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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PUBLIC EMPLOYMENT RELATIONS BOARD,

Plaintiff/Petitioner,

v.

CITY OF SAN DIEGO,

Defendant/Respondent.

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION,

Real Party in Interest.

Case No. 37-2012-00092205-CU-MC-CTL

EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE REGARDING A PRELIMINARY INJUNCTION

IMAGED FILE

(Gov. Code, §§ 3509, subds. (a), (b) & 3541.3, subd. (j); Cal. Code Regs., tit. 8, § 32450 et seq.; Code Civ. Proc., §§ 526, 527 & 1085)

Ex Parte Hearing Date:
Date: February 21, 2012
Time: 8:30 a.m.
Dept.: C-67
Judge: Hon. William S. Dato

Exempt from Fees
(Gov. Code, § 6103)

1. Plaintiff and Petitioner Public Employment Relations Board (PERB) hereby applies ex parte to this Court for a Temporary Restraining Order (TRO) and Order to Show Cause (OSC) re: Preliminary Injunction, enjoining and restraining Defendant and Respondent City of San Diego (City), its agents, employees, representatives, officers, and officials, and any other person acting in concert or participation with any of them, and ordering them and each of them, pending further order from this Court, to:

(a) immediately, and in all events prior to March 9, 2012, take all necessary steps to remove the "Proposition—Charter Amendment/Comprehensive Pension Reform for San Diego" (referred to herein as the Initiative) from the June 5, 2012 ballot; and

(b) cease and desist from taking or attempting to take any further action, directly or indirectly, by any means, method or device whatsoever, to cause or permit the Initiative to be placed before the voters on June 5, 2012, until the date of a hearing upon an OSC re Preliminary Injunction.

2. By this Ex Parte Application, PERB seeks to preserve the status quo that preceded the City's alleged violation of its duty to meet and confer with the MEA about wages and retirement benefits before placing the Initiative on the ballot for the June 5, 2012 election, pending a hearing or trial on a preliminary injunction.

3. As the accompanying Declaration of Wendi L. Ross and Memorandum of Points and Authorities demonstrate, if the City is not enjoined as described in Paragraph 1 above, great and irreparable injury will result to Real Party in Interest San Diego Municipal Employees Association (MEA), current and future employees of the City for whom MEA serves as the recognized exclusive representative under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) in the Professional, Supervisory, Technical, and Administrative Support and Field Service Units (City Employees or bargaining unit members), and the public in the City of San Diego and the State of California, before the matter can be heard on notice.

4. This application is made pursuant to Code of Civil Procedure sections 526 and 527 on the grounds that the MEA, current and future City Employees, and the public in the City and the State of California, will suffer great or irreparable injury if injunctive relief is not obtained prior to a

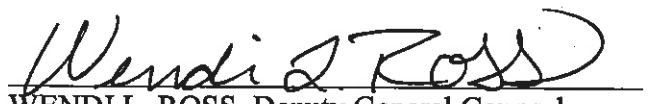
hearing or trial on a preliminary injunction.

This application is based on the accompanying Complaint for Injunctive Relief and Verified Petition for Writ of Mandate, the Declaration of Wendi L. Ross, the Memorandum of Points and Authorities, a [Proposed] Order, and all pleadings, papers, and evidence as will be submitted in connection with the application and hearing on the OSC re preliminary injunction.

Dated: February 14, 2012

Respectfully submitted,

M. SUZANNE MURPHY, General Counsel

By 

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PUBLIC EMPLOYMENT RELATIONS BOARD, Plaintiff/Petitioner, v. CITY OF SAN DIEGO, Defendant/Respondent.	Case No. 37-2012-00092205-CU-MC-CTL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PERB'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE REGARDING A PRELIMINARY INJUNCTION** **IMAGED FILE**
SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, Real Party in Interest.	Ex Parte Hearing Date: Date: February 21, 2012 Time: 8:30 a.m. Dept.: C-67 Judge: Hon. William S. Dato **Exempt from Fees (Gov. Code, § 6103)**

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INTRODUCTION

Almost thirty years ago, the California Supreme Court ruled that local governments must satisfy the "meet and confer" requirements of the Meyers-Milias-Brown Act (MMBA or Act)[1] before proposing to the electorate a charter amendment that would impact a subject within the scope of representation. (§ 3505; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [*Seal Beach*].) Plaintiff and Petitioner Public Employment Relations Board (PERB or Board), has similarly affirmed that this bargaining obligation must be satisfied *before* an employer can ask voters to decide a matter that impacts employees' wages, hours, or terms and conditions of employment. (*County of Santa Clara* (2010) PERB Decision No. 2120-M; *County of Santa Clara* (2010) PERB Decision No. 2114-M.)

This case involves a ballot initiative, entitled the "Proposition—Charter Amendment/ Comprehensive Pension Reform for San Diego"[2] (Initiative) that would, if passed by the voters on June 5, 2012, serve to amend the City Charter for Defendant and Respondent City of San Diego (City). There is no dispute that the provisions of the Initiative would have a direct and adverse impact on the wages and retirement benefits of current and future City employees represented by Real Party in Interest San Diego Municipal Employees Association (MEA).

Instead of negotiating in good faith with the MEA over the various provisions of the Initiative that would affect the City employees' wages and retirement benefits, the City has chosen instead to try to skirt the law. The City claims that it is not responsible for the Initiative, but rather it is the product of "private citizens," and is therefore a "citizen's initiative." As the facts in this case clearly demonstrate, however, the Initiative was not written and sponsored by private citizens, but rather is directly attributable to the City based on the conduct and actions of City Mayor Jerry Sanders and other agents of the City. Since the City has a "Strong Mayor" form of governance, Mayor Sanders is also the Chief Labor Negotiator for the City, and has an obligation to meet and

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[1] The MMBA is codified at Government Code section 3500 et seq. All future references are to the Government Code, unless otherwise specified.

[2] The proposed charter amendment is also sometimes referred to as the "Comprehensive Pension Reform Initiative for San Diego" or the "CPR Initiative."

confer in good faith under the MMBA. The City's conduct in this case is a brazen attempt to sidestep the meet-and-confer requirements of the MMBA.

As *Public Employment Relations Bd. v. Modesto City School Dist.* (1982) 136 Cal.App.3d 881(*Modesto*) has long made clear, PERB may obtain injunctive relief if: (1) it has reasonable cause to believe that an unfair practice has been committed; and (2) injunctive relief is "just and proper." (*Id* at p. 891.) There is ample evidence in this case to satisfy both prongs of the *Modesto* standard. This Court should immediately enjoin the Initiative from appearing on the June 5, 2012 ballot and, ultimately, until the City satisfies its meet and confer obligations under the MMBA. For all of these reasons, injunctive relief is mandated.

FACTUAL AND PROCEDURAL BACKGROUND

MEA is the recognized employee organization for approximately 3,800 City employees in four bargaining units: (1) Professional, (2) Supervisory, (3) Technical, and (4) Administrative Support and Field Service. (Declaration of Wendi L. Ross, Exh. B, 0106.)[3] MEA's Memorandum of Understanding with the City expired on June 30, 2011. Article IX of the City Charter, entitled "The Retirement of Employees," specifies employee pension benefits and contributions. (Exh. C.)

Proposed Ballot Initiative

On April 4, 2011, three City residents—Catherine A. Boling (Boling), T. J. Zane (Zane), and Stephen B. Williams (Williams)[4]—notified the City Clerk of their intention to circulate a petition for a ballot measure, entitled "Comprehensive Pension Reform Initiative for San Diego" (in all material respects identical to the Initiative), for the purpose of amending the City Charter. (Exh. B, 0002, 0107.) The three City residents also requested that the City Attorney prepare a

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[3] All further citations to Exhibits are to this declaration, including the four-digit Bates number in the bottom right corner of the document to specify a particular page of the Exhibit.

[4] Boling, a CPA, has served as campaign treasurer for more than 50 local ballot measures and candidates, including Councilmember Faulconer and City Attorney Jan Goldsmith. (http://www.sandiegomagazine.com/media/San-Diego-Magazine/April- 2008/The-Troubleshooter-the-Accountant (February 9, 2012).) Zane is a professional political consultant who has been involved in numerous campaigns involving local ballot measures and City Council elections. (http://www.sdlincolnclub.org/about?q=tj-zane-president-ceo (February 9, 2012).) Williams is a real estate professional. (http://www.sentre.com/bios/sbwilliams (February 9, 2012).) (Exh. K.)

"Title and Summary" for the Initiative pursuant to Election Code sections 9255, 9256, 9202, and 9203. (Exh. A, 0051.)

If approved, the Initiative would make changes to multiple provisions of the current City Charter regarding City employee pensions by, *inter alia*: redefining the term "Base Compensation" for the calculation of pension benefits to exclude all forms of compensation, other than wages (Exh. B, 0008); discontinuing the current "Defined Benefit Pension Plan" for all new hires, other than newly hired sworn police officers, and replace it with a "Defined Contribution Plan" (Exh. B, 0011); increasing pension contributions to the Defined Benefit Pension Plan for current City employees (Exh. B, 0012); "eliminat[ing], to the extent permitted by law, the Defined Pension Benefit Plan for any individual City … employee who is convicted of a felony related to their employment, duties, or obligations as a City … employee" (*ibid.*); limiting employer contributions to the Defined Benefit Pension Plan to 9.2% of the compensation of each participating City employee who is not a Uniformed Public Safety Officer (Exh. B, 0013); authorizing the City to provide disability benefits only to participants in the Defined Plan "who ha[ve] become physically or mentally disabled by reason of bodily injury or illness cause by actions related to the discharge of their duties" (Exh. B, 0014); and eliminating the requirement of a majority vote of employees and/or retirees prior to the adoption of any ordinance amending the retirement system "which affects the benefits of any employee under such retirement system" or "increases" these benefits (*ibid.*).

On December 5, 2011, the City Council adopted a resolution (San Diego Resolution R-307155), declaring its intent to submit the Initiative to the voters. (Exh. E.) On January 30, 2012, the City Council introduced and adopted San Diego Ordinance O-20127, calling for a June 5, 2012 Municipal Special Election to submit the Initiative to qualified City voters. (Exh. F.) The City Council also adopted Resolution R-307249, directing the City Attorney to prepare an impartial analysis and retain outside counsel to assist in its preparation, and directed the Mayor, Independent Budget Analyst, and City Auditor to prepare a fiscal impact analysis, related to the Initiative. (Exh. G.) On February 13, 2012, the City Council was scheduled to formally adopt Ordinance

O-20127, which was prepared by the City Attorney.[5] (Exh. H.)

The City Mayor's Authority in Labor Relations

In a January 26, 2009 memorandum to the Mayor and City Councilmembers, City Attorney Jan I. Goldsmith (Goldsmith) explained the Mayor's authority, pursuant to the City's "Strong Mayor" form of governance, under the City Charter:

> Article XV of the Charter was added by voters on November 2, 2004 and became effective January 1, 2006. The stated purpose of the Article is "to modify the existing form of governance for a trial period of time to test implementation of a new form of governance commonly known as a Strong Mayor for of government." Charter, §250.
>
> Under the strong mayor form of governance, the Mayor assumes all of the authority, power, and responsibilities formally conferred upon the City Manager, as described in Articles V, VII, and IX of the Charter. Charter, §§260(b), 265(b). The Mayor has additional authority and responsibilities, including ***serving as the chief executive officer of the City (Charter, § 265)***; executing and enforcing all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City (Charter, §265(b)(2)); ***recommending to the Council such measures and ordinances as he or she may deem necessary or expedient (Charter, §265(b)(3))***; and making such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable (Charter, §265(b)(3)). ***Under this authority, the Mayor assumes the responsibility of labor negotiations, which is an administrative function of local government.***

(Exh. A, 0192, emphasis added.)

City Agents' Involvement in the Drafting, Circulating, and Financing the Initiative

Although the Initiative was submitted by Boling, Zane, and Williams, there is no genuine dispute that it was authored and sponsored by Mayor Sanders in conjunction with Councilmembers Faulconer and DeMaio. (Exh. B.) Moreover, Mayor Sanders used the private citizens' initiative process for the *express* purpose of avoiding the City's meet-and-confer obligation, and the privileges and prestige of his office to do so. (*Ibid.*) The following are just a few examples indicative of Mayor Sanders' and other City agents' role in the formulation of the Initiative:

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[5] The future deadlines with respect to the initiative process are as follows: March 9, 2012 is the last day for City Clerk to file with Registrar of Voters all election materials; and March 22, 2012 is the last day to file ballot arguments with City Clerk. (Exh. H.)

- On November 19, 2010, the Mayor's Communications Director, Darren Pudgil, issued a "Mayor Jerry Sanders Fact Sheet" (Fact Sheet), which was posted on Mayor Sanders' official website, stating in pertinent part that: "The Mayor … announced he will place an initiative on the ballot that would eliminate defined benefit pensions for new hires, instead offering them a 401(K)-style, defined contribution plan similar to those in the private sector." (Exh. A, 0134.) The Fact Sheet further stated that: "Sanders and Councilmember … Faulconer will craft the ballot initiative language and lead the signature-gathering effort to place the initiative on the ballot." (*Ibid.*)

- On January 7, 2011, Pudgil sent an e-mail message to Fox News, stating that: "The City of San Diego is a national leader in pension reform. We're eliminating employee pensions as we know them and putting in place a 401-K plan like the private sector." (Exh. B, 0101.) He added: "My boss, San Diego Mayor Jerry Sanders, is available any time to come on [the Fox News program, "The O'Reilly Factor"] to talk about what he's doing in San Diego and the greater national problem of bloated pensions and the billions of dollars they are costing taxpayers and forcing cities to reduce services like police and fire to pay for these pensions." (*Ibid.*)

- On January 10, 2011, Goldsmith issued Opinion Number 2011-1, prepared for Mayor Sanders and the City Council, in which he stated that the City could "freeze 'Base Compensation' … as a means to reduce the City's long-term retirement liability," but that such a change was "subject to the [MMBA]," and that the City could offer performance-based increases to compensation that would not be included in retirement calculations." (Exh. A, 0063.)[6]

- On January 12, 2011, Mayor Sanders stated during his official "State of the City" address that "Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan that is similar to the private sector's and reflects the reality of our times." (Exh. B.)

- In April 2011, Mayor Sanders participated in a press conference with Goldsmith, and Initiative signatories Boling and Zane, on the City concourse outside of City Hall, under a banner reading "Pension Reform Now!" (Exh. A, 0061; Exh. B, 0073.)

- In January 2011, Mayor Sanders and Councilmember Faulconer formed a fund-raising committee, "San Diegans for Pension Reform (SDPR)," that contributed a total of

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[6] In a June 19, 2008 memorandum to Mayor Sanders and the City Council, former City Attorney Michael J. Aguirre provided a legal opinion that the Mayor may propose a ballot measure to amend City Charter provisions related to retirement pensions, *provided that the City first complies with its meet and confer obligations under the MMBA*. (Exh. A, 0087, emphasis added.) Aguirre also advised that the Mayor may sponsor a voter petition drive as a citizen, however "*such sponsorship would legally be considered as acting with apparent governmental authority* because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations." (*Ibid.*) Given this apparent authority, Aguirre added, "the City would have the same meet and confer obligations …" (*Ibid.*)

approximately $89,000 to the Initiative between April 1 and June 30, 2011. (Exh. B, 0022, 0038.)

- The Initiative was the result of a "compromise" between "[p]roponents of dueling ballot measures to curtail San Diego city pensions" to "combine forces behind a single initiative for the June 2012 ballot." (Exh. B, 0027.)
- Pudgil "explained in an email" that "though the mayor—along with Council members Kevin Faulconer and DeMaio—authored the ballot measure, Sanders is bringing it forward 'as a private citizen—not as mayor.'" (Exh. B, 0017.) It then again quotes Pudgil, saying: "'The mayor took this route because the public deserves the right to decide a measure of this magnitude and importance.'" (*Ibid.*)
- Mayor Sanders candidly "explained … that pension-reform proponents chose to go the citizen-initiative route *in order to avoid negotiations with the unions* that represent city employees." (Exh. B, 0019, emphasis added.) Mayor Sanders thusly stated, "You do that so you get the ballot initiative on that you actually want," he said. "Otherwise, we'd have gone through meet-and-confer [negotiations], and you don't know what's gonna go on at that point through the meet-and-confer process." (Exh. B, 0020.)

The MEA's Requests to Bargain, the City's Refusals, and the Subsequent UPC/IR Request

On July 15, 2011, the MEA sent Mayor Sanders a "Demand to Meet and Confer re 'Pension Reform' Ballot Initiative" (Exh. B, 0003), but Mayor Sanders did not respond. In an August 10, 2011 letter entitled, "Second Demand to Meet and Confer re 'Pension Reform' Ballot Initiative," the MEA reasserted its request. (Exh. B, 0057.) By letter dated August 16, 2011, Goldsmith rejected the MEA's bargaining demand, stating that "[i]t is the City's position … that the City's duty to meet and confer has not been triggered in relation to the … Initiative." (Exh. B, 0003, 0059.)

In a September 9, 2011 letter, the MEA renewed its bargaining demand. (Exh. B, 0061.) By letter dated September 12, 2011, Goldsmith reiterated his rejection of said demand and expressed his "understand[ing]" that the "initiative was written by a team of lawyers that included former City Attorney John Witt." (*Ibid.*) The parties exchanged additional letters on September 16, 2011, September 19, 2011, and October 5, 2011 (*id.*, 0071, 0079, 0084), but the City never agreed to negotiate with the MEA about the Initiative before placing it on the ballot for the June 5, 2012 election.

On January 31, 2012, the MEA filed with PERB its UPC No. LA-CE-746-M, alleging that

the City refused to meet and confer in good faith with the MEA before placing the Initiative on the ballot for the June 5, 2012 election. (Exh. A, 0001-0011.) The MEA also requested that PERB petition the superior court for an injunction pursuant to sections 3509, subdivision (a), 3541.3 and other applicable sections of the MMBA, and PERB Regulations section 32450 (Cal. Code Regs., tit. 8, § 32450). On February 10, 2012, the Board granted the request. (Exh. J.)

ARGUMENT

I. PERB HAS EXCLUSIVE INITIAL JURISDICTION TO SEEK INJUNCTIVE RELIEF TO HALT UNFAIR LABOR PRACTICES.

The MMBA is administered by PERB, an expert quasi-judicial agency. PERB has broad authority—analogous to that of the National Labor Relations Board (NLRB)—to interpret the MMBA in the interest of bringing "expertise and uniformity to the delicate task of stabilizing labor relations" in California. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 2 (*San Diego*); *City and County of San Francisco v. Int'l Union of Operating Engineers Local 139* (2007) 151 Cal.App.4th 938, 943-944.) PERB's interpretations of the MMBA are made pursuant to the Board's responsibility to evaluate unfair practice charges. (§ 3509, subd. (a).) The MMBA provides a comprehensive administrative procedure for investigating, hearing, and deciding charges of unfair practices against public agency employers. (§ 3509 et seq.)

Sections 3509, subdivision (a), and 3541.3, subdivision (j), authorize PERB to seek injunctive relief, when "appropriate," as an interim remedy against unfair practices proscribed by the MMBA. Indeed, PERB has exclusive original jurisdiction to seek injunctive relief against alleged unfair practices. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 604; *San Diego*, *supra*, 24 Cal.3d 1; *Modesto*, *supra*, 136 Cal.App.3d at p. 891; *Fresno Unified School District v. National Education Association* (1981) 125 Cal.App.3d 259, 270-271.)

II. THE COURT MUST APPLY A TWO-PRONGED TEST IN EVALUATING PERB'S REQUESTS FOR INJUNCTIVE RELIEF.

Recognizing that after-the-fact remedies are not always adequate, the Legislature authorized PERB to seek injunctive relief, prior to an administrative hearing, to halt alleged unfair practices. (§§ 3509, subd. (a) & 3541.3, subd. (j).) Following applicable federal precedent, the California Courts of Appeal have applied a two-prong test in determining the appropriateness of PERB requests

for injunctive relief: "Before injunctive relief may be granted, the trial court must determine [1] that there exists *reasonable cause* to believe an unfair labor practice has been committed, and [2] that the relief sought is *just and proper*." (*Modesto, supra*, 136 Cal.App.3d at p. 896, emphasis in original.)[7] To meet the "reasonable cause" prong of the *Modesto* test, the Board need only establish that its reasons to believe an unfair practice has been committed are neither insubstantial nor frivolous. (*Ibid.*) Even application of novel theories of law will establish "reasonable cause," so long as the theories are arguable. (*Ibid.*) The second prong of the *Modesto* test is met when the Court determines that injunctive relief is "just and proper"—i.e., that the purposes of the Act would be frustrated absent injunctive relief. (*Ibid.*) Although injunctive relief is an extraordinary remedy, it may be granted whenever either an employer or a union has committed an unfair labor practice which, under the circumstances, would render any final order of PERB meaningless. Moreover, preservation and restoration of the status quo are appropriate considerations in granting temporary relief. (*Ibid.*) Application of the *Modesto* rule to the present case demonstrates that PERB's requested interim remedy is appropriate here.

A. There is Reasonable Cause to Believe the City Committed an Unfair Practice.

In *Seal Beach, supra*, 36 Cal.3d 591, the California Supreme Court held that a city council was required, pursuant to the MMBA, to meet and confer with its public sector unions, before it proposed charter amendments affecting matters within the scope of representation. (*Id.* at p. 602; see also, *County of Santa Clara, supra*, PERB Decision No. 2120-M; *County of Santa Clara, supra*, PERB Decision No. 2114-M [MMBA section 3505 requires public agencies to meet and confer in good faith with employee organizations regarding matters with the scope of representation; when a party seeks to change a matter within the scope of representation through the initiative process, it

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[7] Section 10(j) of the National Labor Relations Act (29 U.S.C. § 160(j)), provides that the NLRB has the power, upon issuance of a complaint, to petition a federal district court for appropriate temporary relief or restraining order. The district court has jurisdiction to grant to the Board such temporary relief as it deems just and proper. Because of the similarities between the NLRA and MMBA, it is appropriate for the Board to use federal labor law precedent for guidance in interpreting MMBA provisions. (See e.g. *San Diego, supra,* 24 Cal.3d 1; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616.)

must satisfy its duty to bargain prior to placing the matter before the voters].)

It is undisputed here that the MEA demanded, and the City refused, to meet and confer over the provisions of the Initiative. Further, there is no dispute that the provisions of the Initiative, if passed, implicate mandatory subjects of bargaining—i.e., matters within the scope of representation, including wages and retirement benefits for current and future employees. (*Mendocino County Employees Assn. v. County of Mendocino* (1992) 3 Cal.App.4th 1472, 1478; *Huntington Beach Union High School District* (2003) PERB Decision No. 1525; *Oakland Unified School District* (1982) PERB Decision No. 275.)

The City has repeatedly asserted that, unlike the instant matter, *Seal Beach*, *supra*, 36 Cal.3d 591, involved charter amendments that were placed on the ballot by a *city council*, whereas the present case involves charter amendments that were placed on the ballot by three *private citizens.* Thus, the City maintains it had no obligation to meet and confer with the MEA about the Initiative. In *City of Monterey* (2005) PERB Decision No. 1766-M, however, the Board held that the city council was "a component of the City Government and act[ed] on behalf of the City under authority of applicable laws and regulations," and that "it [was] fair to characterize the City Council as an agent of the City and to hold the City responsible for its actions." (*Ibid.*)

In this case, it is undisputed that Mayor Sanders: (1) co-authored the Initiative with Councilmembers Faulconer and DeMaio; (2) partially funded the Initiative through a fund-raising committee he formed with Councilmember Faulconer; and (3) used his Communications Director, his official "State of the City" address, and his official title and authority under San Diego's "Strong Mayor" form of governance, to garner support for the Initiative. In these circumstances, since Mayor Sanders, along with two members of the City Council and City Attorney Goldsmith, acted as agents of the City, their actions must be attributed to the City. Consequently, Mayor Sanders' use of the "private citizen initiative process" for the express purpose of avoiding the City's meet-and-confer obligations with the MEA therefore appear to be in violation of the MMBA. (*Seal Beach*, *supra*, 36 Cal.3d 591.)

The City has nevertheless asserted that even if the Mayor did author and solicit support for the Initiative, he did so without City Council involvement or authority. The City, however,

ignores the legal definitions of actual and apparent authority; "Actual authority is that which 'a principal intentionally confers upon the agent, or *intentionally, or by want of ordinary care, allows the agent to believe himself to possess.*' (Civ. Code, § 2316.) Ostensible or apparent authority is that which 'a principal, *intentionally or by want or ordinary care, causes or allows a third person to believe the agent to possess.*' (Civ. Code, § 2317.)" (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 781 [*Inglewood*], emphasis added; accord, *Chula Vista Elementary School District* (2004) PERB Decision No. 1647.)

The appropriate standard articulated in *Inglewood*, *supra*, is, as follows: "[T]he existence of agency [is determined] on a case-by-case approach on the basis of whether the employees [the electorate in this case] could reasonably believe that the supervisor [Mayor Sanders in this case] was acting within the scope of his or her employment." In *Inglewood*, a high school principal brought a lawsuit against nine teachers, who were also union members. The court affirmed PERB's decision finding that the public employer was not responsible for the lawsuit filed by its employee, finding the following facts to be dispositive of the issue of agency: the principal did not discuss the lawsuit with either the superintendent or the governing board of the District prior to filing the complaint, nor at any time afterward (*id.* at p. 772); the Association did not prove that the District knew of the details of the lawsuit, so there was no reason for the District to disavow the suit (*id.* at p. 783); "[t]he only indicia of District involvement in the lawsuit was the use of the school mail system to distribute the complaint to the teachers named as defendants in the suit" (*id.* at 781); and "[s]ince the Association did not prove that the District knew of the details of the lawsuit, there was no reason for the District to disavow the suit" (*id.* at p. 783).

Here, by contrast, it readily appears that the City intentionally or by want of ordinary care allowed both Mayor Sanders and the public to believe that Mayor Sanders had the authority to sponsor and garner support for the Initiative on behalf of the City when it allowed him to use his Communications Director, his official "State of the City" address, his official title as City Mayor, and the prestige of his office for this purpose. The City's conduct is all the more telling as City Attorney Goldsmith had informed Mayor Sanders and City Councilmembers in a July 29, 2010 memorandum—before Mayor Sanders first announced in 2010, that he would place an initiative on

the ballot that would eliminate defined benefit pensions for new hires—that "[a] city official may not use public resources to support … a ballot measure or engage in campaign activity," and that "[a] public official … should not take part in ballot measure campaigns while on 'city time' and should be careful to separate their official work from their political and campaign work." (Exh. M.) Yet when Mayor Sanders later violated the former prohibitions and failed to meet the latter obligation, neither Goldsmith nor any other City official challenged his actions. In fact, in April 2011, Goldsmith joined Mayor Sanders, Initiative signatories, and others for a press conference under a banner reading "Pension Reform Now!" that was held during normal business hours—i.e., "on 'City time'"—on the City concourse. (Exh. A, 0005.) City agents, thereby failed "to separate their official work from their political and campaign work." By allowing this to happen, the City gave Mayor Sanders actual and apparent authority to develop and garner support for the Initiative on behalf of the City.

As further evidence of Mayor Sanders' representations of authority, he himself explained in an article appearing in the December 7, 2011 issue of San Diego CityBeat, that the citizen-initiative route *was chosen in order to avoid negotiations with the unions*—fostering a reasonable belief that this policy, or tactical choice was made on behalf of the City and imputed thereto. (Exh. B.) Thus, unlike the facts in *Inglewood*, here the extraordinary level of publicized involvement from Mayor Sanders, two City Councilmembers, and City Attorney Goldsmith, with clear knowledge imputed to the City, the evidence in this case amply demonstrates that the electorate could reasonably believe that the Mayor was acting on behalf of the City in authoring, sponsoring, promoting, and funding the Initiative.

Based on these facts, the court must not permit the City to evade its MMBA obligations by the clever maneuverings of its Strong Mayor, its City Council Members, and its City Attorney in order to, as Mayor Sanders so boldly and publicly told the media, "get the ballot initiative that [we] actually want[ed].… Otherwise we'd have gone through meet-and-confer[.]" As such, reasonable cause exists to believe the City's conduct constitutes an unfair labor practice. (Exh. B, 0020.)

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B. Injunctive Relief is Just and Proper in the Present Case.

1. PERB Proceedings

As noted above, the just and proper standard is met when the purposes of the MMBA would be frustrated absent injunctive relief. That is, a final Board order would be meaningless without the relief sought. (*Modesto*, *supra*, 136 Cal.App.3d at p. 903.) That a final Board order could be rendered meaningless is particularly true in this case where, if passed, the Initiative will have devastating effects on the wages and retirement benefits of current and future employees.

In *Modesto*, the Court of Appeal held that "preservation and restoration of the status quo are the appropriate considerations in granting temporary relief pending determination of the issues by the Board," with the status quo ante defined as "the last uncontested status that preceded the pending controversy." (*Id.* at p. 902.)[8] As stated by the Court of Appeal in *Agricultural Labor Relations Board v. Ruline Nursery Co.* (1981) 115 Cal.App.3d 1005, 1016-1017 (*Ruline*):

> If employees who have suffered unfair labor practices must wait, in some instances, years before a final disposition by the Board is rendered, the clear message to remaining employees ... is that the [Board] is not able to meaningfully aid those who are unlawfully discharged or penalized for participating in collective bargaining.

The City is likely to assert that injunctive relief is not "just and proper" here because if the Initiative is approved by the voters in June 2012, there is sufficient opportunity to address the merits of MEA's claims after the election in quo warranto proceedings. The Initiative, however, states that "[t]his Charter amendment shall become effective in the manner allowed by law." Under Section 27.1045 of the San Diego Municipal Code, "[a] legislative act proposed by an initiative petition ... which has received the requisite number of affirmative votes for adoption shall be effective thirty

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[8] The City's argument that injunctive relief would alter the status quo, rather than preserve it, is misplaced. This argument is based on a single inapposite federal court case, *Boire v. Pilot Freight Carriers, Inc.* (5th Cir. 1975) 515 F.2d 1185, where the Court of Appeals affirmed the denial of a request by the NLRB for preliminary injunctive relief in the form of an interim bargaining order pending final determination of the union's representative status. (*Id.* at pp. 1193-1194.) Here, the controversy was precipitated when Mayor Sanders co-authored, partially funded, and garnered support for the Initiative, eventually causing it to be placed on the June 5, 2012 ballot. Hence, the status quo ante is the period before the Initiative was placed on the ballot, and injunctive relief would appropriately preserve that status.

days after the date of the special election, or at the time indicated in the legislative act, whichever is later." (Italics in original.) With no effective date indicated in the Initiative, it will become effective, if approved, as early as July 5, 2012. It is a virtual certainty that no final Board disposition can be rendered on this charge before that date, and that any remedy the Board may order is likely to be stayed during the lengthy court challenge that is sure to follow.[9] In these circumstances, the Board will "not [be] able to meaningfully aid" those new employees who in the meantime have been forced into the Defined Contribution Plan, or those current employees who in the meantime have been forced to pay higher employee contributions to the Defined Benefit Plan, or those who have retired with diminished benefits. (See *Ruline*, *supra*, 115 Cal.App.3d at p. 1017.) This inability to meaningfully aid these employees will "render any final order of the Board meaningless or so devoid of force that the remedial purposes of the Act will be frustrated." (*Modesto*, *supra*, 136 Cal.App.3d at pp. 902-903.) Moreover, once the Charter amendment has become effective, a final Board decision by itself, finding the adoption of the Initiative to have been unlawful, even if upheld by the courts, will likely not be able to effect an invalidation of the Charter amendment.

2. Election Code Proceedings

The Board's request to enjoin and restrain the City from proceeding with the Initiative also finds support under California election law. As the Courts of Appeal have held, prior to the election, "any person or entity with standing," such as the Board, "may file a petition for [traditional] writ of mandate, seeking a court order removing the initiative measure from the ballot." (*Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149 [*Save Stanislaus*].) However, "once those provisions have become effective, their procedural regularity may be attacked only in quo warranto proceedings." (*Int'l Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694.) It is clear, however, that a pre-election action may include an attack "on the

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[9] Illustrative of this point, in *City of Fresno v. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 85 (*City of Fresno*), the court noted that the Attorney General granted the unions involved in that case leave to sue in 1993 (76 Ops.Cal.Atty.Gen. 169 (1993)) after the election was held in 1992, but it was not until 1999 that the Court of Appeal rendered a decision. The quo warranto process can take a very long time to complete, at which point the remedial purposes of the MMBA will have been frustrated.

ground that prior to its adoption the city had not met and conferred with the designated employee representatives as required by the [MMBA]." (*Id.* at p. 690.)

As discussed above, the time that will elapse between the effective date of the Charter amendment and the resolution of quo warranto proceedings will leave the MEA and the employees who are adversely affected by the Charter amendment without "meaningful aid" so that "the remedial purposes of the Act will be frustrated." (*Ruline*, *supra*, 115 Cal.App.3d at p. 1017; *Modesto*, *supra*, 136 Cal.App.3d at p. 903.) Of course, the standard that has to be met by a pre-election challenge to a ballot initiative is an exacting one:

> The standard is one of great deference to the electorate's constitutional right to enact laws through the initiative process; a court will remove an initiative from the ballot only "on a compelling showing that a proper case has been established for interfering." ... "In our view, the court should shortcut the normal initiative procedure only where the invalidity of the proposed measure is clear beyond a doubt." (Citations omitted.)

(*Save Stanislaus*, *supra*, 13 Cal.App.4th at pp. 146, 150-151 [the court ordered the county to place initiative on ballot].) However, in *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, the Court of Appeal, while acknowledging that "'it is usually more appropriate to review ... challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity,'" nevertheless stated that "we do not believe that this strict rule is inflexible, nor that it should be." (*Id.* at p. 1022.) The court further stated:

> [I]f the court is convinced, at any time, that a measure is fatally flawed, it should not matter whether that decision is easy or difficult, simple or complicated. Certainly it would be unconscionable for this court, at this time, to rule in favor of petitioner on the basis that the issue is close—only to be faced with a postelection challenge should the measure pass.

(*Ibid.*) The court also noted that "if an initiative ordinance is invalid, no purpose is served by submitting it to the voters," and was concerned that, "[t]he costs of an election—and of preparing the ballot materials necessary for each measure—are far from insignificant, [as] proponents and opponents of a measure may both expend large sums of money during the election campaign." In addition, the court observed, "heated rhetoric of an election campaign may open permanent rifts in a

community." (*Id.* at p. 1023.)

Here, the court should find that the Initiative is fatally flawed because it was placed on the ballot in violation of the MMBA, and it would be unconscionable for the court to rule against the Board, "only to be faced with a postelection challenge should the measure pass." This case is of special importance, in that if the Initiative is presented to the electorate, the policy, spirit, and bargaining mandates established by the Legislature and codified in the MMBA will be circumvented. This attempt to side-step the MMBA in the guise of a "citizens' initiative" will cause nothing short of irreparable harm to the collective bargaining rights provided by public sector labor laws, and will open the floodgates to other equally impermissible attempts elsewhere. In *City of Fresno*, *supra*, the court, although finding in that case that the issues were not within the scope of bargaining, reiterated, "[t]he duty to bargain in good faith established in [the] MMBA is a matter of statewide concern and of overriding legislative policy, and nothing that is or is not in a city's charter can supersede that duty." (72 Cal.App.4th at p. 100, citing *Seal Beach*, *supra*, 36 Cal.3d at p. 600.)

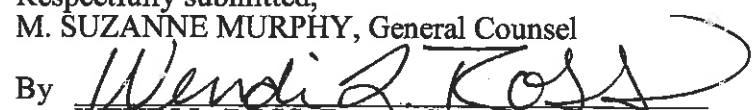
Based on the foregoing, well established legal principles, and the balance that must be struck between the rights of the electorate and the duty to bargain in good faith pursuant to the MMBA, the overriding legislative and statewide concerns associated with bargaining rights must prevail. (See *Seal Beach*, *supra*, 36 Cal.3d at p. 600; *City of Fresno*, *supra*, 71 Cal.App.4th at p. 100.) Accordingly, the standards for pre-election challenges to ballot initiatives supports PERB's challenge here. Thus, the "just and proper" standard is met as well.

CONCLUSION

PERB has plainly met its burden of showing "reasonable cause" to believe the City refused to bargain with the MEA in violation of the MMBA, and that injunctive relief is "just and proper" given the drastic changes to City employees' wages and retirement benefits. Accordingly, PERB respectively asks the Court to order the City to remove the Initiative from the June 5, 2012 ballot.

Dated: February 14, 2012

Respectfully submitted,
M. SUZANNE MURPHY, General Counsel

By 
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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PUBLIC EMPLOYMENT RELATIONS BOARD, Plaintiff/Petitioner, v. CITY OF SAN DIEGO, Defendant/Respondent.	Case No. 37-2012-00092205-CU-MC-CTL **DECLARATION OF NOTICE RE EX PARTE APPLICATION AND HEARING** **IMAGED FILE** Ex Parte Hearing Date: Date: February 21, 2012 Time: 8:30 a.m. Dept.: C-67 Judge: Hon. William S. Dato **Exempt from Fees (Gov. Code, § 6103)**
SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, Real Party in Interest.	

I, WENDI L. ROSS, hereby declare:

1. I am employed as Deputy General Counsel by and for the Public Employment Relations Board (PERB or Board). My job duties include investigating unfair practice charges and requests for injunctive relief filed with PERB. I was assigned to the instant matter by PERB's General Counsel.

2. Before filing the Complaint for Injunctive Relief and Verified Petition for Writ of Mandate herein, PERB notified counsel for the City, Executive Assistant City Attorney Andrew Jones and Deputy City Attorney Joan Dawson, by voicemail on February 13, 2012, that PERB intended to file an Ex Parte Application for a Temporary Restraining Order (TRO) and Order to Show Cause (OSC) Regarding a Preliminary Injunction in this Court and also intended on appearing before the Court on February 16, 2012 for the ex parte hearing. PERB confirmed this same information to Mr. Jones via facsimile on February 13, 2012. (See Exhibit L to the Declaration of Wendi L. Ross, filed in support of PERB's Ex Parte Application.)

3. PERB also transmitted a copy of the Complaint for Injunctive Relief and Verified Petition for Writ of Mandate to Mr. Jones on February 13, 2012 via facsimile, and will transmit to Mr. Jones its Ex Parte Application for a TRO and OSC re Preliminary Injunction, its Memorandum of Points and Authorities, a Proposed Order, and the Declaration of Wendi L. Ross, via electronic mail on February 14, 2012.

4. On February 14, 2012, I called Mr. Jones and left a voice-mail message stating that we had scheduled an ex parte hearing in Department 67 on February 21, 2012 at 8:30 a.m.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on the 14th day of February, 2012, in Sacramento, California

Dated: February 14, 2012

By Wendi L. Ross

WENDI L. ROSS
ATTORNEY for Plaintiff and Petitioner
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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PUBLIC EMPLOYMENT RELATIONS BOARD, Plaintiff/Petitioner v. CITY OF SAN DIEGO, Defendant/Respondent	Case No. 37-2012-00092205-CU-MC-CTL **[PROPOSED] ORDER GRANTING TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION** **IMAGED FILE** Ex Parte Hearing Date: Date: February 21, 2012 Time: 8:30 a.m. Dept.: C-67 Judge: Hon. William S. Dato **Exempt from Fees (Gov. Code, § 6103)**
SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, Real Party in Interest.	

Upon reading the Application, Complaint, supporting Declarations and Points and Authorities on file in this action, it appears to the satisfaction of the Court that Plaintiff and Petitioner California Public Employment Relations Board (PERB or the Board) has demonstrated that there is reasonable cause to believe Defendant and Respondent City of San Diego engaged in unlawful conduct in violation of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.[MMBA

or Act]) by refusing to meet and confer in good faith with Real Party in Interest San Diego Municipal Employees Association (the MEA) about the provisions of a local ballot measure entitled "Proposition—Charter Amendment/Comprehensive Pension Reform for San Diego" (Initiative) before it approved and acted to place the Initiative on the ballot for the June 5, 2012 election. It further appears to the satisfaction of the Court that PERB has demonstrated that it would be just and proper to issue a Temporary Restraining Order (TRO) and Order to Show Cause (OSC) regarding a Preliminary Injunction because Defendant will continue to engage in said unlawful conduct; PERB's remedial authority under the MMBA and it ability to provide meaningful relief from the alleged violation of the Act will be thwarted; and great and irreparable injury will result to the MEA, current and future employees of the City for whom it is serves as the recognized exclusive representative under the MMBA in the Professional, Supervisory, Technical, and Administrative Support and Field Service Units (City Employees or bargaining unit members).

Accordingly, IT IS HEREBY ORDERED:

1. That Defendant and Respondent City of San Diego (City), its agents, employees, representatives, officers, and officials, and all corporations, unincorporated associations, and natural persons acting in concert or participation with any of them, until a hearing or trial on a preliminary injunction, be enjoined and restrained, pending further order from this Court, to:

(a) immediately, and in all events prior to March 9, 2012, restore the status quo preceding the alleged violation of the MMBA by rescinding all approvals of the Initiative and taking all necessary steps to remove the Initiative from the ballot for the June 5, 2012 election; and

(b) cease and desist from taking or attempting to take any further action, directly or indirectly, by any means, method or device whatsoever, to cause or permit the Initiative to be placed before the voters on June 5, 2012, until the date of a hearing upon an OSC re Preliminary Injunction.

2. That Defendant and its agents, employees, representatives, and officers, and all corporations, unincorporated associations, and natural persons acting in concert or participation with them or any of them, until a hearing or trial on a preliminary injunction, be enjoined and restrained from doing or attempting to do, directly or indirectly, by any means, method or device whatsoever,

any of the acts enjoined in paragraph 1 during the duration of this action.

3. That a Temporary Restraining Order be granted, enjoining and restraining the City, its agent, employees, representatives, and officers, and all corporations, unincorporated associations, and natural persons acting in concert or participation with them or any of them, until a hearing upon an Order to Show Cause, from doing or causing or permitting to be done any of the acts enjoined in paragraph 1.

4. That Defendant City of San Diego appear before this Court in the courtroom of Department _____, on _____, 2012, at _____, _.m., then and there to show cause why a preliminary injunction should not be issued enjoining the City and its agents, employees, representatives, officers, and assigns, and each of them:

(a) from taking or attempting to take any further action, directly or indirectly, by any means, method or device whatsoever, to cause or permit the Initiative to be placed before the voters on June 5, 2012;

(b) from refusing to meet and confer in good faith with the MEA about the provisions of the Initiative or any similar initiative that will or may adversely impact bargaining unit members' wages or retirement benefits.

IT IS FURTHER ORDERED that a copy of the Complaint, together with a copy of this Order to Show Cause and Temporary Restraining Order, accompanying declarations and points and authorities must be filed and served on Defendant the City not later than _____. The opposition papers must be filed and served on Plaintiff by mail no later than _____. A reply brief must be filed and served on Defendant the City by mail no later than _____.

Dated: February __, 2012

_____
JUDGE OF THE SUPERIOR COURT