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8

9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**  
11

12 SONOMA COUNTY ASSOCIATION OF  
RETIRED EMPLOYEES,

13 Plaintiff,

14 v.

15 SONOMA COUNTY,

16 Defendant.  
17  
18  
19

CASE NO. CV 09-4432 CW

**REPLY BRIEF IN SUPPORT OF  
DEFENDANT SONOMA COUNTY'S  
MOTION TO DISMISS THE SECOND  
AMENDED COMPLAINT (Fed. R. Civ.  
Proc. 12(b)(1) AND 12(b)(6))**

Date: July 11, 2013  
Time: 2:00 p.m.  
Courtroom: 2, 4th Floor

Judge: Hon. Claudia Wilken

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1 **I. INTRODUCTION.**

2 Both the Ninth Circuit Court of Appeals and this Court held that Plaintiff's First Amended  
 3 Complaint ("FAC") failed to plausibly allege facts sufficient for its contract claims to proceed and  
 4 therefore this Court properly concluded that Plaintiff failed to state a claim. The Ninth Circuit  
 5 explicitly rejected Plaintiff's reliance on all 68 of the Board of Supervisor ("BOS") resolutions and  
 6 memoranda of understanding attached to the FAC as insufficient.<sup>1</sup> The Ninth Circuit remanded  
 7 this case to allow Plaintiff to try again by alleging new facts concerning BOS resolutions or  
 8 ordinances that might establish the claimed lifetime benefits. Plaintiff has failed once more and  
 9 therefore the motion to dismiss should now be granted without leave to amend.

10 This is a contract case. Plaintiff claims that the County of Sonoma entered into contracts  
 11 with its non-union and union employees to provide them lifetime retiree health benefits. Under  
 12 California law, contracts for compensation of county employees must be made by resolution or  
 13 ordinance adopted by a majority of the BOS, both for non-union and union-represented  
 14 employees.<sup>2</sup>

15 At the outset, there can be no contract for lifetime benefits if the claimed contract is  
 16 prohibited by statute. Plaintiff's alleged implied contract term claim based on any MOU  
 17 negotiated post-1992 or post-1992 resolution is expressly prohibited by County Ordinance 4478.  
 18 Plaintiff ignores the plain words of that ordinance, mistakenly claiming that the County uses it as  
 19 an argument under California's public meetings act. This misconstrues the ordinance and  
 20 mischaracterizes the County's position. First, Ordinance 4478 is not a public meetings procedural  
 21 ordinance. To the contrary, it makes "unenforceable and void" any action to pay money unless  
 22 there is an "express prior authorization" of the BOS. Therefore, this is substantive legislation.  
 23 Plaintiff seeks to ignore these words. The rules established by the California Supreme Court and

24 \_\_\_\_\_

25 <sup>1</sup> *Sonoma County Association of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1116-1117  
 26 (9th Cir. 2013) ("*Sonoma III*"). This Court's Order of November 23, 2010, Dkt. 51, is referred to  
 as *Sonoma II*.

27 <sup>2</sup> California Government Code ("Gov't Code") § 25300; *Retired Employees Assn. of Orange*  
 28 *County v. County of Orange*, 52 Cal.4<sup>th</sup> 1171 (2011) ("*REAOC*") at 1184-1185.

1 the Ninth Circuit make unenforceable and void any implied term, (or any implied contract), for  
 2 lifetime retiree benefits prohibited by statute or ordinance. "Implied" terms are prohibited in the  
 3 County of Sonoma, by clear BOS legislative enactment. "Express prior authorization" requires  
 4 just that, a clear, direct writing. Because there can be no implied contract term if there is a statute  
 5 or ordinance that prohibits "such arrangements"<sup>3</sup> the SAC fails in its entirety.

6 The SAC fails for other independent reasons as well. Plaintiff says that the question is  
 7 whether this pleading is sufficient under *Sonoma III*. That is the correct question and the correct  
 8 answer is no. The union and non-union retirees must be viewed differently because the source of  
 9 their claimed contract rights are different. Union employees' terms of employment are established  
 10 by memoranda of understanding ("MOUs") and any BOS resolutions or ordinances adopting the  
 11 MOUs. Non-union employees' terms of employment are established solely by resolutions or  
 12 ordinances and are presumed to be non-contractual as a matter of law.<sup>4</sup> Plaintiff pleads multiple  
 13 contracts and admits it.<sup>5</sup> Contrary to Plaintiff's assertions, these two employee groups must be  
 14 viewed separately to determine what contract (if any) provides for each of their claimed retiree  
 15 benefits.

16 For non-union employees, Plaintiff essentially argues that no new allegations are required  
 17 and therefore none were asserted in the SAC. That is clearly contrary to the Ninth Circuit's  
 18 decision in *Sonoma III* which held that the FAC was insufficient to withstand a motion to dismiss  
 19 for any retirees, non-union or union. Specifically, *Sonoma III* held that Plaintiff failed to establish  
 20 a contract for any retired former non-union employees based on the allegations and resolutions  
 21 identified in the FAC.<sup>6</sup> The SAC only reiterates the same failed resolutions and allegations as in  
 22 the FAC for this group. In accordance with *Sonoma III* and the prior decisions of this Court, the  
 23 SAC must be dismissed for all non-union retirees without leave to amend because Plaintiff has

24 \_\_\_\_\_  
 25 <sup>3</sup> *REAOC*, 52 Cal.4<sup>th</sup> 1176-1177.

26 <sup>4</sup> *REAOC*, 52 Cal. 4<sup>th</sup> at 1185-1186; *See National R. Passenger Corp. v. A.T. & S.F.R. Co.*, 470  
 U.S. 451, 466 (1985).

27 <sup>5</sup> Plaintiff's Opposition to the County's Motion to Dismiss the SAC (the "Opp.") 13, fn. 5.

<sup>6</sup> *Sonoma III* at 1117.

1 failed to establish any contract for this group.

2       The SAC fails to plausibly allege a claim for union retirees. Plaintiff woodenly argues that  
3 it only must additionally plead that the County's resolutions, ordinances and MOUs were the  
4 product of a bargained for exchange or the MOUs were ratified by resolution or ordinance.<sup>7</sup>  
5 *Sonoma III* holds that the FAC does not sufficiently plead an exchange and the SAC adds nothing  
6 new in this regard. Instead, Plaintiff added 26 new BOS resolutions to the SAC adopting MOUs  
7 starting in 1989. Yet the newly added BOS resolutions that approve the MOUs do not reference  
8 the lifetime benefits allegations and contradict them. The SAC adds no other new allegations to  
9 establish this claim. In short, the newly added resolutions are insufficient for Plaintiff to establish  
10 a claim for union retirees and, of course, have no application to the non-union retirees. The  
11 resolutions demonstrate that it is not plausible that the BOS approved resolutions that provided for  
12 lifetime benefits. The four corners provisions of the MOUs submitted in support of this motion  
13 further demonstrate that.

14 **II. COUNTY ORDINANCE NUMBER 4478 PROHIBITS THE ALLEGED**  
15 **CONTRACTS AND MAKES THEM UNENFORCEABLE AND VOID.**

16       A county may be bound by an implied contract "if there is no legislative prohibition  
17 against such arrangements, such as a statute or ordinance."<sup>8</sup> Sonoma County Ordinance Number  
18 4478 expressly prohibits the implied term contract claims for lifetime benefits alleged by Plaintiff.  
19 Ordinance 4478 provides that:

20               "any purportedly binding promise or representation made by any  
21               officer, employee or agent of the County of Sonoma . . . that would  
22               require the payment of money . . . where the making of the promise  
23               or representation did not have the *express prior authorization* of the  
24               Board of Supervisors is, unless otherwise provided by law,  
25               unenforceable and void." (Italics added.)

26       This ordinance requires the "express prior authorization" of the BOS for the County to

27 <sup>7</sup> Opp. 7:14-17; 8:8-9.

28 <sup>8</sup> *REAOC* at 1176; *Sonoma III* at 1114

1 spend money on retiree health benefits for life. Express contracts are stated in words.<sup>9</sup> There is no  
 2 ambiguity here. "Express"<sup>10</sup> means that the County has, by ordinance, prohibited the  
 3 establishment of lifetime retiree health benefits by implied contract or by implied terms in a  
 4 contract.<sup>11</sup> Plaintiff claims that the BOS has impliedly promised retiree health benefits for life. In  
 5 fact, Plaintiff concedes that it does not allege an express contract.<sup>12</sup> Plaintiff alleges multiple  
 6 contracts that by implication allegedly created a vested retiree subsidy right for "employees who  
 7 retired during the duration of these contracts." (SAC ¶¶ 21, 22, 29) Under the *REAOC* and  
 8 *Sonoma III* decisions, Ordinance 4478 is an absolute bar to a claim under an implied term or an  
 9 implied contract by any retiree that retired under any MOU adjusted post-1992 or any alleged post  
 10 1992 resolution identified that by implication allegedly supports union (or non-union) retiree  
 11 claims.

12 Plaintiff tries to avoid this Ordinance and utterly fails to cogently explain why it does not  
 13 control here.<sup>13</sup> Plaintiff argues that this ordinance implements the Ralph M. Brown Act.<sup>14</sup>  
 14 Nonsense. No ordinance was required to implement the Brown Act which was enacted in 1953.  
 15 Plaintiff also says that the County relies on *REAOC* to support an argument under the Brown  
 16 Act.<sup>15</sup> Plaintiff ignores the governing words of Ordinance 4478. The Brown Act deals with  
 17 process and procedure – how the BOS and every other public body in California since 1953 must  
 18 operate so members of the public may fully participate in their government. Ordinance 4478 is  
 19 substantive, not procedural. The County is not arguing that Ordinance 4478 relates to public  
 20 participation. That is not what it says. It plainly says that a promise to spend County money is  
 21 "unenforceable and void" unless there is an "express" prior BOS authorization. That means to

22 \_\_\_\_\_  
 23 <sup>9</sup> California Civil Code § 1620; see *REAOC*, 52 Cal.4<sup>th</sup> at 1178.

24 <sup>10</sup> "Directly, firmly, and explicitly stated". Merriam Webster's Collegiate Dictionary, 10<sup>th</sup> Ed.

25 <sup>11</sup> "Express. Adj. clearly and unmistakably communicated; directly stated." Black's Law  
 Dictionary, Eighth Edition. "Implied. Adj. Not directly expressed". Id.

26 <sup>12</sup> Opp. 6:12-13.

27 <sup>13</sup> Plaintiff devotes two short paragraphs to this. See Opp. 16:12-27.

28 <sup>14</sup> Cal. Gov't. Code § 54950, et. seq. (the "Brown Act").

<sup>15</sup> Opp. 16:20



1 specifically state the words that make the promise; there are none here.

2 Ordinance 4478 is precisely the type of statute or ordinance that the California Supreme  
 3 Court in *REAOC* held prohibits an implied contract or an implied term of a written contract. This  
 4 legislative enactment sets absolute boundaries on the County's ability to enter into any agreement  
 5 to pay money. There is no ambiguity – "express" is contrary to "implied" -- because the BOS has  
 6 forbidden "implied." In Sonoma County there cannot be an implied contract for lifetime retiree  
 7 health benefits for any post-enactment retiree. There also cannot be an implied term of a contract  
 8 for such benefits. Governing County law requires that any such promise must be "express."

9 Further, the *Sonoma III* court's statements concerning the plausibility of Plaintiff's  
 10 allegations as to implied term in the MOUs,<sup>16</sup> did not consider Ordinance 4478 because it was not  
 11 before the Court. Ordinance 4478 independently forecloses Plaintiffs from establishing a claim  
 12 for lifetime health benefits for every post-1992 alleged contract and any retiree who retired under  
 13 it. Such an alleged implied term is void and unenforceable as a matter of law as to both union and  
 14 non-union retirees.

15 **III. THE SAC DOES NOT PLAUSIBLY ALLEGE A CONTRACT FOR LIFETIME**  
 16 **HEALTH BENEFITS FOR NON-UNION RETIREES.**

17 There can be no implied term for lifetime benefits without a contract. To establish a  
 18 contract for these benefits, the BOS must have adopted a resolution or ordinance creating such a  
 19 contract.<sup>17</sup> The principal function of a legislature is not to make contracts but to make laws to  
 20 establish policy.<sup>18</sup> Therefore, it is presumed that a statutory scheme is not intended to create  
 21 private contractual or vested rights."<sup>19</sup> Plaintiff bears a heavy burden to overcome that  
 22 presumption and the FAC failed to do so. The SAC fails for non-union retirees for the same  
 23 reason because it adds nothing new.

24 \_\_\_\_\_

25 <sup>16</sup> *Sonoma III* at 1115.

26 <sup>17</sup> *REAOC* at 1176, 1184; *Sonoma III* at 1116-1117; *Harris v. County of Orange*, 682 F.3d 1426,  
 1135 (9<sup>th</sup> Cir. 2012) ("*Harris*").

27 <sup>18</sup> *REAOC* at 1185.

28 <sup>19</sup> *Id.*

1           **A.     The SAC Adds Nothing To The FAC For Non-Union Retirees, Which The**  
 2           **Ninth Circuit And This Court Held Insufficient To Survive A Motion To**  
 3           **Dismiss.**

4           Plaintiff argues that for non-union retirees the claimed promises were contained in BOS  
 5 resolutions<sup>20</sup> and that no further showing of BOS action is required.<sup>21</sup> This is incorrect. The Ninth  
 6 Circuit and this Court held that these same resolutions in the FAC failed to state a claim for  
 7 lifetime benefits for any retirees – both non-union and union. The Ninth Circuit affirmed this  
 8 Court's finding that none of the resolutions identified in the FAC established a contract with non-  
 9 union retirees with either express or implied terms.<sup>22</sup> The appellate Court decision focused on  
 10 union employees where it concluded that the County did have contracts in the form of MOUs and  
 11 required Plaintiff to identify resolutions as a means to potentially support the claims for non-union  
 12 retirees because that was still not sufficient.<sup>23</sup>

13           The Ninth Circuit allowed Plaintiff a chance to re-plead in light of *REAOC*. The Court,  
 14 nevertheless, made clear that Plaintiff had yet to plead BOS resolutions that plausibly allege  
 15 lifetime contracts.<sup>24</sup> The SAC identifies no new resolutions applicable to the non-union retirees.  
 16 Each newly added resolution deals only with MOUs that by law only apply to union employees.  
 17 Consequently, the SAC has not complied with the standard set by the Ninth Circuit to plead  
 18 sufficient new facts or resolutions to establish a contract for non-union retirees. The Ninth  
 19 Circuit's decision that the FAC did not state a claim now applies equally to the SAC for non-union  
 20 retirees because Plaintiff has done nothing to cure the fatal defect of the FAC under either of its  
 21 competing theories.<sup>25</sup>

---

22           <sup>20</sup> Opp. 2:18; 8:12; 9:21.

23           <sup>21</sup> Opp. 9:26.

24           <sup>22</sup> *Sonoma III* at 1117.

25           <sup>23</sup> Plaintiff argues that the Ninth Circuit did not distinguish between the union and non-union  
 26 retirees. The Court held that there were insufficient allegations to withstand a motion to dismiss  
 27 for both groups. The Court's statement as to sufficient allegations to support a claim concerned a  
 28 contract for union members who work under MOUs. *Sonoma III* at 1116, 1119-1120.

<sup>24</sup> *Sonoma III* at 1116-1117.

<sup>25</sup> While Plaintiff quarrels with the competing theory designation (Opp. 2 fn.1), it fails to explain  
 (footnote continued)

1           **B.       The SAC Does Not Allege Sufficient Exchange Of Services To Withstand A**  
 2           **Motion To Dismiss.**

3           Plaintiff also claims that in *Retiree Support Group of Contra Costa County v. Contra*  
 4 *Costa County*<sup>26</sup> the Court found allegations that if a promise was made in exchange for reduced  
 5 wages and other reductions the pleading was sufficient.<sup>27</sup> *Contra Costa* is not relevant here  
 6 because in this case the Ninth Circuit held that the FAC did not make allegations sufficient to  
 7 establish that the resolutions, ordinances, and MOUs were the product of a bargained for exchange  
 8 of consideration. *Sonoma III* at 1117. The SAC merely re-alleges that employees' performance of  
 9 services in exchange for the claimed promises created a contract.<sup>28</sup> These allegations in the FAC  
 10 have already been rejected by the Ninth Circuit in *Sonoma III* and the SAC adds nothing new in  
 11 this regard either. The Court specifically stated that the FAC allegation that the "retirees  
 12 performed services as employees in exchange for [retiree health benefits] is the sort of legal  
 13 conclusion unsupported by factual matter that the Supreme Court rejected as inadequate in  
 14 *Iqbal*."<sup>29</sup> Manifestly, the prior failed FAC allegations cannot resuscitate the FAC claims that the  
 15 *Sonoma III* Court held did not pass muster.

16           **C.       Plaintiff's Argument That County Representatives Met With Representatives**  
 17           **Of Non-Union Employees Does Not Support Plaintiff's Claims And Is**  
 18           **Incompatible With California Law.**

19           Finally, with respect to non-union employees, Plaintiff argues that the County's Employee  
 20 Relations representative "has met with representatives of the [employee group at issue] regarding  
 21 salaries, benefits and other terms and conditions of employment."<sup>30</sup> Plaintiffs are confused. Non-  
 22

23 how the same resolutions and ordinances on the one hand could clearly evince a BOS intent to  
 24 promise to pay "all or substantially all" of premiums and simultaneously clearly evince a BOS  
 25 intent to promise to pay the same amount that is paid for unrepresented management even if that  
 26 amount is less than "all or substantially all."

25 <sup>26</sup> 2013 WL 1915661 (N.D. Cal. May 8, 2013) ("*Contra Costa*")

26 <sup>27</sup> Opp. 10:1-4.

26 <sup>28</sup> SAC ¶¶ 2, 6, 20, 46, 57, 71 and 78.

27 <sup>29</sup> Opp. 8:10-18

27 <sup>30</sup> Opp. 10:13-18.

1 union employees do not have statutory authorized representatives to meet with the County to  
 2 discuss and agree on terms and conditions of employment. Hence, they are “non-represented”  
 3 employees. Employment terms for the unrepresented County employees are set unilaterally by the  
 4 BOS pursuant to Government Code § 25300. Section 25300 grants the County BOS exclusive  
 5 authority to set compensation consistent with the California Constitution. Because union  
 6 employees have a statutory right to representation, their union negotiates terms of employment  
 7 with the County by statute under the MMBA.<sup>31</sup> Non-union employees have no such statutory  
 8 right, rendering this argument and corresponding allegations essentially meaningless.

9 In summary, for non-union retirees Plaintiff has failed to comply with the requirements set  
 10 by the Ninth Circuit in *Sonoma III* to withstand a motion to dismiss for non-union retirees.  
 11 Plaintiff has failed to add anything, much less what the Ninth Circuit required for these retirees to  
 12 state a claim. By failing to add any new allegations or resolutions applicable to this group,  
 13 Plaintiff effectively concedes they have no claim.

14 Plaintiff attempts to treat the non-union retirees and union retirees as one in a mistaken  
 15 attempt to conflate the two even though their terms and conditions of their employment are  
 16 determined separately under different processes and statutes and therefore separate alleged  
 17 contracts. The non-union retirees' claims must be assessed separately and because nothing new  
 18 has been added to the SAC to support their claims, the SAC should be dismissed without leave to  
 19 amend. Indeed, Plaintiff's attempt to combine the groups contradicts the allegations of the SAC  
 20 which refer to contracts in the plural as to both competing theories. (SAC ¶¶ 22 and 29) The  
 21 distinction is made in the SAC, specifically in paragraph 19(a), which identifies resolutions  
 22 applicable only to non-represented employees (as contracts) and paragraph 19(b) which refers only  
 23 to MOUs (as contracts) applicable to non-union retirees. Plaintiff cannot have it both ways by  
 24 alleging the formation of separate contracts and then attempting to treat them as the same to avoid  
 25

26 \_\_\_\_\_  
 27 <sup>31</sup> The MMBA refers to the Meyers Milias Brown Act, Cal. Gov't Code § 3500, et seq.  
 28

1 dismissal. Contrary to Plaintiff's argument "contract by contract" parsing is necessary.<sup>32</sup> In short,  
 2 Plaintiff has failed to establish a contract *ab initio* for the non-union retirees which was fatal to  
 3 their claims in the FAC and is fatal now.

4 **IV. PLAINTIFF'S NEWLY ADDED BOS RESOLUTIONS DO NOT SUPPORT A**  
 5 **LIFETIME BENEFITS CLAIM FOR UNION RETIREES.**

6 **A. The Newly Added Resolutions In The SAC Contradict Plaintiff's Claim That**  
 7 **The BOS Took Action To Establish Lifetime Benefits For Union Retirees.**

8 Plaintiff argues that the only thing that it must plead in the SAC to withstand a motion to  
 9 dismiss is that "the County's resolutions, ordinances, and MOUs were the product of a bargained-  
 10 for-exchange or were ratified by resolution or ordinance."<sup>33</sup> In fact, the Court only found at a  
 11 minimum, Plaintiff "may be able to plausibly allege" a claim with new allegations of relevant  
 12 BOS-adopted resolutions as to MOUs.<sup>34</sup> As discussed above in Section III.B, the allegations of  
 13 such an exchange in the FAC were found insufficient and the SAC alleges nothing new in this  
 14 regard either. Thus, the SAC does not allege the sufficient exchange and does not meet the *Iqbal*  
 15 requirements established by *Sonoma III*. That leaves only the post 1989 MOU adopting  
 16 resolutions that were added by Plaintiff in the SAC. These resolutions do not meet the  
 17 requirements of *Sonoma III* or *REAOC* for the reasons explained below.

18 First, it is undisputed that the newly added resolutions deal with MOUs only and therefore  
 19 can only apply to union retirees. Each approves a specific durationally limited MOU and each  
 20 resolution tracks that durational limitation. Almost all of these resolutions use the following  
 21 words (with different unions and MOU dates as appropriate):

22 "BE IT FURTHER RESOLVED that the terms and conditions of the  
 23 Memorandum of Understanding shall be in full force and effect from  
 24 February 8, 2000 to and including February 3, 2003, except as  
 specified otherwise in the Memorandum of Understanding;"<sup>35</sup>  
 (italics added)

25 <sup>32</sup> Opp. 13 fn.5.

26 <sup>33</sup> Opp. 7:14-16; 8:7-9.

27 <sup>34</sup> *Sonoma III* at 1119.

28 <sup>35</sup> Plaintiff's Exhibit 69, Resolution No. 00-0185. See also SAC Exhibits 70 through 94.

1           There is nothing in any of the 26 new MOU resolutions that even reference retiree health  
 2 care, much less reference to retiree lifetime health care, or for that matter, anything else for life.  
 3 The only words that speak to the period of time for which the BOS has approved the terms in the  
 4 MOU are the ones in italics in the above resolution setting out a precisely limited time period for  
 5 the terms of employment established in each MOU. Implied terms should not be read to  
 6 contradict express (written) terms.<sup>36</sup>

7           Under the law established by *REAOC* and *Sonoma III* for a resolution to establish a  
 8 contract for life, the legislation's" language or the circumstances accompanying its passage must  
 9 clearly evince a legislative intent to create private rights of a contractual nature."<sup>37</sup> The language  
 10 of the resolutions, of course, does not do this. To avoid dismissal Plaintiffs then must plead the  
 11 circumstances "accompanying [each resolution's] passage" that "clearly evince" an intent by the  
 12 BOS to create private contract rights.<sup>38</sup> The SAC does not do this either. There is nothing in the  
 13 SAC that describes any circumstances that were before the BOS when these resolutions were  
 14 enacted. Therefore, the SAC alleges nothing that could be interpreted as clearly demonstrating  
 15 that the BOS had an intent to create lifetime health benefits when enacting these resolutions.  
 16 Indeed, to the contrary, Ordinance 4478 required express language to grant such a promise and the  
 17 BOS can be presumed to know the law under which it operated.

18           The only circumstances that are alleged in the SAC that accompany the passage of these  
 19 resolutions are, in fact, the words of the resolutions themselves. And they fail to support Plaintiff's  
 20 claims. Plaintiff does not allege any other circumstances for any of the SAC's newly added  
 21 resolutions such as: a staff memorandum (or any other documents provided to or approved by the  
 22 members of the BOS) describing lifetime retiree health benefits; minutes of the meeting of the  
 23 BOS describing discussion of lifetime retiree health benefits; public comments about lifetime

24 \_\_\_\_\_  
 25 <sup>36</sup> *REAOC*, 52 Cal.4<sup>th</sup> at 1179, quoting *Carma Developers (Cal.) Inc. v. Marathon Development California Inc.*, 2 Cal.4<sup>th</sup> 342, 374 (1992).

26 <sup>37</sup> *REAOC* at 1177; see also *Sonoma III* at 1114

27 <sup>38</sup> Or Plaintiff can plead sufficient bargained for exchange but as discussed above this was not  
 28 done in either the FAC or the SAC.

1 benefits, taxpayer comments of the same sort, to name a few.

2 Plaintiff clings to the statement in the opinion in *Sonoma III* that SCARE plausibly alleged  
 3 that the MOU "included an implied term that the benefits were vested for perpetuity."<sup>39</sup> But the  
 4 Court reached this conclusion without seeing the resolutions that have been newly added to the  
 5 SAC. These resolutions undercut the plausibly of Plaintiff's claimed implied lifetime benefit term.  
 6 The normal, natural and only plausible reading of these added resolutions is that they only create  
 7 terms of employment for a stated and limited period of time. Put simply, nothing is added to show  
 8 a BOS member plausibly considered that he or she intended to create lifetime benefits when  
 9 voting to approve these resolutions. Further, silence to and by the BOS is insufficient to establish  
 10 Plaintiff's claims.<sup>40</sup>

11 **B. The Newly Added Resolutions Do Not Meet The Requirement Of *Sonoma III***  
 12 **To Identify A Resolution Or Ordinance That Created An Implied Contract**  
 13 **Term For Lifetime Benefits.**

14 *Sonoma III* required that the amended complaint must "plausibly point to a resolution or  
 15 ordinance that created the contract implying these [lifetime] benefits."<sup>41</sup> Three ways were offered  
 16 by the Court to meet this requirement: First, the text or circumstances "of their [the resolutions]  
 17 passage" must "clearly evince" an intent to create lifetime vested rights. As described above, that  
 18 requirement is not met in the SAC. Second there must be an "unambiguous element of exchange  
 19 of consideration, a requirement again not met in the SAC. Third, "In the alternative, the County's  
 20 intent to make a contract by legislation 'is clearly shown' when a resolution or ordinance ratifies or  
 21 approves the contract."<sup>42</sup> As discussed above at pages 7 and 8, Plaintiff has not met the first two  
 22 ways so it has grasped for the third as to union retirees, and still fails to show a clearly evinced  
 23 intent by the BOS to make the claimed lifetime promise.

24 Plaintiff argues that all it must do is show that the MOUs were ratified by the BOS by

25 <sup>39</sup> *Sonoma III* at 1115.

26 <sup>40</sup> *California Statewide Law Enforcement Assn v. Dept. of Personnel Administration*, 192  
 Cal.App.4th 1, 19 (2011).

27 <sup>41</sup> *Sonoma III* at 1116-1117.

<sup>42</sup> *Sonoma III* at 1117 quoting *REAOC*.

1 resolution or ordinance.<sup>43</sup> That is a start but not an end. The requirements of *Sonoma III* (and in  
 2 particular those stated in paragraph 3 at page 1117) can only be read in light of *REAOC*. *REAOC*  
 3 imposes a heavy burden on Plaintiffs to demonstrate a promise for lifetime benefits and a general  
 4 presumption that resolutions are not contracts. *REAOC* also requires that an implied term for a  
 5 lifetime promise, must be based on a clearly evinced intent by the BOS.<sup>44</sup> *Sonoma III* too  
 6 confirms that resolutions must "clearly evince" an intent to create vested rights.<sup>45</sup> One cannot  
 7 "clearly evince" where the formal BOS approval of the MOU is silent as to lifetime benefits.  
 8 *Sonoma III* requires that any text, circumstance accompanying the passage of a resolution,  
 9 unambiguous exchange of consideration or any ratification resolution clearly evince an intent to  
 10 create lifetime benefits. The newly alleged resolutions do not meet the *REAOC* and *Sonoma III*  
 11 requirements, even if Ordinance 4478 did not exist as an ultimate statutory bar to Plaintiff's  
 12 claims.

13 **C. The MOU Four Corners Provision Contradicts Plaintiff's Implied Term Claim**  
 14 **For Lifetime Benefits.**

15 The MOU promises are explicitly confined to the four corners of the document, each of  
 16 which typically states that the MOU "sets forth the full and entire understanding of the parties  
 17 regarding the matters set forth herein."<sup>46</sup> These provisions contradict Plaintiff's implied term  
 18 claims, particularly given the clearly evinced intent heightened proof standard under *REAOC*,  
 19 *Harris* and *Sonoma III*. Notably, these MOU provisions were not considered by the *Sonoma III*  
 20 Court because they were only introduced in the County's Request for Judicial Notice in Support of  
 21 this Motion. Plaintiff's claim that the four corners provision does not apply under *REAOC* and  
 22 *Sonoma III* is simply wrong.<sup>47</sup> *REAOC* cited settled California law that "as a general matter,  
 23  
 24

25 <sup>43</sup> Opp. 8:4-13.

26 <sup>44</sup> *REAOC* at 1177, 1188, 1191.

27 <sup>45</sup> *Sonoma III* at 1117.

28 <sup>46</sup> See the County's Request For Judicial Notice In Support Of This Motion, Exs. 2-39. (Dkt. 78)

<sup>47</sup> Opp. 13 fn. 4.



1 implied terms should never be read to vary express terms."<sup>48</sup> So too here.

2 **V. PLAINTIFF MISREADS GOVERNMENT CODE 31692, WHICH BARS ITS**  
 3 **CLAIMS.**

4 The County of Sonoma provides retirement benefits under the County Employee  
 5 Retirement Act of 1937 (the "CERL").<sup>49</sup> Section 31691 of the CERL authorized the County to  
 6 provide retiree health benefits and CERL section 31692 provides that no employee has any vested  
 7 rights in retiree health benefits. Section 31692 therefore creates a statutory bar to Plaintiff's claims  
 8 by its terms and under *REAOC*.

9 Surprisingly, Plaintiff claims that a 1959 County resolution soliciting bids for the County's  
 10 new health benefits plan (for active employees) is evidence that Government Code § 53201 was  
 11 the basis for its retiree health benefits, not section 31692.<sup>50</sup> This cannot be the case. No  
 12 government agency could provide retiree health benefits under Gov't Code § 53201 in 1959. That  
 13 section was amended in 1963 to allow retiree health benefits to be provided.<sup>51</sup> So Plaintiff is  
 14 wrong if it claims that a 1959 action related to retiree health benefits under Gov't Code § 53201.  
 15 Further, even if Plaintiff is correct in relying on the County health plan, the terms of that plan  
 16 squelches Plaintiff's claim. The Plan itself provides that it may be amended or terminated at any  
 17 time.<sup>52</sup> There can be no lifetime vested rights when the plan document – the contract – allows the  
 18 BOS to eliminate the benefit at any time.

19 Plaintiff also mistakenly argues that section 31691 and therefore section 31692 is limited  
 20 to contributions to a "hospital or medical service corporation."<sup>53</sup> Not so. Section 31691 allows the  
 21 BOS to provide "disability insurance" policies. Under California Insurance Code section

22 \_\_\_\_\_  
 23 <sup>48</sup> *REAOC* at 1179.

24 <sup>49</sup> Gov't Code § 31450, et seq.

25 <sup>50</sup> Opp. 17:9-11.

26 <sup>51</sup> See Gov't Code § 53201, Notes: 1963 (Matthew Bender & Co., Inc. 2012). Sections 31691 and  
 31692 were enacted in 1961 to allow counties to provide retiree health coverage. Stats 1961 ch  
 1876 § 1.

27 <sup>52</sup> Dkt. No. 41 (*See* Req. for Jud. Not. Ex. A, 1986 Health Plan Document Article 6).

28 <sup>53</sup> Opp. 17:17-20.

1 Insurance Code 106(b) "disability" insurance specifically includes health insurance.<sup>54</sup>

2 Finally, Plaintiff argues that the language in the SAC's newly added BOS resolutions is  
 3 irrelevant because it makes clear that the BOS does not encroach on the jurisdiction of the County  
 4 Board of Retirement under the CERL. Nevertheless, this portion of the resolutions provides clear  
 5 intent that all BOS actions are subject to all of the CERL, which includes the rules of section  
 6 31692 providing that any action by the BOS pursuant to section 31691, shall give no vested right  
 7 to any member or retired member, and the board of supervisors . . . may amend or repeal the  
 8 ordinance or resolution at any time" with a 90 day waiting period for anyone who is currently  
 9 retired.

10 **VI. CONCLUSION.**

11 Based on the foregoing, the SAC should be dismissed in its entirety. Specifically, both  
 12 retiree groups' implied term contract claims are expressly barred by Sonoma County Ordinance  
 13 4478 and CERL § 31692. The former non-union retirees have failed to establish any contract *ab*  
 14 *initio*, which is fatal to their claims standing alone. The former union retirees' claims fail because  
 15 the resolutions that adopted these MOUs neither refer to the claimed promise, are expressly  
 16 durationally limited as are the MOUs and are contradicted by the four corners provisions of the  
 17 MOUs.

18 DATED: June 24, 2013

HANSON BRIDGETT LLP

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By: \_\_\_\_\_/s/ Raymond F. Lynch

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RAYMOND F. LYNCH

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SARAH D. MOTT

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THE COUNTY OF SONOMA

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<sup>54</sup> See also California Insurance Code §§ 10140(b) and (c) and §10601(f).

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