No. S192828
(2nd Civil No. B228732)
(L.A.S.C. Case No. BS126192)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, and DOES 1 through 50, inclusive,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

ENGINEERS AND ARCHITECTS ASSOCIATION,

Petitioner and Real Party in Interest.

After a Decision by the Court of Appeal, Second Appellate District, Division Three, Case No. B228732

PETITIONER CITY OF LOS ANGELES' REPLY TO ENGINEERS AND ARCHITECTS ASSOCIATION'S SUPPLEMENTAL BRIEF ON INARBITRABILITY UNDER THE MANAGEMENT RIGHTS CLAUSE

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UNFAIR DECISION

STATUTES

I. INTRODUCTION

This brief is submitted in Reply to the Supplemental Brief submitted by Engineers and Architects Association (Association) and to the extent necessary, to the Supplemental Brief submitted by Amicus Curiae AFSCME District Council 36 et al. (AFSCME) in response to the question posed in this Court's October 31, 2012 Order.

Nothing in the Association's Supplemental Brief, or that of AFSCME, changes the fundamental fact that these grievances challenge a decision of the Los Angeles City Council. Association's deconstruction of the Management Rights Clause in an attempt to avoid its rational meaning or an understanding of its application is unavailing. The Management Rights clause reserves to the City the unfettered right to "take all necessary actions . . . in emergencies," thus exempting such decisions from challenge through the grievance process, while expressly permitting Association to bring grievances over the "practical consequences" of such decisions. The grievance process itself starts and ends within individual departments and includes no process for challenging City Council policy decisions. Accordingly, the answer to the Court's question is "Yes," the

management rights provisions of the Memorandum of Understanding (MOU) make these issues not subject to the grievance and arbitration provision of the MOU.

II. REMAND IS UNNECESSARY BECAUSE EXTRINSIC EVIDENCE CANNOT BE USED TO VARY THE TERMS OF THE PARTIES' ARBITRATION AGREEMENT

As a preliminary distraction, Association submits that this Court must consider extrinsic evidence to determine whether the MOUs require arbitration of the City Council's decision to impose furloughs in a financial emergency. (Association's Supplemental Brief (ASB) at pp. 2-3.)[1] Association is mistaken.

Under California law, the ordinary rules of contract interpretation apply to determine whether the parties have agreed to arbitrate a particular controversy. (*Pinnacle Museum Tower Assoc. v. Pinancle Market Development, LLC et al.* (2012) 55 Cal.4th 223, 236.) As this Court has held:

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[1] Our references to "Slip Op." are to the typed Court of Appeal opinion. "ABOM" for the City's Answer Brief on the Merits; "ABS" for the Association's Supplemental Brief; "AFSCME SB" for AFSCME's Supplemental Brief"; "3RJN" for Association's Motion for Judicial Notice filed on September 26, 2011; and, we use "AA" to refer to the exhibits submitted to the Court of Appeal with the City's mandate petition.

"""The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties .... Such intent is to be inferred, if possible, solely from the written provisions of the contract. (Civ. Code § 1639.) ....A [contract] provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But the language in the contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract." [Citation.]'" (*TRB Investments, Inc. v. Firemen's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27.)

The issue of whether a contract is ambiguous presents a question of law. (*Suarez v. Life Ins. Co. of North America* (1988) 206 Cal.App.3d 1396, 1406-1407.) Extrinsic evidence may be considered by a court as an aid to interpretation of a written contract when relevant to prove a meaning to which the language of the contract is *reasonably susceptible*. (*Producers Dairy Delivery Co. v. Sentry Ins.*

Co. (1986) 41 Cal.3d 903, 913, emphasis added.) However, extrinsic evidence is not admissible to add to, detract from or vary the terms of a written contract. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39; *Morey v. Vannuci* (1998) 164 Cal.App.4th 904, 912; see *Barnhart Aircraft, Inc. v. Preston* (1931) 212 Cal.19, 22 (*Barnhart Aircraft*).)[2] Moreover, "courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." (*Reserve Insur. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.)

Article 3.1 of the MOU unequivocally limits the grievance and arbitration procedure to "dispute [s] concerning the interpretation or application of a written [MOU] or of departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this MOU." The scope of arbitration under the MOUs is further qualified by article 1.9, which limits the employees' right to file grievances to the "practical

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[2] Even in the face of extrinsic evidence in the record (assuming, *arguendo*, any exists), "[w]hen the contractual language is clear, there is no need to consider extrinsic evidence of the parties' intentions; the clear language of the agreement governs." (*Efund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1322.)

consequences" of decisions involving the exercise of reserved management rights, including the City's "right to take all necessary action to maintain uninterrupted service to the community and to carry out its mission in emergencies." Such language cannot reasonably be interpreted as extending the arbitration procedure to City Council's decisions in response to a fiscal emergency.

Here, there is no ambiguity because the MOU language is not reasonably susceptible to the interpretation urged by Association.[3] As discussed throughout the City's papers, the clear contract language compels the conclusion that City Council's decisions in response to a fiscal emergency are not subject to arbitration.

III. ASSOCIATION'S INTERPRETATION OF THE MOU LANGUAGE IS NOT REASONABLE

A. The MOU Management Rights Clause Exempts from Arbitration City Council Actions Deemed Necessary to Preserve Public Services in Financial Emergencies.

Association argues that the Management Rights clause cannot mean what it says, because the City Council's decision to impose

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[3] "'An agreement is not ambiguous 'merely because the parties (or judges) disagree about its meaning. Taken in context, words still matter.' [Citation.]" (*Banning Ranch Conservancy* (2011) 193 Cal.App.4th 903, 914.)

furloughs "directly impact[s]" public employee wages. (ASB at p. 4.) This is a red herring. The issue sought to be arbitrated by Association is much broader than public employee compensation. Instead, the grievances are an attempt by Association to challenge the City's authority to determine what actions are "necessary to maintain uninterrupted service to the community and to carry out [the City's] mission in an emergency." Such policy choices inherently involve the exercise of discretion reserved to the City itself, which has the ultimate authority and obligation to protect the health and safety of City residents and "considerable potential liability if that obligation is not fulfilled." (*San Francisco Firefighters, Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 674.) As such, arbitration of the City Council's decision to impose furloughs due to a fiscal emergency would directly impact matters "at the heart" of municipal powers. (*Firefighters v. City of Vallejo* (1974) 12 Cal.3d 608, 616 (*Vallejo*).) This extraordinary expansion of the arbitration obligation violates the limiting language in *Vallejo,* upon which Association relies. It also cannot be reconciled with the clearly stated "reasonable boundaries" in article 1.9 of the MOU. That provision

unequivocally reserves to the City discretion to determine what is necessary for preserving public services in an emergency. (See City's Supplemental Brief at pp. 14-16).

B. Scope of Arbitration is the Issue, Not Scope of Bargaining.

This case is *not* about whether furloughs, in a vacuum, are a management right on par with layoffs. (*International Association of Fire Fighters v. Public Employment Relations Board (Richmond)* (2011) 51 Cal.4th 259, 276; *Professional Engineers v. Schwarzenegger* (2010) 50 Cal.4th 989, 1040-1041.) Instead, the issue is whether the City can be compelled to arbitrate the City Council's policy choice to impose furloughs as a "necessary" means of achieving a balanced budget *in a fiscal emergency,* when the negotiated MOU language does not contemplate arbitration as a means for challenging City Council actions. (See City Supplemental Brief at pp. 14-16, 20–27; ABOM at pp. 32-36.)[4] AFSCME's supplemental brief (AFSCME's SB) similarly overstates the issues. (AFSCME's SB at pp. 2-3.)

[4] This is in stark contrast to the arbitration clause at issue in *Taylor v. Crane* (1979) 24 Cal.3d 442 (*Taylor*), which specifically subjected City ordinances to arbitral review. (See ABOM at p. 39.)

Here, the *bona fide* nature of the City's financial emergency has never been questioned. Indeed, the City's Employee Relations Board, in its decision on Association's unfair employee practice charge (which also challenged the City Council's decision to impose furloughs), held that the City was justified in implementing the furloughs, because an "emergency did exist." (3RJN ex. 3, p. 2.) (See also ABOM at pp. 14-16, 56-59.)

As part of its straw man argument, Association refers to the balancing test established by this Court to determine whether a subject is within the scope of mandatory bargaining. (ASB at p. 7.)[5] The scope of the bargaining obligation under the MMBA and Ordinance is not the issue before this Court. Here, the question is whether a particular dispute is within the scope of arbitration—a matter

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[5] Under the balancing test used in *Richmond, supra,* and *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630, the appropriate subject for the balancing analysis would not be *furloughs*, as narrowly argued by Association, but rather, the City's *need to act swiftly to preserve public services in emergencies*. (*Richmond, supra,* at pp. 273-274.) Application of the balancing test shows that the equities lie with the City. The validity of the City's declaration of fiscal emergency has never been challenged. The City's need to take extraordinary action was confirmed by the Board. The City's need for unencumbered decision making under the circumstances presented by this case outweighed the marginal benefit that might have accrued had there been bargaining. (3RJN ex. 3, p. 2.)

controlled by the agreement of the parties, not a judicially applied balancing test. Nothing in the MMBA or the Ordinance mandates that the scope of bargaining and the scope of arbitration are synonymous.[6]

Equally misguided is Association's reliance upon selective portions of the MOUs' wage and hour provisions to support its contention that furloughs are within the scope of bargaining. (ASB at p. 10.) In doing so, Association ignores contract language which expressly provides that "Management may assign employees to work a four/ten, five/forty, nine/eighty *or other work schedule.* The Association will be entitled to *consult* with Management on the matter... ." (Emphasis added) (1AA: 112, 172, 238; 2AA: 303). Thus, the MOUs unequivocally reserve to management the right to assign employees to particular work schedules, while giving Association the limited right to consult on such decisions, but not meet and confer. These boundaries belie Association's contention that work schedules are within the scope of its mandatory bargaining

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[6] Association incorrectly states that the City does not claim that the MOUs allow furloughs. (ASB at p. 8, fn. 7.) The City has always argued that the MOUs do not guarantee employees specific work hours or work schedules, and unequivocally reserves to management the authority to change schedules. (See ABOM at pp. 11-12; Slip Op. at p. 15, fn 11.)

rights under the MOUs. As before, however, Association argues an issue not raised in this case.

AFSCME's recitation of cases analyzing the relationship between arbitration rights and court jurisdiction (AFSCME SB at pp. 4-7) does not reference the latest analyses from this Court or the United States Supreme Court. (*Granite Rock Company v. Int. Brotherhood of Teamsters* (2010) 561 U.S.____, 130 S.Ct. 2847 (*Granite Rock*); *Pinnacle Museum Tower, Assn, supra,* 55 Cal. 4th at 236 ["The party seeking arbitration bears the burden of proving the existence of an arbitration agreement"].) (See also ABOM at pp. 26-27, 33-37, and City's Supplemental Brief at pp. 14, 26.) Indeed, AFSCME's claim that the City has failed to identify an express exclusion from arbitration (AFSCME SB at p. 15) is both wrong as a matter of fact, and wrong as a matter of law. (*Pinnacle Museum Tower, Assn, supra,* 55 Cal.4th at 236; City's Supplemental Brief at pp. 10-11.)

C. City Council Actions are Outside the Scope of the Parties' Arbitration Agreement.

Association incorrectly argues that the MOUs' arbitration clause is "broad and encompasses the parties underlying dispute," and

then proceeds to narrowly define the "dispute" so as to ignore the City Council's obligations under the City Charter to formulate and balance an annual City budget. (ASB at p. 9.) Indeed, Association makes no effort to distinguish (or even discuss) cases which have already determined that this particular grievance procedure does not authorize cross departmental grievances. (*See Service Employees International Union v. City of Los Angeles* (1994) 24 Cal.App.4th 136, 140 (holding that this MOU grievance procedure does not authorize cross departmental grievances); *Los Angeles Police Protective League v. City of Los Angeles* (1988) 206 Cal.App.3d. 511 (same).) (See City's Supplemental Brief at pp. 6-9, 14-16.) Association cites no authority for its proposition that *this* grievance procedure can be applied to emergency ordinances enacted by City Council.

The Court of Appeal recognized the disingenuous nature of this argument, stating:

> "The Union's argument is an elevation of terms over substance. The issue is not whether the Union is seeking arbitration of a grievance (and thus "grievance arbitration"), but whether the

Union is seeking arbitration of policy matters left to the discretion of the City Council." (Slip Op. at p. 25.)[7]

Such matters are not arbitrable. AFSCME's analysis suffers from the same oversimplification. (AFSCME's SB at pp. 8-10, 15-17.)

AFSCME's reliance upon *International Bhd. of Teamsters, etc., Local Union No. 371 v. Logistics Support Group* (*Logistics)* (7th Cir. 1993) 999 F.2d 227, 229-30, is indeed "instructive." (AFSCME's SB at p. 13.) There, the court held that the management rights provision excluded from arbitration a grievance challenging an employee's termination, because the grievance was not based on an express contract provision. The court rejected the union's argument that it could have simply listed some contractual provision to avoid this problem. Relying upon its decision in *International Ass'n of Machinists and Aerospace Workers, Lodge No. 1000 v. General Electric Co.* (*Machinists*) 865 F.2d 902 (7th Cir. 1989) that this claim was "too wooden, too blinkered, too literal-minded," (*Machinists*, *supra,* 865 F.2d at 905), the court held the union was obligated to base

[7] Association's characterization of the issues sought to be arbitrated (ASB at p. 9) is at odds with the Court of Appeal's discussion of the actual subject matter of the grievances. (Slip Op. at p. 6, fn 6.)

its arbitration demand on a "provision expressly addressed to the dispute the union seeks to arbitrate." (*Machinists*, *supra,* 865 F.2d at p. 906; *Logistics, supra,* 999 F.2d at p. 231). Here, Association's arbitration demand is similarly based on just such a "wooden," "blinkered" and "literal-minded" assertion. Notwithstanding Association's listing of an MOU provision as the basis for the grievances, the Court of Appeal rightly concluded that these grievances were in fact an attempt to arbitrate an emergency ordinance passed by City Council, and that no provision in the MOU mandated arbitration of City Council policy and budgetary decisions.

D. The Management Rights Clause must be Read as an Integrated Clause.

In its analysis, Association deconstructs article 1.9 of the MOU, thereby rendering its provisions meaningless. This reading ignores the statutory and case law cited by both Association and the City, that contacts must be construed "so as to give effect to every part" (Civ. Code § 1641.) (ASB at p. 11.) Indeed, Association is reduced to relying upon an amorphous assertion that its reading of article 1.9 is supported by the parties' "mutual intent." (ASB at p. 13, fn 9.) No citation supports this assertion. As discussed above, Section II, the

MOUs must be read as an integrated document, and no evidence supports the assertion that some "mutual intent" or extrinsic evidence exists which could change the clear meaning of the actual language.

E. This Case Concerns the City's Emergency Authority to Address a Fiscal Crisis.

Contrary to Association's argument, the City does not argue that article 1.9 permits it to willy-nilly abrogate the wage and hour provisions of the MOU. The City's argument rests on the undeniable existence of the dire economic conditions facing the City in Fiscal Year 2009-2010. The City has been clear that article 1.9 of the MOUs expressly exempts decisions taken in emergency situations from the scope of arbitration. Thus, this is not a situation where the management rights provision is being asserted in an attempt to swallow the whole of the contract. (ASB at p. 14; *Vallejo, supra,* 12 Cal.3d at 615.) The City has not asked this Court to determine that the City has "carte blanche" to violate the MOU, contrary to Association's argument.

Notwithstanding Association's histrionic rhetoric, the City's position is circumscribed. The City asserts that in emergency situations, consistent with the MMBA, the Ordinance and the MOUs,

it has certain latitude to make policy choices beyond the range of its discretion under "normal" circumstances.[8] Furthermore, this particular arbitration agreement does not subject City Council actions to arbitral review. (City's Supplemental Brief at pp. 9-11; Slip Op. at p. 14, fn 10 and p. 26, fn 19; *supra.*)

City management retains the right to take all actions deemed necessary in an emergency, while the employees retain the right to grieve the "practical consequences" of such emergency decisions — not the decisions themselves. No other language in the MOU limits the ability of City management to respond to emergencies. As the Court of Appeal explained, "[N]o other construction of article 1.9 makes sense. If employees had retained the right to grieve the management decisions themselves, article 1.9 would have so provided, rather than indicating only that they retained the right to

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[8] When viewed in the context of the parties' entire agreement, it is clear that the City's reserved emergency authority under article 1.9 was intended to prevail, in emergencies, over other MOU provisions governing ordinary times (e.g., the salary and work schedule provisions). (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 98.)

grieve the practical consequences." (Slip Op. at p. 15; see also City's Supplemental Brief at pp. 9-14.)[9]

F. Association's Interpretation of Article 1.9 is Unsupportable.

Association's argument that the language in article 1.9 referencing "lack of funds" means exclusively layoffs is undermined by the structure and context of the clause itself. As the Court of Appeal noted, contrary to the language in article 1.9, the City Charter defines layoffs as "layoffs" and "suspensions" (Slip Op. at p. 19, fn 16.). Had the parties intended article 1.9 to apply exclusively to the City's regular layoff procedures, they would have cross referenced Charter section 1015, or used the same language. They did neither. Thus, Association's reliance upon *Professional Engineers, supra* (ASB at pp. 16-17) for its interpretation of that language is unavailing. In *Professional Engineers, supra,* other MOU and statutory provisions

[9] AFSCME devotes much of its brief to arguing that the Court of Appeal in footnote 12 (Slip. Op. at p. 15) wrongly interprets the meaning of the word "herein" in Article 1.9. (AFSCME SB at pp. 11-15.) This argument turns the decision on its head and inflates one footnote out of logical proportion. The Court of Appeal's decision is correctly decided regardless of the meaning of the word "herein."

limited the meaning of the contract language.[10] By contrast, here, the Charter shows that when the language means "layoffs" the City uses that express term. The Court of Appeal's decision in *Engineers & Architects Association v. Community Development Department* (1994) 30 Cal.App.4th 644, 652-653, did not hold that this language applies *only* to layoffs. That case arose in the context of a challenge by Association to an actual layoff. There, the Court of Appeal held, consistent with all authority, that layoffs are a management right. It did not hold that this language meant that *only* layoffs are a management right.

Association's claim that the City's declaration of fiscal emergency is insufficient to sustain the City's action (ASB at p. 18) ignores the history of the parties' litigation over this issue. Association has already had ample opportunity to challenge the City's declaration of fiscal emergency. This issue was raised and decided by the Board in *Engineers & Architects Association v. City of Los*

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[10] *Professional Engineers, supra,* is legally and factually distinguishable from the instant case. (See City's Supplement Brief at pp. 16-18; see also Brief of Amicus League of California Cities and California State Association of Counties at pp. 24-26; and City's Supplemental Brief at pp. 16-18.)

Angeles (2011) U-214. (3RJN ex. 2; ABOM at pp. 70-71.) Having failed to raise this issue in its Superior Court proceeding (*Engineers and Architects v. City of Los Angeles*, Los Angeles Superior Court Case No. BC417398; ABOM at p. 12.), Association has waived the right to make such claims at this late date.

The recognition in article 1.9 of the MOUs that employees may grieve the "practical consequences" of decisions involving the exercise of the City's reserved management rights does not mean, as Association states, that it can resolve bargaining disputes through the grievance mechanism. (ASB at p. 20.) The language means what it says: employees may bring grievances concerning the practical consequences of managerial decisions. It does not mean that the arbitration provision extends to the resolution of bargaining disputes.

The Ordinance was established to resolve, among other things, bargaining disputes. Indeed, the Ordinance specifies that "An impasse in meeting and conferring upon the terms of a proposed memorandum of understanding is not a grievance." (LAAC Section 4.801; 3RJN ex. 2.) This exclusionary language is expressly included

in the negotiated grievance procedure at article 3.1 of the MOUs. (1AA: 103, 163, 228; 2AA:293.)

Association's labeling of the language in article 1.9 limiting grievances to the practical effects of managerial decisions as an "additional source" of grievance arbitration (ASB at pp. 20-21) attempts to end run this limitation. This strained reading is, like much of Association's argument, inconsistent with the plain meaning of the written words. This Court should not be swayed. Instead, the Court of Appeal understood this language correctly. (Slip. Op. at pp. 15-16.)

Accordingly, the Court of Appeals decision should be affirmed.

IV. CONCLUSION

Based on the foregoing, the City of Los Angeles, respectfully requests that this Court affirm the Court of Appeal's decision in *City of Los Angeles v. Superior Court (Engineers & Architects Assn.)*.

Dated: December 14, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, **Rule 8.204 (c)(1),** Petitioner hereby certifies that this Supplemental Brief on Inarbitrability has been prepared using Times New Roman typeface, 14 point, and that the word count for all included portions is 3,969 as calculated by the Microsoft Word processing system used to prepare the brief.

DATED: December 14, 2012

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PROOF OF SERVICE
(VIA VARIOUS METHODS)

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 800 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On **December 14, 2012**, I served the foregoing document(s) described as **PETITIONER CITY OF LOS ANGELES' REPLY TO ENGINEERS AND ARCHITECTS ASSOCIATION'S SUPPLEMENTAL BRIEF ON INARBITRABILITY UNDER THE MANAGEMENT RIGHTS CLAUSE** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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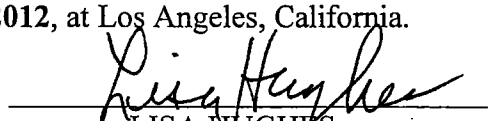

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