CASE NO. D066507

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

DENNIS GIBSON,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF SAN DIEGO COUNTY
CASE NO. 37-2012-00097458-CU-BC-CTL
THE HONORABLE RANDA TRAPP, JUDGE

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D066507
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Michael A. Conger, Esquire (State Bar No. 147882) Law Office of Michael A. Conger P.O. Box 9374 Rancho Santa Fe, CA 92067 TELEPHONE NO.: (858) 759-0200 FAX NO. *(Optional)*: (858) 759-1906 E-MAIL ADDRESS *(Optional)*: congermike@aol.com ATTORNEY FOR *(Name)*: Dennis Gibson	Superior Court Case Number: 37-2012-00097458-CU-BC-CTL ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Dennis Gibson RESPONDENT/REAL PARTY IN INTEREST: City of San Diego	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Dennis Gibson

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 26, 2015

Michael A. Conger
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I

INTRODUCTION

Plaintiff Dennis Gibson ("Gibson") is appealing a summary judgment favoring defendant City of San Diego ("City").

Gibson began working for the City in 1986 with the promise that if Gibson worked for the City for at least 20 years, after he retired the City would (1) provide him with the same health insurance coverage the City provided to its active employees, and (2) the City would pay the premiums for that health insurance. The City expressly stated that this was a "permanent" benefit. Gibson accepted the City's offer and worked for the City for more than 20 years. He left City employment in 2006, However, in 2011, before Gibson was old enough to retire, the City adopted an ordinance substantially reducing the retiree health benefit it had promised to Gibson. This litigation challenges the validity of the City's 2011 ordinance reneging on the promise it made to Gibson from 1986 through 2006.

As we will demonstrate, resolution of this dispute requires application of ordinary principles of contract law. The City may not alter the terms of a contract after the other party, Gibson, accepted the terms of that contract and fully performed his obligations under that contract.

After Gibson filed suit seeking declaratory relief, a writ of mandate, and breach of express contract, the trial court sustained the City's demurrer and only permitted Gibson to assert a breach of implied contract claim. Then the trial court granted summary

judgment as to Gibson's remaining breach of implied contract claim.

The trial court's order sustaining the City's demurrer was erroneous because Gibson had adequately pleaded valid claims. (Section IV(A)-(C), *post.*) Alternatively, Gibson had stated a valid claim for relief under municipal law. (Section IV(D), *post.*) The trial court also erred by limiting leave to amend to state only a breach of implied contract claim. (Section V, *post.*)

Finally, the trial court erred by granting summary judgment for several reasons. (Section VI, *post.*) *First*, the trial court's previous ruling that a provision of the parties' contract was ambiguous precluded summary judgment. (Section VI(B), *post.*) *Second*, there is a triable issue of fact regarding whether there is an unimpairable contract that the City would (1) provide a permanent health benefit to retired employees equivalent to the health insurance provided to active employees and (2) pay the premiums for that insurance. (Section VI(C), *post.*) *Third*, there is a triable issue of fact regarding whether the City's 2011 ordinance constitutes an anticipatory breach of contract. (Section VI(D), *post.*) *Fourth*, there is a triable issue of fact regarding whether Gibson has suffered damages. (Section VI(E), *post.*)

Courts should require the City to keep its contractual promise. This simple legal action for breach of contract seeks nothing more. The summary judgment and order sustaining the City's demurrer should be reversed.

II

STATEMENT OF THE CASE

A. Statement of Material Facts

1. *In 1981, in order to save millions of dollars, the City desired to withdraw from the Social Security and Medicare systems.*

The Retiree Health Benefit came into effect in 1982 when the City desired to withdraw from the Social Security system. (8 Joint Appendix in Lieu of Clerk's Transcript ("JA") 1473-1474 [¶ 4]; 8 JA 1583; 8 JA 1536; 8 JA 1552; 7 JA 1250 [City's undisputed material fact 3].)

As the City Manager explained in a report to the City Council Rules Committee on October 27, 1981, a task force which had "met over the past 2 1/2 years" concluded that it was in the City's best interest to have its employees withdraw from the Social Security and Medicare systems, saving the City more than $4.5 million per year. (8 JA 1531-1534.)

The City Manager explained that "[w]hile Social Security provides a range of . . . benefits, the two most common concerns of employees would be the replacement for the Disability and Medicare Benefits." (8 JA 1533.) Although the City had "already instituted a Long Term Disability Program which . . . is an adequate replacement for the Social Security Disability program" it had no existing replacement for Medicare. (*Ibid.*) Therefore, the City Manager recommended that "Medicare coverage is proposed to be replaced for future retirees with the City sponsored health insurance plans." (*Ibid.*) Under that proposal: "[t]he current retirement system would be amended to provide that

the retirement system would pay the premiums for participation in City-sponsored health plans for employees who retire after January 1, 1982." (8 JA 1532.)

a. Resolution R-255320

To accomplish the City's desire to withdraw from Social Security and Medicare and reap the savings it desired, an employee vote was required. (8 JA 1532-1533; 8 JA 1536; 8 JA 1539.) On November 2, 1981, the City Council adopted Resolution R-255320 which approved conducting the election. (8 JA 1536-1537.) A majority of City employees had to approve the withdrawal for the City's plan to be successful. (8 JA 1536.) The resolution stated: "if a majority of those employees voting wish to withdraw, it is intended that a variety of in-lieu benefit options be established . . . ." (*Ibid.*) One such benefit "intended as an in-lieu benefit [was] to amend the Retirement System for future retirees to provide medical insurance on the same basis as is provided to City employees." (*Ibid.*) Resolution R-255320 was approved by the City Attorney. (8 JA 1536-1537.)

2. *The Retiree Health Benefit was offered to employees as consideration for their vote to opt out of the Social Security and Medicare systems.*

a. City Manager's memorandum to all employees dated November 20, 1981

Eighteen days later, in order to accomplish its objective of saving millions of dollars in employer Social Security contributions and to induce City employees to vote to withdraw from the Social Security and Medicare systems, the City Manager circulated a memorandum to all affected City employees. (8 JA 1539-1550; 8 JA 1583 [City Attorney

memo dated September 27, 2007].) The City stated that it had been studying withdrawal from Social Security "[f]or several years." (8 JA 1539.)

"[A]ttached [to the memo] was a series of questions and answers most likely to arise concerning the plan and proposed withdrawal from Social Security." (8 JA 1539, 1544-1548.) Employees were advised to "review it carefully." (8 JA 1539.)

The following question and answer was provided under the heading "Medicare Medical Insurance": "24. [Question:] What will the City provide for medical insurance? [Answer:] *Retired employees will be included in the City health plans. The City will pay the premiums.*" (8 JA 1548, italics added; 8 JA 1473-1474 [¶ 4]; 8 JA 1562.)

In answering another question, the City *expressly* promised that "[t]he City will pay for the retired employee's health insurance premiums." (8 JA 1547; 8 JA 1473-1474 [¶ 4]; 8 JA 1583.)

3. *After the employees voted in favor of withdrawal from the Social Security and Medicare systems, the City codified the agreement it had reached with its employees regarding the Retiree Health Benefit.*

Relying on the City's promises, City employees approved their withdrawal from the Social Security and Medicare systems. (8 JA 1474 [¶ 8].) The City then passed a resolution and enacted an ordinance establishing the Retiree Health Benefit.

a. Resolution R-255610

As City Attorney Opinion No. 2007-04 correctly states, "Resolution R-255610, adopted January 4, 1982, and effective January 1, 1982, set the parameters for the

[Retiree] Health Benefit." (8 JA 1583.)[1] That resolution expressly provided that "the intent of th[e City] Council [is] to provide [the Retiree Health Benefit] as a *permanent* benefit for eligible retirees." (8 JA 1552; 8 JA 1555; 8 JA 1583, italics added.) The City explicitly promised that "in lieu of Social Security participation," the City would provide eligible retirees "the same choice of [health insurance] coverage as is offered to active employees of the City." (8 JA 1552.) In other words, retirees would get the same insurance *coverage* as active employees. (8 JA 1473-1474 [¶¶ 4-7].) The City promised "premiums for said insurance are to be paid out of the City-Sponsored Retiree Health Insurance Plan Fund." (8 JA 1552.) Finally, that resolution provided that "City-Sponsored Retiree Health Insurance shall be made available to eligible retirees, commencing January 8, 1982." (*Ibid.*) Resolution R-255610 was also approved by the City Attorney. (8 JA 1553.)

The City Attorney was "directed to prepare, to be effective July 1, 1982, an amendment to the retirement system ordinances of the San Diego Municipal Code ("SDMC"), to include within the retirement system ordinances provision for the City-Sponsored Group Health Insurance Program for eligible retirees and premium payments thereof." (8 JA 1553.)

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[1] A city attorney's opinion is judicially noticeable as legislative history reflecting the basis of an enactment. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 9, fn. 5.) The trial court granted all requests for judicial notice (7 JA 1255-1438; 8 JA 1498-1645) with the exception of an opinion written by the Superior Court for the County of Los Angeles (8 JA 1610-1625). (10 JA 1892.)

b. Ordinance O-15758

On June 1, 1982, the City Council unanimously approved Ordinance O-15758, which codified the Retiree Health Benefit. (8 JA 1555-1558; 8 JA 1628-1629 [Agenda Item 50]).) As directed in Resolution R-255610, the City Attorney codified the Retiree Health Benefit "within the retirement system ordinances," i.e., in Article 4 of Chapter 2 of the San Diego Municipal Code, as former San Diego Municipal Code section 24.0907.2. (8 JA 1552; 8 JA 1555, 1557-1558.)

Ordinance O-15758 incorporated and attached Resolution R-255610. (8 JA 1555.) It repeated that "it [is] the intent of the Council to provide such [retiree health insurance] coverage as a *permanent* benefit for eligible employees." (*Ibid.*, italics added.) "[P]remiums for said City-sponsored group health insurance [will] be paid . . . by the City . . . ." (*Ibid.*; 8 JA 1558 ["Retiree premiums shall be paid by the City"]; 8 JA 1558 ["The Auditor and Comptroller shall set aside . . . an amount sufficient to pay premiums as required"]; 8 JA 1473-1474 [¶ 4].)

Eligibility for the Retiree Health benefit simply required that an employee (1) "be on the active payroll of The City of San Diego on *or after* January 1, 1982, (2) "retire on or after January 8, 1982, and (3) "be eligible for an receiv[ing] a retirement allowance from The City of San Diego." (8 JA 1557-1558, italics added.)

Ordinance O-15758 was also approved by the City Attorney. (8 JA 1558.)

4. ***The essential terms of the agreement were that (1) City employees would lose all Social Security benefits, but (2) after retirement City employees would receive the same health insurance benefits as active employees, and (3) the City would pay the premiums for that insurance.***

The essential terms of the agreement between the City and its employees was not complicated. City employees forfeited their right to receive Social Security benefits, including Medicare. In exchange, eligible employees who retired after January 8, 1982, would (1) receive the Retiree Health Benefit, which consist of "the same choice of [health insurance] coverage as is offered to active employees of the City," and (2) the City would pay the premiums for such insurance. (8 JA 1532-1533; 8 JA 1536-1537; 8 JA 1539, 1547-1548; 8 JA 1552-1553; 8 JA 1555-1558; 8 JA 1473-1475; 8 JA 1562; 8 JA 1583-1584; 7 JA 1260-1261.)

5. ***The City reserved the right to modify the scope of health care coverage provided to retirees so that it could maintain consistency in the health insurance benefit provided to active and retired employees, i.e., when active health insurance coverage changed, so would the Retiree Health Benefit.***

In Ordinance No. O-15758 the City ensured that the insurance coverage under the Retiree Health Benefit could change along with any changes to insurance coverage under the health insurance provided to active employees. (8 JA 1474 [¶¶ 5-7]; 8 JA 1558.) That ordinance provided: "[h]ealth plan *coverage* for retirees and eligible dependents is subject to modification by the City and provider of health care services, and may be modified periodically as deemed necessary and appropriate." (8 JA 1558, italics added.) As the uncontroverted declaration of former City Treasurer Conny Jamison—who was

"one of the few employees requested by City management to assist in the wording of the Retiree Health Benefit" (8 JA 1473 [¶ 3])—established, "we included [this] provision to allow the City the flexibility to make the same types of changes to the coverage to retired employees of the City (with whom the City does not negotiate labor contracts)." (8 JA 1474 [¶¶ 5-7].)

6. *In 2006, the City's Mayor confirmed that: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange they were promised life-time health insurance upon retirement."*

The *contractual* nature of the vote to withdraw from the Social Security System has been confirmed by former City Mayor Jerry Sanders. On March 14, 2006, during "Sunshine Week," the City's Mayor promulgated a "Fact Sheet," which stated: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange, they were promised life-time health insurance upon retirement." (8 JA 1562.)

7. *When Gibson became employed with the City in 1986, he was promised that (1) upon retirement, he would receive the same health insurance benefits as active employees and (2) the City would pay the premiums for that insurance.*

Gibson began working for the City in 1985 and became a full-time employee with benefits in 1986. (7 JA 1251 [fact 10]; 7 JA 1357-1358, 1365; 8 JA 1471 [¶ 2].) At that time, Gibson qualified for the Retiree Health Benefit, which was applicable to all City employees "on the active payroll of The City of San Diego on or *after* January 1, 1982." (8 JA 1557, italics added.) At the time he became a City employee eligible for benefits, the City had enacted an ordinance which provided eligible retirees "the same choice of

[health insurance] coverage as is offered to active employees of the City." (8 JA 1552; 8 JA 1555.) In other words, retirees would get the same insurance coverage as active employees. (8 JA 1473-1474 [¶¶ 4-7].) Further, the City promised that it would pay the cost of the premiums of the health insurance it provided to retired employees. (8 JA 1473-1474 [¶ 4]; 8 JA 1552; 8 JA 1558.)

Gibson was aware of the Retiree Health Benefit at the time he accepted full-time employment with the City. (7 JA 1367:14-23.) He was told by a human resources staff member that it would be a "lifetime benefit. (*Ibid.*) The City also repeatedly promised to Gibson during his employment that he would be provided lifetime retiree health benefits. (9 JA 1788-1794; 8 JA 1472 [¶ 7].) This promise was repeated to Gibson later in his career. (9 JA 1788-1794.) Stated simply, the Retiree Health Benefit was a form of deferred compensation. (8 JA 1536.)

8. *Gibson worked for the City for more than 20 years.*

Gibson worked for the City for a total of 21 years and left the employment of the City on December 26, 2006. (7 JA 1251 [fact 13]; 7 JA 1354:18-22.) He resigned to take another job. (7 JA 1354:23-24.)

9. *Gibson became a "Deferred Member" of the retirement system.*

Gibson left City employment at age 43, well below the City's minimum retirement age of 55 years. (9 JA 1787 [Gibson born in March 1963]; 7 JA 1252 [facts 20, 22]; 7 JA 1399 [City Charter, § 141: employees may retire at age 55 with 20 years of service[2]].)

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[2] The City Charter permits "policemen, firemen, and full time lifeguards" to retire at age 50 with 20 years of service, but Gibson was not employed in those positions.

He became a "Deferred Member" of the retirement system. (8 JA 1519.)

10. ***San Diego Municipal Code section 24.0103 provides that "Deferred Members" are entitled to "the retirement benefits in effect when the Deferred Member terminates City . . . service," i.e., on December 26, 2006, for Gibson.***

The City's Municipal Code provides for the level of retirement benefits to be received by a deferred member of the retirement system when that person actually retires. San Diego Municipal Code section 24.0103 provides:

> "'*Deferred Member*' means any Member who leaves his or her employee contributions on deposit with the Retirement System after terminating City or contracting agency service. *When a Deferred Member applies for retirement benefits, he or she is entitled, when eligible, for the retirement benefits in effect on the day the Deferred Member terminates City or contracting agency service and leaves his or her contributions on deposit with the Retirement System.*"

(8 JA 1519, italics modified.)

On December 26, 2006, when Gibson completed his employment for the City and became a deferred member of the retirement system, San Diego Municipal Code section 24.0103 defined a "Health Eligible Retiree" as:

> "'Health Eligible Retiree' means any retired General Member, Safety Member, or Elected Officer who: (1) was on the active payroll of the City of San Diego on or after October 5, 1980, and (2) retires on or after October 6, 1980, and (3) is eligible for and is receiving a retirement allowance from the Retirement System.

(8 JA 1520.)

(7 JA 1251 [facts 12-14].)

11. *In 2011 the City adopted an ordinance which excluded Gibson from the Retiree Health Benefit he had been promised during his employment.*

On or about October 18, 2011, almost five years after Gibson completed his employment for the City and became a deferred member of the retirement system, the City adopted Ordinance O-20105. (7 JA 1260-1287.) That ordinance narrowed the definition of a "Health Eligible Retiree" in a manner that excluded Gibson. The new ordinance also lowered the Retiree Health Benefit Gibson had been promised during his employment with the City.

Ordinance O-20105 added a new requirement that a "Health Eligible Retiree" must retire *before April 1, 2012*. It provides:

> "'*Health Eligible Retiree*' means any retired General Member, Safety Member, or Elected Officer who: (1) was on the active payroll of the City of San Diego on or after October 5, 1980 and before July 1, 2005, (2) retires on or after October 6, 1980, (3) is eligible for and is receiving a retirement allowance from the Retirement System, and (4) *if the Member is a General Member or a Safety Member, retires before April 1, 2012*.

(7 JA 1267, italics modified.) Because an employee with 20 years of service may not retire until he or she reaches age 55 (7 JA 1399), and Gibson was born in March 1963 (7 JA 1348), he is not eligible to retire until March 2018. Therefore, under the additional fourth requirement of Ordinance O-20105, Gibson would never be a "Health Eligible Retiree."[3]

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[3] Ordinance O-20105 contains a concession of the eligibility requirements which existed prior to the adoption of that ordinance. (7 JA 1261 [last "Whereas" clause].)

For employees who retire after March 31, 2012, Ordinance O-20105 also created a reduced retiree health benefit. (7 JA 1274-1286.) That revised benefit provides for three options: A, B, and C. Because Gibson was not on the City payroll on April 1, 2012, he is ineligible for Option A (7 JA 1276) or Option B (7 JA 1279). He is only eligible for Option C. (7 JA 1280 [SDMC section 29.0103(d)(1)(B) applies to Gibson because he was a "deferred member" on April 1, 2012].)

Under Option C, upon Gibson's retirement, "the City will deposit into [Gibson's defined contribution] Plan account an amount that, assuming an annual investment return of six percent, is projected to yield $8,500 annually [or $708.33 monthly] during [Gibson's] life expectancy as determined under subparagraphs (A) or (B) . . . ." (7 JA 1280; 7 JA 1242:22-24 [City concession that Gibson's new retiree health benefit will be fixed at $708 per month].) This is a lower benefit than the one in effect on December 26, 2006, the date Gibson left City service and went on deferred status. As of 2014, that Retiree Health Benefit (1) fully reimbursed retired employees for monthly insurance premiums ranging from $754.77 to $931.24, (2) allowed the reimbursement amount to increase by up to 10 percent per year for life,[4] and (3) provided full reimbursement for

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[4] In 2002, the City and all active employees, including Gibson agreed to modify the Retiree Health Benefit to cap the City's responsibility to pay retirees' full premium cost to a 10 percent increase per year, tied to the "projected increase for National Health Expenditures by the Centers for Medicare and Medicaid Services." (8 JA 1527 [under SDMC section 24.1202(a)(3), the amount paid for retiree health benefit can increase 10 percent per year]; 8 JA 1590; 8 JA 1572 [¶ 5].)

Medicare Part B coverage.[5]

B. Statement of Procedure

1. *After the City's 2011 ordinance unilaterally reduced the Retiree Health Benefit Gibson had been promised, Gibson filed an action for (1) declaratory relief, (2) mandamus and (3) breach of contract.*

On May 15, 2012, concerned because the City had reduced the Retiree Health Benefit Gibson had been promised during his entire employment, he filed an action against the City for (1) declaratory relief, (2) mandamus, and (3) breach of contract. (1 JA 1-11.)[6]

In his first cause of action for declaratory relief, Gibson sought "a judicial determination that the portions of Ordinance O-20105 which reduce[] the Retiree Health Benefit of deferred members is invalid." (1 JA 11.)

In his third cause of action for breach of express contract, Gibson sought damages. (*Ibid.*)

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[5] 9 JA 1743 [as of 2013-2014, all former City employees (who like Gibson, were not members of the POA or Local 127) who retired before March 31, 2012, were receiving between $754.77 to $931.24 per month]; 8 JA 1472 [¶ 5] [amount paid for former Retiree Health Benefit can increase by 10% per year]; 7 JA 1261 [acknowledging former ordinance provided a Retiree Health Benefit that "escalated annually"]; 8 JA 1527; 9 JA 1755 [employees who retire before March 31, 2012, receive 100 percent reimbursement for Medicare Part B, those retiring after that date are not guaranteed 100 percent reimbursement and have only limited funds to pay for Medicare Part B].

[6] Although Gibson filed his action as a putative class action on behalf of himself and similarly-situated employees (1 JA 1), he never sought class certification and the class was never certified by the trial court.

2. *The trial court sustained the City's demurrer to all three of Gibson's causes of action and allowed Gibson to amend only to allege a breach of implied contract claim.*

The City filed a general demurrer to Gibson's complaint. (1 JA 13-71.) Over Gibson's opposition (1 JA 72-2 JA 286), the trial court sustained the City's demurrer as to all three causes of action. (2 JA 379-381.[7]) The trial court permitted Gibson leave to amend, but only "to amend to allege facts to show there is an *implied* contract." (2 JA 381, italics added.[8])

3. *Gibson adhered to the trial court's order and filed an amended complaint asserting only a cause of action for breach of implied contract.*

Following the trial court's order limiting amendment, Gibson filed an amended complaint. (2 JA 382-392.) In his first amended complaint, Gibson explained that in exchange for providing more than 20 years of labor to the City foregoing his right to receive Social Security benefits (2 JA 389, ¶ 40), the City agreed:

> "(a) to provide Gibson . . ., after retirement from the City, medical insurance on the same basis as then provided to the City's active employees (i.e., Resolution Number R-255610, adopted January 4, 1982, agreeing to "establish a City-Sponsored Group Health Insurance Plan for eligible retirees, providing the same choice of program coverage as offered active City employees" and "[t]hat the program of City-Sponsored Retiree Health Insurance shall be made

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[7] The trial court's tentative ruling was to sustain the City's demurrer *without* leave to amend. (2 JA 352.) However, after oral argument (1 RT 1-43) and Gibson's formal request for leave to amend (2 JA 355-375), the trial court took the matter under submission (2 JA 354) and permitted Gibson limited leave to amend. (2 JA 381.)

[8] The trial court also denied Gibson's request to amend (2 JA 355-375) pursuant to *Requa v. Regents of the University of California* (2012) 213 Cal.App.4th 213) to allege promissory and equitable estoppel. (2 JA 381.)

available to eligible retirees, commencing January 8, 1982);

(b) to pay for the cost of the coverage provided (i.e., Resolution Number R-255610, adopted January 4, 1982, agreeing "to cause premiums for said insurance to be paid out of the City-Sponsored Retiree Health Insurance Plan Fund" and Ordinance O-15758 "Retiree premiums shall be paid by the City"); and

(c) . . . '[r]etired employees will be included in the City health plans. The City will pay the premiums."

(2 JA 388 [¶ 38].)

Because Gibson had been limited to a claim for breach of implied contract, he sought only damages for the alleged breach. (2 JA 391.)

4. *The trial court overruled the City's demurrer to Gibson's first amended complaint, holding that the City adopted a "permanent benefit for eligible employees" and promised to pay the premiums for that insurance.*

The City filed another general demurrer to Gibson's first amended complaint. (2 JA 394-3 JA 588.) After Gibson filed his opposition (3 JA 589-4 JA 805), the trial court overruled the City's demurrer. (4 JA 830-832.)

In denying the City's demurrer, the trial court explained:

> "Resolution No. R-255610, adopted January 4, 19[8]2, provided that the City had declared that 'certain benefits shall be provided to employees in lieu of Social Security participation.' It was the intent of the City Council 'to provide such coverage as a permanent benefit for eligible retirees . . . .' [Citation.]
>
> Ordinance No. O-15758, adopted on June 1, 1982, also provided that it was the intent of the Council to provide City-sponsored health benefits for eligible retirees as a permanent benefit. Retiree premiums shall be paid by the City. Premium rates for eligible retirees shall be determined and established by the City. Health plan

> coverage for retirees is subject to modification by the City and the provider of health care services and may be modified periodically as deemed necessary and appropriate. [Citation.]
>
> The intent of Ordinance O-15758 was to provide City-sponsored group health insurance benefits as a permanent benefit for eligible employees and the City would pay the premiums. *While the Ordinance contained a reservation of rights, the reservation is ambiguous given the promises of permanency and payment.*
>
> In March 2006, the Mayor's office released a 'Fact Sheet', which stated that '[i]n 1982, City employees voted to get out of the Social Security/Medicare system. In exchange, they were promised life-time health insurance upon retirement. [Citation.]
>
> Ordinance No. O-20105 . . . provides maximum payment or reimbursement levels for certain health eligible retirees who retire after a certain date. [Citation.] Plaintiff alleges this ordinance substantially and materially decreased the amount of the Retiree Health Benefit that he . . . will be entitled to receive upon retirement.
>
> Similar to Requa, the allegations and the judicially noticed documents here are sufficient to state a cause of action for breach of an implied contract that the City would permanently provide retiree health benefits and pay the premiums on the same basis as provided to active employees. [Citation.]"

(4 JA 831-832, italics added.)

5. *The trial court granted the City's motion for summary judgment on Gibson's remaining breach of implied contract claim.*

The City then moved for summary judgment (5 JA 839-6 JA 1219), a motion the City later amended. (7 JA 1220-1438.)

Gibson opposed the City's motion. (8 JA 1439-9 JA 1794.) In his opposition, Gibson provided a declaration from former City treasurer Conny Jamison who "was one of a few employees requested by City management to assist in the wording of the Retiree

Health Benefit" in 1982. (8 JA 1473 [¶ 3].) Gibson also provided a personal declaration (8 JA 1471-1472), lodged eight exhibits (9 JA 1646-1794), and requested judicial notice of 17 additional documents (8 JA 1498-1645).

On June 5, 2014, the trial court granted the City's motion for summary judgment on Gibson's sole remaining claim for breach of implied contract. (10 JA 1892-1894.) Judgment was entered on June 24, 2014. (10 JA 1884-1914.)

6. *Gibson timely filed this appeal.*

Gibson timely filed his appeal on August 1, 2014. (10 JA 1915-1917.)

C. Statement of Appealability

Because Gibson's appeal is from a final judgment entered after an order granting the City's motion for summary judgment, this Court has jurisdiction to hear this appeal. (Code Civ. Proc., § 904.1, subd. (a)(1); Cal. Rules of Court, rule 8.204(a)(2)(B).)

III

ISSUES PRESENTED

1. Whether the trial court erred in sustaining the City's general demurrer to Gibson's causes of action for declaratory relief and breach of express contract (Section IV(A)-(C), *post*).

2. Whether, even if the Retiree Health Benefit is not a contractual right, Gibson has a right under municipal law to receive that benefit because it was in effect on the day he became a deferred member (Section IV(D), *post*).

3. Whether the trial court abused its discretion by limiting leave to amend to state only a breach of implied contract claim (Section V, *post*).

4. Whether the trial court erred by granting summary judgment despite ruling that the modification-of-coverage clause is ambiguous (Section VI(B), *post*).

5. Whether the trial court erred by granting the City's motion for summary judgment because there is a triable issue of fact regarding the City's promises to (a) provide Gibson the same health insurance as it provides to active employees and (b) to pay for it (Section VI(C), *post*).

6. Whether the trial court erred by granting the City's motion for summary judgment because there is a triable issue of fact regarding whether Ordinance O-20105 constitutes an anticipatory breach of the implied contract (Section VI(D), *post*).

7. Whether the trial court erred by granting the City's motion for summary judgment because there is a triable issue of fact regarding Gibson's damages (Section VI(E), *post*).

IV

THE TRIAL COURT ERRED IN SUSTAINING THE CITY'S GENERAL DEMURRER.

A. Standard of Review

In *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 157, the Supreme Court restated a plaintiff's burden of pleading as follows: "'"[a]ll that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the *essential facts* of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of his cause of action"' (italics added)." (*Semole v. Sancoucie* (1972) 28 Cal.App.3d 714, 719; *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415 [a plaintiff must allege ultimate facts that as a whole apprise the adversary of the factual basis of the claim]; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 378, pp. 513-515.)

"In reviewing the sufficiency of a complaint against a general demurrer," reviewing courts "treat the demurrer as admitting all material facts properly pleaded." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed," and given a reasonable interpretation, "with a view to substantial justice between the parties." (Code Civ. Proc., § 452; *Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140-141.) The court treats as true not only the complaint's material factual allegations, but also facts which may be reasonably implied or inferred from those expressly alleged. (*Id.* at p. 141; *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.)

"Because the function of a demurrer is to test the sufficiency of a pleading as a matter of law, [reviewing courts] apply the de novo standard of review." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247; *Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542, 549.) It is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1201 (*Aryeh*); *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810 (*Fox*).)

A trial court's "[i]nterpretation of statutes, including local ordinances and municipal codes, is [also] subject to de novo review." (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 78 (*City of San Diego*); *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Rubalcava v. Martinez* (2007) 158 Cal.App.4th 563, 570.) Therefore, the trial court's interpretations of San Diego Municipal Code section 24.0103, Resolution R-255320, Resolution R-255610, Ordinance O-15758, Ordinance O-20105, and the San Diego City Charter, among other similar documents, are reviewed independently.

B. Gibson's First Cause of Action Stated a Valid Claim for Declaratory Relief.

"Declaratory relief is available 'in cases of actual controversy relating to the legal rights and duties of the respective parties.' (Code Civ. Proc., § 1060.) '"Whether a claim presents an 'actual controversy' within the meaning of Code of Civil Procedure section 1060 is a question of law that [appellate courts] review de novo." [Citation.]'" (*Coronado Cays Homeowners Assn. v. City of Coronado* (2011) 193 Cal.App.4th 602,

607, italics omitted.) "'Where, therefore, a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; . . . if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action.'" (*Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1426–1427.)

"Declaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, rights are invaded or wrongs are committed. Thus the remedy is to be used to advance preventive justice, to declare rather than execute rights. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 360.) Declaratory relief serves a practical purpose in stabilizing an uncertain or disputed legal relation, thereby defusing doubts which might otherwise lead to subsequent litigation. (*Ibid.*)" (*Kirkwood v. California State Automobile Assn. Inter–Ins. Bureau* (2011) 193 Cal.App.4th 49, 59.)

A prerequisite to the issuance of a declaratory judgment is the existence of a "ripe" controversy. A controversy is ripe if it is "'definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170–171.) A declaratory judgment must "'decree, not suggest,

what the parties may or may not do.'" (*Ibid.*) "'A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.'" (*Ibid.*) However, section 1060 *"does not require a breach of contract in order to obtain declaratory relief*, only an 'actual controversy.' Declaratory relief pursuant to this section has frequently been used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations. [Citations.]" (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647, italics added.) Thus, a plaintiff seeking declaratory relief need not show past harm; he "must instead show a very significant possibility of future harm." (*Coral Const., Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 17 (*Coral Const.*).) "Any doubt should be resolved in favor of granting declaratory relief." (*Warren v. Kaiser Foundation Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 683.)

This case is a paradigm of when declaratory relief is appropriate. *First*, there is an actual dispute between the parties. The City contends that Ordinance O-20105 may lawfully reduce the retiree health benefit it promised Gibson. (1 JA 9 [¶ 47].) Gibson contends to the contrary, both under ordinary contract principles and San Diego Municipal Code section 24.0103, which provides that a deferred member shall receive the benefits in existence when that member goes on deferred status. (1 JA 9 [¶ 48].) *Second*, it is reasonably likely that the City will not increase the retiree health benefit available to Gibson, particularly now that it would require a public vote under San Diego Municipal Code section 24.1902. (1 JA 179.) *Third*, and most significantly, Gibson will suffer a

hardship if the issue is not adjudicated now, because he needs to know whether he is entitled to the Retiree Health Benefit he was promised before he finalizes his retirement plans.

"It is a settled rule that in an action in which the complaint alleges sufficient facts to show the existence of an actual controversy within the provisions of section 1060 of the Code of Civil Procedure and requests that the respective rights and duties of the parties be adjudged, it is the duty of the court to declare such rights and duties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration and that it is error to sustain a demurrer without leave to amend to such a complaint. [Citations.] If the complaint is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is appropriate, it is error for the trial court to enter a judgment on the pleadings dismissing the action. [Citations.]" (*Wilson v. Board of Retirement* (1957) 156 Cal.App.2d 195, 199-200.)

Because Gibson stated an adequate claim for declaratory relief, the trial court erred when it sustained the City's demurrer to that cause of action.

C. Gibson's Third Cause Adequately Alleged Breach of an Express Contract.

1. *The parties had an express contract because the terms were stated in words.*

As the California Supreme Court explained in *Retired Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.4th 1171 (*REAOC II*): "A contract is either express or implied. (Civ. Code, § 1619.) The terms of an express contract are stated in

words. (Civ. Code, § 1620.) The existence and terms of an implied contract are manifested by conduct. (Civ. Code, § 1621.) The distinction reflects no difference in legal effect but merely in the mode of manifesting assent." (*Id.* at p. 1178.) Here, because the parties' contract was stated in words, it is properly viewed as an express contract.

2. *The terms of the express contract were contained in (1) Resolution R-255320, (2) Resolution R-255610, and (3) Ordinance O-15758.*

"[R]esolutions and ordinances may create a contract if . . . they 'contain[ ] an unambiguous element of exchange of consideration by a private party for consideration offered by the [City].'" (*Sonoma County Ass'n of Retired Employees v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, 1117 (*Sonoma County*), quoting *REAOC II*, *supra*, 52 Cal.4th at p. 1187.) "In the alternative, the [City's] intent to make a contract by legislation 'is clearly shown' when a resolution or ordinance ratifies or approves the contract." (*Sonoma County* at p. 1117, quoting *REAOC II* at p. 1187.)

The express contract between the City and its employees was stated in words the City adopted in two resolutions and in an ordinance, all approving that contract.

Resolution R-255320 provided that "if a majority of those employees voting wish to withdraw [from the Social Security system], it is intended that a variety of in-lieu benefit options be established . . . ." (1 JA 137.) One such benefit "intended as an in-lieu benefit [was] to amend the Retirement System for future retirees to provide medical insurance on the same basis as is provided to City employees." (*Ibid.*)

Resolution R-255610 expressly provided that "the intent of th[e City] Council

[was] to provide [the Retiree Health Benefit] as a *permanent* benefit for eligible retirees." (1 JA 153, italics added.) The City explicitly promised that "in lieu of Social Security participation," the City would provide eligible retirees "the same choice of [health insurance] coverage as is offered to active employees of the City." (*Ibid.*) The City promised "premiums for said insurance are to be paid out of the City-Sponsored Retiree Health Insurance Plan Fund." (*Ibid.*) Finally, that resolution provided that "City-Sponsored Retiree Health Insurance shall be made available to eligible retirees, commencing January 8, 1982." (*Ibid.*)

Finally, Ordinance O-15758 attached and incorporated Resolution R-255610. (1 JA 156.) It repeated that "it [is] the intent of the Council to provide such [retiree health insurance] coverage as a *permanent* benefit for eligible employees." (*Ibid.*, italics added.) "[P]remiums for said City-sponsored group health insurance [will] be paid . . . by the City . . . ." (*Ibid.*; 1 JA 159 ["Retiree premiums shall be paid by the City"].)

Eligibility for the Retiree Health benefit simply required that an employee (1) "be on the active payroll of The City of San Diego on *or after* January 1, 1982, (2) "retire on or after January 8, 1982, and (3) "be eligible for and receive a retirement allowance from The City of San Diego." (1 JA 158-159, italics added.)

These resolutions and the ordinance are more than sufficient to create a binding, express contract. (*REAOC II*, *supra*, 52 Cal.4th at p. 1187 ["intent to make a contract by legislation is clearly shown when a resolution or ordinance ratifies or approves the contract"].)

3. *Under the parties' express contract, the City agreed to provide and pay the premiums for a permanent retiree health benefit in exchange for Gibson's labor.*

Gibson began working for the City in 1985 and became a full-time employee with benefits in 1986. (7 JA 1251 [fact 10]; 7 JA 1357-1358, 1365; 8 JA 1471 [¶ 2].)

Gibson was aware of the Retiree Health Benefit at the time he accepted full-time employment with the City. (7 JA 1367:14-23.) He was told by a human resources staff member that it would be a "lifetime benefit." (*Ibid.*) The City also repeatedly promised Gibson during his employment that he would be provided lifetime retiree health benefits. (9 JA 1788-1794; 8 JA 1472 [¶ 7].) This promise was repeated to Gibson later in his career. (9 JA 1791-1793.)

Gibson worked for the City for a total of 21 years and left the employment of the City on December 26, 2006. (7 JA 1251 [fact 13]; 7 JA 1354:18-22.)

During Gibson's entire span of employment for the City, the Retiree Health Benefit was applicable to him because he was "on the active payroll of The City of San Diego on or *after* January 1, 1982." (1 JA 158, italics added.) At the time he became a City employee eligible for employment benefits, the City had enacted an ordinance which provided eligible retirees "the same choice of [health insurance] coverage as is offered to active employees of the City." (1 JA 153; 1 JA 156.) In other words, retirees would get the same insurance coverage as active employees. (8 JA 1473-1474 [¶¶ 4-7].) Further, the City promised that it would pay the cost of the premiums of the health insurance it provided to retired employees. (1 JA 149; 1 JA 153; 8 JA 159 ["Retiree premiums shall

be paid by the City"].) The Retiree Health Benefit was expressly labeled a "permanent" benefit. (1 JA 153; 1 JA 156.)

"'"[T]he contractual basis of [a public employee's] right is the exchange of an employee's services for the [deferred compensation] right offered by the statute"' [Citations.]" (*Deputy Sheriffs' Association of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 579 (*Deputy Sheriffs' Association*) When Gibson worked for the City, he accepted the City's proposal—labor for compensation and deferred compensation. "Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal." (Civ. Code, § 1584; *DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 812-813 [employee's acceptance of continued employment constituted acceptance of employer's compensation plan].) The Retiree Health Benefit was simply a form of deferred compensation Gibson would receive later, in exchange for his labor.

"As the California Supreme Court previously explained, 'all modern California decisions treat labor-management agreements whether in public employment or private as enforceable contracts which should be interpreted to execute the mutual intent and purpose of the parties.' [Citations.]" (*Sonoma County*, *supra*, 708 F.3d at pp. 1115-1116; *REAOC* II, *supra*, 52 Cal.4th at pp. 1178-1179, 1187 [the government is bound by its contracts, including its implied contracts]; *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 334-338 (*Glendale*) [binding agreements enforceable against City]; *National City Police Officers' Assn. v. City of National City* (2001) 87

Cal.App.4th 1274, 1278.)

Gibson alleged that the City made a contractual promise to him, namely, that in exchange for his labor the City would provide him deferred compensation when he reached retirement age. (1 JA 2-5 [¶¶ 7-31].) That deferred compensation included a Retiree Health Benefit which would provide the same coverage as the health insurance provided to the City's active employees. (1 JA 153-154; 1 JA 156-159; 1 JA 149.) The City agreed to pay the premiums for that insurance. (*Ibid.*) Gibson alleged that he had fully performed his part of that contract by providing labor to the City for more than 20 years. (1 JA 2[¶ 7], 5 [¶¶ 28-31], 10 [¶ 59].) Gibson also alleged that the City had a legal duty to provide the deferred compensation it had promised to him. (1 JA 10 [¶ 58].) Finally, Gibson alleged that the City's adoption of Ordinance O-20105 on October 11, 2011 was a material, anticipatory breach of that contract because it substantially and materially decreased the deferred compensation Gibson had already earned. (1 JA 10 [¶ 60].)

4. *Under the state and federal constitutions, contracts may not be impaired by legislation.*

Constitutional prohibitions "limit[] the [City's] power 'to modify its own contracts with other parties . . . .'" (*Deputy Sheriffs' Association*, *supra*, 233 Cal.App.4th at p. 578, quoting *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1130.) "'[O]nce a public employee has accepted employment and performed work for a public employer, the employee obtains certain rights arising from the legislative provisions that establish the terms of the employment relationship—rights that are protected by the

contract clause of the state Constitution from elimination or repudiation by the state.' (*White v. Davis* (2003) 30 Cal.4th 528, 566 . . . .)" (*Deputy Sheriffs' Association* at pp. 578-579.) "Under the California Constitution, a 'law impairing the obligation of contracts may not be passed.' (Cal. Const., art. I, § 9.) Similarly, under the federal Constitution, 'No state shall . . . pass any . . . law impairing the obligation of contracts . . . .' (U.S. Const., art. I, § 10, cl. 1.) The contract clauses of the state and federal Constitutions limit the power of public entities to modify their own contracts with other parties. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1130 . . . .)" (*San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1222 (*San Bernardino*); *Protect Our Benefits v. City and County of San Francisco* (2015) ___Cal.App.4th ___ [2015 WL 1404952, *4].)

The City's original statement of legislative intent bears directly on the issue whether the Retiree Health Benefit is a constitutionally-protected, *contractual* right, or merely a temporal term of employment. (*San Bernardino*, *supra*, 67 Cal.App.4th at p. 1223.) That issue turns on the City Council's repeated statements in Resolution R-255610 and Ordinance O-15758 that "it is the *intent* of the City Council to provide [the Retiree Health Benefit] as a *permanent* benefit . . . ." (1 JA 153; 1 JA 156, italics added.)

5. *Under ordinary principles of contract law, a party may not unilaterally change the terms of the contract, particularly after the other party has fully performed.*

Recently, both the United States and California Supreme Courts have explained that the determination of whether an employer must provide retiree health benefits simply requires the application of "ordinary contract principles."

In *M & G Polymers USA, LLC v. Tackett* (2015) 135 S.Ct 926, the Court held that the determination of the terms of an employer's agreement to provide retiree health care benefits simply requires application of "ordinary principles of contract law." (*Id.* at p. 930.)

And in *REAOC II*, the California Supreme Court held that ordinary contract principles apply to governmental entities to determine the nature and extent of an agreement related to retiree health care benefits. (*REAOC II*, *supra*, 52 Cal.4th at pp. 1178-1179.) The Court explained: "All contracts, whether public or private, are to be interpreted by the same rules unless otherwise provided by the Civil Code. (Civ. Code, § 1635; see also *M.F. Kemper Const. Co. v. City of L.A.* (1951) 37 Cal.2d 696, 704 . . . ['California cases uniformly refuse to apply special rules of law simply because a governmental body is a party to a contract'].)" (*Id.* at p. 1179.)

In *Glendale*, *supra*, 15 Cal.3d at p. 336, the Supreme Court asked rhetorically, as if it had this case in mind:

> "Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its

> approval were without significance? *What integrity would be left in government if government itself could attack the integrity of its own agreement?*" (Italics added.)

The Court also affirmed that "successful bargaining rests upon the sanctity and legal viability of the given word." (*Ibid.*) Here, Gibson simply seeks to hold the City to its bargain—work for the City and receive deferred compensation which will include the Retiree Health Benefit.

The rules of contract interpretation are well established. In *People v. Shelton* (2006) 37 Cal.4th 759, 767, the Supreme Court explained: "'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (*Id.,* § 1649; see *AIU* [*Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807,] 822 . . . .)' (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265 . . . .) 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code, §§ 1635-1656; Code Civ. Proc., 1859-1861, 1864; [citations].)' (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 . . . ."

Here, the City's intention could not be clearer—if employees gave up Social Security they would receive the Retiree Health Benefit. The terms of the Retiree Health Benefit are explicit—provide retirees the same health insurance coverage as is provided to active employees at the City's expense. Gibson has fully performed his part of the parties' contract—he provided the City with more than 20 years of labor. In exchange, he was to receive deferred compensation, including the Retiree Health Benefit. The City may not change the terms of the parties' agreement after Gibson has full performed.

6. *The trial court's rationale for sustaining the City's general demurrer to Gibson's breach of express contract claim was erroneous.*

In its order sustaining the City's general demurrer to Gibson's breach of express contract claim without leave to amend that claim, the trial court expressed only two reasons. (2 JA 380.) Neither withstands scrutiny.

a. **The contract alleged by Gibson was not considered in *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System.***

First, the trial court held that "[t]he breach of contract claim fails because retiree medical benefits . . . are not protectable contract rights. (2 JA 380.) Citing *San Diego Police Officers' Association v. San Diego City Employees' Retirement System* (9th Cir. 2007) 568 F.3d 725, 739-740 (*SDPOA*), the trial court ruled that "[t]he City's reimbursement level is not a vested contractual benefit." (2 JA 380.)

SDPOA is distinguishable because the court in that case did not consider the express contract alleged by Gibson, which is based on two resolutions and an ordinance.

As explained above in Section IV(C)(2), the "intent to make a contract by legislation is clearly shown when a resolution or ordinance ratifies or approves the contract." (*REAOC II, supra*, 52 Cal.4th at p. 1187.) Neither Resolution R-255320, Resolution R-255610, nor Ordinance O-15758 were cited or considered in *SDPOA*. And Gibson took pains to demonstrate this to the trial court by providing it with the pleadings in *SDPOA* to prove that to be the case. (2 JA 206-286.) The appellate court in *SDPOA* was deciding only the issue raised by the appellants in that case—whether the trial court erred in granting a motion for summary judgment *based on the evidence presented at the trial court.*

"[C]ases are not authority for propositions not considered." (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).) Because the courts deciding *SDPOA* never considered Resolution R-255320, Resolution R-255610, or Ordinance O-15758—or the basis for Gibson's breach of express contract claim—that case is not controlling.

In *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 155, 1170-1171, the Court of Appeals cautioned: "In determining whether it is bound by an earlier decision, a court considers not merely the 'reason and spirit of cases' but also 'the letter of particular precedents.' *Fisher v. Prince,* 97 Eng. Rep. 876, 876 (K.B.1762). This includes not only the rule announced, *but also the facts giving rise to the dispute*, other rules considered and rejected and the views expressed in response to any dissent or concurrence. Thus, when crafting binding authority, the precise language employed is often crucial to the contours and scope of the rule announced." (Italics added.)

The court continued: "[A] court confronted with apparently controlling authority

must parse the precedent *in light of the facts presented* and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are *material* to the application of the rule or allow the precedent to be distinguished on a principled basis." (*Id.* at p. 1171, italics added).

Similarly, in *Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 Cal.App.2d 113, 124, the court explained: "In any case, 'The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) [his or her] decision as based on them.' (Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161.) The principle of a case is not found in the reasons given in the opinion or in the law therein set forth."

SDPOA was an opinion affirming a summary judgment in the defendants' favor. (*SDPOA*, *supra*, 568 F.3d at p. 730.) There are voluminous, "material" differences between the facts of this case and the facts of *SDPOA*. In that case, the San Diego Police Officers' Association presented no evidence of the City's contractual intent in enacting the Retiree Health Benefit.[9] The SDPOA presented no evidence of the fact that City employees surrendered hundreds of millions of dollars of Social Security benefits in consideration for receiving the Retiree Health Benefit, or that the City saved millions of

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[9] 2 JA 210-237 [SDPOA's opposition brief devoting only nine lines (232-233) to the Retiree Health Benefit]; 2 JA 239-244 [the only evidence presented]; 2 JA 247-248 [SDPOA's response separate statement of fact number 117, citing no evidence]; 2 JA 253-254 [City reply noting lack of evidence presented by the SDPOA]; 2 JA 258-259 [order granting summary judgment based on the evidence submitted]; 2 JA 272 [SDPOA's appellate reply brief, p. 5, conceding issue].

dollars in employer contributions. On *that record,* it fairly appeared to the district court and the Ninth Circuit that the Retiree Health Benefit was not a vested, constitutionally-protected, contractual right. However, when the *SDPOA* opinion is "parsed" and carefully examined, the Court of Appeals held only that (1) whether a public employee's right is a contractual, constitutionally-protected, "vested" right depends on legislative intent and (2) based upon the record of the summary judgment before it, the district court had correctly concluded that the retiree health benefit of San Diego employees was not such a right. (*SDPOA,* at pp. 739-740.)

Because this case involves (1) a *different record* of legislative intent and (2) evidence strongly supporting the conclusion that the summary judgment that was affirmed in *SDPOA* was the result of the failure to present evidence of legislative intent in opposition to a motion for summary judgment (see, e.g., 2 JA 247-248 [response to fact 117]), this Court—consistent with *Hart v. Masannari*—should adopt a *narrow* interpretation of the Ninth Circuit's holding. *SDPOA* does not constitute controlling precedent in a case involving materially different facts. The "principle of the case," the *ratio decidendi* (*see* 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, pp. 572-574, of *SDPOA* is simply that, *in the absence of any evidence of legislative intent to create a permanent benefit,* the City's Retiree Health Benefit is not a vested, constitutionally-protected, contractual right. That principle, though correct, is inapplicable here.

An additional reason that *SDPOA* does not constitute binding precedent under the

doctrine of stare decisis is that "[f]ederal decisions are . . . not controlling on matters of state law." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 507, pp. 570-571, and cases there cited; *Bank of Italy Nat. Trust & Sav. Assn. v. Bentley* (1933) 217 Cal. 644, 653.) The issues disputed by the City—whether (1) Gibson has a contractual right to receive the Retiree Health Benefit (2) that was in effect on the day he terminated his City employment (SDMC section 24.0103)—are questions of state and municipal law, not federal law.

b. The City's reservation of the right to modify retiree insurance coverage to equalize the health insurance benefit provided to active and retired employees did not render the City's contractual promises illusory.

Second, the trial court held that "[e]ven though the word 'permanent' is used in . . . Ordinance [O-15758], the reservation to modify does not evince an intent that the City contractually obligated itself to forever provide retiree health benefits of a certain kind or amount and there are no allegations that the City is removing City-sponsored group health insurance." (2 JA 380.) This rationale does not withstand scrutiny for several reasons.

The trial court's reference is to a provision in Ordinance No. O-15758 that provides:

> "Retiree premiums shall be paid by the City from those funds to be credited to the Reserve for Employer Contributions from Surplus Undistributed Earnings as provided in Section 24.0907.1 above. The Auditor and Comptroller shall set aside from such account an amount sufficient to pay premiums as required. Premium rates for eligible retirees shall be determined and established by the City. *Health plan coverage for retirees and eligible dependents is subject*

> *to modification by the City and the provider of health care services, and may be modified periodically as deemed necessary and appropriate.*"

(1 JA 159, italics added.) The trial court's belief that the italicized clause altered the material terms of the parties' agreement—for the City to permanently provide retirees the same coverage as active employees and to pay for it—is incorrect for a number of reasons.

First, one of the "ordinary principles of contract law" provides: "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641; *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1060 [rejecting interpretation of a contract which failed to follow section 1641].) As Gibson explained to the trial court during the hearing on the City's demurrer,[10] the modification-of-coverage provision was included in Ordinance O-15758 to allow the City the flexibility to make the same types of changes to the *coverage* provided to retired employees (with whom the City does not negotiate labor contracts) as the City periodically made to the health insurance coverage provided to its active employees.[11] Otherwise, the contract's term that retired employees

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[10] 1 RT 3:15-4:18, 4:23-26, 6:10-7:2, 14:2-23, 14:28-15:15.

[11] At the demurrer hearing, Gibson made an offer of proof that former City Treasurer Conny Jamison would testify that the modification-of-coverage clause was only included in the ordinance to allow the City the flexibility to make the same types of changes to the coverage to retired employees of the City (with whom the City does not negotiate labor contracts) as it did for the coverage of active employees. (1 RT 4:10-18.) Gibson later supplied that testimony in opposition to the City's motion for summary judgment. (8 JA 1474 [¶¶ 5-7].)

would be "provided the same choice of program coverage as is offered active employees of the City" (1 JA 153) could not be implemented. The City would have no vehicle to modify retired employees' coverage to keep it the same as the coverage provided to active employees. Because the modification-of-coverage clause of Ordinance O-15758 is susceptible of a reasonable interpretation that does *not* negate the City's promise, in the same ordinance, to create a "permanent" Retiree Health Benefit, it is the duty of courts to adopt the interpretation which harmonizes the two clauses. (Civ. Code, § 1641.)

Second, "[t]he words of a contract are to be understood in their ordinary and popular sense . . . ." (Civ. Code, § 1644.) Black's Law Dictionary defines *coverage* as: "the risks within the scope of an insurance policy." (Black's Law Dict. (9th ed. 2009), p. 422.) The City's reservation of the right to modify health plan coverage simply allowed it to modify which health risks are included within the scope of the insurance policy. This is not the same as the amount the City agreed to *pay* for insurance *premiums*. (1 JA 156 "[P]remiums for said City-sponsored group health insurance [will] be paid . . . by the City"]; 1 JA 159 ["Retiree premiums shall be paid by the City"]; 1 JA 159 ["The Auditor and Comptroller shall set aside . . . an amount sufficient to pay premiums as required"].

Third, another ordinary principle of contract law provides: "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643; *Powers v. Dickson, Carlson & Campillo* (1997) 54

Cal.App.4th 1102, 1111.) To interpret the modification-of-coverage clause to vitiate two other terms the contract—(1) to provide retirees the same health insurance as the City provides to active employees, and (2) to pay the premiums—would be inconsistent with Civil Code section 1643.

Fourth, Civil Code section 1647 provides: "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Those circumstances include the desire of the City to provide a Retiree Health Benefit in lieu of the Medicare coverage that employees would lose if they opted out of Social Security. And the legislative history—including two City Manager memoranda, two City Council resolutions, and an ordinance—all consistently demonstrate an intent to provide the Retiree Health Benefit as one of the "permanent," "in lieu of" benefits.

Fifth, another canon of contract interpretation provides that "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649.) The City (promisor) believed that the employees (promisees) understood they would receive a "permanent" retiree health benefit equal to the health insurance provided to active employees, at no cost to retirees. Based on that understanding, the promisees permanently *forfeited* very substantial, future, federal *benefits*, and the City undoubtedly saved very substantial, future, *employer contributions* to Social Security. No rational City employee would have voted to surrender Social Security and Medicare benefits for an alternative benefit that the City could unilaterally

reduce or revoke.

Sixth, in overruling the City's second demurrer, the trial court later held that the modification-of-coverage clause of Ordinance O-15758 was ambiguous: "While the [o]rdinance contained a reservation of rights, *the reservation is ambiguous given the promises of permanency and payment.*" (4 JA 831, italics added.) However, the trial court never allowed Gibson to reinstate his breach of express contract claim, or modified its ruling sustaining the City's demurrer on that claim without leave to amend it.

For all of these reasons, the trial court erred by sustaining the City's general demurrer to Gibson's breach of express contract claim without leave to amend it.

D. Alternatively, Gibson Stated a Claim for Relief Under Municipal Law.

As noted above in Section IV(A), it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. (*Aryeh*, *supra*, 55 Cal.4th at p. 1201; *Fox*, *supra*, 35 Cal.4th at p. 810.) Even if Gibson failed to allege a cause of action for declaratory relief, mandamus, or breach of express contract, he stated a claim for relief under municipal law.

San Diego Municipal Code section 24.0103 provides, in relevant part: "[w]hen a Deferred Member applies for retirement benefits, *he or she is entitled*, when eligible, for the retirement benefits *in effect on the day the Deferred Member terminates City* or contracting agency *service* and leaves his or her contributions on deposit with the Retirement System" (1 JA 120, italics added.) Gibson has shown that Ordinance O-20105, effective on October 18, 2011, reduced the amount of health insurance premium

he will receive when he retires and that ordinance applies to him because he was a deferred member on April 1, 2012. (Section II(A)(11), *ante*; 7 JA 1280, SDMC section 29.0103(d)(1)(A).) These are not the "retirement benefits in effect on the day [Gibson] terminate[d] City . . . service," December 26, 2006.

Gibson explained his theory in the trial court. (1 RT 8:11-11:1.) However, the trial court ruled that "th[is] claim fails because [section 24.0103] merely provides definitions." (2 JA 381.) The only place the word "definition" appears in section 24.0103 is in the heading. (1 JA 118.) This ruling was error because "'[t]itle or chapter headings are unofficial and do not alter the explicit scope, meaning, or intent of an [ordinance].' [Citations.]" (*Dailey v. City of San Diego* (2014) 223 Cal.App.4th 237, 251 (*Dailey*).)

Dailey does not contradict Gibson's position that the Retiree Health Benefit is a "retirement benefit" under San Diego Municipal Code section 24.0103. In *Dailey*, the court was required to decide whether the retiree health benefit codified in section 24.1201-24.1204 was a benefit under the "retirement system," as the term "retirement system" is used in Charter section 143.1(a). (*Dailey*, *supra*, 223 Cal.App.4th 237.) That Charter section imposes referendum requirements on ordinances amending such benefits. The court held in part that, because the retiree health benefit was not a benefit under the "retirement system," the referendum requirements were inapplicable. The court did not hold that the retiree health benefit is not a "retirement benefit."

The issue in this case is whether the retiree health benefit is a "retirement benefit"

within the meaning of section 24.0103. It is not whether the retiree health benefit is a benefit under the "retirement system." As this court expressly reasoned in *Dailey,* some City post-employment benefits are not benefits under the "retirement system."[12] Benefits provided under the "retirement system" are only a subset of the "retirement benefits" (benefits enjoyed post-employment) provided by the City. Therefore, the issue presented in this case is different from the issue decided in *Dailey.*

In *Dailey,* the court did not construe or apply the *express text* of any language of section 24.0103. It regarded Dailey's argument as having been based solely on the unofficial "headings" of municipal law, and not on the express text of section 24.0103. (223 Cal.App.4th at p. 251.)

In *Dailey*, the court held that the City's unilateral alteration to police officer Denise Dailey's retiree health benefit did not require a vote of affected employees under City Charter section 143.1. (*Dailey*, *supra*, 223 Cal.App.4th at p. 240.) Because Dailey was a police officer and a member of the San Diego Police Officers' Association, the court also held that she was collaterally estopped from presenting any contract claims because those claims were presented by the police union in *SDPOA*, *supra*, 568 F.3d 725. (*Id.* at pp. 255-260.) *Dailey* is distinguishable because (1) Gibson does not raise any issue regarding City Charter section 143.1 and (2) he was never a police officer (1 RT 21:2).

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[12] "'[I]t is undisputed that not all postemployment benefits for City employees are benefits under the Retirement System.' For example, the City offers a supplemental pension plan for certain employees that is not established under the retirement system. The City also offers a defined contribution retirement savings plan, which is established under Internal Revenue Code section 401(k), not under the retirement system." (223 Cal.App.4th at p. 250.)

"The granting of retirement benefits is a legislative action within the exclusive jurisdiction of the City." (*City of San Diego*, *supra*, 186 Cal.App.4th at p. 79.) Here, the Retiree Health Benefit Gibson was promised was a "retirement benefit," i.e., a benefit to be received only after he retires. Municipal Code section 24.0103 provides in its *text* that "when a deferred member applies for *retirement benefits*, he or she is entitled, when eligible, for the *retirement benefits* in effect on the day the deferred member terminates city or contracting agency service and leaves his or her contributions on deposit with the retirement system." (Italics added.)

Properly construed, the term "retirement benefits," as used in the provision defining and establishing the rights of deferred members in section 24.0103, means *all* benefits provided to employees and enjoyed in retirement. That is the "ordinary and usual meaning" of the words "retirement benefits." Gibson's Retiree Health Benefit (§§ 24.1201-24.1204) is a "retirement benefit," whether or not it is also a benefit under the "retirement system" referred to in City Charter section 143.1(a).

V

THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING LEAVE TO AMEND TO STATE ONLY A BREACH OF IMPLIED CONTRACT CLAIM.

A. Standard of Review

Code of Civil Procedure section 472a, subdivision (c), provides in relevant part: "When a demurrer is sustained, the court may grant leave to amend the pleading *upon any terms as may be just . . . .*" (Italics added.)

"Where the complaint is defective, '[i]n the furtherance of justice *great liberality should be exercised in permitting a plaintiff to amend his complaint*, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]' (*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 664.)" (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549, italics added; *Fox*, *supra*, 35 Cal.4th 797 at p. 810; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

Code of Civil Procedure section 472c, subdivision (a), provides: "When any court makes an order sustaining a demurrer without leave to amend the question whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." Here, Gibson expressly requested leave to amend his complaint in his written opposition to the City's general demurrer and orally at the hearing on the demurrer. (1 JA 92:22-26; 1 RT 8:7-8, 11:17-18.)

In *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023, the

court held that, "[f]ollowing an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint *only as authorized by the court's order*." (Italics added; 49A Cal.Jur.3d, Pleading, § 171, p. 284, citing *Harris.*)

By permitting Gibson to allege only a new cause of action for breach of an *implied* contract (2 JA 381), the trial court effectively *denied* Gibson leave to amend any of his three alleged causes of action for declaratory relief, mandamus, and breach of *express* contract.

B. By Limiting Leave To Amend To State Only a Breach of Implied Contract Claim, the Trial Court Abused Its Discretion.

"Leave to amend is in general required to be liberally granted (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939 . . .) provided there is no statute of limitations concern. Leave to amend may be denied if there is prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490 . . . .)" (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.)

None of the circumstances justifying a severe limitation of leave to amend were present in this case, and such a limitation was not a "just" term (Code Civ. Proc., § 472a, subd. (c)). There were no issues regarding the statute of limitations, delay of trial, loss of evidence, or added costs of preparation for trial. Gibson had not previously been granted leave to amend his complaint. The trial court was not in a position to know all of the legal theories that unalleged, additional facts may have supported.

Under these circumstances, it was an abuse of discretion to deny Gibson even one opportunity to cure any judicially-perceived defects in his three alleged causes of action for declaratory relief, and breach of express contract. (See fn. 8, *ante*; *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 239-240 [applying equitable estoppel to governmental entity].)

VI

THE TRIAL COURT ERRED IN GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT.

A. Standard of Review

A reviewing court owes "the superior court no deference in reviewing its ruling on a motion for summary judgment; the standard of review is de novo. (*Johnson v. City of Loma Linda* [2000] 24 Cal.4th 61, 67-68, ...)" (*Coral Const., supra*, 50 Cal.4th at p. 336.)

"A moving party is entitled to summary judgment when the party establishes that it is entitled to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant may make this showing by establishing that the plaintiff cannot establish one or more elements of all of his causes of action, or that the defendant has a complete defense to each cause of action. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466, ...)" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 454-455 (*Bains*).)

"In reviewing a trial court's ruling on a motion for summary judgment, the reviewing court makes '"an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether . . . the moving party is entitled to judgment as a matter of law. [Citations.]"' [Citations]." (*Bains, supra,* 172 Cal.App.4th at p. 455.)

Of course, "'[a]s with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting

authority. In other words, review is limited to issues which have been adequately raised and briefed.' [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230, ...)" (*Bains, supra,* 172 Cal.App.4th at p. 455.)

Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470 (*Miller*) [reversing grant of summary judgment in a sexual harassment and retaliation case where the "Court of Appeal failed to draw [reasonable inferences in favor of the nonmoving party] and took too narrow a view of the surrounding circumstances"].)

B. The Trial Court Erred by Granting Summary Judgment Despite Ruling That the Modification-of-Coverage Clause Is Ambiguous.

Although the trial court had expressly held in overruling the City's demurrer to Gibson's first amended complaint that the modification-of-coverage clause of Ordinance O-15758 (4 JA 678) is "ambiguous given the promises of permanency and payment" (4 JA 831), and Gibson repeatedly raised this issue in opposition to the City's motion for summary judgment (2 RT 49:5-51:17; 8 JA 1447:10-12, 1448:1-4 ["ambiguity itself defeats the City's motion"]), the trial court overlooked this issue in granting the City's motion for summary judgment. (10 JA 1887-1889.) This was error.

Whether a contract is ambiguous is a question of law reviewed de novo. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166.) "When two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible

to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment . . . ." (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 158; *Winet v. Price*, at pp. 1165-1166; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 317.) For that reason alone, the summary judgment is erroneous.

In addition to the trial court's previous ruling that the modification-of-coverage clause of Ordinance O-15758 is "ambiguous given the promises of permanency and payment" (4 JA 831), Gibson presented extrinsic evidence that the drafters of the Retiree Health Benefit included the modification-of-coverage provision only "to allow the City the flexibility" to maintain consistency between the health insurance coverage offered to active and retired City employees. (8 JA 1474 [¶ 7].) This intended flexibility was never intended to permit the City to "escape its two fundamental promises: (1) to provide retired employees the same insurance as provided to active employees, and (2) that the City would pay for it." (*Ibid.*)

In the trial court, the City argued that "[a]ny ambiguity that may have existed earlier in this litigation over whether or not the City has the legal ability to adjust the amount it reimburses retirees for their health care premiums has now been resolved once and for all in *Dailey*." (10 JA 1801:18-21.) Its position is mistaken for two reasons. *First, Dailey* involved no issue regarding any ambiguity in Ordinance No. O-15758 (*Dailey*, *supra*, 233 Cal.App.4th 237), and "[c]ases are not authority for propositions not considered" (*Brown, supra,* 54 Cal.4th at p. 330). *Second,* the City never even proffered

an interpretation of Ordinance O-15758 that would create any contractual ambiguity (10 JA 1801), i.e., a reasonable interpretation that was inconsistent with its promises (1) to provide retired employees the same health insurance coverage it provided to active employees and (2) to pay for that insurance.

Gibson has never argued that retirees are entitled to an *immutable* amount of retiree health insurance "coverage" or that the amount the City must reimburse retirees for that coverage is a *fixed* dollar amount. Gibson only contended that the City promised to provide him, in retirement, with the same health insurance coverage it provides to active employees and to pay for the premiums. Ordinance O-15758 does not authorize the City to provide different insurance "coverage" to retirees than it provides to active employees, and it does not require retirees to pay any amount for the "coverage" they receive.

C. There Is a Triable Issue of Fact Regarding Whether There Is an Unimpairable, Implied Contract That the City Would (1) Provide a Permanent Health Benefit to Retired Employees Equivalent to the Health Insurance Provided to Active Employees and (2) Pay the Premiums for That Benefit.

1. *The City entered into an implied contract to provide a permanent retiree health benefit in consideration for its employees' labor and forfeiture of their rights under the Social Security system.*

As explained in Sections IV(C)(1) and (3) above, the City's agreement to provide Gibson the Retiree Health Benefit in exchange for his labor and forfeiture of his right to receive Social Security and Medicare benefits is properly viewed as an express contract because it was stated in words. However, because Gibson's performance of his part of the contract—providing more than 20 years of labor—is also manifested by conduct, the

parties contract may also be viewed as an implied contract. (Civ. Code, § 1621.)

2. *The terms of the implied contract were contained in (1) Resolution R-255320, (2) Resolution R-255610, and (3) Ordinance O-15758.*

And, as explained in Section IV(C)(2) above, the terms of the parties' implied contract were contained in (1) Resolution R-255320, (2) Resolution R-255610, and (3) Ordinance O-15758. These resolutions and the ordinance are more than sufficient to create a binding contract. (Section IV(C), *ante*; *REAOC II*, *supra*, 52 Cal.4th at p. 1187 [intent to make a contract by legislation is clearly shown when a resolution or ordinance ratifies or approves the contract].)

3. *The fact that Gibson's employment commenced after the 1982 vote to forfeit Social Security benefits is immaterial.*

The trial court made note of the fact that Gibson began working for the City after employees voted to withdraw from the Social Security system in exchange for the Retiree Health Benefit. (10 JA 1893.) This is immaterial for at least three reasons.

First, the Retiree Health Benefit is deferred compensation (like a pension) that was promised to Gibson when he commenced his service to the City; it is a term of his employment contract with the City. Gibson was aware of the Retiree Health Benefit when he first began working for the City, and provided more than 20 years of labor relying on the City's promises. (Section IV(C)(3), *ante*.) Gibson's employment for more than 20 years is sufficient consideration to support the City's promise to provide the Retiree Health Benefit. (*Deputy Sheriffs' Association*, *supra*, 233 Cal.App.4th at pp. 578-579.)

Second, if he is not a formal party to the 1982 contract because he did not vote, he is certainly a third party beneficiary of that contract. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 685, 687-688, pp. 771-776.) Ordinance O-15758 expressly applied to employees, like Gibson, "on the active payroll of The City of San Diego on or *after* January 1, 1982." (8 JA 1557, italics added.) Therefore, the quid pro quo—the Retiree Health Benefit in lieu of Social Security—was expressly intended to, and did, burden and benefit Gibson. Gibson did not receive Social Security benefits for his service to the City. (8 JA 1471 [¶ 2].)

4. *The requirements of Charter section 99 were met when the Retiree Health Benefit was created in 1982 by the adoption of Ordinance O-15758.*

The trial court also held that finding "any implied contract would be contrary to [City] Charter section 99." (10 JA 1894.) That Charter section provides, in relevant part, "[n]o contract, agreement, or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two thirds' majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance." (7 JA 1437; 7 JA 1239-1240.) The trial court erred in stating this as a basis for granting the City's motion for summary judgment because (1) the issue was not raised in the parties' pleadings; (2) the City offered no evidence in support of that affirmative defense; and (3) Gibson raised a triable issue of fact precluding summary judgment.

"On motion for summary judgment, the pleadings define the issues . . . ."

(*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, revd. on another ground, (1981) 453 U.S. 490.) Therefore, "[s]ummary judgment cannot be granted on a ground not raised by the pleadings." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663, citing *Metromedia, Inc.*)

Compliance with Charter section 99 is not an element of Gibson's cause of action for breach of implied contract. (2 JA 382-392.) The City's claimed noncompliance with Charter section 99 constitutes "new matter" which must be pleaded as an affirmative defense.[13] (Code Civ. Proc., § 431.30, subd. (b)(2).) Because the City did not plead noncompliance with Charter section 99 as an affirmative defense in its answer (4 JA 833-836), that issue was not properly before the trial court, and summary judgment may not be granted on that ground (*Kendall v. Walker* (2009) 181 Cal.App.4th 584, 598; Weil & Brown, Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group 2014) ¶ 10:51.19, p. 10-24).

Even if an unalleged affirmative defense could properly be raised as a ground for summary judgment, the City proffered no evidence in support of that affirmative defense. (7 JA 1220-1438.) It therefore failed to meet its burden as the moving party and failed to shift any burden of producing contrary evidence to Gibson.

Finally, though not required to, Gibson presented triable issues of fact regarding

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[13] "An affirmative defense is an allegation of new matter in the answer that is not responsive to an essential allegation in the complaint. In other words, an affirmative defense is an allegation relied on by the defendant that is not put in issue by the plaintiffs [sic] complaint." (*Bank of New York Mellon v. Preciado* (2013) 224 Cal.App.4th Supp. 1, 8, citing *Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 698; *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725.)

compliance with Charter section 99. In fact, the City Council voted unanimously to adopt Ordinance No. O-15758. (8 JA 1628-1629 [Item 50 passed by a vote of 7-0 with two members absent].) Thus, Ordinance O-15758 was adopted by more than a two-thirds vote. Moreover, as the minutes from the City Council meeting of June 1, 1982 reflect, the matter was first introduced on May 17, 1982, when the ordinance passed by an 8-0 vote. (8 JA 1629.) Because the City Council first considered the matter at a public meeting on May 17, 1982—more than two weeks prior to its adoption on June 1, 1982—it provided more than 10 days' public notice. For all these reasons, the trial court's reliance on the City's Charter section 99 argument, which was both factually unsupported and unsupportable, should have been rejected.

5. *Under state and federal constitutions, contractual rights may not be impaired by legislation.*

As explained in Section IV(C)(4) above, both the state and federal constitutions prohibit passage of laws impairing the obligations of contracts. These prohibitions limit the City's power to modify its own contracts. Because the distinction between express contracts and implied contracts "reflects no difference in legal effect but merely in the mode of manifesting assent" (*REAOC II*, *supra* 52 Cal.4th at p. 1178), for the same reasons the City cannot pass legislation impairing an express contract, it cannot pass legislation impairing an implied contract.

6. *The implied contract alleged by Gibson was not considered in* San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System.

Finally, in granting the City's motion for summary judgment, the trial court erroneously relied on *SDPOA*, *supra*, 568 F.3d 725. (10 JA 1893-1894.) As explained above in Section IV(C)(6)(a), the contract alleged by Gibson was not considered in that case. "[C]ases are not authority for propositions not considered." (*Brown*, *supra*, 54 Cal.4th at p. 330.) Because the court deciding *SDPOA* never considered Resolution R-255320, Resolution R-255610, or Ordinance O-15758—or the basis for Gibson's breach of implied contract claim—that case is not controlling.

D. There Is a Triable Issue of Fact Regarding Whether Ordinance O-20105 Constitutes an Anticipatory Breach of the Implied Contract.

The trial court ruled that Gibson had no claim for anticipatory breach of contract because there was no contract. (10 JA 1894.) As we have shown above, Gibson established a basis for both his breach of express contract and breach of implied contract claims. Therefore, the trial court's ruling was erroneous.

As well explained by the Supreme Court in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479 (*Romano*), normally, "a cause of action for breach of contract does not accrue before the time of the breach. [Citations.]" (*Id.* at p. 488.) "Nonetheless, if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred." (*Id.*, at p. 489.) "The rationale for this rule is that the promisor has engaged not only to perform under the contract, but also not to repudiate his or her promise. (4 Corbin,

Contracts (1951 ed.) § 959, p. 852.) " (*Ibid.*)

"In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies—he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' [Citations.]" (*Romano, supra*, 14 Cal.4th at p. 489; *Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc.* (2015) ___ Cal.App.4th ___ [2015 WL 1261569, *4].)

The trial court cited *Diamond v. University of So. California* (1970) 11 Cal.App.3d 49, apparently for the proposition that "the doctrine of breach by anticipatory repudiation does not apply to contracts which are unilateral in their inception or have become so by complete performance by one party." (*Id.* at p. 53; 10 JA 1894; 7 JA 1241:16-24 [City's memorandum].) However, the court's reliance on *Diamond* is mistaken for two reasons.

First, Diamond is factually distinguishable. Gibson's right to receive the Retiree Health Benefit in effect on the day he left City service in 2006 has not become unilateral. In order to receive that benefit, he must leave his employee contributions on deposit with the San Diego City Employees Retirement System ("SDCERS") until he begins to draw his retirement benefits. (8 JA 1519 [SDMC section 24.0103].) He has performed, and is continuing to perform, that obligation.

Second, Diamond has been impliedly overruled,[14] because the theory of that case was expressly rejected in *Romano, supra,* 14 Cal.4th 479. As Witkin notes:

> The theory [of *Diamond*] is that in bilateral contracts where one party repudiates, it is unfair to compel the injured party to continue performance or maintain readiness to perform on his or her part up to the time when the promisor's performance is due; but in unilateral contracts the injured party has already performed, and he or she does not suffer any unreasonable loss by merely waiting until the time of counterperformance before bringing suit. (See 23 Williston 4th, §63:28; 17A Am.Jur.2d (2004 ed.), Contracts §720.)
>
> Corbin criticizes this view, asserting that a promisor is required not only to perform his or her promise when it is due but *also to forbear from repudiating it prior to that time. Breach of this duty to forbear is a proper basis for allowing an action for anticipatory breach of a bilateral or unilateral contract.* (See Corbin §959 et seq.) But California courts, taking note of this criticism, nevertheless find the illogical distinction justifiable on policy grounds. (See *Minor v. Minor* (1960) 184 C.A.2d 118, 125, . . . , infra, §868; *Diamond v. University of Southern Calif.* (1970) 11 C.A.3d 49, 54, . . . , footnote 4, infra, §868.)

(1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 867, pp. 954-955, italics added.)

In *Harris v. Time, Inc.* (1987) 191 Cal.App.3d 449, the court also noted Corbin's criticism of California law: "the commentator argues the aggrieved party has lost the ability to rely on a promise and plan accordingly. (2 Kaufman, Corbin on Contracts (1984 Supp.) § 962, p. 146.) According to the commentator, this approach 'almost always operates in favor of the rich and powerful, and tramples on the poor and helpless.' (*Id.* at p. 147.) The most recent California decision to follow the challenged approach

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[14] "It is an established rule of law that a later decision overrules prior decisions which conflict with it, whether such prior decisions are mentioned and commented upon or not." (*In re Lane* (1962) 58 Cal.2d 99, 105.)

acknowledged these arguments and conceded, 'The day may come when that principle . . . will be successfully questioned . . . .' (*Diamond v. University of So. California, supra,* 11 Cal.App.3d at p. 55, . . . ; citations omitted.)" (*Id.* at pp. 457-458.) The court characterized the theory of *Diamond* as a "tottering rule." (*Id.* at p. 458.)

The predicted day came in 1996 when, in *Romano, supra,* 14 Cal.4th 479, the Supreme Court held that the "rationale [for the rule of anticipatory breach] is that the promisor has engaged not only to perform under the contract, *but also not to repudiate his or her promise.* (4 Corbin, Contracts (1951 ed.) § 959, p. 852.)" (*Id.* at p. 489, italics added.) The court clearly adopted the view of Corbin, which, as noted by Witkin and the court deciding *Harris*, is contrary to the theory of *Diamond.* Under the holding of *Romano,* a party may sue for anticipatory breach of a unilateral—as well as a bilateral—contract by repudiation, because the promisor has agreed "not only to perform" its promise but also "not to repudiate" its promise.

Under the law of stare decisis, all lower courts are bound to follow the precedents of the Supreme Court when they conflict with those of lower appellate courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) "Where the conflict is between decisions of the Supreme Court and Courts of Appeal, the court may disregard the lower appellate decisions and accept the Supreme Court decisions as controlling." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 532, p. 603.) Therefore, this court is obliged to follow the rationale of *Romano,* not the rationale of *Diamond.*[15]

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[15] The implied overruling of *Diamond* by *Romano* is an issue which meets the criteria for publication. (Cal. Rules of Court, rule 8.1105(c)(5).)

E. There Is a Triable Issue of Fact Regarding Whether Gibson Has Suffered Damages.

Although the trial court did not reach the issue (10 JA 1892-1894), the City contended below that Gibson could not establish that he had suffered any damages. (7 JA 1242-1243.) This argument overlooks decades of case law.

The City admitted that Ordinance O-20105 (7 JA 1260-1287), enacted in 2011, caps the amount of Gibson's Retiree Health benefit. The City conceded that under the 2011 ordinance, "Plaintiff will receive a lump sum payment from the City . . . ." (7 JA 1242:22-23.) The City stated that the lump sum payment "is projected to yield $8,500 per year." (*Ibid.*)

As SDCERS, which administers the Retiree Health Benefit explains, this lump sum, fixed amount does not ensure that Gibson will receive the Retiree Health Benefit for life, as he was promised. (9 JA 1751 ["the amount is not guaranteed"].) "Once the City contributes the required funds into [an employee's] trust account, [the employee] will assume the market risk on investment gains and losses." (*Ibid.*)

In 2006, when Gibson completed his 20-plus years of City employment and became a "deferred member" (8 JA 1519 [SDMC section 24.0103]), the City had agreed to pay Gibson a much higher Retiree Health Benefit. (8 JA 1527 [SDMC section 24.1202(a)(3)].) As of March 31, 2012, that benefit was $931.24 per month, or $11,174.88 per year. (9 JA 1743.) Thus, in dollar terms, Gibson's promised benefit has been unilaterally reduced by $2,674.88 per year ($11,174.88 minus $8,500.) And instead of an assured lifetime Retiree Health Benefit that can increase by 10 percent per year (8

JA 1527 [SDMC section 24.1202(a)(3)]), Gibson will receive a lump sum benefit which can be exhausted during his lifetime.

In *Betts v. Board of Administration* (1978) 21 Cal.3d 859 (*Betts*), the court explained why a "fixed" system of providing benefits was materially worse than a "fluctuating" system, which could be adjusted for inflation. Quoting *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 132, the court explained: "'Payment of a fixed amount freezes the benefit at a figure which is based on salary scales preceding retirement, thus the longer an employee is retired on a fixed pension the more likely it is that the amount of his pension will not accurately reflect existing economic conditions, whereas a retired employee receiving a fluctuating pension based on the salaries that active employees are currently receiving can maintain a fairly constant standard of living despite changes in our economy.'" (*Betts*, at p. 864.) "In inflationary times . . . , the resulting disadvantage of a 'fixed' system is obvious . . . ." (*Ibid.*)

Here, Ordinance O-20105, and its one-time, lump-sum payment is similarly disadvantageous to Gibson. Rather than being paid a Retirement Health Benefit for life, which must provide him the same coverage as offered to the City's active employees, Gibson will receive only a lump sum which has no lifetime guarantee. And instead of receiving an increase of up to 10 percent per year as was promised during his employment, Gibson will receive no annual increase. In 2012 SDCERS reported that the cost of retiree insurance premiums increased by 15 percent for two of the three plans it administers. (9 JA 1735.) According to the holdings or *Allen* and *Betts*, the disadvantage

to Gibson by replacing a fluctuating Retiree Health Benefit with a fixed benefit is "obvious."

VII

CONCLUSION

As President Lincoln admonished in his first message to Congress on December 3, 1861: "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. [Citation]." (*United States v. Mitchell* (1983) 463 U.S. 206, 213.)

In 1982 City employees voted to forfeit their federal Social Security and Medicare benefits in consideration for the City's promise of a "permanent," alternative benefit: health insurance in retirement, equal to the health insurance provided to active employees. All employees who were "on the active payroll of The City of San Diego on or after January 1, 1982" (8 JA 1557) would receive that deferred compensation if they were eligible to receive other retirement benefits.

Because abundant evidence supports the City's contractual promise, and there is no shred of contrary evidence that City employees surrendered their valuable, federal rights gratuitously, this court should reverse the summary judgment with directions to:

(1) vacate the order sustaining the City's demurrer to the original complaint;

(2) vacate the order granting the City's motion for summary judgment;

(3) enter a new order denying the City's motion for summary judgment; and

(4) grant Gibson leave to file a second amended complaint alleging causes of action for (a) declaratory relief and breach of express contract (as properly alleged in his original complaint) and (b) breach of implied contract (as properly alleged in his first

amended complaint).

DATED: April 8, 2015

LAW OFFICE OF MICHAEL A. CONGER

By: _____
Michael A. Conger

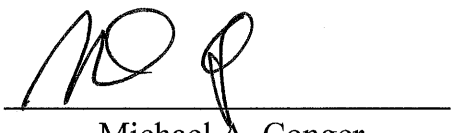
Attorney for Plaintiff and Appellant
DENNIS GIBSON

CERTIFICATE OF APPELLATE COUNSEL

I, Michael A. Conger, certify that:

I am appellate counsel for plaintiff and appellant Dennis Gibson. The preceding Appellant's Opening Brief was produced on a computer. That brief, exclusive of its cover, tables, and this certificate, contains 16,486 words. In certifying that word count, I have relied on the word count of the Corel WordPerfect X6 computer software used to prepare the brief.

DATED: April 8, 2015



Michael A. Conger

PROOF OF SERVICE

I, PATRICIA B. MESSER declare:

I am and was at the time of the service described below a resident of the State of California, County of San Diego, and at least 18 years old. I am not a party to the above-entitled action. My business address is Law Office of Michael A. Conger, P. O. Box 9374, Rancho Santa Fe, CA 92067.

On April 9, 2015, I served the documents described as:

1. **APPELLANT'S OPENING BRIEF; and**

2. **JOINT APPENDIX IN LIEU OF CLERK'S TRANSCRIPT (VOLUMES 1 - 10);**

on the following:

Walter C. Chung, Esquire **Office of the San Diego City Attorney** **1200 Third Avenue, Suite 1100** **San Diego, CA 92101**	**Attorneys for Defendant and Respondent CITY OF SAN DIEGO** **(Personally served)**
Clerk of the Superior Court of California for the County of San Diego **(for delivery to Trial Judge:** **The Hon. Randa Trapp** **330 West Broadway, Dept. C-70** **San Diego CA 92101)**	**One copy of Appellant's Opening Brief** **(Service via U.S. Mail)**

(X) **BY PERSONAL SERVICE** - I hand-delivered said documents to the addressee on April 9, 2015, pursuant to Code of Civil Procedure §1011.

(X) **BY MAIL** - I am readily familiar with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service, and that the document(s) shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure § 1013a.

On April 9, 2015, I also served an electronic copy of the **APPELLANT'S OPENING BRIEF** on the Supreme Court of California by sending a copy to the Supreme Court's electronic notification address pursuant to rule 8.212(c)(2)(A) of the California Rules of Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 9, 2015, at Rancho Santa Fe, California.

PATRICIA B. MESSER