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**UNITED STATES DISTRICT COURT**

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**NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

11

12 SONOMA COUNTY ASSOCIATION OF  
 RETIRED EMPLOYEES,

CASE NO. CV 09-4432 CW

13

Plaintiff,

Date: July 11, 2013

14

v.

Time: 2:00 p.m.

15

SONOMA COUNTY,

Courtroom: 2, 4th Floor

16

Defendant.

Judge: Hon. Claudia Wilken

17

18

**NOTICE OF MOTION, MOTION AND MEMORANDUM  
 19 OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION  
 20 TO DISMISS THE SECOND AMENDED  
 COMPLAINT (Fed. R. Civ. Proc. 12(b)(1) AND 12(b)(6))**

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**NOTICE OF MOTION AND MOTION**

TO: PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 11, 2013, at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable Claudia Wilken of the Northern District of the United States District Court, Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, California, Defendant Sonoma County (hereafter the "County") will and hereby does move for an order dismissing Plaintiff's Second Amended Complaint in this action for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the FRCP (this "Motion").

This Motion is made on the grounds that the Second Amended Complaint filed by Plaintiff Sonoma County Association of Retired Employees on May 13, 2013, and each cause of action alleged therein, fails to state facts sufficient to state any claim against the County or to establish associational standing to pursue such claims, as more fully articulated in the following brief in support of this Motion. (FRCP 12(b)(1), 12(b)(6))

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support of this Motion and in support of the County's previous two motions to dismiss, the County's prior Requests for Judicial Notice and the Third Request for Judicial Notice ("TRJN") filed herewith, the exhibits attached to and incorporated into the Second Amended Complaint, on all other pleadings and papers on file in this action, and on any oral argument entertained by the Court concerning this Motion.

DATED: June 3, 2013

HANSON BRIDGETT LLP

By:           /s/ Raymond F. Lynch            
RAYMOND F. LYNCH  
SARAH D. MOTT  
Attorneys for Defendant  
County of Sonoma

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**  
 2 **IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**  
 3 **PLAINTIFF'S SECOND AMENDED COMPLAINT**

4 **I. INTRODUCTION**

5 Whether the Second Amended Complaint ("SAC") brought by the Sonoma County  
 6 Association of Retired Employees ("Plaintiff" or "SCARE") can survive a motion to dismiss  
 7 begins and ends with the application of *Ashcroft v. Iqbal*, 556 U.S. 662, (2009) ("*Iqbal*"), *Retired*  
 8 *Employee Assn. of Orange County v. County of Orange*, 52 Cal. 4th 1171 (2011) ("*REAOC*") and  
 9 the Ninth Circuit decision in this case *Sonoma County Association of Retired Employees v.*  
 10 *Sonoma County* ("*Sonoma III*"), 708 F.3d 1109, 1115-16 (2012).<sup>1</sup> As with Plaintiff's two prior  
 11 complaints, the SAC must be dismissed for failure to state a plausible legal claim for relief.

12 The essence of this case is whether Plaintiff has sufficiently alleged facts that plausibly can  
 13 establish that the County has entered into a contract to pay for lifetime health benefits for eligible  
 14 retirees. Both the Ninth Circuit in *Sonoma III* and the California Supreme Court in *REAOC* have  
 15 held that a contract for lifetime retiree health benefits may be established only when the County's  
 16 Board of Supervisors ("BOS") has adopted a resolution or ordinance with "text" that "clearly  
 17 evinces" an intent to provide lifetime benefits or with "circumstances accompanying its passage"  
 18 that "clearly evince" an intent to provide such benefits. *Sonoma III*, 708 F.3d at 1114; *REAOC*, 52  
 19 Cal. 4th at 1187. Although terms of a contract may be implied from the text of a resolution or  
 20 ordinance, "vested rights should not be inferred without a clear basis in the contract or convincing  
 21 extrinsic evidence" and plaintiffs have a "particularly 'heavy burden' to demonstrate 'the legislative  
 22 body's intent to create vested rights'." *Sonoma III*, 708 F.3d at 1120; *REAOC*, 52 Cal. 4th at 1191.

23 The Ninth Circuit in *Sonoma III* has held that the Plaintiff has not met that burden. This  
 24 Court twice has held that Plaintiff has not met that burden. Moreover, the anti-vesting provisions  
 25 of Sonoma County Ordinance No. 4478 and California Government Code Section 31692 bar the

26 <sup>1</sup> The Ninth Circuit decision in this case is referenced throughout as *Sonoma III*. For similar ease,  
 27 this Court's Order of May 14, 2010 (Dkt. 34) is referred to as *Sonoma I*. This Court's Order of  
 28 November 23, 2010 (Dkt. 51) is referred to as *Sonoma II*.

1 imposition of the implied vested rights alleged here.

2 The Ninth Circuit gave Plaintiff one more chance to plausibly allege sufficient facts to  
3 overcome the presumption against the BOS establishing a contract for life for retiree health  
4 benefits and to meet its very heavy burden. The SAC fails to do what the Ninth Circuit, and this  
5 Court, has required. It should be dismissed without leave to amend.

## 6 II. STATEMENT OF THE CASE

### 7 A. Plaintiff's Complaint And First Amended Complaint Were Dismissed.

8 On May 14, 2010, this Court dismissed the complaint brought by SCARE for failure to  
9 state a claim, holding that "[i]n the context of public employment, the contract must be a  
10 resolution or ordinance formally enacted by a majority of the members of the Board of  
11 Supervisors." (*Sonoma I*, Dkt. 34 at 6:1-5.) The Court ordered SCARE to identify a specific  
12 resolution or ordinance that creates a right to lifetime retiree health benefit contributions if it  
13 intended to proceed with its lawsuit. (*Id.* at 6:5-10; 12:1-6; *see* 7:5-8; 10:19-26; 11:11-16.)  
14 Plaintiff's First Amended Complaint (the "FAC") failed to meet that burden and was dismissed by  
15 this Court without leave to amend on November 23, 2010. (*Sonoma II*, Dkt. 51 at 1:24-28.)  
16 SCARE appealed that decision to the Ninth Circuit. (Dkt. 54.) During the pendency of that  
17 appeal, the California Supreme Court issued its decision in *REAOC*.

### 18 B. The Ninth Circuit Found Plaintiff Failed To Plausibly Allege A Claim But Vacated 19 And Remanded The Case To Allow Plaintiff Another Chance To State A Claim.

20 On February 25, 2013, the Ninth Circuit issued its decision on that appeal. The Court  
21 determined the District Court correctly found that the FAC failed to state a claim.<sup>2</sup> *Sonoma III*,  
22 708 F.3d at 1117. Specifically, it held that SCARE did not meet its burden to identify either a  
23 particular resolution or the bargained-for exchange of consideration required to infer a vested  
24 right:

25 \_\_\_\_\_

26 <sup>2</sup> Judge Rawlinson concurred with the Majority that SCARE had failed to state a claim but  
27 dissented from the decision to allow plaintiff one more chance to plead a contract claim. *Sonoma*  
28 *III*, 708 F.3d at 1120.



1 [T]he complaint must also plausibly point to a resolution or  
 2 ordinance that created the contract implying these benefits. ...  
 3 Specifically, the County's resolutions and ordinances may create a  
 4 contract if the text and the circumstances of their passage 'clearly  
 5 evince' an intent to grant vested benefits ... or if they contain[] an  
 6 unambiguous element of exchange of consideration of a private  
 7 party for consideration offered by the state. . . In the alternative the  
 8 County's intent to make a contract by legislation "is clearly shown"  
 9 when a resolution or ordinance ratifies or approves the contract.

10 *Id.* at 1116-17. Neither alternative was plausibly alleged and the FAC's "passing references" to  
 11 BOS ratification were insufficient. The Ninth Circuit stated, "here the amended complaint does  
 12 not plausibly allege either alternative." *Id.* at 1117. Therefore, the Ninth Circuit majority upheld  
 13 this Court's dismissal of the FAC but vacated and remanded, providing Plaintiff with a third  
 14 chance to amend its complaint in light of the *REAOC* decision. *Id.* at 1117-18.

15 **C. The Second Amended Complaint Relies On The Same Resolutions And MOUs  
 16 Previously Alleged And Only Identifies Resolutions Adopting MOUs Beginning In  
 17 1990.**

18 **1. The SAC Asserts The Same Alternative Competing Legal Theories.**

19 SCARE asserts the same thirteen causes of action here as in its two previous defective  
 20 complaints. Each of these claims is now premised on an implied term in an alleged express  
 21 contract entered into between the County and its retirees in which the County allegedly agreed to  
 22 provide health benefit contributions to retirees and their dependents for the rest of their lives.

23 SCARE once again asserts two alternative and competing contract theories. The first  
 24 theory claims retirees possess a vested right to have "all or substantially all" of their health  
 25 benefits paid for by the County. (SAC at 3-12, ¶¶ 15-23.) Alternatively, the second theory alleges  
 26 a 1985 "tie agreement" whereby retirees have a vested contractual right to the same healthcare  
 27 contributions as certain non-union County employees. (*Id.* at 12-15, ¶¶ 16-31.) Effective June 1,  
 28 2013, active County employees now receive \$500 per month health insurance contributions. (SAC  
 at 17, ¶ 35.) Differing and additional monthly amounts were paid commencing in June 2009  
 during a phase-in period to 2013.<sup>3</sup> Plaintiff also claims an entitlement to an additional \$600 per

<sup>3</sup> County retirees who are 65 or older receive more than actives. They receive up to \$500 for  
 (footnote continued)

1 month, established pursuant to a September 2008 salary resolution<sup>4</sup> granting active employees an additional taxable salary allowance that can be used for any purpose. (SAC at 16, ¶ 33.)<sup>5</sup> Plaintiff claims an entitlement to this salary payment to active employees as a further implied term of the "tie agreement." Plaintiff reasserts the same factual allegations in the SAC to support this claim as in the FAC, as noted above.

Plaintiff alleges each of the identified resolutions and MOUs it relies on constituted separate contracts (SAC ¶¶ 21, 22 and 29.) Plaintiff alleges multiple contracts with each of the identified resolutions and MOUs that allegedly created vested rights to the payment of health care subsidies for "retirees who retired during the duration of the contracts." (SAC ¶¶ 21, 29.) Thus, Plaintiff alleges separate contract claims for retirees that are specific to the time each SCARE member retired, and alleges separate contracts for union and non-union retirees. Plaintiff also alleges separate contracts for the alleged "all or substantially all" and for the alleged "tie" agreement. Consequently, each alleged contract for each claim – "all or substantially all" and the "tie"-- must be examined and each alleged contract for non-union retirees and for union retirees must be examined and decided separately.

**2. Plaintiff Again Relies On The Same Resolutions And MOUs (Exhibits 1 through 68) Which This Court And The Ninth Circuit Have Already Held Insufficient To State A Claim.**

None of Plaintiff's resolutions, and neither of its theories regarding the implications and intentions of County employees, can cure the defect at the heart of the Second Amended Complaint. The SAC cites the same 68 resolutions and MOUs attached to the FAC as Exhibits 1 through 68 here. The Ninth Circuit and this Court already held them to be insufficient to survive a motion to dismiss. *Sonoma III* at 117; *Sonoma II* at 10, 15 and 18.

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premiums and in addition they receive \$96.46 per month to pay Medicare Part B premiums, for a total of \$596.46 per month. Therefore these Plaintiffs receive more than the actives to whom they claim they are "tied". (See SAC, Ex. 9, p. 13 of 17.)

<sup>4</sup> This resolution is not an exhibit to the SAC.

<sup>5</sup> Premium payments are tax free under Internal Revenue Code, 26 U.S.C. §§ 105 and 106.

1 The Ninth Circuit found, as did this Court, that those resolutions and ordinances did not  
 2 create a contract based on their text and circumstances of passage; nor did they contain an  
 3 "unambiguous element of exchange of consideration." *Sonoma III*, 708 F.3d at 1116-1117.  
 4 Additionally, the Ninth Circuit expressly held that the FAC allegations that retirees performed  
 5 services as employees in exchange for those alleged promises were inadequate legal conclusions  
 6 under *Iqbal* and could not establish the necessary bargained-for consideration. *Id.* Therefore, the  
 7 SAC fails to the extent that it relies on the same 68 resolutions and MOUs as before. The SAC  
 8 also relies on the same insufficient legal conclusions alleged in the FAC in a failed effort to  
 9 establish consideration.<sup>6</sup>

10 **3. Plaintiff Identifies New Resolutions (Exhibits 69 through 94) That Adopt**  
 11 **MOUs Starting in 1990.**

12 In an effort to meet the requirements of *Sonoma III*, Plaintiff newly identifies 26  
 13 resolutions adopting the MOUs referenced in Exhibits 10 through 48 of the SAC. None of those  
 14 resolutions refer to retiree health benefits. They do not reference any tie agreement. The SAC  
 15 includes no factual allegations regarding the circumstances accompanying their passage. Notably,  
 16 like the FAC, no resolution (or writing of any kind) is identified from 1985 to support the alleged  
 17 "tie agreement" claims. The resolutions adopting MOUs do not relate to non-union retirees.

18 These 26 additional resolutions do not meet the Ninth Circuit's *Sonoma III* pleading  
 19 requirements. None of the resolutions "contain an unambiguous element of exchange of  
 20 consideration" for lifetime retiree health benefits. *Sonoma III*, 708 F.3d at 1117. None of the  
 21 "text and the circumstances of their passage 'clearly evince' an intent to grant vested benefits." *Id.*<sup>7</sup>

22 There is no clear showing that any resolution ratified or approved a contract for lifetime  
 23 retiree health benefits because the identified resolutions are wholly silent with respect to retiree  
 24 health benefits. The identified resolutions do not show any intent – much less “clearly evince” an

25 \_\_\_\_\_  
 26 <sup>6</sup> Compare FAC ¶¶ 1, 2, and 22 with SAC ¶¶ 1, 2 and 22. See *Sonoma III* at p. 1117.

27 <sup>7</sup> See Argument, § V.A.2 and V.B.1-2, *infra*.

1 intent – to provide lifetime retiree health benefits. Moreover, by their own terms they have no  
2 legal effect whatsoever on non-union or pre-1990 retirees.

3 **III. STATEMENT OF ISSUES**

4 1. Whether the 26 exhibits added to the SAC adopting durationally limited MOUs in  
5 effect at various times from 1990 through 2010 (the "Added Exhibits") are sufficient to overcome  
6 the FAC's failure to plausibly allege a lifetime contract right to the payment of "all or substantially  
7 all" health care payments for non-union retirees.

8 2. Whether the Added Exhibits are sufficient to overcome the FAC's failure to  
9 plausibly allege a lifetime contract right to the payment of the same health care benefits payments  
10 as active County employees pursuant to a "tie agreement" adopted by the County BOS in 1985 for  
11 non-union retirees.

12 3. Whether the Added Exhibits are sufficient to overcome the FAC's failure to  
13 plausibly allege a lifetime contract for the payment of "all or substantially all" health care  
14 payments for union retirees.

15 4. Whether the Added Exhibits are sufficient to overcome the FAC's failure to  
16 plausibly allege a lifetime contract right for the payment of the same health care benefits payment  
17 received by active County employees for union retirees.

18 5. Whether Sonoma County Ordinance No. 4478 adopted by the County BOS in  
19 January 1992 bars Plaintiff's claims in their entirety for any non-union retiree retiring after that  
20 date or any union retiree retiring under any subsequently negotiated MOU.

21 6. Whether the anti-vesting provisions of California Government Code § 31692  
22 constitute a legislative bar to each of Plaintiff's alleged claims in their entirety.

23 7. Whether Plaintiff can establish associational standing for its "all or substantially  
24 all" contract and promissory estoppel claims.

25 ////

26 ////

27 ////

28 ////

1 **IV. LEGAL STANDARD SET BY *REAOC* AND ITS PROGENY**

2 **A. *REAOC* Establishes A Heavy Burden For Plaintiff To Establish A Contract**  
 3 **Containing An Implied Term To Vested Retiree Health Care Benefits.**

4 "[T]he principal function of a legislature is not to make contracts, but to make laws that  
 5 establish the policy of the [governmental body]." *REAOC*, 52 Cal. 4th at 1185. Policies, unlike  
 6 contracts, are "inherently subject to revision and repeal" and to "construe laws as contracts when  
 7 the obligation is not *clearly and unequivocally expressed* would be to limit drastically the essential  
 8 powers of a legislative body." *Id.* (citations omitted; emphasis added). Courts must "proceed  
 9 cautiously both in identifying a contract within the language of a ... statute and in defining the  
 10 contours of any contractual obligation." *Id.* at 1188 (citations omitted). There is a "heavy burden  
 11 [on Plaintiff] of establishing, from statutory language or relevant circumstances, that the public  
 12 entity intended to create a compensation contract by ordinance or resolution." *Sonoma III*, 708  
 13 F.3d at 1120. Plaintiff "also bears the equally heavy burden of establishing that implied terms in  
 14 that contract provide vested healthcare." *Id.*

15 In addition, the California Supreme Court has made clear that the County cannot be bound  
 16 by the implied terms of a written contract or by an implied contract if there is a statutory  
 17 prohibition against such an agreement. *REAOC*, 52 Cal. 4th at 1183.

18 In the most recent district court decision in *REAOC*, on remand from the Ninth Circuit, the  
 19 District Court carefully and "cautiously" examined the wording of the resolutions identified by the  
 20 plaintiff, finding there was no language in any resolution promising a continuing obligation and,  
 21 therefore, none could be imputed. *Retired Employees. Ass'n of Orange County, Inc. County of*  
 22 *Orange*, No. SACV 07-1301, 2012 U.S. Dist. LEXIS 146637, \*15-17 (C.D. Cal. Aug 13, 2012)  
 23 ("*REAOC 2*") (Notice of Appeal filed 9/6/12). This careful and cautious examination is required  
 24 under *REAOC*. Cal. 4th at 1188-89.

25 **B. The Ninth Circuit Applies The *REAOC* Heavy Burden Standard**

26 **1. *Harris***

27 The Ninth Circuit has cited this Court's Orders with approval twice, once in *Sonoma III*  
 28 and again in *Harris v. County of Orange*, 682 F.3d 1126 (9th Cir. 2012) ("*Harris*"). In *Harris*, the

1 Ninth Circuit dealt with another part of the claim against Orange County for "pooled" (meaning  
2 blended cost for actives and retirees) healthcare premiums. Adhering to the California Supreme  
3 Court's *REAOC* decision, the *Harris* court required a formal enactment of a resolution or  
4 ordinance by a majority of a board of supervisors in order to create a contract. *Harris*, 682 F.3d  
5 at 1134. Plaintiffs must plead specific resolutions or ordinances establishing that right. *Id.*

6 Additionally, the *Harris* court explicitly quoted, with approval, this Court's opinion in  
7 *Sonoma II* dismissing SCARE's complaint "where none of the Board resolutions or Board-certified  
8 MOUs 'explicitly provided[d] that Sonoma agreed to provide health insurance benefits to retirees  
9 in perpetuity [and so] a contract to do so has not been formed.'" *Id.* at 1134-35 (citations omitted).

10 The *Harris* standard – which is the same as that applied in *Sonoma III* and by this Court in  
11 *Sonoma I* and *II* – is not met by the SAC. The SAC only adds resolutions starting in 1990 and still  
12 does not identify any resolution explicitly providing that Sonoma agreed to provide health  
13 insurance benefits to retirees in perpetuity. The 26 newly alleged resolutions do not even mention  
14 retiree health care either for a discrete period or for life. The requirements of the Ninth Circuit,  
15 and of this Court, have not been met by the SAC.

## 16 2. *Sonoma III*

17 The Ninth Circuit decision in *Sonoma III* is a close companion to the *Harris* decision. In  
18 *Sonoma III*, the court required that the complaint "plausibly point to" a resolution or ordinance that  
19 created lifetime benefits. *Sonoma III*, 708 F.3d at 1116-17 (citations omitted). The *Sonoma III*  
20 Court held that the FAC did not do this. *Id.* at 1117. The majority agreed to allow SCARE to  
21 replead its case, but set up stiff barriers to going forward. With regard to the required resolutions,  
22 "the text and the circumstances of their passage [must] 'clearly evince' an intent to grant vested  
23 benefits or "contain an unambiguous element of exchange of consideration" between the parties.  
24 *Id.* (citations omitted). Alternatively, the intent to create lifetime benefits must be "clearly shown"  
25 in the resolution or ordinance that approves a contract. *Id.* (citations omitted). Moreover, the  
26 *Sonoma III* Court reiterated that SCARE has a "heavy burden" to establish "from statutory  
27 language or relevant circumstances" that the County intended to create vested health care. *Id.* at  
28 1120.

1 Absent clear language in the resolution or ordinance itself, under *REAOC* and the Ninth  
 2 Circuit decisions, a contract can only be established by circumstances accompanying their passage  
 3 that clearly evince an intent of the Board of Supervisors to enter into a contract. No such  
 4 circumstances are alleged in the SAC. The circumstances in the SAC deal with alleged actions  
 5 that took place away from any Board of Supervisors public meeting in which retiree health care  
 6 was considered. These allegations, even if proved, will not establish a contract for life for retiree  
 7 health benefits. The courts are clear that "circumstances" must be such that the taxpayers – the  
 8 voters – are not blindsided by a liability that cannot be understood by public, full Board action.  
 9 *See California Statewide Law-Enforcement Assoc. v. DPA*, 192 Cal.App.4th 1, 19 (2011); *see*  
 10 *also, REAOC 2* at p. 5; *Valdes v. Cory*, 139 Cal.App.3d 773, 782 (1983). Nor can a County  
 11 delegate its statutory or constitutional authority. *Id.*

12 The following legal rules have been recognized in all of these cases where vested retiree  
 13 health benefits for County retirees are alleged: (i) it is unusual for a BOS to establish a contract,  
 14 and not a policy; (ii) there is a presumption against a resolution establishing a contract; (iii) to  
 15 establish a contract there must be clear intent on the part of the BOS; (iv) it is not enough to  
 16 merely establish a contract because then there is an additional heavy burden to demonstrate the  
 17 Board of Supervisors intended to create lifetime benefits; (v) courts must be very cautious in  
 18 finding such intent in any contract.<sup>8</sup> These rules must continue to be followed in this case because  
 19 of the extraordinary nature of the claim, the extraordinary limitation that such a claim would place  
 20 on county government and its elected officials, and the extraordinary burden it would place on  
 21 taxpayers.

22 **C. It is Plaintiff's Burden To Meet The *Iqbal* Requirements Consistent With The**  
 23 ***REAOC* Standard.**

24 To survive a motion to dismiss, the Plaintiff must clearly allege facts that plausibly meet  
 25 the standards established by the Ninth Circuit and this Court. *Iqbal*, 556 U.S. at 678. A claim only

26 \_\_\_\_\_  
 27 <sup>8</sup> *REAOC 52* Cal.4th at 1187-1188, 1191; *Harris*, 682 F.3d at 1134-1135; *Sonoma III*, 708 F.3d at  
 28 1114-1115, 1117; *REAOC 2* at 5-6.

1 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
2 reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

3 First, a court must conduct a “context-specific” analysis that “draw[s] on [the court’s]  
4 experience and common sense” to determine whether the allegations “plausibly give rise to an  
5 entitlement to relief.” *Id.* at 678-79. Second, in determining whether a plaintiff has alleged  
6 sufficient facts to meet its burden of plausibility, a court first must identify and reject any legal  
7 conclusions that are unsupported by factual allegations because they are “not entitled to the  
8 assumption of truth.” *Id.* at 678-80. (“Threadbare recitals ... supported by mere conclusory  
9 statements” are insufficient to survive a motion to dismiss). *See also Sprewell v. Golden Gate*  
10 *Warriors*, 266 F.3d. 979, 988-89 (9th Cir. 2001) (allegations that contradict documents  
11 incorporated by reference or a matter of judicial notice are not accepted as true).

12 SCARE did not succeed in the FAC. The same is true of the SAC, which does not add  
13 anything new that will meet the required standards. In all the mass of paper submitted by Plaintiff  
14 – 94 exhibits, in all – not one resolution references any intent to provide any particular level of  
15 future contributions, much less for life.

## 16 V. ARGUMENT

### 17 A. **The Ninth Circuit Found That The Resolutions Cited In The FAC Failed To 18 Establish A Contract And Therefore The *Non-Union Retirees And All Pre 1990* 19 *Retirees Still Have Not And Cannot State A Claim Under Either The "All Or* 20 *Substantially All" Or The "Tie Agreement" Claims.***

#### 21 1. **The 68 Resolutions Previously Identified In The FAC (Exhibits 1-9 and 48-68) 22 and Reiterated In The SAC Already Have Been Found Insufficient To 23 Establish A Contract Under Either Of SCARE's Competing Legal Theories.**

24 The Ninth Circuit and this Court have held that the FAC is insufficient to withstand a  
25 motion to dismiss. Therefore, the Ninth Circuit and this Court have held that the resolutions that  
26 were alleged in the FAC were insufficient to withstand a motion to dismiss. Additionally the  
27 Ninth Circuit held that to withstand a motion to dismiss, SCARE must allege new facts – new  
28 resolutions – that meet the *Sonoma III*, *Harris*, *REAOC* and this Court's requirements. That has  
not happened.



1           **2.       None Of The 26 New Resolutions Relate To Non-Union Employees.**

2           All of the newly offered resolutions deal only with MOUs for **union employees**. Not a  
3 single one of the newly offered resolutions deals with non-union employees or retirees. Therefore,  
4 not a single one can be used to establish a contract for lifetime health care for them.

5           The Ninth Circuit in *Sonoma III* held that for SCARE to withstand a motion to dismiss, it  
6 had to allege new resolutions that clearly evince an intent to grant vested benefits or contain an  
7 unambiguous element of exchange of consideration. *Sonoma III*, 708 F.3d at 1117. Additionally,  
8 the Court in *Sonoma III* held that it was not sufficient to allege that retirees performed services as  
9 employees in exchange for the County's promise to confer vested healthcare benefits on them. *Id.*  
10 This is a legal conclusion of the type rejected in *Iqbal. Id., citing Iqbal*, 556 U.S. at 678.

11 Therefore, with respect to the non-union retirees, the SAC has not alleged any new facts and,  
12 consequently, has not changed the facts alleged in the FAC as to them. The FAC was held by the  
13 Ninth Circuit and this Court to be insufficient to withstand a motion to dismiss. The SAC should  
14 be dismissed without leave to amend for all alleged contract claims that relate to non-union and  
15 pre-1990 retirees because SCARE has failed to establish the alleged contract for any of these  
16 retirees under either of its competing contract theories.

17           **3.       Plaintiff Has Not Established The 1985 “Tie Agreement” Because SCARE Has**  
18 **Identified No 1985 Resolution Or Consideration To Support This Claim.**

19           **a.       Plaintiff Alleges The Tie Agreement Was Made In 1985 But Identifies**  
20 **No 1985 Resolution Which Is Required To Establish That Claim.**

21           Plaintiff alleges, without factual support, that a “tie agreement” was made in 1985. (SAC ¶  
22 24.) It still has not identified any resolution from 1985 to support this claim, even though the  
23 Ninth Circuit in *Sonoma III* requires such identification to survive a motion to dismiss. Put  
24 simply, with no BOS resolution to support a claimed promise to the non-union employees,  
25 Plaintiff fails to allege any facts that – under the standards established by the Ninth Circuit – can  
26 withstand a motion to dismiss for non-union retirees. Therefore, none of these newly added  
27 resolutions can be used to establish a claim for lifetime benefits. Consequently, the SAC should  
28

1 be dismissed without leave to amend with respect to the alleged "tie agreement" claims asserted  
2 for non-union retirees.<sup>9</sup>

3 **b. There Is No Bargained-For Exchange Of Consideration To Support A**  
4 **Contract Claim For The Non-Union And Pre 1990 Retirees.**

5 The Ninth Circuit found the FAC did not sufficiently allege that the cited "resolutions,  
6 ordinances, and MOUs were the product of a bargained-for-exchange of consideration." *Sonoma*  
7 *III*, 708 F.3d at 1117. It specifically held that the allegation that the retirees performed services as  
8 employees in exchange for a promise of vested rights to be a legal conclusion insufficient under  
9 *Iqbal. Id.* at 1117, *citing Iqbal*, 556 U.S. at 678.

10 This holding is particularly important with respect to the "tie agreement." SCARE's  
11 allegation that the retirees' bargained for these allegedly vested rights in 1985 remains  
12 unsupported by factual allegations and remains nothing more than a legal conclusion. Notably,  
13 the retirees, unlike union employees, have no legal standing to bargain for anything with the  
14 County. This is recognized by California law, which provides that retirees only may have a  
15 reasonable opportunity to comment on proposed changes to retiree health benefits. (California  
16 Government Code ("Cal. Gov. Code") § 31693. Therefore, the failure to identify a resolution to  
17 establish the "tie agreement" in 1985 and the failure to recognize that retirees have no standing to  
18 bargain with the County are both fatal to the non-union retiree claims and they should be  
19 dismissed for that reason as well.

20 **B. The Newly Cited Resolutions Adopting MOUs Beginning In 1990 Cannot Support**  
21 **Either The "All Or Substantially All" Or The "Tie Agreement" Competing Contract**  
**Theories For Union Retirees.**

22 **1. The Newly Alleged Resolutions Adopting The MOUs Have No Textual Anchor**  
23 **For Plaintiff's Alleged Implied Contract Term Claim.**

24 The Ninth Circuit required SCARE to allege resolutions or ordinances that clearly evince  
25 an intent to establish an intent to create vested rights, to allege an unambiguous exchange of

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26 <sup>9</sup> As noted in Statement of the Case II., C. 1, *supra*, SCARE alleges separate contract claims for  
27 each of these groups of retirees. (SAC ¶¶ 21, 22 and 29).

1 consideration to establish vested rights, or to clearly show that resolutions adopting the MOUs  
 2 demonstrate an intent to grant vested rights. *Sonoma III*, 708 F.3d at 1117. These requirements  
 3 were not met with the FAC. They are not met with the SAC.

4 First, none of the resolutions added to the SAC (Exs. 69-94) contain any provision that  
 5 promises any health care contribution or term that could anchor any claim to a vested right to such  
 6 payments. Second, there is no allegation of circumstances accompanying passage of these  
 7 resolutions that supports SCARE's vested rights claim. Notably, there is no tie agreement for  
 8 vested rights because the alleged tie is not anchored to any 1985 contract claim, as discussed,  
 9 *supra*. In short, none of the newly added resolutions contain text or circumstance accompanying  
 10 passage to support these claims.

11 The SAC adds the Resolutions in Exhibits 69 through 94 in an attempt to meet the  
 12 requirements of the Ninth Circuit. These resolutions do no more than adopt various MOUs  
 13 commencing in 1990 and lasting through 2010 for some unions. The words of these resolutions  
 14 all follow the same patterns. They provide that an MOU is approved, is incorporated by reference,  
 15 and is in effect from one specified date to a later specified date. For example, the words of Exhibit  
 16 69, Resolution 00-0185, are typical:

17 "NOW, THEREFORE, BE IT RESOLVED that this Board hereby  
 18 approves the Memorandum of Understanding between the County  
 19 and the Deputy Sheriffs' Association which is incorporated by  
 reference herein for the County of Sonoma and on file with the  
 Clerk."

20 "BE IT FURTHER RESOLVED that the terms and conditions of the  
 21 Memorandum of Understanding shall be in full force and effect  
 22 from February 8, 2000 to and including February 3, 2003, except as  
 specified otherwise in the Memorandum of Understanding."

23 Nowhere in this resolution – or in any of the newly provided resolutions -- is there any  
 24 mention of retiree health benefits or of providing lifetime health benefits. Some of the newly  
 25 proffered resolutions have slightly different language from that quoted above. For example, here  
 26 are the words of Exhibit 71, Resolution 90-1649, which are typical:

27 "NOW THEREFORE BE IT RESOLVED that this Board finds,  
 28 declares, determines and orders as follows: . . .

1           2. This Board implements the memorandum, between the County  
2           and the Union, which is on file with the Clerk of the Board.

3           3. This Memorandum shall be in effect as of July 24, 1990, except  
4           as may be specified otherwise in the Memorandum."

5           Again, there is no reference to retiree health benefits in these resolutions and certainly no  
6           reference to lifetime health benefits. The Resolutions that are newly alleged by SCARE are only  
7           bare recitations that MOUs are adopted. Bare resolutions are insufficient. The Ninth Circuit held,  
8           "here the amended complaint does not plausibly allege either alternative." *Id.* at 1117. There is  
9           nothing in the resolutions that demonstrate any intent by the BOS to grant lifetime benefits when it  
10          adopted the resolutions.

11          Moreover, the SAC does not allege any circumstances accompanying these Resolutions  
12          that even suggest that the BOS "clearly evince[d]" an intent to grant vested lifetime retiree health  
13          benefits. The allegations of the SAC in this regard are the same as the allegations in the FAC.  
14          The Ninth Circuit held that the allegations in the FAC were insufficient to meet the "circumstances  
15          of passage" requirement. Because there are no new allegations regarding circumstances, the SAC  
16          does not meet the "circumstances" requirement and, therefore, the SAC must be dismissed.

17           **2.       The Newly Alleged Resolutions Adopting Post 1990 MOUs Are Durationally  
18           Limited And Silent As To Any Promise Of Health Care Subsidies Or Vested  
19           Rights.**

20          The newly alleged Resolutions, and the MOUs to which they relate, by their express terms  
21          are time limited and do not extend for retirees' lifetimes. Each resolution states a limited time  
22          during which the adopted MOU is in effect. As noted in *Harris, supra*, although durational  
23          clauses may not always be determinative, they "cannot be the source of a claim that benefits  
24          survive indefinitely." 682 F.3d at 1135. *See also, California Statewide Law Enforcement*, 192  
25          Cal.App.4th 1,4 (2011) ("*CLSEA*") (The Court held if the monetary obligation is not presented to  
26          the legislature it cannot establish an enforceable obligation). None of the resolutions provide for  
27          vesting in perpetuity.

28          "It is undisputed that the MOUs are time limited documents subject to the collective  
bargaining process." *Sonoma II* at p. 12. Each MOU has a finite duration stated on the cover  
page, in the MOU text and in the accompanying resolution. (*See Third Request for Judicial*

1 Notice in Support of Motion to Dismiss ("TRJN"), concurrently filed and incorporated herein,  
 2 Exs. 2-39.) For example, this Court previously identified a number of MOUs that contain  
 3 language that undercuts and contradicts any claim to lifetime health care benefits. Nothing in the  
 4 newly added resolutions changes that language.<sup>10</sup>

5 **3. The Four Corners Provisions of the MOUs Precludes Implying a Term for**  
 6 **Lifetime Health Care Subsidies.**

7 The MOU promises are explicitly confined to the four corners of the document. Most have  
 8 a specific provision, which states that the MOU "sets forth the full and entire understanding of the  
 9 parties regarding the matters set forth herein." (TRJN, Ex. 2-39) In *REAOC*, the California  
 10 Supreme Court stated that "as a general matter, implied terms should never be read to vary express  
 11 terms." *REAOC*, 52 Cal.4th at 1179 quoting *Carma Developers (Cal.), Inc. v. Marathon*  
 12 *Development California Inc.*, 2 Cal.4th 342, 374 (1992). SCARE's claim that a silent implied  
 13 monetary term for life is embraced in these provisions fights with the integration clause language  
 14 and contradicts it.

15 **C. Sonoma County Ordinance Number 4478 Enacted January 7, 1992 Bars Plaintiff's**  
 16 **Alleged Implied Term Contract Claims .**

17 As a specific matter and further undercutting SCARE's legal claims, the County's BOS  
 18 passed Sonoma County Ordinance No. 4478, which precludes the imposition of an implied  
 19 contract term for vested rights in any MOU negotiated after the post-1992 MOU. *REAOC* held  
 20 that a legislative prohibition such as a statute or ordinance forecloses any claimed right to vested

21 \_\_\_\_\_  
 22 <sup>10</sup> "See, e.g., Ex. 10 at 2492 ("This Memorandum shall expire or otherwise fully terminate. . .on  
 23 February 3, 2003."); Ex. 15 at 9215 ("During the term of this Memorandum. . ."); Ex. 18 at 20 ("In  
 24 the event that changes to the County Health Plan are proposed, the Union and the county agree to  
 25 re-open Article 9 [Health and Welfare] of this MOU"); Ex. 29 at 3616, ¶ 86.16 ("Currently, the  
 26 County contributes to the cost of a health care plan for its retirees and their dependents."); Ex. 38 at  
 27 3860, § 12.5.1 ("each year under this three-year Memorandum. . ."); Ex. 42 at 5144, ¶ 5.3(B)  
 ("The County reserves the right to meet and confer with the Association at any time during the  
 term of this Memorandum over the issue of current and future employee's ability to enroll in the  
 County Health Plan upon retirement from the County.")" *Sonoma II* at p. 12. These same MOUs  
 are again relied on in the SAC.

1 retiree health benefits. *REAOC*, 52 Cal. 4th at 1176.

2 Sonoma County Ordinance Number 4478, enacted on January 7, 1992, provides that any  
3 contract promising to pay money that purports to bind the County is unenforceable and contrary to  
4 public policy unless it has the express approval of the Board of Supervisors. (TRJN, Ex. 1)

5 Specifically, the Ordinance states:

6 SECTION 1. The Board of Supervisors finds and determines that it  
7 is the public policy of this State that the decision to obligate public  
8 funds and property should be made openly and publicly in  
9 accordance with the requirements of the Ralph M. Brown Act,  
10 unless otherwise authorized by law. This ordinance is adopted in  
11 furtherance of that public policy.

12 SECTION II. Section 1-11 is hereby added to the Sonoma County  
13 Code to read as follows:

14 Sec. 1-11. (a) Any purportedly binding promise or  
15 representation made by any officer, employee or agent of the County  
16 of Sonoma, including other public agencies governed in whole or in  
17 party by the Board of Supervisors, that would require the payment  
18 of money, performance of service, transfer of any property, real or  
19 personal, or the giving of any other thing of value of the County of  
20 Sonoma, or other public agency governed in whole or in part by the  
21 Board of Supervisors, where the making of the promise or the  
22 representation did not have the express prior authorization of the  
23 Board of Supervisors is, unless otherwise provided by law,  
24 unenforceable and void. The delegation of authority to the  
25 Department Head or Purchasing Agent in Sections 2-52 et seq. of  
26 this Code is an express prior authorization within the meaning of  
27 this Section. (Italics added)

28 (b) Notwithstanding the foregoing, the Board of Supervisors  
retains the right, in its sole discretion, to ratify any such promise or  
representation by adopting a resolution expressly for that purpose.

*Id.* (emphasis added) This ordinance requires *express authorization* by a majority of the Board of  
Supervisors enacted in public session in accordance with the public meeting law (the Ralph M.  
Brown Act) for that express purpose to commit the County to the payment of money.

Sonoma County Ordinance 4478 forecloses SCARE's claim to a vested right to retiree  
health care contributions for any non-union retiree retiring after January 1992 and for any retiree  
retiring under any MOU subsequently negotiated. *REAOC* precludes the establishment of any  
implied contractual obligation to vested benefits when prohibited by ordinance. *REAOC* at 1176.  
No cited resolution expressly obligates the County to make payments to any retiree for life.

1 Implying such a term to any contract would run directly counter to Sonoma County Ordinance  
2 4478.

3 Further, this ordinance specifically precludes anyone – any "employee or agent" -- other  
4 than the Board of Supervisors to establish a claim for vested rights. If the BOS does not expressly  
5 authorize a claim for payment of money, then the claim is unenforceable and void. The ordinance  
6 therefore renders Plaintiff's allegation of testimony from former County Administrators, individual  
7 supervisors or others irrelevant. Only a majority of the Board of Supervisors could legally and  
8 plausibly commit the County to a substantial vested right obligation and there is no evidence of  
9 such an express promise as required by this ordinance. *See Katsura v. City of San Buenaventura*,  
10 155 Cal.App.4th 104, 109 (2007) ("No government, whether state or local is bound to any extent  
11 by an officer's act in excess of his ... authority.")

12 **D. The Anti-Vesting Provisions of California Government Code Section 31692 Bars**  
13 **Plaintiff's Contract And Contract Based Claims In Their Entirety.**

14 "[T]he law does not recognize implied contract terms that are at variance with the terms of  
15 the contract as expressly agreed or as prescribed by statute." *REAOC*, 52 Cal. 4th at 1181-82  
16 (citations omitted). The County provides retiree health benefits to its employees pursuant to the  
17 County Employees Retirement Law of 1937, Cal. Gov. Code § 31450, et. seq. (the "CERL").

18 "The adoption of an ordinance or resolution pursuant to Section  
19 31691 **shall give no vested right to any member or retired**  
20 **member, and the board of supervisors or the governing body of the**  
21 **district may amend or repeal the ordinance or resolution at any**  
22 **time."**

21 The County's authority to amend, change or repeal its provision of health benefits is  
22 limited only by notice provisions and reasonable opportunity by the retirees to comment. Cal.  
23 Gov. Code § 31693. Thus, as a matter of law, even if the BOS had passed a resolution or  
24 ordinance granting retirees and their dependent health benefits – and it did not – the Legislature  
25 has established that these benefits can be amended or repealed by the BOS at any time.

26 The Board of Supervisors was fully cognizant of the importance of the CERL and of the  
27 limits that are embodied in it. Each of the newly added resolutions – all of which concern MOUs -  
28 - contains this language.

1 "It is not the intent of this Board of Supervisors in approving this  
2 Memorandum to change, modify or repeal any existing rules of the  
3 Board of Retirement of the Sonoma County Employee's Retirement  
4 Association nor to diminish or remove from that Board any of its  
5 jurisdiction under the 1937 County Employees Retirement Act."

6 (SAC Exs. 69-94)<sup>11</sup>

7 The BOS expressly reserved all of its powers to act in accordance with the CERL,  
8 including those under Section 31692. Accordingly, Government Code Section 31692 bars all of  
9 SCARE's alleged claims. Thus, even if any health benefit could be implied by the MOUs  
10 adoption, it is invalidated by Section 31692.

11 **E. The SAC Does Not Set Forth Facts Sufficient To State A Cause Of Action For  
12 Promissory Estoppel.**

13 Plaintiff's Eighth and Ninth Causes of Action for promissory estoppel (SAC at ¶¶ 84-93)  
14 also fail. California courts apply the rules of promissory estoppel against a public agency only "if  
15 to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public."  
16 *Poway Royal Mobilehome Owners Ass'n v. City of Poway*, 149 Cal. App. 4th 1460, 1471 (2007)  
17 (citations omitted). To state a claim, a plaintiff must plausibly allege "(1) a clear promise, (2)  
18 reliance, (3) substantial detriment, and (4) damages 'measured by the extent of the obligation  
19 assumed and not performed.'" *Id.* Such a promise must be "clear and unambiguous." *Aguilar v.*  
20 *Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 446 (9th Cir. 1992) (citations omitted).

21 The SAC fails to identify any document in which the County promises to pay any specific  
22 amount or percentage of retirees' health care benefits for any period. There is no "clear promise"  
23 by the BOS, which is the only promise that is legally cognizable. The SAC merely asserts the legal  
24 conclusion that retirees were induced to and did forego other benefits and compensation, allegedly  
25 including "other benefits and/or compensation" in lieu of retiree health care benefit contributions.  
26 (SAC at ¶¶ 45, 67-70). The general and conclusory claim that Retirees made "numerous life  
27 decisions" (SAC ¶ 45) fails to provide any additional requisite factual support for the promise or

28 <sup>11</sup> These generally are found on the second page of each Resolution.



1 reliance. Because Plaintiff has not stated a specific promise or alleged facts that would support  
2 reasonable reliance upon it, the promissory estoppel claims must be dismissed.

3 **F. Because There Is No Lifetime Health Subsidy Contract, SCARE Cannot State Any**  
4 **Constitutional Impairment Of Contract Or Constitutional Due Process Claim.**

5 Plaintiff's Fourth through Seventh Causes of Action assert impairment of contract under  
6 the California and Federal Constitutions. (SAC at ¶¶ 56-83). The California and Federal  
7 Constitutions preclude states from passing a law that impairs the obligation of contracts. U.S.  
8 Const. Art I, § 10, cl. 1; Cal. Const. Art I, § 9. To determine whether a County's legislative  
9 enactment has violated the Contracts Clause, the threshold inquiry is "whether a contract exists as  
10 to the specific terms allegedly at issue." *San Diego Police Officers' Ass'n v. San Diego City*  
11 *Employees. Ret. Sys.*, 568 F.3d 725, 736-37 (9th Cir. 2009), *citing*, *General Motors Corp. v.*  
12 *Romein*, 503 U.S. 181, 186 (1992) and *Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir.  
13 2006), cert. denied, 550 U.S. 935 (2007).

14 Plaintiff's impairment of contract claims fail because no contract has been established.  
15 Plaintiff has not provided facts to support the clear legislative intent required by the California  
16 Supreme Court and the Ninth Circuit, which is necessary to create vested contractual rights. *See*  
17 *San Diego Police Officers' Ass'n*, 568 F.3d at 737, *citing*, *Nat'l R. Passenger Corp. v. Atchison,*  
18 *Topeka & Santa Fe R. Co.*, 470 U.S. 451, 465-66 (1985). The Fourth through Seventh Causes of  
19 Action should be dismissed for failure to state a claim.

20 Plaintiff's Tenth through Thirteenth Causes of Action, which allege a due process violation  
21 under the U.S. and California Constitutions (SAC ¶¶ 94-121), similarly cannot withstand a motion  
22 to dismiss. In the absence of a contract providing retirees with payment for all or substantially all  
23 or their health care costs or, in the alternative, \$1100 per month for life toward health care costs,  
24 Plaintiff cannot state any claim for violation of the due process clause. *White v. Davis*, 30 Cal.4th  
25 528, 574 (2003) (holding that where state employees had no contract right under California law,  
26 they could not state a claim for violation of the due process clause because the state had not  
27 deprived them of a right they otherwise possessed). Accordingly, Plaintiff's due process claims  
28 must be dismissed for failure to state a claim.

1 **G. Plaintiff Cannot Establish Associational Standing For The "All Or Substantially All"**  
 2 **And Promissory Estoppel Claims.**

3 SCARE purports to represent all County employees, whether formerly union or non-union,  
 4 including those who are not members of the organization. (SAC ¶¶ 4, 5). Although SCARE seeks  
 5 associational standing under FRCP 12(b)(1), it does not possess such standing.

6 The United States Supreme Court has recognized that associational standing requires  
 7 Plaintiff to make the following showing: "(a) its members would otherwise have standing to sue  
 8 in their own right; (b) the interests it seeks to protect are germane to the organization's purpose;  
 9 and (c) neither the claim asserted nor the relief requested requires the participation of individual  
 10 members in the lawsuit." *United Food & Commercial Workers Union, Local 751 v. Brown*  
 11 *Group*, 517 U.S. 554, 5554 (1996); *Lake Mohave Boat Owners Ass'n v. National Park Serv.*, 78  
 12 F.3d 1360, 1367 (9th Cir. 1995). The third prong focuses on administrative convenience and  
 13 efficiency. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1113 (9th Cir. 2003).

14 When monetary damages are sought, associational standing generally is precluded because  
 15 this requires the participation of individual association members. *See Associated Gen. Contrs. of*  
 16 *Am. v. Metropolitan Water Dist. of S. Cal.*, 159 F.3d 1178, 1181 (9th Cir. 1998); *SEIU, Local*  
 17 *721 v. County of Riverside*, No. EDVC 09-00561, 2011 U.S. Dist. LEXIS 46008, \*31 (C.D. Cal.  
 18 Apr. 27, 2011) (no standing insofar plaintiff seeks damages.) Even if no damages are sought,  
 19 however, a claim for individualized declaratory relief precludes associational standing. *Ass'n of*  
 20 *Christian Sch. Int'l v. Stearns*, 678 F. Supp. 2d. 980, 984-85 (C.D. Cal 2008).

21 **1. The "All Or Substantially All" Claim Requires An Individualized Damage**  
 22 **Assessment As To Each Retiree.**

23 There is no factual allegation that informs the County or the Court as to the specific  
 24 meaning of the term "all or substantially all." Although the Prayer for Relief attempts to create a  
 25 "one size fits all" model, no such methodology is possible under this theory.

26 For example, on April 10, 2007, the BOS adopted a resolution amending the Salary  
 27 Resolution that set forth the amounts the County would pay toward medical insurance for all  
 28 retirees. (SAC, Ex. 8). Per that action, the County changed its contribution method to 85 percent

1 of the lowest cost medical plan and freezing all County contributions until the lowest cost plan  
2 contribution. (SAC, ¶ 23(c)). SCARE does not challenge this action.

3 Even under this relatively recent and straightforward formula, however, the MOUs and  
4 salary resolutions attached to the SAC demonstrate the level of individualized inquiry necessary to  
5 determine what "all or substantially all" means.<sup>12</sup> As evidenced by the Exhibits to the SAC, the  
6 County has offered up to four different health plans for active employees (and their spouses and  
7 dependents), which vary from union to union and from union to non-union, with contribution rates  
8 varying from year to year. The County continues to contribute \$96.40 per month for all Medicare  
9 eligible retirees in addition to the \$500 per month contribution. (SAC, Ex. 9, p. 13 of 17)  
10 Coverage for retirees and their survivors, spouses and dependents includes those same different  
11 health plans, and also varies over time depending upon BOS action. Moreover, the contributions  
12 vary over time for individual retirees. Retirees who are not eligible for Medicare and who have a  
13 number of dependents may receive substantially different contributions than Medicare eligible  
14 retirees. This Court would need to make an individualized inquiry for each retiree, as well as for  
15 their spouses, dependents and survivors, in order to provide the compensation demanded in the  
16 SAC's Prayer for relief. A review of varying contribution amounts the County has made to  
17 retirees between 2009 and 2013 as set forth in SAC, Ex. 9 at pp. 6 of 17 to 12 of 17.

18 Associational standing is precluded here because the monetary component of Plaintiff's  
19 requested relief requires an individualized assessment to determine "compensation".

20 **2. Promissory Estoppel Requires Individualized Damage Assessment That**  
21 **Precludes Associational Standing For This Claim.**

22 Plaintiff also specifically lacks standing to assert its promissory estoppel claim. "When the  
23 claims require an 'ad hoc factual inquiry' for each member represented by the association, the  
24 organization does not have associational standing." *Ass'n of Christian Schools Int'l*, 678 F. Supp.

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25  
26 <sup>12</sup> The complexity of the individualized damages issue expands exponentially under the vested  
27 rights theory also pressed by SCARE, in which retirees theoretically would be entitled, for life, to  
28 whatever health benefit contribution was provided at the time of the particular retiree's retirement.  
(See SAC, ¶¶ 22 and 29)

1 2d at 986. Plaintiff alleges that "[i]n reliance on the County's promises, the Retirees made  
 2 numerous life decisions regarding, among other things, whether and how long to work for the  
 3 County, how much to save for retirement, and whether to select the County's retiree health care for  
 4 themselves and their families rather than other retiree health care options available through their  
 5 spouses' or other dependents' employers. Many retirees chose to continue working for the County  
 6 rather than moving to other, higher paying employment at least in part because of the promise of  
 7 retiree health care benefits." (SAC ¶¶ 37-38). An "ad hoc factual inquiry" for each retiree will be  
 8 required in order to determine whether the County's alleged promise induced each individual  
 9 retiree to accept and continue their employment with the County and to forego other health care  
 10 benefit options. Associational standing should be denied for this claim as well under both  
 11 alternative and competing promissory estoppel theories.

## 12 VI. CONCLUSION

13 For all of these reasons, the County asks this Court to dismiss the Second Amended  
 14 Complaint and each alleged cause of action without leave to amend.

15 DATED: June 3, 2013

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