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8 DAVID C. BROWN IN PRO PER

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF MARIN**

DAVID C. BROWN,

Petitioner,

V

THE CITY OF SAN RAFAEL

AND

SAN RAFAEL CITY COUNCIL

Respondents

} Case No.:
}
} **Verified Petition for Writ of**
} **Traditional Mandate (CCP**
} **1085) and Complaint for**
} **Declaratory Relief (CCP 1060)**
}
} **Supporting Memorandum of**
} **Points and Authorities**

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10 Exhibit A: 2015 Grand Jury report: *Pension Enhancements: A Case*
 11 *of Government Code Violations and A Lack of Transparency*

12
 13 Exhibit B: Government Code section 7507 as it existed from 2001
 14 to 2006.

15
 16 Exhibit C: The City of San Rafael Required Response to the Marin
 17 County Civil Grand Jury

18
 19 Exhibit D: Memo to the San Rafael City Council from Colantuono,
 20 Highsmith, Whatley, PC. (The CHW memo.)

21
 22 Exhibit E: Enrolled Bill Report, SB 439, August 15, 1977

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 24 Exhibit F: Letter from Senator Newton R. Russell to then-Governor
 25 Edmund G. Brown, Jr.

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3 meeting
4

5 **INTRODUCTION**

6 Petitioner David C. Brown petitions this Court for a writ of
7 mandate and for declaratory relief directed to respondents The
8 City of San Rafael and the San Rafael City Council (hereafter
9 Respondents), and by this Verified Petition alleges Respondents
10 have failed and are failing in their duty to comply with California
11 Government Code Section 7507¹ which is mandatory.

12 Petitioner is seeking relief under California Code of Civil
13 Procedure sections 1060 and 1085 because there is no plain,
14 speedy or adequate remedy at law. Petitioner has exhausted any
15 and all available administrative remedies to the extent required
16 by law.

¹Unless otherwise noted, all statutory references herein are to the Government Code. Section 31515.5 requires compliance with Section 7507; therefore, violations to Section 7507 described herein also refer to violations to Sections 31515.5.

1 In light of their refusal to act on this matter Respondents
2 have forfeited their right to remedy the situation on their own
3 and, in fact, continue to violate Section 7507.

4
5 **FACTUAL STATEMENT AND PROCEDURAL HISTORY**

6 **No Facts in Dispute**

7 Petitioner believes there are no facts in this case that are
8 subject to any disagreement.

9
10 **The Grand Jury Report**

11 On April 16, 2015, the Marin County Civil Grand Jury issued
12 a report titled *Pension Enhancements: A Case of Government Code*
13 *Violations and A Lack of Transparency*. (A true and correct copy of
14 the report appears as Exhibit A.) In it the Grand Jury found nine
15 instances in which The City of San Rafael and its City Council did
16 not comply with the requirements of Government Code Section
17 7507 in granting pension increases. The subject resolutions and
18 their adoption dates are as follows:

1 (A true and correct copy of Section 7507 as it existed in
2 2001 is attached as Exhibit B.)

3 It is the specific order to perform directed at “local
4 legislative bodies” under Section 7507 that necessitated the
5 inclusion of the *City Council* of San Rafael as a respondent in this
6 petition.

7 **Required Response to Grand Jury Report**

8 All entities so directed in a report by a Civil Grand Jury are
9 required by law to issue a response to the report. This response
10 must be placed on the entity’s agenda and approved at a public
11 meeting. (A true and correct copy of Respondent’s required
12 response to the Grand Jury report is attached as Exhibit C.)

14 **MEMORANDUM AND POINTS AND AUTHORITIES**

15 **I: Issues Presented:**

- 16 A. Standing.
- 17 B. Capacity.
- 18 C. Jurisdiction and venue.
- 19 D. Statute of Limitations.

- 1 E. San Rafael's required response to the Grand Jury Report.
- 2 F. Compliance: strict, substantial or lack thereof.
- 3 G. The Citizens of San Rafael were prejudiced.
- 4 H. The intent of section 7507.
- 5 I. Section 7507 is mandatory.
- 6 J. Respondents failed to comply with section 7507.
- 7 K. Failure to comply with section 7507 is invalidating.
- 8 L. Unlawfully granted benefits are not vested.
- 9 M. Pension benefits can be modified (reduced).

10

11 **II. LEGAL DISCUSSION:**

12 **A. STANDING**

13 **A.1 Petitioner has standing under Code of**
14 **Civil Procedure Section 1085**

15

16 Petitioner David C. Brown is a citizen of Marin County and
17 the State of California.

18 "[Where] the question is one of public right and the
19 object of the mandamus is to procure the enforcement
20 of a public duty the relator need not show that he has
21 any legal or special interest in the result, since it is
22 sufficient that he is interested as a citizen in having
23 the laws executed and the duty in question enforced "

1 ... The exception promotes the policy of guaranteeing
2 citizens the opportunity to ensure that no
3 governmental body impairs or defeats the purpose of
4 legislation establishing a public right. (Citation
5 omitted.) It has often been invoked by California
6 courts. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.)
7

8 **A.2 Petitioner has standing under Code of**
9 **Civil Procedure Section 1060:**

10 Petitioner has standing pursuant to the holding in *Blair v. Pitchess*
11 (1971) 5 Cal. 3rd 258, 267-268:
12

13 We have even extended section 526a to include
14 actions brought by nonresident taxpayers. [Citations
15 omitted.] [W]e stated: "In this state we have been
16 very liberal in the application of the rule permitting
17 taxpayers to bring a suit to prevent the illegal conduct
18 of city officials, and no showing of special damage to
19 the particular taxpayer has been held necessary."
20

21 **B. RESPONDENTS HAVE CAPACITY.**

22 Respondents are the City of San Rafael in the County of
23 Marin, State of California and the San Rafael City Council. At all
24 times mentioned in this Verified Petition Respondents have been
25 and are now charged with administering the provisions of
26 California Government Code Section 7507. The presiding officer of
27 the Respondent City Council is Mayor Gary Phillips. The Vice-

1 Mayor of the City Council is Maribeth Bushey. The Council is
2 composed of five members.

3
4 **C. JURISDICTION AND VENUE:**

- 5 1. This Court has jurisdiction over this action under
6 California Code of Civil Procedure sections 1060 and
7 1085.
8 2. Venue in this Court is proper under California Code of
9 Civil Procedure section 394.

10
11 **D. STATUTE OF LIMITATIONS HAS NOT EXPIRED:**

12 **D1. The Controlling Statute Regarding the**
13 **Statute of Limitations is California**
14 **Code of Civil Procedure Section 338(a):**
15

16 CCP Section 338 states: "Within three years: (a) An action
17 upon a liability created by statute, other than a penalty or
18 forfeiture."³

³ On April 16, 2015 the Marin County Civil Grand Jury issued its report titled *Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency*. In it the Grand Jury found

1 As the below discussion of the applicable law will show, the
2 failure to lawfully grant the initial right to a pension means there
3 is no legal basis on which to continue making installments. They
4 are unlawful. There is no right to receive them. With each
5 unlawful payment, the right to sue commences anew.

6 **D.2. Continuous Accrual:**

7 **D.2(a) Continuous accrual generally.**

8 Under the doctrine of “continuous accrual”, the statute of
9 limitations resets with every unlawful payment made to or
10 accrued by an employee of, or retiree from, The City of San Rafael.

11 “(W)e conclude that if, as alleged, the tax is illegal, its
12 continued imposition and collection is an ongoing
13 violation, upon which the limitations period begins
14 anew with each collection.” (*Howard Jarvis*
15 *Taxpayers Association v. City of La Habra* (2001) 25
16 Cal.4th 809, 812.)

17
18 The doctrine of continuous accrual is not limited to cases of
19 illegally imposed taxes. In *Hogar Dulce Hogar v. Community*

nine instances in which The City of San Rafael and its Council did not comply with Government Code section 7507. (See Appendix A of Exhibit A.)

1 *Development Commission* (2003) 110 Cal.App.4th 1288, 1295 the

2 Court held:

3 When an obligation or liability arises on a recurring
4 basis, *a cause of action accrues each time a wrongful*
5 *act occurs, triggering a new limitations period.*

6 (Citation omitted.) The continuing accrual rule has
7 been applied in a variety of actions involving the
8 obligation to make periodic payments under
9 California statutes or regulations. (See e.g. (Citations
10 omitted.); *Dryden v. Board of Pension Commrs.*
11 (1936) 6 Cal.2d 575, 580-582, 59 P.2nd 104 [pension
12 benefits].) (Brackets in the original. Emphasis
13 added.)

14
15
16 **D.2(b) Continuous accrual as**
17 **applied specifically to pensions.**
18

19 Regarding pension cases specifically, in *Dillon v. Board of*
20 *Pension Commrs.* (1941) 18 Cal.2d 427, 430 (*Dillon*) the Court
21 held:

22 *The right to receive periodic payments under a pension*
23 *is a continuing one* [citation], and any time limitation
24 upon the right to sue for each installment necessarily
25 *commences to run from the time when that installment*
26 *actually falls due.* Before plaintiff can claim these
27 periodic payments, however, she ***must establish her***
28 ***right to a pension.*** (Emphasis added.)
29

30 The Court in *Dillon* also held the “continuous accrual”
31 exception where it applies to pension cases as being for claims for

1 non-payment of pensions owing, which the retiree had *previously*
2 *established her right to receive:*

3 An action to determine the existence of the right thus
4 necessarily precedes and *is distinct from* an action to
5 recover installments which have fallen due after the
6 pension has been granted. (*Id.*, at p. 430, Emphasis
7 added.)

8
9 Note that the Court distinguished between the right to
10 receive a pension and the right to recover installments that have
11 fallen due after the right to the pension has been established. Note
12 also that the right to receive a pension and the right to recover
13 installments that have fallen due are derived from the initial right
14 to receive a pension.

15 For these reasons, *Dillon* held that continuous accrual
16 applies because:

17 *...any time limitation upon the right to sue for each*
18 *installment necessarily commences to run from the*
19 *time when that installment actually falls due. (Ibid.,*
20 *emphasis added.)*

21
22 Therefore, the *Dillon* Court affirmed that the granting of the
23 initial right to receive a pension establishes the subsequent right
24 to receive future payments. (*Ibid.*) **Thus, in the present case, the**

1 **failure to lawfully grant the initial right, because of**
2 **noncompliance with Section 7507, means there is no legal**
3 **basis on which to continue making installments. They are**
4 **unlawful. There is no right to receive them. With each**
5 **unlawful payment, the right to sue commences anew.** (*Dillon*
6 *v. Board of Pension Commrs.*)

7 The court has addressed the question of continuous accrual
8 with regard to pensions on a number of occasions. For example, in
9 *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438 (*Abbott*) the
10 Supreme Court held:

11 “... On the other hand, if declaratory relief is sought
12 'before there has been a breach of the obligation in
13 respect to which said declaration is sought,' or within
14 the statutory period after the breach, *the right to such*
15 *relief is not barred by lapse of time.*” Here, as we have
16 seen, the statutory time limitation upon the right to
17 sue for each pension instalment commences to run
18 from the time when that instalment falls due. (*Id.*, at
19 p. 463, emphasis added.)
20

21 The Court in *Abbott* then went on to hold:

22
23 It follows that even though plaintiffs might have
24 earlier brought suit for declaratory relief ... (Citation
25 omitted.) their failure to do so *does not operate to bar*
26 *their right to declaratory relief with respect to future*
27 *pension payments as well as to a monetary judgment*

1 for the difference, for three years (insofar as the
2 subject statute is concerned) prior to the filing of
3 these actions, between the amount of the fixed and
4 the fluctuating pensions. (*Id.*, at pp. 463-464,
5 emphasis added.)
6

7 And in *Dryden v. Board of Pension Commrs.* (1936) 6 Cal.2d
8 575 the Court also held, as it did in *Abbott*, that the right to receive
9 future payments is dependent on the establishment of the initial
10 lawful right to the pension:

11 Petitioner by her conduct may have barred herself
12 from collecting payments which have accrued, but
13 *this does not mean that she is without means to*
14 *enforce the right to present and future pension*
15 *payments*, as distinguished from past and accrued
16 pension payments, provided she proceeds to do so in
17 the manner required by law. The distinction between
18 a single covenant and a continuing covenant is well
19 settled in the law. (*Id.*, at pp. 580-581. Emphasis
20 added.)
21

22 Further in *Dryden*, the Court relied on an Iowa
23 decision, (*Gaffney v. Young et al.*, 200 Iowa, 1030 [205 N.W.
24 865]), which held:

25 '*If appellee was, on the death of her husband, entitled*
26 *to a pension, her right to present and future*
27 *payments from the pension fund is not barred by any*
28 *provision of the statute of limitations.'* (*Id.*, at p. 582,
29 emphasis added.)

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D.2(c) Continuous accrual applies in this case

Each of the examples above reaffirms the holding in *Dillon*: namely, that the right to sue for payments owing and unpaid is a continuing one and renews with each payment. Further, the above Courts held that the establishment of the right to receive ongoing payments is distinct from, *and reliant upon*, the original establishment of the right to receive the pension.

As will be shown below, there was no lawful establishment of the right to receive the enhanced pensions. Therefore, there is no legal right to the enhanced payments owing and unpaid. Accordingly, under “continuous accrual” Petitioner is not time barred from taking action to prevent these unlawful payments.

E: SAN RAFAEL’S REQUIRED RESPONSE TO THE GRAND JURY REPORT

E1. The CHW memo:

The City of San Rafael hired attorney Michael Colantuono of the firm Colantuono, Highsmith and Whatley (hereafter CHW) to

1 draft a memo (hereafter “CHW memo”) on which it based its
2 required response to the Grand Jury. Presumably, CHW had
3 unfettered access to all documents and records in the archives of
4 the City and the City Council.

5 (A true and correct copy of the CHW memo is attached as
6 Exhibit D.)
7

8 **E2. Errors in the CHW memo**

9 In its memo, CHW makes the following erroneous assertions:

- 10 1. Government Code Section 7507 is directory, not mandatory.
- 11
- 12 2. The Respondents secured actuarial reports in full
13 compliance with Section 7507.
- 14
- 15 3. Respondents “*substantially*” complied with government code
16 Section 7507’s public notification requirements.
- 17
- 18 4. Lack of strict compliance with Section 7507 imposes no
19 consequence.
- 20
- 21 5. Lack of a stated or implied consequence in Section 7507
22 means it is directory.
- 23
- 24 6. Pensioners and employees have vested rights to the pension
25 enhancements.
- 26

27 Each of these assertions will be disproved below.

28

1 **F. COMPLIANCE: STRICT, SUBSTANTIAL OR THE LACK**
2 **THEREOF.**

3
4 On numerous occasions the CHW memo erroneously asserts
5 Respondents were in “*substantial*” compliance with Section 7507.
6 This argument is misleading. That is, either the City complied with
7 the requirements of Section 7507 or it did not. Section 7507 does
8 not provide for “*substantial*” compliance. The concept of
9 “*substantial*” compliance with Section 7507 is a legal fiction
10 invented by the CHW memo. No legal authority is cited to support
11 the claim of substantial compliance, as opposed to real or actual
12 compliance.

13
14 **G. THE CITIZENS OF SAN RAFAEL WERE PREJUDICED.**

15 The strain of unfunded pension liabilities arising from the
16 unlawfully granted benefit increases has prejudiced and continues
17 to prejudice the citizens of San Rafael and will prejudice the future
18 citizens of San Rafael, as manifested by a reduced workforce,
19 reduced public services, increased debt and increased taxes and
20 fees.

1 Furthermore, due to the failure of Respondents to fully
2 comply with Section 7507, the exact harm against which it was
3 expressly designed to protect did, in fact, occur. Unfunded
4 liabilities skyrocketed.⁴ For example, according to the annual
5 actuarial reports from the Marin County Employees' Retirement
6 Association (MCERA), the City had a surplus in its retirement fund
7 of approximately \$3.4 million as of June 30, 2002. At the end of
8 the ensuing twelve months, during which seven of the nine
9 pension enhancements were authorized, the surplus was gone,
10 and unfunded liabilities exceeded \$34 million. As of June 30, 2016,
11 unfunded liabilities had increased to over \$156 million.

12
13 **H. LEGISLATIVE INTENT OF GOVERNMENT CODE SECTION**
14 **7507 IS UNAMBIGUOUS.**

15
16 **H.1. History of Section 7507**

⁴ See Exhibit F: Enrolled Bill Report, Dept. of Finance, on Sen. Bill No. 439, September 15, 1977 ("It is recognized that increases in Retirement Benefits will cause unfunded liabilities in the retirement fund unless they are properly funded at the time such benefits are adopted. This bill addresses this issue.")

1 Government Code section 7507 was adopted by the
2 Legislature and signed into law in 1977. Unarguably, the legislative
3 intent of Section 7507 is to protect taxpayers by avoiding
4 unfunded pension liabilities resulting from increases in retirement
5 benefits. "It is recognized that increases in Retirement Benefits will
6 cause unfunded liabilities in the retirement fund unless they are
7 properly funded at the time such benefits are adopted. This bill
8 addresses this issue." (Enrolled Bill Report, Dept. of Finance, on
9 Sen. Bill No. 439 ⁵, September 15, 1977.)

10 (A true and correct copy of this document is attached as
11 Exhibit E.)

12 Furthermore, in a letter dated September 12, 1977 from the
13 bill's author, Senator Newton R. Russell, to then-Governor Edmund
14 G. Brown, Jr., Senator Russell stated his reasons for submitting the
15 bill:

16 As a former member of [the Senate Committee on
17 Public Employment and Retirement] and as its
18 current chairman, I have witnessed far too many
19
20

⁵ Government Code section 7507 was enacted in 1977, as Senate Bill 439.

1 instances of “*end-running*” local government by
2 employee groups asking the legislature to grant
3 “*permissive*” legislation with the final result being that
4 local government approves employee retirement
5 benefit increases *without the taxpayers ever knowing*
6 *the real cost.* (Emphasis added.)
7

8 Senator Russell then went on to state:

9
10 *I believe these costs should be ascertained and **made***
11 ***public prior** to the benefit increases being granted,*
12 *and this bill will accomplish that.”* (Emphasis added.)
13

14 (A true and correct copy of Senator Russell’s letter is

15 attached as Exhibit F.)

16 It cannot be stressed enough that the intent of section 7507,
17 as explicitly stated above, is for the *taxpayers*, not the legislative
18 bodies, to know the real cost of the benefit increases prior to their
19 adoption. In fact, Senator Russell was skeptical about the
20 legislatures’ ability to resist the granting of “*permissive*” legislation
21 in the absence of public oversight. Therefore, it is the very essence
22 of the statutory design that 1) the costs be determined by the
23 actuary *prior* to adoption by the legislature, and 2) that these
24 costs be “*made public at a public meeting*” (Sec. 7507) at least two
25 weeks prior to the adoption of the benefit increases.

1 **H.2. CHW memo distorts the intent of**
2 **Senator Russell’s letter.**

3
4 The CHW memo at page 8 misquotes Senator Russell’s
5 letter, giving the statement by Senator Russell an incorrect
6 meaning. Senator Russell’s letter, correctly quoted, states: “...
7 *these costs should be ascertained and made PUBLIC prior to the*
8 *benefit increases being granted, and this bill will accomplish that.*”
9 (Emphasis added.) The CHW memo omitted the word *PUBLIC*,
10 stating instead: “... *these costs should be ascertained and made*
11 *prior to the pension increases being granted...*” The omission of the
12 word “public” is completely misleading, giving the appearance
13 that Section 7507 was only intended to require that the cost of the
14 pension increases be ascertained before they are granted, when,
15 in fact, the purpose of the bill is not only that the costs of the
16 benefit increases be quantified before adoption, but also that
17 these costs be *made public* before they are approved.

18
19 **H.3 Retirement Costs are Different**

1 Unlike salaries and (current) benefits, in the words of
2 Senator Russell, "It is recognized that increases in Retirement
3 Benefits will cause unfunded liabilities in the retirement fund
4 unless they are properly funded at the time such benefits are
5 adopted." Salaries and (current) benefits cannot create unfunded
6 liabilities. Retirement benefits, on the other hand, are payments
7 made in the future (as much as 75 years, in some cases) for
8 services rendered in the here and now. This can lead to unfunded
9 liabilities, which can place great burdens on taxpayers, and also to
10 intergenerational inequity. This is why Section 7507 contains the
11 specific requirement to separately estimate the cost of an increase
12 in retirement benefits and to inform the public of the long-term
13 commitment being made on its behalf.

14 In addition, two of the three components of compensation,
15 salaries and benefits, extend only through the end of the current
16 bargaining agreement. They can then be renegotiated. Under
17 current California Court decisions, known collectively as the
18 *California Rule*, once a pension increase is granted, it can *never* be
19 reduced without an offsetting benefit. The irrevocability of an

1 increase in retirement benefits is yet another reason the costs
2 associated with them must be calculated separately and disclosed
3 to the taxpayers before adoption.

4
5 **I. SECTION 7507 IS MANDATORY. ANY CONCLUSION TO THE**
6 **CONTRARY IGNORES THE LEGISLATIVE INTENT OF SECTION**
7 **7507.**

8
9 Section 7507 contains the word “shall” three times, each
10 time without qualification or limitation of any kind. The California
11 Government Code, in [Section 14](#), [states](#): “Shall” is mandatory.
12 “May” is permissive.” The San Rafael City Code, in section 1.08.110
13 (a), [states](#): “Shall” is mandatory and “may” is permissive.

14
15 **I.1. Courts have ruled 7507 is mandatory.**

16 The CHW memo, on page 7, [states](#): “No case has determined
17 whether Section 7507 is directory or mandatory. [The memo is in](#)
18 [error](#). In fact, in *Voters for Responsible Retirement v. Board of*
19 *Supervisors* (1994) 8 Cal. App.4th 765 ([Voters](#)), a case omitted from
20 the CHW memo, the Supreme Court [of California held directly to](#)
21 [the contrary. In Voters, the Supreme Court held:](#)

1 ...section 7507 provides that the local legislative body,
2 before adopting increases in public retirement
3 benefits for its employees, *must* obtain actuarial
4 evaluations of future annual costs of the plan, *and*
5 [must] make that cost information public "at a public
6 meeting at least two weeks prior to the adoption of
7 any increases in public retirement plan benefits." (*Id.*,
8 785, emphasis added. Bracketed material added.)
9

10 That is, the Court did not state that the requirements of
11 Section 7507 were directory or optional or elective. It stated just
12 the opposite. It stated that the local legislative body *must* comply
13 with the requirements of Section 7507. (*Ibid.*)

14 The CHW memo (page 7) misstates the holding in *California*
15 *Statewide Law Enforcement Association v. Department of Personnel*
16 *Administration* (2011) 192 Cal. App. 4th 1 (California Statewide),
17 describing it as a case in which "[T]he decision does not analyze
18 Section 7507 separately from other state-specific requirements ..."
19 In fact, in California Statewide the Court *invalidated* the retroactive
20 portion of a benefit increase because, among other reasons, *the*
21 *requirements of section 7507 were not met* for that portion of the
22 increase. The Court held:

23 This requirement *necessarily* includes the obligation
24 to present the Legislature with a fiscal analysis of the

1 cost of the agreement. (See § 7507, subd. (b)(1)
2 ["before authorizing changes in public retirement
3 plan benefits or other postemployment benefits," the
4 Legislature shall have a "statement of [their] actuarial
5 impact upon future annual costs, including normal
6 cost and any additional accrued liability"].) *California*
7 *Statewide* (*Id.*, at p. 18. Emphasis added.)
8

9 Regarding *Howard Jarvis Taxpayers Association v. Bd. Of*
10 *Supervisors* (1996) 41 Cal. App.4th 1363 (*Howard Jarvis v. BOS*) the
11 CHW memo at page 8 states: "The only other case that cites 7507
12 concluded that it did not apply to a county employees' retirement
13 association and its board of directors." This statement is entirely
14 irrelevant, as the case at hand has nothing to do with a retirement
15 board and its board of directors.

16 In fact, the Court in *Howard Jarvis v BOS* said more. It held
17 that 7507 *does* apply to a legislative body:

18 "However, the record demonstrates the change in the
19 retirement system of which plaintiffs complain was
20 not an "increase in public retirement plan benefits"
21 *which the board of supervisors may authorize, and*
22 *which would subject it to the requirements of section*
23 *7507, but rather a change in LACERA'S method of*
24 *calculating "compensation earnable" ... "* (*Id.*, at p.
25 1375. Emphasis added.)
26

1 Thus, the distinction drawn by the Court in *Howard Jarvis v.*
2 *BOS* was the distinction between an “increase in public retirement
3 plan benefits” made by a *local legislative body* (like Respondents),
4 to which section 7507 *does* apply, and “a change in compensation
5 earnable” made by a *retirement board*, a body to which section
6 7507 does not apply.

7 **I.2. CalPERS circular indicates 7507 is mandatory.**

8 Evidence that California Public Employees’ Retirement
9 System (CalPERS), the largest public pension fund in the state,
10 considers Section 7507 to be mandatory is provided by CalPERS
11 Circular Letter number 200-032-09 dated June 9, 2009:

12 If a benefit change requires amendment to your
13 CalPERS contract, then *CalPERS will require that your*
14 *agency certify compliance* with Government Code
15 Section 7507. (Emphasis added.)

16
17 While the Circular Letter is dated after the benefit
18 enhancements discussed in this Petition, Section 7507 remained
19 essentially unchanged between 2000 and the issuance date of the
20 letter in 2009. (A true and correct copy of CalPERS Circular Letter
21 200-032-09 is attached as Exhibit G.)

1 **I.3. The CHW memo fails to persuade that**
2 **Section 7507 is directory**

3
4 The CHW memo (page 9) states: “Section 7507’s notification
5 requirement, while important, is not essential to the statute’s
6 operation and its requirements are therefore directory.” The
7 memo then selectively cites from *City of Santa Monica v. Gonzales*
8 (2008) 43 Cal.4th 905 (*Gonzales*) to support this claim:

9 If the procedure is essential to promote the statutory
10 design, it is 'mandatory' and noncompliance has an
11 invalidating effect. If not, it is directory. (*Id.*, at p. 924.)

12
13 This citation in no way supports the argument made in the
14 CHW memo. In light of the legislative intent of Section 7507, as
15 shown above, this citation fully supports Petitioner’s case. Further,
16 when this sentence is read in the surrounding context provided by
17 the Supreme Court in *Gonzales*, it is even more supportive of
18 Petitioner’s argument that Section 7507 is mandatory:

19 Courts determine whether an obligatory statutory
20 provision should be given mandatory or directory
21 effect by ascertaining the legislative intent. [Citation
22 omitted.] *Of course, when the Legislature imposes*
23 *particular statutory requirements, it generally does not*
24 *intend for them to be disregarded.* [Citation omitted.]
25 But where, as here, " 'the consequences of not obeying
26 them in every particular are not prescribed, the

1 courts must judicially determine them.' "[Citation
2 omitted.]

3
4 There is "no simple, mechanical test" for making this
5 determination. [Citation omitted.] Invariably, "courts
6 look to the procedure's purpose or function. *If the*
7 *procedure is essential to promote the statutory design,*
8 *it is 'mandatory' and noncompliance has an*
9 *invalidating effect.* If not, it is directory." [Citation
10 omitted.] In this regard, " "the construction of
11 particular provisions must be left for determination in
12 such light as the obvious purpose they were intended
13 to accomplish may afford. ... On the other hand, *[one]*
14 *ought always to be at liberty to insist that directions*
15 *which the law has given to its officers for his benefit*
16 *shall be observed.*" " [Citation omitted.] (*Id.*, at p. 924,
17 emphasis added., brackets added.)
18

19 As stated above, Section 7507 has two essential parts: 1)

20 Calculate some numbers and 2) make those numbers "public at a
21 public meeting" at least two weeks prior to taking action. Because
22 the purpose of Section 7507 is to ensure that the *public* has the
23 information calculated by the actuary *prior* to the vote of the
24 legislature, *both parts, working in tandem*, are essential under any
25 reasonable statutory interpretation. The letter from Senator
26 Russell to then-Governor Brown affirms this: "I believe these costs
27 should be ascertained and made public prior to the benefit

1 increases being granted, and this bill will accomplish that.”

2 Section 7507 is absolutely mandatory.

3 Petitioner’s comprehensive research has found no Court of
4 Appeals has ever ruled that 7507 is not mandatory.

5
6 **J. RESPONDENTS FAILED TO COMPLY WITH SECTION 7507.**

7
8 **J.1 Requirements of Section 7507 and the**
9 **documented failure to meet them**

10
11
12 The CHW memo at page 4 states, “Section 7507 thus imposed
13 four requirements for pension enhancements:”

- 14 a. The City Council must retain an enrolled actuary.
- 15 b. The City Council must obtain the actuary's statement
16 of the "future annual costs" of a proposed pension
17 enhancement.
- 18 c. The City Council must make the estimated "future
19 annual costs" public at a public meeting.
- 20 d. That meeting must occur at least two weeks before
21 the City Council approves a pension enhancement.
- 22
23
24

25 Petitioner agrees with this list of requirements.

26
27 **Requirement (a) The City Council must retain**
28 **an enrolled actuary.**

1
2 **For all of the resolutions adopted (11190, 11191,**
3 **11199, 11208 and 12036) the *City Council* did not secure the**
4 **services of an enrolled actuary before authorizing the**
5 **retirement increases.** Section 7507 requires *the local legislative*
6 *body* (in this case the City Council), not the agency (in this case the
7 City), to secure the services of an enrolled actuary. The CHW
8 memo (page 5) states that the City, not the City Council, received
9 the actuarial report. This is not a trivial distinction and the CHW
10 memo concedes that the City Council did not secure the services
11 of an enrolled actuary, a violation of Section 7507. The
12 requirement that the “local legislative body”, not the “agency”, (or,
13 say, the human resources department of the agency) secure the
14 services of an enrolled actuary exists for a reason. It avoids
15 conflicts of interest and it ensures that the City Council is
16 informed of the future annual costs before they are approved,
17 thereby enabling individual members to properly execute their
18 duty to their constituents.

1 **Requirement (b): The City Council must obtain the**
2 **actuary's statement of the future annual costs of a**
3 **proposed pension enhancement.** (Emphasis
4 added.)
5

6 **For all of the resolutions adopted (11190, 11191,**
7 **11199, 11208 and 12036) neither the City or the City Council**
8 **received the future annual cost of a proposed pension**
9 **enhancement as required by Section 7507.** The critical word in
10 the previous sentence is “a”, as in “a proposed pension
11 enhancement”. Using the CHW memo’s own language (listed
12 above as Requirements a, b, c and d) Section 7507 does not permit
13 an estimate of future annual costs for a *group* of proposed pension
14 enhancements. It requires a statement of the future annual costs
15 for “a” proposed pension enhancement.

16 Why does Section 7507 require that the actuarial statement
17 secured by the City Council include the future annual cost of a
18 retirement plan benefit increase before adoption? It does so in
19 order that the Council can make an informed decision before
20 authorizing a particular improvement in retirement benefits. The
21 CHW memo (page 5) is clear that a separate actuarial statement

1 was not prepared for each pension increase. It states that one
2 actuarial report was prepared for ALL of the City's miscellaneous
3 employees and that one actuarial report was prepared for ALL of
4 the City's safety employees.

5 However, none of the pension increase resolutions adopted
6 by the City Council covered either ALL miscellaneous or ALL
7 safety employees. *Therefore, in violation of Section 7507, the City*
8 *Council never had available to it an actuarial report or the cost*
9 *information specific to any of the nine pension enhancements*
10 *granted by the five resolutions at the time of their adoption. As a*
11 *result, in violation of Section 7507, the public never had available*
12 *to it the future estimated annual cost of any particular pension*
13 *increase at the time of its adoption.*

14 **Requirement (c): The City Council must**
15 **make the estimated "future annual costs"**
16 **public at a public meeting.**
17

18 **For all of the resolutions adopted (11190, 11191,**
19 **11199, 11208 and 12036) the City Council failed make the**
20 **estimated "future annual costs" public at a public meeting.**

1 The description of the agenda item for each resolution makes no
2 reference to an increase in pension benefits and it does not
3 disclose the actuarially estimated future annual cost of any
4 contemplated increase in pension benefits. (The agendas for the
5 City Council meetings at which these resolutions were adopted
6 are attached as Exhibit H.)

7 Each agenda item at a City Council meeting is accompanied
8 by an explanatory “Report to the Mayor and City Council”. In no
9 case does the “Report to the Mayor and City Council” provide the
10 actuarially estimated future annual cost of the increase in pension
11 benefits. Each report provides the cost of the agreement inclusive
12 of the cost of the pension enhancements, but not the cost of the
13 enhancements themselves. (See section H.3 of this petition:
14 Retirement Costs are Different.) (The reports to the Mayor and
15 City Council for these agenda items are attached Exhibit I.)

16 **Requirement (d): That [the public] meeting**
17 **[at which the actuary’s estimate of future**
18 **annual costs is made public] must occur at least**
19 **two weeks before the City Council**
20 **approves a pension enhancement.”**

21 [Bracketed material added.]
22

1 Section 7507 requires that the estimated future annual
2 costs of pension benefit increases be made public at a public
3 meeting at least two weeks prior to adoption. There is no
4 evidence in the public record that the actuarially estimated future
5 annual costs of these resolutions were made public at public
6 meetings earlier than those at which they were adopted. The CHW
7 memo presents no evidence that the required two-week notice
8 was given. Understandably so, because there is no such evidence.

9 The CHW memo agrees with the Grand Jury Report and
10 admits and concedes that the two-week notice did not happen for
11 any of the five resolutions and nine pension enhancements. (CHW
12 memo Page 6: “The City substantially, but apparently not strictly,
13 complied with Section 7507’s public notice requirement”. See
14 section F to the effect that “substantial” compliance is no
15 compliance.)

16 Furthermore, the failure to provide public notice in this case
17 must be viewed through the lens provided by the Court in *Pulcifer*
18 *v. County of Alameda*, (1946) 29 Cal. 2d 258:

1 While time provisions are often held directory, they
2 will be considered *mandatory* if the language contains
3 negative words or shows that the designation of the
4 time was intended as *a limitation of power, authority*
5 *or right.* (*Id.*, at p. 262. Emphasis added.)
6

7 The requirement to make the cost of pension enhancements
8 public at a public meeting two weeks prior to adoption is without
9 question a limitation of power, authority or right. It is a restraint
10 on the legislatures' ability to spend public funds without
11 accountability. It limits the legislatures' ability, in the words of the
12 letter from Senator Russell to then-Governor Brown, "...to
13 approve employee retirement benefit increases without the
14 taxpayers ever knowing the real cost." The time provision in
15 Section 7507 is mandatory.
16

17 **J.2 Failure to Comply: Summary**

18 Summarizing, regarding Respondent's compliance with the
19 four requirements of Section 7507 *as set forth by Respondent's own*
20 *attorney*, and highlighted above, the evidence is damning.

21 a. The City Council *did not* retain an *enrolled actuary*.

- 1 b. The City Council *did not* obtain the actuary's
2 statement of the "*future annual costs*" for even one
3 of the pension enhancements.
4
5 c. The City Council *did not* make the estimated
6 "*future annual costs*" *public at a public meeting*.
7
8 d. The City Council *did not* disclose the "future annual
9 costs" of *any* pension enhancement *at least two*
10 *weeks* before it was approved by the City Council.
11

12 **K. FAILURE TO COMPLY WITH 7507 INVALIDATES THE**
13 **PENSION INCREASES.**

14
15
16 **K.1. If procedure is essential, lack of**
17 **compliance is invalidating.**
18

19 If a procedure is essential, lack of compliance is invalidating.

20 Thus, *Gonzales* holds that, "[W]hen the Legislature imposes
21 *particular statutory requirements, it generally does not intend for*
22 *them to be disregarded.*" (*Id.*, at p. 924).

23 Accordingly, *Gonzalez* held that, "Invariably, 'courts look to
24 the procedure's purpose or function. **If the procedure is**
25 **essential to promote the statutory design, it is "mandatory"**
26 **and noncompliance has an invalidating effect.'**" (*Ibid.*,)

27 As stated in the letter from Senator Russell to then-
28 Governor Brown and as discussed earlier, ascertaining the future

1 costs of increases in retirement benefits *combined with* proper
2 prior public notice, and working together, are essential to
3 promote the statutory design of Section 7507. In fact, they *are* the
4 statutory design. Without them, the statute would be a nullity, a
5 metaphorical blank page.

6
7
8 **K.2. Precedent for invalidation due**
9 **to lack of compliance.**

10 Precedent for invalidation due to a lack of compliance with
11 Section 7507 was established in *California Statewide* in which the
12 Court reversed (invalidated) an arbitrator's award of retroactive
13 safety service credit stating:
14

15 This requirement *necessarily* includes the obligation
16 to present the Legislature with a fiscal analysis of the
17 cost of the agreement. (See § 7507, subd. (b)(1)
18 ["before authorizing changes in public retirement
19 plan benefits or other postemployment benefits," the
20 Legislature shall have a "statement of [their] actuarial
21 impact upon future annual costs, including normal
22 cost and any additional accrued liability"].) (*California*
23 *Statewide, Id.*, at p. 18, emphasis added.)
24

1 In an attempt to deflect from the principle that failure to
2 comply with 7507 is invalidating, the CHW memo, relying on
3 *Gonzalez* (pp. 923-924), states at page 7, "A statutory requirement
4 is directory if the statute does not contain a stated or implied
5 consequence for its violation." *Gonzalez* in no way supports this
6 assertion. It is make believe law.

7 No matter, the CHW memo then digs itself an even deeper
8 hole, stating: "By contrast, a mandatory requirement is one for
9 which the statute specifies or implies a consequence for its
10 violation." But again, the claimed reliance is misleading. To
11 support *this* argument the memo now cites directly to *Gonzalez* in
12 yet a further attempt to confound:

13 In the mandatory-directory context, however, the
14 "mandatory" or "directory" designation does not refer
15 to whether a particular statutory requirement is
16 obligatory or permissive, but instead denotes
17 "whether the failure to comply with a particular
18 procedural step will or will not have the effect of
19 invalidating the governmental action to which the
20 procedural requirement relates." (*Ibid.*)

21
22 In fact, nowhere in this citation is found any reference
23 to a specified or implied consequence for the violation of a

1 statute. Further, in *Gonzalez*, in a part of the opinion ignored
2 by the CHW memo, the Court stated:

3 But where, as here, "the consequences of not obeying
4 them in every particular are not prescribed, *the courts*
5 must judicially determine them.'" (*Id.*, at p. 924,
6 emphasis added.)
7

8 **L. UNLAWFULLY GRANTED BENEFITS ARE NOT VESTED:**

9 **L.1. No valid contract, therefore no vesting.**

10 In its discussion of vested rights, the CHW memo at page 9
11 states, "After an employee retires and *all conditions precedent to a*
12 *pension award are fulfilled*, pension payments may not be changed
13 to the retiree's detriment." (Emphasis added.) In the present case,
14 as discussed above, "all conditions precedent to a pension award"
15 were NOT fulfilled.

16 In *Medina v. Board of Retirement* (2003) 112 Cal.App.4th
17 639, 640) (*Medina*), specifically addressing pensions, the Court
18 held:

19 When a claim is presented under the contract clause,
20 it must first be determined "whether there is a valid
21 contract to be impaired. *The contract clause does not*
22 *protect expectations that are based upon contracts that*
23 *are invalid*, illegal, unenforceable, or which arise

1 without the giving of consideration. (Citations
2 omitted.)

3
4 The *Medina* Court went on to state:

5
6 Nor does the contract clause protect expectations
7 which are based upon legal theories other than
8 contract, such as quasi-contract or estoppel. (Citations
9 omitted.) *Any purported contract to give appellants the*
10 *pension benefits of safety members was invalid, and*
11 *thus **the vested rights doctrine does not***
12 *apply.* (*Ibid.*, Emphasis added.)

13
14 Because the contracts to enhance benefits in this case did
15 not comply with Section 7507 they are not valid contracts.

16 Because they are not valid contracts the protections of the
17 contract clause do not apply. Therefore, the benefits are not
18 vested.

19 **L.2 Marin Superior Court Ruled**
20 **Pensions Not Vested.**

21
22 Petitioner is aware that Superior Court rulings are not
23 citable in this proceeding, but they can be persuasive. Therefore, it
24 is worth noting that in *Brown v Southern Marin Fire District*
25 (Marin Superior Court case CIV 1603276, 2016), a case with the
26 identical core issue as here, the Court overruled Respondent's

1 demurrer on the ground of failure to join necessary and
2 indispensable parties, stating,

3 Nor could current or retired employees raise an
4 “estoppel” argument or claim they had a “vested
5 contractual right” to these benefits, *since they are not*
6 *entitled to retirement benefits that are not lawfully*
7 *adopted.* (See *Medina v. Board of Retirement, Los*
8 *Angeles County Employees Retirement Assn.* (2003)
9 112 Cal.App.4th 864, 869-872.) (Emphasis added.)

10
11 (A true and correct copy of the ruling is attached as Exhibit J. See
12
13 last paragraph of page seven.)

14
15
16 **M. PENSION BENEFITS MAY BE MODIFIED TO MAINTAIN THE**
17 **INTEGRITY OF A RETIREMENT SYSTEM, EVEN IF THE**
18 **MODIFICATION REDUCES BENEFITS.**

19
20 In *Marin Association of Public Employees v. Marin County*
21 *Employees’ Retirement Association* (2016) 2 Cal.App. 5th 674, 680
22 (Rev. Granted 09/26/2016; S237460/A139610)⁶ the Court said,

⁶ Effective July 1, 2016, rules 8.1105 and 8.1115 of the Rules of Court have been amended to change the effect on a Court of Appeal's published opinion that has been granted review. (1) A grant of review no longer automatically affects the published status of the Court of Appeal opinion. (2) While review is pending, the case has no binding or precedential effect, but it may be cited for its potentially persuasive value.

1 "As will be shown, while a public employee does have
2 a "vested right" to a pension, that right is only to a
3 "*reasonable*" pension—not an *immutable entitlement*
4 *to the most optimal formula of calculating the*
5 *pension.*" (Emphasis added.)
6

7 If petitioner prevails, pensions would not be eliminated
8 entirely. They would revert to the level in place prior to the
9 unlawful enhancements, a level that was considered reasonable
10 for many years.

11 Pension benefit may be modified if it is critical to save the
12 pension system. (See, e.g., *Kern v. City of Long Beach*, (1947) 29
13 Cal.2d 848, 854 (noting that legally authorized pension rights may
14 be modified but not wholly destroyed, and pointing to several
15 cases where legally authorized vested pensions were modified,
16 including a reduction from two-thirds to half of an employee's
17 salary); *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131
18 (Pension benefit modifications that maintain the integrity of a
19 pension system are reasonable). And, *pension benefits that fail to*
20 *satisfy the requirements of law may be repealed retroactively.*

1 (*California Statewide Law Enforcement Assn. v. California Dept. of*
2 *Personnel Admin.* (2011) 192 Cal.App.4th 1.)

3
4 **ALLEGATION AND BASIS OF RELIEF**

5 Notwithstanding the plain duty imposed by law as set forth
6 in this document on Respondents, Respondents wrongfully failed
7 and refused and continue to fail and refuse to comply with Section
8 7507 and to cease payment and accrual of the pension
9 enhancements unlawfully granted by Board resolutions:

10 Resolution 11190; October 21, 2002
11 Resolution 11191; October 21, 2002
12 Resolution 11199; November 18, 2002
13 Resolution 11208; December 2, 2002
14 Resolution 12036; September 5, 2006

15 Unless compelled respondents will continue to fail and refuse to
16 do so.

17 As a result of the inaction of Respondents described above, all
18 citizens of San Rafael have suffered and will continue to suffer
19 irreparable damage by the payment of taxes in excess of what they
20 otherwise would have paid in the past or will pay in the future; and by
21 the reduction in quality of service from the City in the past and in the

1 future as funds that could have been and would be used for additional
2 staff, equipment and facilities were and will be used instead to pay
3 unlawfully granted retirement benefits.

4 **PRAYER FOR RELIEF**

5 Wherefore, petitioner prays for relief as follows:

- 6 1. The Court to declare that the nine pension enhancements
7 granted by San Rafael City Council Resolutions 11190,
8 11191, 11199, 11208 and 12036 were granted in violation
9 of Government Code Section 7507 and were, therefore,
10 granted unlawfully.
- 11 2. The Court to declare that, because the nine pension
12 enhancements granted by San Rafael City Council
13 Resolutions 11190, 11191, 11199, 11208 and 12036 were
14 granted unlawfully, there is no valid contract and, therefore,
15 there is no vested contractual right to these pension
16 enhancements.
- 17 3. For a writ to issue prohibiting any further payments or
18 contributions by the City of San Rafael to, or accruals on
19 behalf of, current employees and/or retirees in amounts

1 calculated in reliance on City Council Resolutions 11190,
2 11191, 11199, 11208 and 12036.

3 4. For a writ to issue prohibiting any payments or
4 contributions by the City of San Rafael to the Marin County
5 Employees' Retirement Association on behalf of current
6 employees and/or retirees in amounts calculated in reliance
7 on San Rafael City Council Resolutions 11190, 11191,
8 11199, 11208 and 12036.

9 5. For a writ to issue ordering a monetary adjustment for the
10 three years (insofar as the statute of limitations is
11 concerned) prior to the filing of this action equal to the
12 difference between the amounts paid under the terms of the
13 previously lawfully granted pensions and the amounts paid
14 under the terms of the unlawfully granted pensions
15 identified in this petition.

16 6. For such other and further relief as the Court deems just,
17 reasonable, and appropriate.

18 Respectfully submitted,

19 David C. Brown: _____ Date: _____

VERIFICATION

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17

I, David C. Brown, am the petitioner in this action. I have read the above Petition for writ of mandate and declaratory relief and know its contents, and know them to be true, except as to those matters stated in it on my information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.