory language must evince a clear and unmistakable indication that the legislature intends to bind itself contractually before a state legislative enactment may be deemed a contract for purposes of the Contracts Clause." *Id.* Federal courts also "look to state law to determine the existence of a contract,'" and "'accord respectful consideration and great weight to the views of the State's highest court.'" *REAOC II*, 610 F.3d at 1102; *San Diego Police Officers' Ass'n*, 568 F.3d at 737, quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992).

2. The California Supreme Court Provided an Analytical Framework to Help the Court Determine Whether There Is a Contractual Agreement Regarding the Specific Term at Issue

Applying the above to the instant case, this Court asked 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." *REAOC II*, 610 F.3d at 1101-1102.

The California Supreme Court stated "that a county may be bound by an implied contract under California law if there is no legislative prohibition against such arrangements, such as a statute or ordinance." *REAOC III*, 52 Cal. 4th at 1176-1177. It then held that "Government Code section 25300 ... does constrain a county's discretion" as to the method by which it sets employee compensation, limiting counties to doing so only by ordinance or resolution and not by some other method. *Id.* at 1184. It also stated that the "County, in particular, has mandated that these matters be addressed by resolution." *Id.* at 1184-1185, citing Orange County Code, tit. 1, div. 3, art. 1, § 1–3–2. In light of the mandatory nature of both the statute and ordinance, the state supreme court held that "a court must look to Board resolutions, including those resolutions approving or ratifying MOU's (see Gov.Code, § 3505.1), to determine the parties' contractual rights and obligations." *Id.*

The court declined to decide whether the contract alleged by REAOC had been formed in this case, as it was "beyond the scope of the certified question, and we do not purport to decide it here." *Id.* at 1188, 1191. It also stated: "We need not decide whether County, in light of Government Code section 25300 and the County ordinance cited above, may form an implied contract with its employees on matters of compensation though, as REAOC assured us at oral argument that it was seeking recognition only of an implied *term* of an existing contract (and not the recognition of an implied *contract*)." *Id.* at 1185 (emphasis in original). .

Based on the assumption of an "existing contract" such as an MOU approved by a resolution, the court described the "limited circumstances" under which "contractual rights may be implied from legislative enactments." *Id.* at 1185. First, it recognized the *presumption* that Board resolutions are not intended to create private contractual or vested rights, and that the party asserting the right has the burden of overcoming that presumption. *Id.* at 1185-1186. Second, for REAOC to overcome the presumption, it must identify a County resolution whose "language or circumstances accompanying its passage 'clearly evince a legislative intent to create private rights of a contractual nature enforceable against'" the County. *Id.* at 1187, quoting *Valdes v. Cory*, 139 Cal.App.3d 773, 786 (1983). Legislative intent to create contractual obligations "'must clearly and unmistakably

appear,'" and the "'the implication of suspension of legislative control must be 'unmistakable.'" *Id.* at 1186, quoting *Taylor v. Bd. of Educ.*, 31 Cal.App.2d 734, 746 (1939), and quoting *Claypool v. Wilson*, 4 Cal.App.4th 646, 670 (1992). "The requirement of a 'clear showing' that legislation was intended to create the asserted contractual obligation (citation) should ensure that neither the governing body nor the public will be blindsided by unexpected obligations." *Id.* at 1188-1189, quoting *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir. 1997).

This Court recently summarized the "limited circumstances" by which a contractual obligation may be implied from a resolution:

> "Specifically, the County's resolutions and ordinances may create a contract if the text and the circumstances of their passage 'clearly evince' an intent to grant vested benefits, *id.* at 296 (internal quotation marks omitted), or if they 'contain[ ] an unambiguous element of exchange of consideration by a private party for consideration offered by the state.' *Id.* In the alternative, the County's intent to make a contract by legislation 'is clearly shown' when a resolution or ordinance ratifies or approves the contract. *Id.*"

Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty., 708 F.3d 1109, 1117 (9th Cir. 2013), quoting *REAOC III*, 52 Cal.4th at 1186-1187. It also reiterated the cautionary language of the *REAOC III* opinion, noting a plaintiff's "heavy burden" of establishing both the existence of an implied term as well as a legislative intent that the term provide vested healthcare, the presumption that statutory schemes are

not intended to create contractual or vested rights, and a court's obligation to proceed "cautiously" and "identify 'a clear basis in the contract or convincing extrinsic evidence' establishing that a contract exists and clearly delineating the contractual obligation at issue." *Id.*, quoting *REAOC III*, 52 Cal. 4th at 1185-1186, 1191.

3. The District Court Properly Applied the California Supreme Court's Analytical Framework

On remand, the district court reviewed the California Supreme Court decision and the key cases cited therein. It specifically reviewed those key cases that implied obligations from statutes and those that did not. (I ER10-14, discussing *Valdes v. Cory*, 139 Cal. App. 3d 773 (1983); *Cal. Teachers Ass'n. v. Cory*, 155 Cal. App. 3d 494 (1984); *Claypool v. Wilson*, 4 Cal. App. 4th 646 (1992); *Sappington v. Orange Unified School District*, 119 Cal. App. 4th 949 (2004).) Although the California Supreme Court reached its conclusion "[f]rom these cases" (*REAOC III*, 52 Cal. 4th at 1187), REAOC claims that the district court's review of these same cases was "a mistake that logicians call the fallacy of the 'hasty generalization.'" (Op. Br. at 37-39, citing *Downs v. Perstorp*

Components, Inc., 126 F.Supp.2d 1090, 1098 (E.D. Tenn. 1999).[1] This is an odd and unfounded attack on the district court's careful efforts to follow *REAOC III*. The district court's analysis of these cases helps shed light on the limited circumstances in which a contractual term may be implied from a statute or resolution.

In *Valdes*, the court found an implied contractual duty to make substantial monthly PERS contributions where "there were statutory provisions mandating ongoing 'compulsory employer contributions' in specific codified amounts, accompanied by a statement that these monthly contributions were 'continuing obligations of the State.'" (I ER12, quoting *Valdes*, 139 Cal. App. 3d at 782, 785-796.) In *California Teachers*, the court found that tables contained in a 1978 statute that listed amounts to be paid into the Teacher's Retirement Fund through 1995 and that "provided a formula for calculating funding in the ensuing years... constituted 'a straight-out promise to pay fixed and determinable sums of money.'" (I ER12, quoting *Cal. Teachers Ass'n*, 155 Cal. App. 3d at 502 n.4, 508.) Both cases "implied contractual obligations" "on the strength of assurances to be found in the language of the governing statutes..." *Claypool*, 4 Cal.App.4th at 670.

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[1] The "hasty generalization" is applied to expert witness determinations under Federal Rule of Evidence 702– not to judicial reasoning. *Downs*, 126 F.Supp.2d at 1098.

In *Claypool*, the court declined to find "an implied right to a particular Cola funding methodology." (I ER13, citing *Claypool*, 4 Cal. App. 4th at 669-670.) Unlike *Valdes* and *California Teachers*, the "statute at issue in *Claypool* did not include any assurances showing a commitment to permanency of funding," and the asserted right was not "necessary to maintain the fundamental integrity of the pension system." (*Id.*) *Claypool* declined to find "'a vested right to control the administration of the plan'" because "it would place 'a fundamental constraint on the freedom of action of the Legislature.'" (*Id.*)

In *Sappington*, the court "declined to find that the retired employees of the Orange County unified school district had an implied right to receive free lifetime PPO benefits." (I ER13-14, citing *Sappington*, 119 Cal. App. 4th at 955-956.) Although the *Sappington* plaintiffs identified "specific statutory language purportedly granting their implied right," the language was ambiguous, and the other evidence plaintiffs provided, such as "the fact that the District had a 20-year policy of providing the PPO benefits" did "'not prove the District promised to provide that option forever.'" (*Id.*) The *Sappington* court did not reach the issue of whether the policy obligated the District to provide at least one fully paid health plan, such as free HMO coverage, "because the sole issue on appeal is whether the

policy requires the District to provide free PPO coverage," and to that, "the answer is no." *Sappington*, 119 Cal. App. 4th at 955.

Although REAOC contends that the district court required it to show "an express legislative promise" (e.g., Op. Br. at 29, 30, 39), the district court's thorough analysis of the *REAOC III* decision demonstrates it understood when legislative "intent to make a contract" is "clear" if not "express," and is consistent with the summary provided by this Court in *Sonoma County*. (I ER11:2-4, quoting *REAOC III*, 52 Cal. 4th at 1187.) *Sonoma Cnty.*, 708 F.3d at 1114-1117.[2]

Mindful of its mandate to "'proceed cautiously both in identifying a contract within the language of a . . . statute and defining the contours of any contractual obligation,'" the district court applied the above authority. (I ER15, quoting *REAOC III*, 52 Cal.4th at 1188.)

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[2] California cases decided after *REAOC III* are all based on different facts and legislative records, and none are counter to the district court's interpretation of *REAOC III*. See, e.g., *Inter. Brotherhood v. City of Redding*, 210 Cal. App. 4th 1114, 1120-1122 (2012) (no implied contract analysis because MOU language expressly provided for the alleged benefit by referring to retirees "in the future"); *Requa v. Regents of the Univ. of Cal.*, 213 Cal. App. 4th 213 (2012) (Regents' discretion to set compensation is not restricted by Section 25300); *City of San Diego v. Haas*, 207 Cal. App. 4th 472, 495 (2012) (rejecting claim of vested rights to certain retirement benefits because it was contrary to an MOU).

a. The District Court Looked to Board Resolutions to Determine the Parties' Contractual Rights and Obligations, But Found None To Support REAOC's Claim.

The California Supreme Court held that because REAOC contended that a unified pool was "deferred compensation," Section 25300, combined with the County ordinance regarding compensation, mandate that "a court must look to Board resolutions, including those resolutions approving or ratifying MOU's (see Gov. Code, § 3505.1), to determine the parties' contractual rights and obligations." *REAOC III*, 52 Cal. 4th at 1184-1185, citing *Van Riessen v. City of Santa Monica*, 63 Cal.App.3d 193, 196 (1976); Codified Ordinances of Orange County Title 1, Div. 3, Art. 1 § 1-3-2. The court cited *Van Riessen* for the proposition that, "where the municipal code stated that payment for unused sick leave 'may be further regulated by resolution or Memorandum(s) of Understanding,' plaintiff's failure to identify a resolution or memorandum authorizing payment required denial of the claim." *Id.* at 1185.

Here, REAOC did not identify any Board resolution, including one adopting an MOU, authorizing a contractual right to pooled rates for any of its members. It continues to rely solely on "the parties' course of dealing and other extrinsic evidence" to meet its burden of showing the Board's intent. (Op. Br. at 2.) Nevertheless, the district court looked to the legislative record to determine if there

was a resolution that supported REAOC's claims. (I ER15:26-18:4; see ER6:10-15, referencing County's submission of rate resolutions from 1981 through 2009 and corresponding record of approved MOUs.)

i. Rate Resolutions Are Limited to One Plan Year

The district court looked to Resolution 84-1460, the resolution REAOC initially identified as creating pooled rates but later abandoned as the source of any contractual right. *REAOC I*, 632 F.Supp.2d at 986. As to the text of the resolution, the district court found:

> "Resolution 84-1460 does not discuss pooling or the Subsidy for *any* period of time beyond the 1985 calendar year. It simply included a bare-bones table listing the premium rates for that year."

(I ER16:6-9, emphasis in original.) It contrasted Resolution 84-1460 with the statutes in cases finding implied rights by observing that there was no language in the resolution "indicating that pooling would be a 'continuing obligation,'" and the County "did not mandate the future amounts that it was required to contribute to the retired employees' health care premium rates." (I ER16:1-6, citing *Valdes*, 139 Cal. App. 3d at 778; *Cal. Teachers Ass'n*, 155 Cal. App. 3d at 502 n.4.)

The court turned next to the circumstances surrounding passage of Resolution 84-1460. (I ER16:10-19.) Based on evidence provided by REAOC, the court found that the "impetus for the 'pooling' methodology was a $900,000 shortfall in the budget for retiree healthcare due to a large accounting mistake," as the "County had been erroneously reporting retiree medical insurance claims as active employee claims, which meant that premiums paid by retirees were far too low to cover the actual expenses." (I ER4:14-18, citing Patton Decl., ¶ 7; Harris Decl., Dkt. No. 128, ¶ 8.) This finding was also supported by the staff report to the Board, which "describes two ways to handle this budget shortfall: increase retiree premiums by 112%, or "equalize[]" retiree and employee rates, resulting in a 72% increase to retiree rates." (I ER4:19-5:4, SER63.) Although staff recommended the 72% increase, it did so "[w]ithout further justification or discussion." (I ER 5:4-10; SER63, 68.)

The district court concluded:

> "The circumstances accompanying the passage of Resolution 84-1460 suggest that it did not arise out of a bargained-for exchange with employees. Rather, the County independently realized that it needed to correct its past accounting mistake. To rectify this error, the County had to raise retired employee premiums by either 72% or 112%. The County elected to raise them by the still hefty 72%, which was only achieved by pooling rates, indirectly resulting in the Subsidy. The bottom line is that pooling was an immediate solution to an

> immediate problem. The Subsidy was a by-product of the County's accounting clean-up. Nothing in Resolution 84-1460 indicates that the County intended to grant a lifetime benefit to retired employees. In fact, the immediate effect of Resolution 84-1460 was to *harm* retired employees by raising their premiums."

(I ER16:10-19 [emphasis in original].)

Although REAOC did not rely on Resolution 84-1460 in its motion for summary adjudication, REAOC finds fault with the district court's analysis of it. (Op. Br. at 43-46.) REAOC asserts that by choosing to raise retiree rates for 1985 by over 70% instead of 112% in order to correct the accounting error, the Board conferred an "immediate benefit on retired employees." (Op. Br. at 44.) Even if these increased rates may be considered beneficial, the resolution does not "'contain[] an unambiguous element of exchange of consideration'" between the County and the retirees, nor was it intended to last beyond 1985. *REAOC III*, 52 Cal.4th at 1186; *Sonoma Cnty.*, 708 F.3d at 1117 (rejecting as inadequate the unsupported legal conclusion that "the retirees performed services as employees in exchange for the County's promise to confer vested healthcare benefits upon them"). It was simply the County's immediate fix to an accounting error. (I ER16:10-19.)

Without citing to the record, REAOC asserts that the Board pooled the rates for 1985 "knowing and intending that it would result in the *ongoing* subsidization

of premiums of then-current retirees, and those active employees that retired while the Pooled Rate Structure was in effect." (Op. Br. at 44-45; see also Op. Br. at 11-12 [similar unsupported statements re "Board" "understanding" about continued pooled rates].) REAOC relies only on the recollections of retirees Gaylan Harris, Russell Patton, and Dave Carlaw that the County decided to pool rates after hearing concerns from retirees about proposed rate increases. (See Op. Br. at 12, citing II ER49:15-18, ER172:17-23.) REAOC does not cite to the resolution, its agenda staff report, or any other aspect of the legislative record, and neither these citations nor the legislative record described above support REAOC's conclusion that the Board had any "understanding" or intent that it would subsidize retiree rates past 1985. *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1081, 1082 (9th Cir. 1991) ("This circuit relies on official committee reports when considering legislative history, not stray comments by individuals or other materials unrelated to the statutory language or the committee reports"); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565, 567-568 (7th Cir. 1995) (rejecting "self-serving statements of . . . employees and Union officials offered to establish their subjective belief that benefits vested"). The resolution was expressly limited to 1985 rates, there is nothing in the resolution or the accompanying agenda staff report to clearly and unmistakably indicate any intention to continue pooled rates

beyond 1985, and thus there is no authority for implying a contrary temporal term into the resolution. (SER 59-68.) *REAOC III*, 52 Cal.4th at 1179, 1181-1182 ("as a general matter, implied terms should never be read to vary express terms").

Finally, REAOC states that the Board must have intended to convey a contractual benefit because it pooled the rates in 1984 in the midst of an ongoing dispute with its unions over retiree medical benefits. (Op. Br. at 45.) Given that this was not referenced in the 1984 resolution or accompanying staff report, or in any MOU with the unions, it simply does not amount to "clear" or "unmistakable" evidence of legislative intent. *REAOC III*, 52 Cal. 4th at 1186-1187.

Regarding the subsequent rate resolutions, the district court found that they too were "devoid of any language reflecting a continuing obligation to provide the Subsidy." (I ER16:20-21.) It noted specifically that the "Board approved the pooling policy on an annual basis, and limited its approval to the upcoming calendar year only," making "no commitment to the years beyond." (*Id.* at ER16:21-23.) It emphasized that the "later Resolutions explicitly calculate the impact of discontinuing this policy." (*Id.* at ER16:22-27; see also SER118, 152, 162, 168, 174, 180, 186, 193, 199] [reports attached to resolutions approving rates for 1991, 1994-2001].) The district court concluded correctly, "Overall, the

legislative language reflects the Board's intent that the decision to continue granting the Subsidy, or not, was its to make anew each year." (I ER16:28-17:1.)

ii. No Resolutions Approving MOUs Support a Right to Pooled Rates

The California Supreme Court understood REAOC was seeking to imply a term from an existing MOU, confirming the assurance REAOC made at oral argument that it was "seeking recognition only of an implied *term* of an existing contract." *REAOC III*, 52 Cal. 4th at 1182, 1183, 1185 (noting "County negotiated and approved MOU's with its employee bargaining units during the relevant period" and that the "parties here entered into valid bilateral contracts governing compensation"). The court was thus careful to note that "a court must look to Board resolutions, *including those resolutions approving or ratifying MOU's (see Gov.Code, § 3505.1),* to determine the parties' contractual rights and obligations." *Id.* at 1185 (emphasis added), citing *Van Riessen*, 63 Cal.App.3d at 196 (denial of claim where plaintiff could not identify resolution or MOU).

A theory that pooled rates were an implied term of the MOUs applicable to REAOC members when they were County employees would require a court to look to Board resolutions approving those MOUs. *Id.* The County identified seven unions in its summary judgment motion. (VI ER1020, ¶¶ 5, 6.) REAOC has never identified the unions that represented its members, nor has it identified an

actual MOU, or a resolution approving an MOU, from which to imply the alleged contractual right to pooled rates for any of its members. See *REAOC I*, 632 F.Supp.2d at 986. (I ER18:8-17; SER4:15-22.)

On appeal, REAOC points to the language in the MOUs that permits employees to "change medical plans at date of retirement," arguing that the "price that retirees pay" to participate in the County's group health plans is central to the right to enroll in County health care programs and that the pooled-rate subsidy was important to the retirees "in financial terms." (Op. Br. at 34, 36.) But REAOC never relied on that provision in the district court – presumably because it has nothing to do with rates or the affordability of health plans, and it does nothing to indicate clearly or unmistakably an intent to provide pooled rates. (Op. Br. at 33, 52 n.8, citing V ER876, ER894, ER900, ER905, ER918, ER927, ER937, ER945.) See *Sappington*, 119 Cal. App. 4th at 955 (limiting "promise" to language of the District policy and holding that retirees did not have vested right to free PPO coverage even though they "'accepted' the benefit" for 20 years); *San Diego Police Officers Ass'n*, 568 F.3d at740 ("Were the recognition of constitutional contract rights to be based on the importance of benefits to individuals rather than on the legislative intent to create such rights, the scope of rights protected by the

Contracts Clause would be expanded well beyond the sphere dictated by traditional constitutional jurisprudence").

Instead, REAOC argued in the district court "that lifetime pooling rights were a hidden term lurking in *every* ratified MOU, understood but never clearly expressed." (I ER18:8-17, emphasis in original.) REAOC also focuses its claim on appeal on course-of-conduct evidence: (1) Comments made during negotiations over the 1993 MOUs that were never actually included in the MOUs or considered by the Board; (2) alleged statements of the County's labor negotiators, accountants, and actuarial officials, made during negotiations to restructure the retiree medical program, including deciding whether to split the pool; (3) alleged statements made by the County's lawyers in defending the decision to split the pool; and (4) a 23-year "practice" of pooling rates. (Op.Br. at 46, 48-49, 51-55, 63.)

The district court declined REAOC's request to "imply this hidden term, *not* from specific textual language, but from extrinsic evidence, such as the parties' post-1983 conduct, informal remarks, and informational booklets never incorporated into any formal resolutions." (I ER18:14-20:28, emphasis in original.) It based its conclusion on *REAOC III*, the cases upon which *REAOC III* relied, and this Court's decision in *Harris*. (I ER16:28-20:28.)

This Court in *Harris* held that "[i]n order to state a claim for a contractual right to the Grant, the Retirees must plead specific resolutions or ordinances establishing that right." *Harris*, 682 F.3d at 1135. Where the alleged source of the contractual right was the MOUs, this Court recognized the requirements of Section 25300, and required the retiree plaintiffs "to set out specifically the terms of those MOUs on which their claim is predicated." *Id.* at 1134-1135. It found "without merit" the retirees' argument that "they do not have to identify specific terms in the MOUs." *Id.* Because the alleged source of the implied right in both this case and *Harris* is the MOUs, the district court correctly reached the same result.

REAOC criticizes the district court's reasoning that it "must reach the same conclusion" as *Harris* because it was "[f]aced with a similar record." (Op. Br. at 31, citing I ER14-15, 17-18.) But the district court was correct. The plaintiffs in both cases are seeking to imply terms into MOUs. In *Harris*, the retirees sought to imply a term into certain MOUs that would extend the Grant benefit beyond the expiration date of those MOUs. In rejecting that claim, this Court found without merit the retirees' argument that "they do not have to identify specific terms in the MOUs," and held that "the Retirees have failed to plead facts that suggest that the County promised, in the MOUs or otherwise, to maintain the Grant as it existed on the Retirees' respective dates of retirement." *Harris*, 682 F.3d at 1135. In this

case, REAOC seeks to imply the pooling term itself into unspecified MOUs that are silent as to rate-setting methodology, as well as a term that would extend pooled rates beyond the expiration of any MOU. (Op. Br. at 4-5.)

The only difference between the two cases is that there is actual language in some MOUs related to the Grant benefit in *Harris*, but no language at all in any MOU related to the pooling methodology in the instant case. In both cases, the duration clause of each MOU is a barrier to implying a term into any MOU that would extend beyond the MOU's expiration. *Harris*, 682 F.3d at 1135. Finding a vested right based on no language in the MOU in this case, while declining to find a vested right in the MOUs in *Harris* that actually addressed the benefit at issue would "erroneously elevate[] extrinsic evidence above enacted language." (I ER19:15-16.)

REAOC writes at length about statements made about the pooling subsidy during the negotiations leading up to the 1993 Grant Plan and the MOUs incorporating it. (Op. Br. at 12-18, 36, 46-49.) But the legislative record does not support a finding that the Board intended to grant a vested right to pooled rates through these negotiations. First, no agreements related to the pooling subsidy made it into either the 1993 Plan or the MOUs that the Board considered and approved. (Op. Br. at 4-5, 49 [conceding "the absence of an express reference to

the Retiree Premium Subsidy in the new MOUs"].) See *Glendale City Emps.' Ass'n, Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336 (1975) (only the governing body's "favorable 'determination' engenders a binding agreement"); Cal. Gov't Code § 3505.1; *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147-1149 (9th Cir. 2004) (where, as here, there was an "integration clause," any agreements "that were not expressed in the written agreement were presumptively superseded by the written agreement"). REAOC claims there was no language regarding the pooling subsidy in the 1993 MOUs because "the Board did not feel it necessary to change the existing contract language," but there is no Board action or agenda staff report to support this claim, and REAOC does not provide any citation to the record. (Op. Br. at 47.)

Second, implying a vested pooled-rate term into the 1993 Grant Plan and MOUs adopting the 1993 Plan would contradict the express no-vesting provisions of the 1993 Plan, the duration clauses of the MOUs, and the fact that the Board continued to consider and vote on the rates each year. (I ER16:28-17:6, ER17:26-18:3.) See *REAOC III*, 52 Cal. 4th at 1179 ("implied terms should never be read to vary express terms"). The no-vesting provision not only stated that the Plan did not "create any vested rights to the benefits provided" under the Plan, but it also stated that the "County, by establishing and maintaining this Plan, does not give

any Employee, Retiree or any other person any legal or equitable right against the County or the Administrator." (SER38-39 [Article 1.3].) This is directly contrary to any clear legislative intent to create a vested right to pooled rates by virtue of creating this 1993 Grant Plan. REAOC tries to argue that the 1993 Plan's no-vesting provisions do not apply to pooled rates because "[i]t is undisputed that the 1993 Plan Document says nothing about the Retiree Premium Subsidy," while at the same time arguing that a lifelong commitment to pooled rates arose from the negotiations for the 1993 Plan. (Compare Op. Br. at 67 and 46-49.) REAOC cannot have it both ways. Either (1) pooled rates are neither an express nor implied term of the 1993 MOUs because there is no language about them in any of these legislative enactments, or (2) pooled rates are an implied term in the 1993 MOUs and the 1993 Plan and thus subject to the no-vesting provision. The district court properly concluded that the express provisions of the Board-approved 1993 Plan, which culminated from the same negotiations as the 1993 MOUs, "is explicit evidence of legislative intent regarding the question of vested retiree health benefits, and it falls squarely on the County's side." (I ER17:3-6.)

Third, the Board adopted the 1993 Plan shortly after it had prevailed in the *OCEA* litigation, and after another appellate court had found that another county was "not compelled to offer retirees and active employees a health plan funded by

a single and uniform premium to both groups of insureds." *OCEA*, 234 Cal. App. 3d at 836-837; *Ventura Cnty. Retired Emps.' Ass'n, Inc. v. Cnty. of Ventura*, 228 Cal. App. 3d 1594, 1596-1597, 1599 (1991) (where County retirees experienced increased premiums after being removed in 1987 "from the pool of active employees receiving medical health benefits"). Although REAOC attempts to discount the relevance of these cases (Op. Br. at 41-43), case law in effect when the resolutions approving the 1993 Plan and related MOUs were adopted is part of the "circumstances" of a resolution's adoption because "the legislature presumably had the doctrine of these cases in mind when it adopted the act now under review..." *Dodge v. Bd. of Educ.*, 302 U.S. 74, 80-81, 58 S.Ct. 98 (1937). And although REAOC mis-characterizes the trial and appellate rulings in *OCEA* (Op. Br. at 13-14), the end result was that the County prevailed on the vested rights and statutory theories related to retiree health benefits. (See SER18 [contrary to REAOC's assertion, there is nothing in the trial court ruling limiting its no-vested-rights holding to "future" benefits or active employees].) *OCEA*, 234 Cal. App. 3d at 845 (County was not obligated by statute to "provide retired personnel with health benefits equal in cost to those provided to active employees").

Finally, this Court's *Sonoma County* decision supports the district court's analysis. There, this Court conditioned the consideration of extrinsic evidence on

the plaintiff plausibly alleging "that the County created a contract by means of a formally enacted resolution which ratified an MOU, for instance..." *Sonoma Cnty.*, 708 F.3d at 1116, n.4. It found that even though the MOUs the plaintiffs submitted in that case "support the Association's allegation that the MOUs promised healthcare benefits," the proffered extrinsic evidence of legislative intent was insufficient to state a plausible claim for relief because the complaint did not "establish that the resolutions, ordinances, and MOUs were the product of a bargained-for exchange of consideration" or "plausibly point to a resolution or ordinance that created the contract implying these benefits." *Id.* at 1116-1117, citing *REAOC III*, 52 Cal.4th at 1185. It specifically noted that the plaintiff had not alleged that the County's Board of Supervisors had "ratified the MOUs by resolution or ordinance; nor did the Association submit copies of any such resolutions or ordinances with the amended complaint." *Id.* at 1117. Contrary to REAOC's contention that this case supports its theory of relying purely on extrinsic evidence to determine legislative intent (Op. Br. at 30, citing *Sonoma County* at 1116, n.4), the actual resolution approving the actual MOU is required before this Court will embark on a review of extrinsic evidence. *Id.*

After reviewing the legislative record, the district court correctly held that REAOC had not met its "burden of proving that the relevant statutes or ordinances

reflect 'clear' legislative intent to enter into such a contract," as required by the California Supreme Court's application of Section 25300. (I ER2:14-19.) It noted similarities with *Claypool*, "where the court found no implied promise of continued funding in the Cola legislation." (I ER17:7-12, citing *Claypool*, 4 Cal. App. 4th at 679.) "As here, the court in *Claypool* encountered a total lack of legislative language assuring future funding, or stating that current funding would not be decreased." (*Id.*) The court's analysis was correct, and its decision should be affirmed.

B. REAOC's Attacks on the District Court's Decision Do Not Establish the Existence of an Enforceable Contract to Continue the Pooling Methodology

1. REAOC's Extrinsic Evidence is Unrelated to Any Actual Resolution and Does Not Save Its Claim

The County understands that "contractual rights may be implied from an ordinance or resolution when the language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the county." *REAOC III,* 52 Cal. 4th at 1177. But REAOC attempts to expand this phrase to encompass extrinsic evidence that is not tethered to any legislation at issue. (Op.Br. at 37-41.) This ignores Section 25300 and does not find support in *REAOC III* or any other applicable authority. See, e.g., *Shannon v. United States*, 512 U.S. 573, 583-584 (1994) (declining to give

"authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"). *REAOC III* requires courts to "look to Board resolutions ... to determine the parties' contractual rights and obligations." 52 Cal. 4th at 1185, citing Cal. Gov't Code § 25300. No reading of *REAOC III* shows that a plaintiff can satisfy its heavy burden of evincing legislative intent on extrinsic evidence alone, in the absence of a source resolution.

The district court properly concluded: "REOC turns this analysis on its head by asking this Court to *begin* its inquiry with the parties' course of conduct and other extrinsic evidence." (I ER19:9-10.) It stated that this "'reverse parol evidence rule'" has been firmly rejected "because it erroneously elevates extrinsic evidence above enacted language." (*Id.* at ER 19:14-16, quoting *Garcia v. U.S.*, 469 U.S. 70, 78 (1984).) It concluded REAOC's proposed analysis "improperly shifts the burden of proof to the County," even though it is "REOC's burden to show that the County intended to grant a vested right to such benefits, not the County's burden to prove that a long-standing generous benefits policy was not de facto deferred compensation." (I ER20:3-13, citing *REAOC III*, 52 Cal. 4th at 1190.)

Although REAOC's chief complaint is that the district court did not consider its extrinsic evidence, the district court did address REAOC's evidence that was

arguably related to an actual resolution or circumstances accompanying passage of such resolutions. (See I ER15:26-18:4.) For example, as discussed above, the parties' course of conduct leading up to adoption of the 1993 MOUs does not clearly and unmistakably evince legislative intent to create a vested right to pooled rates, particularly where implying such a term is contrary to the express terms of the 1993 Plan, related MOUs, and annual rate resolutions. (See I ER16:28-17:6.)

As the district court properly found, the remainder of REAOC's proffered evidence had no relation to any resolution or circumstances accompanying its passage that could help REAOC overcome the presumption against implying contractual rights into resolutions.

First, REAOC relies primarily on its members' personal recollections of events decades earlier, notes, and proposals during negotiations – none of which were part of any Board packets or items passed on by the Board that could be considered probative of the Board's legislative intent. Its statement that the "Board" recognized "that retiree medical benefits 'vest' upon retirement" is based on the general recollections of individual retirees Harris, Patton, Carlaw, and Ronald Scott, and does not include a single citation to the legislative record. (Op. Br. at 9, citing II ER54:14-16, ER60:13-15, ER177:6-14, ER265:22-266:2; Op. Br. at 59, II ER177:6-25.) For statements about what the "Board" understood,

"promised" and "confirmed" in approving the 1984 resolution, in labor negotiations during the 1980s and 1990s, and in negotiations for the 1993 Plan, REAOC relies again solely on the recollections of retirees Harris, Carlaw, and Patton, but does not include a single citation to the legislative record; there is no citation to any action or direction from the Board. (See, e.g., Op. Br. at 12, citing II ER50:10-15, 56:26-28, 173:8-19; Op.Br. at 15, citing II ER52:11-53:24, ER58:1-24, ER175:8-176:10; Op. Br. at 16, citing VII ER1216:25-1217:4, VII ER1220, II ER59:23-60:8, ER144-155; Op. Br. at 17, citing II ER60:9-12, ER157-168.) For statements that the County represented to the federal and state governments that the Retiree Premium Subsidy was compensation, REAOC relies on the recollection of retiree Charles Hulse regarding reimbursements "for active employees' health insurance premiums " and not on any Board action. (Op. Br. at 53, 22, citing VIII ER1450-1461.) Such recollections are insufficient to show legislative intent. *Murphy*, 61 F.3d at 565, 567-568; *Hertzberg*, 191 F.3d at 1081, 1082; *Garcia*, 469 U.S. at 76 (same).

Second, REAOC relies on its version of events surrounding the Board's decision to split the pool, including alleged statements of the County's labor negotiators, accountants, actuarial officials, and lawyers. (Op. Br. at 18-23, 51-53, 63.) But as the district court correctly held, "Nor will this Court retroactively find

an implied right based on the circumstances surrounding the 2008 termination of the pooling methodology" because "[t]his post-hoc evidence merely reflects the view of a subsequent legislature, which is 'not controlling' for purposes of determining 'the meaning of a prior legislative enactment.'" (I ER 19:24-20:2, quoting *Cal. Teachers Ass'n.*, 155 Cal. App. 3d at 506-07). In addition, having occurred years or decades after the Board would have approved any resolution conveying the alleged right, these events would not have "accompanied" passage of such a resolution and cannot be evidence of the Board's legislative intent to create a vested right. *REAOC III*, 52 Cal.4th at 1177.

REAOC contends that post-enactment statements by County staff and consultants can be evidence of legislative intent. (Op. Br. at 18, 50, citing *Beverly Hills Firemen's Ass'n, Inc. v. City of Beverly Hills*, 119 Cal. App. 3d 620, 628 (1981) and 5 McQuillin, *Municipal Corporations,* §§ 20:45, 20:51.) But the court in *Beverly Hills* only turned to extrinsic evidence *after* it found support in the text of the applicable resolution, and even then the extrinsic evidence was further *city council action. Beverly Hills,* 119 Cal. App. 3d at 628. *Beverly Hills* simply confirms the importance of looking first to resolutions and to actual Board action. As for McQuillin, Section 20:51 provides, in part, "the language used in an ordinance is to be construed in accordance with its meaning at the time the

ordinance was enacted rather than in accordance with a meaning that afterwards be given it." See also 5 McQuillin, *Municipal Corporations,* § 20:49 ("a city's legal arguments in a lawsuit to which it is a party are not 'evidence' of its interpretation of its own ordinance").

Although not necessary or material for a finding on the issue, the record indicates that these individuals did not consider the pooled-rate methodology or subsidy to be a vested right. REAOC argues that the County's labor negotiations over splitting the pool in 2006 is an admission that the pooling methodology had been a term of compensation in the MOUs, but this is based on its mischaracterization of the deposition testimony of Shelley Carlucci. (Op. Br.at 19-20, 51-54.) Ms. Carlucci corrected REAOC's mischaracterization of her testimony, attaching other portions of her deposition transcript. (VI ER1152-1154, 1157-1161.) She did *not* testify that the pooling methodology was in the MOUs. REAOC also claims County employee Thomas Beckett compared the pooled-rate subsidy to pensions, but nowhere is the word "pension" mentioned in the cited testimony. (Op. Br. at 52, citing III ER328:18-329:8) Mr. Beckett simply confirms in that testimony that the pooled-rate subsidy was classified as an OPEB ("other post-employment benefit") for accounting purposes but that he had "never seen" the definition of an OPEB requiring there to be an obligation on the part of

the County to pay it. (*Id.*) Finally, although REAOC asserts the 2005 valuation report referred to the subsidy from pooled rates as an "underlying promise" during its discussion of the general accounting guidelines of GASB 45, the prior section of the report states, "The plan is assumed to be ongoing for cost purposes. This does not imply that an obligation to continue the plan exists." (Op. Br. at 52-53, 21, citing IV ER572; IV ER 567.)

Finally, REAOC asserts a December 2007 Citizens' Report from the County's Auditor-Controller characterized the pooled-rate subsidy as part of the County's compensation package, but the actual report does not mention pooling. (Op. Br. at 53, citing REAOC RJN, Exh. D at RJN 26, 28.) The relevant page refers only to pension benefits and the "Retiree Medical Plan," which provides the Grant and has a no-vesting provision. The report is dated December 12, 2007, which was *after* the Board voted in 2006 to split the pool, and a month after REAOC filed the instant case, and thus would not have listed pooled rates as an item of compensation. (RJN 28.) As with REAOC's other extrinsic evidence, a 2007 report could not have accompanied passage of a resolution providing the alleged benefit 14 to 23 years earlier, and does not clearly evince legislative intent to create a vested right.

2. A 23-Year Practice of Pooling Rates Is Not a Basis for Implying a Vested Contractual Right From the Legislative Record in This Case

The district court rejected REAOC's claim that "the County's 23-year practice of annually authorizing this generous methodology morphed into an implied contract requiring the County to guarantee this benefit for life." (I ER1:20-22, citing *Sappington*, 119 Cal. App. 4th at 954-55 ["'The fact that the District provided a free PPO benefit for 20 years . . . does not prove the District promised to provide that option forever'"]; *REAOC III*, 52 Cal. 4th at 1190.) See *Schism v. U.S.*, 316 F.3d 1259, 1294, 1301 (Fed. Cir. 2002) (even where recruiters made promises for free lifetime retiree health care for 50 years, plaintiffs could not show Congressional intent to provide the benefit).

Under *REAOC III*'s interpretation of Section 25300, it is simply not possible for a contractual, vested right to develop over time, without the necessary focus on a resolution whose "language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the county." *Id.* at 1177, 1184-1185. Requiring legislative intent to be clear from the circumstances accompanying a resolution's passage – which necessarily occur at a particular point in time – is simply inconsistent with REAOC's view that a county-provided benefit can "become" contractual over time.

REAOC's cited authorities do not hold otherwise. (Op.Br. at 54-55.) REAOC relies on *Sonoma County*, but that case held that facts alleged in the complaint, including "MOUs, resolutions, and other documents establishing the County's long-standing course of conduct" were "not enough to survive a motion to dismiss: the complaint must also plausibly point to a resolution or ordinance that created the contract implying these benefits." *Sonoma Cnty.*, 708 F.3d at1116-1117. REAOC also relies on *Southern California Gas v. City of Santa Ana*, but that case relied on the "language" of the franchise/contract at issue as well as a 50-year past practice that confirmed its reading of the contract. (Op. Br. at 55.) *City of Santa Ana,* 336 F.3d 885, 892 (9th Cir. 2003). REAOC cites a state administrative agency decision holding that Sacramento was required to bargain with unions over changing "the eligibility criteria for current employees-future retirees' participation" in retiree health insurance programs, but the decision states, "Nor does this case address the vesting rights of retirees." (Op. Br. at 55.); *Sacto. Cty. Attys Ass'n v. Cty. of Sacto.*, PERB Dec. No. 2043-M at 2, 5, and pp. 9 n.4, 12 of proposed decision (2009). REAOC cites *Bernard v. City of Oakland,* but that case agreed that "if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent." (Op. Br. at 55.) *Bernard,* 202 Cal. App. 4th 1553, 1560-1567 (2012).

Here, a 23-year practice of pooling rates, combined with annual rate resolutions that considered the cost of pooling each year and approved rates for only one plan year and no more, is insufficient to overcome the presumption that the "practice" was simply a "policy" rather than a contractual obligation. *REAOC III*, 52 Cal. 4th at 1185-1186.

3. REAOC's Argument About the General Nature of Retirement Benefits Does Not Help It Meet Its Burden Here

REAOC contends that "the very nature of retirement benefits" supports its claim that the retirees had a vested right to pooled rates. (Op. Br. at 60-62, 37, citing cases.) But the general judicial characterization of retirement benefits cannot be evidence of the Board's intent to create any specific *right in this specific case*. The California Supreme Court cited the same cases REAOC cites in order to describe REAOC's claim in this case, but it nevertheless declined to decide "[w]hether that claim is valid..." *REAOC III*, 52 Cal. 4th at 1185, 1190-1191, citing *Navlet v. The Port of Seattle*, 164 Wash.2d 818, 194 P.3d 221, 224, 231 (2008); *Suastez v. Plastic Dress–Up Co.*, 31 Cal.3d 774, 780 (1982); *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div.*, 404 U.S. 157, 180, 92 S.Ct. 383 (1971). REAOC also relies on *California League of City Employee Associations v. Palos Verdes Library District*, 87 Cal. App. 3d 135, 140 (1978) (Op. Br. at 60), but the California

Supreme Court said that that case's "analysis was deficient in failing to focus explicitly on 'the legislative body's intent to create vested rights' or the plaintiff's 'heavy burden' to demonstrate that intent." *Id.* at 1187, 1190. Accordingly, "a court must look to Board resolutions, including those resolutions approving or ratifying MOU's (see Gov.Code, § 3505.1), to determine the parties' contractual rights and obligations," rather than the "general nature" of the alleged benefit. *Id.* at 1185.

In any event, none of the cited cases would require a finding of vested right here. See, e.g., *Allied Chemical*, 404 U.S. at 176, fn. 17, 181, n. 20 ("the question presented is not whether retirement rights are enforceable, but whether they are subject to compulsory bargaining"); *Int'l Bhd. of Elec. Workers v. Citizens Telecomms. Co. of Cal.*, 549 F.3d 781, 783-788 (9th Cir. 2008) (union could arbitrate a grievance related to changes to retiree medical benefits without obtaining retiree consent; court did not address vested rights); *Kistler v. Redwoods Community College Dist.*, 15 Cal.App.4th 1326 (1993) (accrued vacation).

4. REAOC's Gratuity Argument Cannot Evince Legislative Intent

REAOC contends that if the pooled-rate subsidy is not compensation, then it must be a gratuity. Because it would be absurd to call it a gratuity, REAOC reasons, then it must be deferred compensation. (Op. Br. at 55-57.) This type of

logic is insufficient to meet REAOC's heavy burden of showing legislative intent to create a lifetime right to pooled rates. See *Newmarker v. Regents of the Univ. of Cal.*, 160 Cal. App. 2d 640, 647-648 (1958) (rejecting similar argument: "Nor is there any merit to plaintiffs' argument that if sick leave is not a vested right, it is a gratuity which would amount to a gift of public monies in violation of article IV, section 31 of the state Constitution").

C. If the District Court Erred In Finding REAOC Could Not Meet Its Burden, There Would Be Issues of Fact Over the Elements of REAOC's Claims

If this Court found that despite the requirement of Section 25300, the district court erred in finding REAOC could not meet its burden of establishing a contractual right to the specific term at issue, there would be disputed issues of material fact precluding summary adjudication for REAOC in this case.

First, there would be disputed issues of fact regarding the evidence upon which REAOC relies to show a course of conduct created the implied contractual term. See, e.g., *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984) (summary judgment improper where questions of fact existed as to parol evidence of retiree medical benefits). Specifically, a retired Human Resources Director, a retired Chief Negotiator and others specifically rejected the premise that the County made any promises as to how long the Board would continue to pool rates.

(See, e.g., VI ER1123-1125, ¶¶ 6,10; SER1-3 (Cheek Decl., ¶¶ 5-7 ["...the County never committed itself to set the premiums in a pooled fashion"]); VI ER1167, ¶ 10.) REAOC's own witnesses admitted in their depositions that they were not aware of any contract requiring pooling and acknowledged the absence of any commitment on the part of the Board to set health rates in any particular fashion. (SER11 [Carlaw: "I'm not going to say I didn't talk about the combined pool, but there wasn't a promise that it would go on indefinitely"]; SER13-17 [retired Benefits Manager Kautz was unaware of the Board ever promising to continue a pooling methodology for the duration of retirees' lifetimes].)

Second, there would be disputed issues of fact over whether the County substantially impaired that right or whether restructuring the retiree medical program was reasonable and necessary to serve an important public purpose. *REAOC II*, 610 F.3d at 1102. After the retiree medical program was restructured, the 1993 Grant Plan survived, and retirees still participate in the County's group health plans at much the same levels as before. (CRJN, Exhs. A, B.)

IX. CONCLUSION

The County's efforts to address a chronic underfunding in its overall retiree medical program enabled it to continue offering viable, group health insurance options to its retirees. REAOC's contractual impairment claims fail because they

are premised on a "promise" or "contract" that the Board never made, either expressly or by implication under the analysis provided by the California Supreme Court. The trial court properly granted summary judgment, and the judgment should be affirmed.

DATED: May 16, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 13,720 words.

DATED: May 16, 2013

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Defendant/Appellee County respectfully asks the Court to hear oral argument in the instant appeal.

DATED: May 16, 2013

Respectfully submitted,

MEYERS NAVE RIBACK SILVER & WILSON

By: /s/ Arthur A. Hartinger
Arthur A. Hartinger
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STATEMENT OF RELATED CASES

The County knows of two related cases as defined in Ninth Circuit Rule 28-2.6:

1) ***Retired Employees Ass'n of Orange County v. County of Orange*, Court of Appeals Docket No. 09-56026**. This is the same case as the case being briefed. It is the first appeal of the district court's initial decision granting summary judgment for the County. During that first appeal, this Court issued an order certifying a question to the California Supreme Court. *Retired Emps. Ass'n of Orange County v. County of Orange*, 610 F.3d 1099 (9th Cir. 2010). After receiving a response from the California Supreme Court, it remanded the case to the district court "for further proceedings consistent with the answer provided by the California Supreme Court." (Dkt. 09-56026, Documents 213 [order], 214 [mandate].) The district court granted summary judgment to the County, and the plaintiff's appeal of that judgment is the case now being briefed.

2) ***Gaylan Harris, Jerry Jahn and James McConnell v. County of Orange*, Court of Appeals Docket No. 11-55669**. This case is related to the case being briefed, it was previously heard in this Court, it raises the same and closely related issues, and it involves the same transaction or event. This Court issued an opinion in this case, which included direction to the district court to coordinate

overlapping portions with the case being briefed. See *Harris v. County of Orange*, 682 F.3d 1126, 1137 (9th Cir. 2012).

DATED: May 16, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2013, 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 CM/EC users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kathy Thomas
Kathy Thomas

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 12-56706

I, Kathy Thomas, certify that this brief is identical to the version submitted electronically on [date] May 16, 2013.

Date May 20, 2013

Signature Kathy Thomas

(either manual signature or "s/" plus typed name is acceptable)